Before the
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Section 1201 Study | Docket No. 2015–8

COMMENTS OF PUBLIC KNOWLEDGE

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I. Introduction

The prohibition on circumventing technological protection measures (TPMs) that protect copyrighted works and other aspects of 17 U.S.C. §1201 have long been of concern to the public interest community, and to Public Knowledge. Enacted by the Digital Millennium Copyright Act of 1998 (DMCA), §1201 circumscribes the public's right to freely use technology and media that they own or possess in a non-infringing manner, foreclosing any use that requires the user to circumvent a TPM. To offset this restriction of lawful uses, §1201 offers the public the opportunity to petition for exemptions to the prohibition on circumvention every three years. Public Knowledge has participated in three of these triennial exemption processes in order to advocate for various exemptions on behalf of the public.

We are pleased that the Copyright Office has undertaken this study of §1201, because we believe it suffers from a number of defects worthy of study. First, by categorically prohibiting conduct that would not otherwise infringe a copyright, §1201 is overly broad. Second, the exemption process makes it too difficult to obtain relief from §1201's reach. Third, even when an exemption is granted, it expires in three years and proponents must re-establish from scratch the legal and factual basis for the exemption or risk denial, even if the exemption is unopposed. Fourth, by categorically restricting the development of circumvention tools and prohibiting users entitled to an exemption from seeking third party assistance to utilize the exemption, the utility of exemptions is greatly limited. Public Knowledge offers these comments in the hope that they will aid the Copyright Office as it undertakes to study Section 1201 and whether and how it might be reformed.

II. General Comments

A. The Role and Effectiveness of the Prohibition on Circumvention of TPMs

As measured against the purposes enunciated by Congress at the time of its enactment, it is unclear that §1201's prohibition on circumvention of TPMs has been effective. Congress understood the enactment of §1201 as an incentive for copyright owners to distribute movie, music, software, and literary works over the internet. In particular Congress envisioned §1201 as a form assurance to copyright owners that their works would not be subject to massive infringement on the internet.[1]

While it's clear that legal online distribution of copyrighted works has reached an impressive scale in the years since the passage of the DMCA, it's less clear that §1201 has any impact in reducing online infringement. Examples of successful digital distribution platforms include sale and rental channels such as the iTunes store, the Google Play store, the Amazon Kindle store, and the Steam store, as well as streaming services such as Pandora, or Netflix. However, even as the digital distribution ecosystem has flourished, copyright owners across the

[1] Report of the Senate Judiciary Comm., S.Rep. No.105-190, at 8 (2d Sess. 1998).

board lament that online infringement is devastating their industries.[2] If we take them at their word, then it follows that §1201 has failed in its purpose of stemming online infringement.

If §1201 is failing in its purpose of preventing online infringement, then it is imperative that the bargain struck by §1201 be re-examined. Copyright law grants authors certain exclusive rights in their works of original expression.[3] The public is entitled to make any use of the work that either does not implicate those rights, or falls under one of the many limitations and exceptions to those rights delineated in the law.[4] The public's rights under the copyright law are of no small consequence. As the Supreme Court has observed repeatedly, the ultimate purpose of the Copyright Act is to benefit the public.[5] The Supreme Court has been clear that the public benefits not just from enforcement of copyright, but also from clarity as to where a copyright owner's rights end, and where the public's rights begin.[6]

§1201 subordinates the public's rights in order to offer copyright owners assurances that their works will not be infringed. In order to achieve this purpose §1201 deprives the public of the ability to engage in non-infringing uses of copyrighted works that are protected by TPMs, which many digital and software works are. Indeed, a growing number of tangible products, such as motor vehicles and home appliances, contain software within them. As demonstrated by both public sentiment regarding the effects of §1201 and the growing number of exemption requests that the Office must field, this shift has serious consequences.[7]

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[2] See e.g. Alex Ben Block, *AFM: Avi Lerner Warns Piracy Could Cripple Indie Film Business in Five Years,* The Hollywood Reporter, Nov. 7, 2014, https://www.hollywoodreporter.com/news/afm-avi-lerner-warns-piracy-747301; *Video Game Piracy On The Rise, Will Cost The Industry As Much As It Makes*, Gearnuke, Aug. 20, 2015, http://gearnuke.com/video-game-piracy-rise-will-cost-industry-much-makes/; Robert Steele, *If You Think Piracy Is Decreasing, You Haven't Looked at the Data...*, Digital Music News, Jul. 16, 2015, http://www.digitalmusicnews.com/2015/07/16/if-you-think-piracy-is-decreasing-you-havent-looked-at-the-data-2/.

[3] 17 U.S.C. §106.

[4] E.g., 17 U.S.C. §§102, 107-122, de minimis copying, etc.

[5] "Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts." *Twentieth Century Music Corp.* v. *Aiken,* 422 U. S. 151, 156 (1975); "The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.' To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work." Feist Publications, Inc. v. Rural Telephone Service Co., 499 U. S. 340, 349-350 (1991) (citations omitted).

[6] "Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible." Fogerty v. Fantasy, Inc. 510 U.S. 517, 527 (1994).

[7] See, e.g., Chris Welch, *White House says 'it's time to legalize cell phone unlocking' in official petition response*, The Verge, Mar. 4, 2013, http://www.theverge.com/2013/3/4/4063428/white-house-issues-official-response-cellphone-unlocking-petition (reporting that over 114,000 people signed a petition demanding White House

The abridgement of the public's ability to engage in lawful non-infringing uses cannot continue if §1201 is as ineffective at curbing infringing activity as copyright owners' statements about online infringement would suggest. The cost imposed by the prohibition on circumvention certainly outweighs the marginal benefits being gained, and the benefit of a prohibition on circumvention should be seriously re-evaluated. However, even if §1201 is assumed to be fulfilling its purpose in stemming online infringement, the law is still in need of reform. As discussed further in these comments, the current operation of the law, and in particular the exemption process that is intended to serve as a safeguard and means of restoring the public's rights, would benefit from a number of improvements in order to be more responsive to the needs of the public while still carrying out Congress's intent.

B. Accommodation of Non-Copyright Concerns

The §1201 process should not accommodate non-copyright concerns to the extent they're considered for the purposes of denying or limiting an exemption. Congress, agencies, or the courts have adopted appropriate statutes, regulations, and legal doctrines to address any concerns beyond the scope of copyright law. Any concern that those measures are inadequate to serve their intended purposes should be addressed by the appropriate subject matter authorities. Copyright law has enough difficulty in adequately regulating its own subject matter - stretching it to also double as a tool in every other possible public policy matter is a disservice to both copyright law and to those independent policy concerns.

More specifically, it is not clear that non-copyright concerns such as pollution or product safety are in any way new. Consumers have modified motorized vehicles and equipment through mechanical alterations for generations, and the law has had ample time to adapt to those practices. The fact that modifications are now affected through altering embedded software, which falls within the jurisdiction of copyright law, does not mean that the policy considerations are somehow novel.

While it is tempting to use §1201 to address all manner of consumer concerns, the Office should be cognizant that there are numerous branches of government with better tools, procedures, and delegated authority to address those problems. Furthermore, the Office's engagement in outside concerns raises serious questions around whether the resulting rulemaking is *ultra vires* and thus unenforceable. The Office could easily put these concerns to rest by making its determinations based on the information and authority that it specifically has been tasked with.

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action on a cell phone unlocking exemption to §1201); Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 79 Fed. Reg. 73856 (Dec. 12, 2014), http://copyright.gov/fedreg/2014/79fr73856.pdf (in particular Proposed Classes 21, 22, 26, and 27); Letter from Sens. Charles E. Grassley and Patrick Leahy, Chairman and Ranking Members of the Senate Committee on the Judiciary, to the Hon. Maria A. Pallante, Register of Copyrights (Oct. 22, 2015), http://copyright.gov/policy/software/grassley_leahy-software-study-request-10222015.pdf.

To the extent that the Office does engage with such outside concerns, it should do so only for purposes of granting, not limiting, exemptions. The statutory language requiring the considerations of "such other factors as [considered] appropriate" is aimed to account for the interests of the public, not copyright owners. Copyright owners' interests are already triply accounted for - first by their statutorily granted exclusive rights in their works; second by the prohibition on circumventing TPMs even for non-infringing purposes; and third by the requirement conditioning exemptions to the circumvention ban on the identification of not just a non-infringing use, but additional adverse affects. The direction to consider other factors is not an invitation to deny or limit exemptions for reasons unrelated to copyright interests. Rather, it allows the rulemaking body to consider the full range of evidence produced by the public, who are required by the statute to produce evidence that it is harmed beyond the limitation of its rights.

III. Rulemaking

A. Presumption of Renewability of Exemptions

One of the many frustrating aspects of the existing §1201 exemption process is the requirement that supporters of an exemption establish the legal and factual record anew every three years. This is more than just a de novo review of the record before the Office. Supporters of exemptions cannot rely on the record established in prior cycles or on a statement that no material facts have changed in the intervening three years. Rather, supporters must reintroduce well-worn legal arguments and develop the factual record anew regardless. While Public Knowledge believes there are a number of areas in which §1201 and its exemption process must be improved, a substantive renewal mechanism would certainly be an improvement over the current state of affairs.

An effective renewal mechanism must relieve the public of the burden of appearing and arguing their case every three years. Public Knowledge supports achieving this by requiring opponents of an exemption to show that an existing exemption should not be renewed for another three years. In practice, such a mechanism might offer opponents of an exemption an opportunity at the outset of each triennial exemption process to present compelling evidence that has not previously been considered by the Office: the kind of evidence that shows that a previously granted exemption should not be automatically renewed because of a change in legal or factual circumstances since the granting of the exemption. In order to be considered compelling, the evidence should, e.g., be determined to materially alter the adverse effects analysis on which the exemption's grant was based.

Absent a finding by the Office that the proffered evidence is compelling, the exemption should be renewed without exemption supporters having to appear or respond. Exemption supporters should have the opportunity to respond at this preliminary stage, but should not be required to, as the burden of proof should lie exclusively with opponents. Should the Office determine that opponents have shown that the the exemption should not be automatically renewed, then the exemption should instead be included alongside requests for new exemptions in the triennial exemption review cycle that would then begin.

In addition to adopting an effective renewal mechanism, the Office should consider further enhancing the process it recently adopted of treating each identified class as a quasi-"docket" by allowing the record from one triennial review process to be automatically ported into the next cycle, for all classes, regardless of whether exemptions were approved or denied.

B. Current Legal Requirements that Proponents Must Satisfy

Public Knowledge believes that the public's exercise of its rights should not be conditioned on first seeking permission through a regulatory process. If a copyright owner's rights are not being infringed, then the public should bear no liability. We support legislative reform that would limit liability for circumventing TPMs to instances where the circumvention is undertaken for purposes of infringing a copyright, and thereby eliminate the need for an exemption process altogether.[8]

Despite our fundamental objection to the exemption process, if it is to remain then the legal requirements that proponents must satisfy in order to obtain an exemption should be altered. The triennial exemption process is the primary method for the public to regain some of its rights. At present, however, the requirements amount to a presumption against allowing an exemption, and a preference favoring limiting exemptions in ways that bear little relation to protecting copyright interests. In the most recent triennial review cycle, Public Knowledge and other organizations filed comments highlighting some of these difficulties and ways in which the Office could alter its approach to the rulemaking process.[9]

Proponents face multiple hurdles in establishing their right to an exemption. First, they must establish that their intended use does not infringe a copyright in the work being used. Second, they must establish that they are being "adversely affected" as a result of being unable to engage in the use. The threshold that the Office has set for satisfying both of these requirements is high, and should be altered.

Two examples that illustrate the problems with the current standard for establishing non-infringement are the analysis of Classes 6 (circumvention of TPMs on DVDs, Blu-rays, and streams for film uses) and 8 (circumvention of TPMs on DVDs and Blu-rays for space and format-shifting uses) in the recently concluded 2015 triennial review process.[10] In both classes, the Office determined that proponents had not established to the Office's satisfaction that some, or all, of the identified uses were non-infringing. In both cases, the determining factor was not the existence of case law harmful to the proponents, but rather the dearth of case law firmly

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[8] E.g., Unlocking Technology Act of 2015, H.R. 1587, 114th Cong. (2015-2016)

[9] General Comments of Public Knowledge Addressing Proposed Classes 1-27, Feb. 6, 2015, http://copyright.gov/1201/2015/comments-020615/InitialComments_LongForm_PublicKnowledge.pdf; General Comments of New America's Open Technology Institute, Feb. 6, 2015, http://copyright.gov/1201/2015/comments-020615/InitialComments_LongForm_NAOTI.pdf.

[10] Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention – Recommendations of the Register of Copyrights, 78-82, 120-124, Oct. 2015, http://copyright.gov/1201/2015/registers-recommendation.pdf ("Register's Recommendations")

establishing the boundaries between the end of copyright owners' rights, and the beginning of the public's rights to use without permission.[11]

A process which results in the denial of exemption requests on the basis of uncertainty as to infringement harms the public by limiting the power of the courts to properly delineate the boundaries of copyright law. As the Supreme Court has observed, the litigation of copyright claims to a judgment on the merits benefits the public by establishing where the limits of copyright law are, and where the right's of the public begin.[12] In fact, the goal of benefitting the public through clear delineation of the boundaries of copyright law is of such importance that the Supreme court endorsed the use of awarding attorney fees, even to prevailing defendants, as a policy tool for achieving that purpose. By recommending that exemptions be denied on the basis of a dearth of case law, the Office is effectively depriving the courts of this critical jurisdiction, and itself of the benefit of a more developed case law. In the examples cited, a court facing a copyright lawsuit over the uses covered by Classes 6 and 8 would not be able to resolve the question of fair use. Rather, the court would not be able to look beyond the lack of an exemption.[13]

Finally, it's worth noting that reasonable experts can disagree as to whether the case law indicates that an act is infringing or not. Indeed, the National Telecommunications and Information Administration, which is instructed by statute to weigh in on exemptions requests, disagreed with the Office with respect to the proponents' persuasiveness as to the non-infringing status of their proposed uses.[14] In such cases, it would be best to grant the exemption, and allow the question to be properly resolved by a federal court if a copyright owner feels aggrieved.

Similarly, the current process presents difficulties for proponents to satisfy the adverse effects requirement. While we believe that being deprived of the right to engage in uses that would otherwise be legal but for the presence of a TPM is itself a self-evident adverse effect, we recognize that the Office believes more is required under the statute. Two examples of how the adverse effects analysis could stand improvement are how the process currently treats the economic impact of the prohibition on circumvention on proponents, and how the use of a "reasonable alternatives" analysis leads to strange outcomes.

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[11] "In sum, based on the evidentiary record in this proceeding and under current law, the Register is unable to determine that the proposed uses are noninfringing." Register's Recommendations at 124; "[T]he Register cannot conclude that the suggested non-documentary uses are likely to be noninfringing." Register's Recommendations at 82

[12] Fogerty v. Fantasy, Inc. 510 U.S. 517, 527 (1994).

[13] See, e.g. *RealNetworks, Inc. v. DVD Copy Control Association, Inc.*, 641 F. Supp. 2d 913 (N.D. Ca. 2009) ("So while it may well be fair use for an individual consumer to store a backup copy of a personally-owned DVD on that individual's computer, a federal law has nonetheless made it illegal to manufacture or traffic in a device or tool that permits a consumer to make such copies.")

[14] Sixth Triennial Section 1201 Rulemaking: Recommendations of National Telecommunications and Information Administration to the Register of Copyrights, 23-33, Sep. 18, 2015, http://copyright.gov/1201/2015/2015_NTIA_Letter.pdf.

The Office repeatedly rejected the notion that an increase in costs to the public constitutes an adverse effect for the purposes of obtaining an exemption.[15] Being required to spend money, when the alternative would not infringe a copyright, should by any sensible definition be considered an adverse effect on the public.

In considering whether to grant an exemption, the Office often considers whether the public has a "reasonable alternative" to an exemption. This analysis ultimately leads the Office away from core copyright concerns, and leads to curious distinctions. These range from determining that higher education and K-12 instructors may circumvent TPMs on DVDs, and digital streams for the purpose of making non-infringing instructional uses of the protected works, but that only higher education instructors may do the same with respect to Blu-Ray discs. The Office reasoned that the proponents did not establish that K-12 instructors needed Blu-ray quality – a decidedly non-copyright consideration.

It is worth restating - the public must demonstrate adverse effects in order to engage in activity that is necessarily non-infringing. An exemption cannot be granted for infringing activity. Which is to say that in the examples cited in the preceding two paragraphs, the Office's determination not to grant, or to limit, an exemption had no basis in protecting a copyright from being infringed.

Lowering the barrier to obtain an exemption would greatly lift the burden imposed on the public by §1201 without exposing copyright owners to extensive harm. Exemptions are not 'Immunity Idols' that can be invoked as a total shield against liability. Even after an exemption is granted, Copyright owners retain the ability to seek redress in court for any activity that is in fact infringing their copyrights. The existence of an exemption would not bear on a court's analysis as to whether an infringement of copyright occurred.

IV. Anti-Trafficking

A. Role of Ban on Development and Trafficking of Circumvention Tools in Limiting Infringement

As discussed in Section II.A, reports of massive online infringement by copyright owners, if they are to be believed, suggests that §1201 has failed at curbing infringement. Given the strength of §1201, with its prohibition on otherwise lawful uses of copyrighted works, and its complete ban on the development and distribution of circumvention, it is safe to say that the appropriate response is not to somehow further restrict the public's right to lawfully use their technology and content. To the contrary, such a finding would support restoring the public's rights, as their restriction has brought little benefit.

Regardless of whether or not it is impeding online infringement, the anti-trafficking provisions are inhibiting innovation. While copyright owners may fear the uses that circumvention tools may be put to, copyright law already has an appropriate test for separating

[15] See e.g. "The Register notes that the mere fact that manufacturer-approved feedstock may cost more is not an adverse effect stemming from the prohibition on circumvention." Register's Recommendations at 372.

the sheep from the goats when it comes to tools, namely the doctrine established in *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984). In *Sony*, the Supreme Court was faced with a technology that copyright owners feared would contribute to infringing activity. The Court balanced those fears, noting that there must be "a balance between a copyright holder's legitimate demand for effective -- not merely symbolic -- protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce. Accordingly, the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial non-infringing uses."[16] At a minimum, innovation would be served by adopting a similar standard with respect to circumvention tools – those tools capable of substantial non-infringing uses should be permitted under the law.

On this point it's worth noting that copyright owners have a historically terrible record at identifying innovation that will benefit their industry versus developments that may harm it. Rather than harm the movie industry, the mass appeal of home recording equipment also created a massive market for home video sales. Ironically, §1201 can be seen in part as intended to protect that very market when home videos became available in digital formats.

B. Third Party Assistance

Allowing any person entitled to make use of an exemption to seek assistance from a third party in utilizing that exemption, either by assistance, education, or by directing the third party to engage in the circumvention on behalf of the user, is necessary in order to maximize the utility of exemptions. This can range from documentary filmmakers seeking assistance in making use of the exemption permitting fair uses of Blu-Ray footage, to tractor owners who would like an independent mechanic to repair their equipment. To the extent that users cannot avail themselves of third party assistance under current law, the law should be amended as soon as possible so as to make the most recent exemptions granted useful.

V. Permanent Exemptions

A. Adequacy of Existing Permanent Exemptions

Permanent exemptions are essential to numerous and important classes of people. The irrevocability, under current law, of those exemptions provides those people with freedom to perform important tasks such as education and security research. More importantly, it allows them to engage in long-term projects without concern that the exemption landscape will change across those projects.

However, the views of the communities intended to benefit from the statutory permanent exemptions, as expressed, e.g., in comments filed in the most recent triennial review cycle speak for themselves as to the inadequacy of the exemptions.[17]

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[16] *Sony* at 442.

[17] See, e.g. Comments of Bellovin, et al., Feb. 6, 2015, http://copyright.gov/1201/2015/comments-020615/InitialComments_LongForm_SecurityResearchers_Class25.pdf

B. Recommendations for New Permanent Exemptions

The number of repeat exemption requests, such as for access to literary works by print-disabled persons, speaks to the value of expanding the set of permanent exemption categories. The continuing requirement that these requestors repeatedly renew and reargue their requests triennial after triennial is wasteful, duplicative, and unnecessary.

VI. Conclusion

In conclusion, we hope that the Copyright Office gives serious consideration to concerns and calls for form raised in this comment.

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