Before the
Copyright Office
Library of Congress
Washington, D.C. 20024

In the Matter of Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies	Docket No. 2014-07

COMMENTS
OF
NEW AMERICA'S OPEN TECHNOLOGY INSTITUTE

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February 6, 2015

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Summary

New America's Open Technology Institute ("OTI") respectfully files these comments in response to the Notice of Proposed Rulemaking published in the above-referenced proceeding on December 12, 2014.[1] OTI urges the Copyright Office and the Library of Congress to conduct this rulemaking in a manner consistent with the language of § 1201(C) authorizing this rulemaking and with Congress's intent.

To maximize public participation and ensure that this rulemaking serves its intended role as a fail-safe mechanism to protect the availability of copyrighted works for lawful uses in the face of abusive overuse of technological protection measures, we urge the Copyright Office in particular to do the following:

- Define "adverse effects" narrowly, as it is defined in the statute

[1] Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, *Notice of Proposed Rulemaking*, 79 Fed. Reg 73,856 (Dec. 12, 2014), *available at* http://copyright.gov/fedreg/2014/79fr73856.pdf [hereinafter 2013 NPRM].

- As directed by the statute, look to see whether proponents' desired uses are "likely" noninfringing as opposed to certainly noninfringing
- Provide a mechanism whereby proponents may submit confidential versions of comments in circumstances that require confidentiality

The first two of these three suggestions are supported very clearly by both the letter and the intent of § 1201. The third suggestion provides a common-sense way to assist the Copyright Office in the development of the most complete rulemaking record possible.

I. Congress Recognized the Potential for Abuse of the Anti-Circumvention Provision

When Congress passed the Digital Millennium Copyright Act ("DMCA"), it recognized that the anti-circumvention provision might be vulnerable to abuse. The House Commerce Committee expressed two concerns in particular: that some would try to leverage what was intended as a protection against piracy to instead support their business models, and that the use of technological protection measures ("TPMs") could become ubiquitous across entire classes of works:

> [T]he Committee is concerned that marketplace realities may someday dictate a different outcome, resulting in less access, rather than more, to copyrighted materials that are important to education, scholarship, and other socially vital endeavors. This result could flow from a confluence of factors, including the elimination of print or other hard-copy versions, the permanent encryption of all electronic copies, and the adoption of business models that depend upon restricting distribution and availability, rather than upon maximizing it.[2]

[2] *Report of the H. Comm. on Commerce on the Digital Millennium Copyright Act of 1998*, H.R. Rep. No. 105-551, pt. 2, at 36 (1998).

The House Commerce Committee's concerns were warranted. Indeed, TPMs have become extremely widespread with respect to broad classes of works. Today, a customer who purchases a movie, ebook, mobile phone, or tablet will almost certainly find it (or a copyrighted work it contains) to be protected by TPM.

And as the Committee anticipated, many entities use TPMs that control access to copyrighted works for the purpose of protecting their "business models that depend upon restricting distribution and availability" rather than to protect against piracy. For example, in 2003 Lexmark sued competitor Static Control under § 1201 to try to prevent third-party printer cartridges compatible with Lexmark printers from competing with its own cartridges.[3] That same year, garage door opener manufacturer Chamberlain sued competitor Skylink under § 1201 to try to prevent Skylink from selling a universal transmitter compatible with Chamberlain products.[4] In 2005, storage solution vendor Storage Technology sued Custom Hardware Engineering, an independent service provider, in an attempt to corner the market on aftermarket maintenance of its products.[5] And in 2010, Microsoft sued chip manufacturer Datel under § 1201 as part of its strategy to prevent Datel from selling third-party accessories for the Xbox 360.[6]

II. Congress Created this Rulemaking to Serve as a Fail-Safe Against Abuses of the Anti-Circumvention Provision

Because Congress recognized the potential for overuse and abuse of TPMs, it granted the Library of Congress the authority to conduct the current rulemaking as "a 'fail-safe' mechanism" to protect lawful uses that could

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[3] *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522 (6th Cir. 2004).
[4] *See Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178 (Fed. Cir. 2004).
[5] *See Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Inc.*, 421 F.3d 1307 (Fed. Cir. 2005).
[6] *See Datel Holdings, Ltd. v. Microsoft Corp.*, 2010-2 Trade Cas. (CCH) P77, 192 (N.D. Cal. 2010).

otherwise be chilled or prevented by the prohibition on circumvention. The Commerce Committee explained:

> Given the threat of a diminution of otherwise lawful access to works and information, the Committee on Commerce believes that a ''fail-safe'' mechanism is required. This mechanism would monitor developments in the marketplace for copyrighted materials, and allow the enforceability of the prohibition against the act of circumvention to be selectively waived, for limited time periods, if necessary to prevent a diminution in the availability to individual users of a particular category of copyrighted materials.[7]

The primary goal of the rulemaking, as then envisioned, would be "to assess whether the prevalence of these technological protections . . . is diminishing the ability of individuals to use these works in ways that are otherwise lawful.[8]"

III. The Copyright Office Can Do More to Honor the Intent of Congress with Respect to this Rulemaking

In the context of the congressionally directed goals of this rulemaking, the Copyright Office can adopt a few changes in the current iteration of the rulemaking to ensure that it more closely reflects the intent of Congress. These changes are necessary because the rulemaking is relatively inaccessible to members of the public that it aims to serve, and because past iterations of the rulemaking have generated results that are at odds with Congress and the needs of the public.[9]

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[7] *Report of the H. Comm. on Commerce on the Digital Millennium Copyright Act of 1998*, H.R. Rep. No. 105-551, pt. 2, at 36 (1998).
[8] *Id.* at 37.
[9] *See Leahy And Other Leaders Of Senate and House Judiciary Committees Hail Final Congressional Action On Pro-Consumer Cell Phone Legislation* (July 25, 2014), https://www.leahy.senate.gov/press/leahy-and-other-leaders-of-senate-and-house-judiciary-committees-hail-final-congressional-action_on-pro-consumer-cell-phone-legislation; Abigal Bessler, *Obama Signs Bill "Unlocking" Cell Phones*,

A. Consistent with the Statute, the Copyright Office Should Define "Adverse Effects" Narrowly

The Copyright Office should define "adverse effects" as referring narrowly to the inability to make noninfringing uses, as Congress intended. § 1201 directs the Librarian of Congress to grant exemptions where "users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition [on circumvention] . . . in their ability to make noninfringing uses under this title of a particular class of copyrighted works." As explained above, the concerns that gave rise to this rulemaking were widespread use of TPM across entire classes of works, and the use of TPM to enforce business models rather than to defeat piracy. Combining the crystal clear language of the statute with legislative history, an "adverse effects" inquiry should be simple: Does or will widespread use of TPM and/or the use of TPM for purposes other than the prevention of piracy diminish users' ability to make uses that are likely noninfringing?

In contrast, definitions of "adverse effects" that are similar to classic definitions of harm have no basis in the statute and thus no place in this rulemaking. For example, in the Notice of Proposed Rulemaking the Copyright Office inappropriately asks supporters of a proposed exemption for unlocking consumer machines to provide "specific examples demonstrating adverse effects *stemming from* a consumer's inability to choose the mobile wireless communications provider."[10] The law is concerned only with the inability to make a use that is likely noninfringing. Outside the context of a fair use inquiry that the Copyright Office may need to perform to determine whether or not the desired use is noninfringing, § 1201 is not concerned with a user's motivation for

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CBS News (Aug. 1, 2014), http://www.cbsnews.com/news/obama-signs-bill-unlocking-cellphones/.

[10] 2014 NPRM at 73,866.

making a First-Amendment-protected lawful use, or with secondary harms "stemming from" the inability to make that use.

To conduct this rulemaking in a manner that is consistent with the statute and the intent of Congress, the Copyright Office should abandon inquiries into secondary harms such as the one detailed above, and should construe "adverse effects" narrowly. Correspondingly, the Librarian of Congress must not deny a proposal where the record does not demonstrate secondary harms "stemming from" users' inability to make noninfringing uses, because such a showing is not required for an exemption under § 1201.

B. Consistent with the Statute, the Copyright Office Should Only Require a Determination that a Desired Use is Likely Noninfringing to Support Granting an Exemption

As it considers exemption proposals, the Copyright Office should only inquire into whether each desired use is at least likely noninfringing, not whether it is definitively so. This is consistent with the text of the statute, as well as with the Copyright Office's own interpretation of the statute. Indeed, in the NOI the Copyright Office explains that "the proponent must establish that the proposed use is likely to qualify as noninfringing under relevant law."[11] As the Copyright Office explained in 2003, "'[l]ikely' . . . means 'probable,' 'in all probability,' or 'having a better chance of existing or occurring than not.'"[12] In other words, if the Copyright Office determines that the desired use presented in a proposed exemption has a better chance of being noninfringing than not, that is sufficient.

In contrast, an inquiry that requires supporters of a proposed exemption to establish by a "preponderance of the evidence" that the desired use *is*

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[11] Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, *Notice of Inquiry and Request for Petitions*, 79 Fed. Reg 55,687 at 55,690 (Sept. 17, 2014), *available at* http://copyright.gov/fedreg/2014/79fr55687.pdf [hereinafter 2014 NOI].

[12] Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, *Recommendation of the Register of Copyrights and Determination of the Librarian of Congress*, 65 Fed. Reg. 64,555 at 64,562 (Oct. 27, 2000) (citing Black's Law Dictionary 638 (Abridged 6th ed. 1991)).

noninfringing would go too far, and thus would be inconsistent with the letter of the statute. The Copyright Office has at times articulated the sufficiency of demonstrating that a proposed use is "likely" noninfringing, but at times it has also seemed to require much more certainty, and has rejected proposals for failing to meet that high burden. For example, when the Copyright Office considered a proposed exemption for jailbreaking of video game consoles in 2012, it stated, "it is important to consider whether proponents have satisfied their burden of demonstrating that the uses in question *are, in fact,* noninfringing."[13] Following a four-factor fair use analysis, the Copyright Office declared, "proponents have failed to fulfill their obligation to establish persuasively that fair use can serve as a basis for the exemption they seek."[14] Similarly, as it considered a proposed exemption for DVD descrambling for the purpose of noncommercial space-shifting, the Copyright Office stated that "proponents bear the burden of demonstrating that a requested use *is* noninfringing."[15] Recommending that that proposal be denied, the Copyrighted Office was "not persuaded that there is a basis under current law to conclude that proponents' uses *are* noninfringing."[16]

The Copyright Office has also said that "this rulemaking is not the forum in which to break new ground on the scope of fair use."[17] But for the Librarian of Congress to determine when proponents' desired uses are likely noninfringing as opposed to certain, it will need to make some judgments about fair use or other theories of noninfringement that are not definitively resolved by existing law.

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[13] Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, *Recommendation of the Register of Copyrights and Determination of the Librarian of Congress* (2012) at 39, *available at* http://copyright.gov/1201/2012/Section_1201_Rulemaking_2012_Recommendation.pdf (emphasis added) [hereinafter 2012 Recommendation].
[14] *Id.* at 44.
[15] *Id.*at 162 (emphasis added).
[16] *Id.*at 165.
[17] *Id.*at 163.

Refusal by the Copyright Office to recommend or the Librarian of Congress to grant exemptions for uses that are only likely (not certainly) infringing would not only be inconsistent with § 1201, it would also have a negative effect on the development of copyright law in the courts. Indeed, without § 1201 exemptions that allow users to test out uses that are likely but not certainly infringing, the development of fair use doctrine would stagnate. Because one would have to circumvent TPM to make use of the work it controls access to, and it is unlawful to circumvent TPM without an exemption, cases of first impression regarding novel noninfringing uses *would never be possible* if the Copyright Office were to limit the granting of exemptions to circumstances in which the law is already established. With such a high burden in place, a proponent who wished to secure an exemption would have to 1) go ahead and circumvent TPM without the protection of an exemption, 2) make the likely noninfringing use of the underlying work, 3) get sued for in infringement (and possibly also for violation of § 1201), and 4) prevail in court before 5) returning to the Copyright Office and completing the exemption process in a future rulemaking.

Consistent with the language of the statute and with its own interpretation of the statute, the Copyright Office should not deny an exemption proposal where the record and existing case law do not establish that the desired use is certainly noninfringing. The statute only requires that the desired use be more likely noninfringing than infringing.

C. The Copyright Office Should Allow Exemption Proponents to Submit Confidential Versions of Comments

The Copyright Office should allow parties that demonstrate a need to file confidential versions of their comments to do so. Many other agencies allow confidential filings in limited circumstances, including the Federal

Communications Commission.[18] Some information that could be critical to the decision-making process is not appropriate for public disclosure because, for example, it is business-confidential, it might expose commenters to legal liability, or it would disclose security vulnerabilities that could then be exploited by malicious third parties.

The absence of a mechanism for submission of confidential comments is particularly problematic for security researchers. One of the reasons security researchers request exemptions in every triennial review is because the threat of legal liability under § 1201 sometimes prevents them from publishing important work. The same fear of legal liability could prevent them from filing public comments in this rulemaking detailing the important work that they do.

In addition, the security research examples that are most illustrative of the critical need for a broad security research exemption are specific examples of existing security vulnerabilities in computers and devices that are closely tied to public safety. But even when researchers are not afraid of the legal liability they could incur by revealing those examples, they might abstain from revealing such vulnerabilities out of fear that the vulnerabilities could be exploited before they are fixed.

To encourage development of the most complete record possible in this proceeding, the Copyright Office should allow confidential filings on a limited basis.

IV. Conclusion

Congress designed this rulemaking to serve as a fail-safe against TPM abuses. As the use of TPM continues to grow, and as more entities use TPM to protect business models rather than to combat piracy, this rulemaking is more important than ever. To ensure that the rulemaking most closely serves the explicit and implicit directions of Congress, we urge the Copyright Office to

[18] *See How to Comment*, FCC, https://www.fcc.gov/guides/how-comment (last visited Feb. 6, 2015).

define "adverse effects" narrowly, as it is defined in the statute; to look to see whether proponents' desired uses are "likely" noninfringing as opposed to certainly noninfringing; and to provide a mechanism whereby proponents may submit confidential versions of comments in circumstances that require confidentiality.

Respectfully submitted,

/s/

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