Long Comment Regarding a Proposed Exemption Under 17 U.S.C. 1201

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Item 1. Commenter Information

This proposal is respectfully submitted by Public Knowledge. Public Knowledge is a nonprofit organization dedicated to representing the public interest in digital policy debates. Public Knowledge promotes freedom of expression, an open internet, and access to affordable communications tools and creative works.

Interested parties are encouraged to contact Michael Weinberg (mweinberg@PublicKnowledge.org) or Sherwin Siy (ssiy@PublicKnowledge.org) as Public Knowledge's authorized representatives in this matter. Public Knowledge's contact information is as follows:

Public Knowledge
1818 N St. NW
Suite 410
Washington, DC 20036
(202) 861-0020

Item 2. Proposed Class Addressed

This comment addresses Proposed Classes 1- 27.

Item 3. Overview

The following comments apply generally to the circumvention rulemaking process and have been included in this proposed class for the sake of completeness. We apologize for any needless redundancy, but were advised that this was the most efficient way to ensure that arguments relevant to each exemption were considered fully.

Item 4. Technological Protection Measure(s) and Method(s) of Circumvention

A number of barriers to data, device firmware, and media access can colorably be classified as technological protection measures controlling access to copyrighted works. Such possible TPMs include encryption on the software or of the signal produced; specially designed cables, plugs, or ports designed to frustrate access; proprietary or deliberately obscure formats for data; or even the simple denial of an programming or user interface to access the software.

While proponents, Public Knowledge, the Librarian, or the Register may disagree about the characterization of any or all of these features as "technological protection measures" under the terms of section 1201(a)(1), it is within the Library's power to permit exemptions of them *to the extent* that a court may later consider them TPMs. We urge the Library and the Office to do so in the interest of removing any potential uncertainty regarding these activities.

As a further note, the distinction between access and copy protection measures (or, to use the statutory language, between a "technological measure that effectively controls access to a work protected under this title" and a "technological measure that effectively protects a right of a copyright owner under this title in a work") is frequently unclear—not simply as a matter of law, but as a matter of fact. In particular, copyrighted works being accessed through digital devices will frequently require some form of "copying" (whether or not that rises to the level of "reproduction" as defined in the Act) in order to merely be used. This aspect of digital technology should not allow access controls to escape this proceeding by simultaneously styling themselves as copy controls.

Furthermore, the Library and the Office should be wary of creating exemptions that are overly specific with regard to particular TPMs and methods of their circumvention. As technologies, particularly with regard to digital formatting, change rapidly, granting exemptions based only upon specific existing measures, and foreclosing finctionally identical ones that may be developed or implemented between now and 2018, would be unnecessarily limiting. The Librarian and Register have the ability to grant exemptions for particular classes of works without specifying the precise mechanisms used by the various protection measures beyond to which classes of works they are applied. Similarly, methods of circumvention will be widely varied, and unlikely to have consequences beyond those that can be anticipated by their qualitative description at this stage.

Item 5. Asserted Noninfringing Use(s)

Affirmative Judicial Precedent is not Necessary for a Determination of Noninfringement

In its Notice of Inquiry, the Office notes that exemptions are to be granted for uses that are, or are likely to be, noninfringing, not merely uses that might plausibly be noninfringing. In describing this standard, the Office says that "[i]nstead, the proponent must establish that the proposed use is likely to qualify as noninfringing under relevant law."[1] If this is taken to mean that positive judicial precedent is required for the Library and Office to find a use noninfringing, it is a misreading of the statutory requirements.

The Office has stated that its burden of proof is a preponderance of the evidence.[2] The burden of proof for a prerequisite for a ruling cannot be higher than that for the ruling as

[1] Notice of Inquiry, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 79 Fed. Reg. 55687, 55690 (Sep. 17, 2014).
[2] *Id.* at 55689.

a whole. Yet demanding that a rulemaking proceeding—a process of factfinding as well as a process of legal judgment—require judicial precedent or statutory instruction before considering the likelihood of a use being noninfringing creates a burden far higher than the "more likely than not" standard required by a preponderance of the evidence. For example, absent specific instruction from an on-point case, it is still possible for any factfinder—including district courts, regulatory agencies, and the Copyright Office—find that a particular use is fair. If the Library and Office believe that a use is more likely to be infringing than not, as informed by existing law, but not relying upon it to the exclusion of other facts and evidence, it should consider the use noninfringing for the purposes of its remaining analysis.

The Infringing Status of Proposed Uses Should Be Assessed on Their Merits

In weighing whether a use is likely to be noninfringing or merely "might plausibly be noninfringing," the Office should be careful to assess the proposed use on its own stated merits. Whether the proposed *circumvention technique* might also be used for infringing purposes is not relevant to this initial part of the analysis. The extent to which a legitimately granted exemption might later be used as a pretext for infringing uses is certainly a relevant part of the considerations in the rulemaking as a whole, but should be reserved for assessment under the statutory factors, not under the status of the actual proposed use or the adverse effects.

Licenses Purporting to Restrict Use of Copyrighted Works Do Not Affect a Fair Use Analysis

Frequently, licenses, contracts, or other agreements so styled will purport to restrict uses of a copyrighted work. In the case of a valid license, breaching the conditions to the license can result in a finding of infringement. However, if the use is a fair one, the existence of a license that purports to restrict that use has no effect.

Fair uses are not within the realm of any rightsholder to prohibit—the exclusive rights of the copyright holder exist subject to the limitations and exceptions in sections 107-122.[3] No copyright holder may license rights it does not own. Therefore, the presence or absence of any license agreement does not affect the noninfringing nature of the use.

The Only Relevant Question Regarding the Lawfulness of the Proposed Use is Whether or Not it Infringes Copyright

In fact, the Library and the Office should disregard the extent to which any proposed uses may infringe contracts, laws, or regulations that are not the exclusive rights granted to authors in section 106.

[3] 17 U.S.C. § 106.

The lawfulness requirement of proposed exemptions is merely that they be "noninfringing," not that they comply with all potential legal restrictions.[4] Such a limitation is necessary to ensure that the rulemaking process, created by Congress, has any meaningful effect. This is true for at least four reasons.

First, allowing unrelated matters of law to bar circumvention for noninfringing uses runs the risk of categorically denying exemptions in any field that is subject to a sufficiently complex set of contracts or regulations.

A finding that a proposed use *may* be barred by regulations unrelated to copyright should not act as a bar to granting an exemption under section 1201(a)(2). To the extent that the proposed use would violate the unrelated rules, nothing in section 1201 supersedes or obviates those rules. Exemption proponents would be free to petition the relevant agencies, offices, or legislative bodies—or advocate for legal changes in court—in order to make use of the exemption granted through this proceeding, but such activity is relevant to this proceeding. Otherwise, allowing unrelated rules to block assessment of the merits of the copyright and circumvention claims could easily lead to a circular stagnation, as each rulemaking authority awaits word from others to proceed. Progress for any sufficiently complex regulated system would be impossible, regardless of the individual merits of an exemption under each separate regime.

Furthermore, the Library and Office should not assess the lawfulness of a proposed use based upon the presence or absence of contractual limitations on that use. It is trivial for any party to create contracts that purport to prohibit circumvention, or uses that might flow from it that do not in themselves infringe copyright. Should the Library and Office assume that any breach of an agreement would bar the granting of an exemption, the entire section and rulemaking process runs the risk of being rendered a nullity by the inclusion of appropriate terms of service by rightsholders or other affected parties. Unless the Library and Office are willing to either presume that contractual obligations will eventually render this rulemaking moot, or to assess the contractual limitations on each instance of a use of given class of works, as well as the contractual limitations anticipated within the next three years, its determinations should not be affected by such extraneous factors.

Second, to the extent that determining the lawfulness of a proposed use requires assessment of the law beyond questions of copyright infringement or other aspects of Title 17, the Copyright Office and the Library of Congress are poorly placed to answer such questions on its own. The details of antitrust enforcement, false advertising, wireless signal interference, or computer intrusion have neither been delegated to these entities, nor are they expert agencies in these matters.

Third, neither copyrights nor the anticircumvention provisions of the DMCA are to be used as proxy enforcement mechanisms of other interests. The doctrine of copyright misuse "forbids the use of the copyright to secure an exclusive right or limited monopoly

[4] 17 U.S.C. § 1201(a)(1)(C).

not granted by the Copyright Office and which it is contrary to the public policy to grant."[5]

In other words, parties should not be able to extend the exclusive powers granted to them over their works beyond their realm in order to achieve goals unrelated to the public purposes of copyright. While a rightsholder is perfectly free to pursue whatever lawful aims it may have beyond the reach of Title 17, copyright misuse prevents it from attaching the presumptions and remedies associated with copyright law into those areas.

One particularly timely example of copyright misuse has come to the fore in *Omega S.A. v. Costco Wholesale Corp*.[6] In that case, the watch manufacturer Omega attempted to restrict imports of its watches. Unable to use other means to prevent Costco from doing so, Omega began placing a copyrighted symbol on the backs of its watches, in an effort to use territorial restrictions in copyright law, and thus copyright law itself, to improve its market share in its own watch importation and retail sales—despite the fact that the copyrighted work upon which its legal theory hinged had no value and was itself of little commercial concern to any of the parties or to the eventual consumers. Even if Costco had breached a contract in the act of its importation, or if it failed to pay some import duty in shipping the watches, those hypothetical violations would have no bearing upon the fact that Omega was engaged in copyright misuse.

By the same token, access protection measures unrelated to preventing infringing uses of the work serve to impermissibly extend exclusive rights beyond those granted by the scope of copyright and the public policy underlying it. One case in point is the geographical encoding present on many DVDs, which do not themselves effectively control copyright-implicating access to works; their presence does not bar the reproduction, distribution, or public performance of motion pictures so much as it allows for the exact sort of geographical restrictions on arbitrage so disfavored in *Omega*.

Within the context of analyzing the merits of exemption requests in this proceeding, the Library and Office should therefore exercise its authority in such a way that confines the reach of section 1201(a)(1) so as to not perpetuate attempts at copyright misuse.

Fourth, the language of section 1201(a)(1) limits the application of the circumvention prohibition to measures that control only those types of access that are protected under title 17. In other words, if a form of access is not protected as an exclusive right of the copyright holder under section 106, a protection measure is not covered by the access control provision.

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[5] *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 977-779 (4th Cir. 1990); *Practice Management Information Corp. v. Am. Medical Ass'n*, 121 F.3d 516, 520 (9th Cir. 1997); .

[6] 2011 U.S. Dist. LEXIS 155893 (E.D. Cal. Nov. 9, 2011), *aff'd* 2015 U.S. App. LEXIS 830 (9th Cir. Jan. 20, 2015).

This interpretation protects all legally cognizable acts of access under the law while preventing potentially absurd overinterpretations of section 1201(a). To the extent that "access" affects the interests of a copyright holder, at least one of the section 106 rights will be implicated. In the digital context, RAM and buffer copies will frequently implicate the reproduction right; other types of access will certainly involve more permanent reproductions, adaptations, distributions, public displays, and public performances.

At the same time, recognizing that "under this title" modifies "access" rather than "work" solves an existing conundrum: how, under the terms of section 1201(a), does a padlock (of however much technological sophistication) on a locker full of books not constitute a "technological measure control[ling] access to a work" protected under Title 17? Certainly it was not the intention of Congress to allow prosecutors to include a DMCA violation against any common burglar.

However, if it is the access that is protected under title 17, then the mere act of unlocking or breaking down a door doesn't meet the copyright-specific criteria of section 1201(a). Just as the mere acts of reading a paperback or privately listening to a recorded album accesses those works without implicating any section 106 rights, the access gained by the defeat of a control mechanism will not trigger section 1201 unless that access is itself covered by title 17.

Each of these various considerations by itself should suffice to indicate why breaches or infringements that are not infringements of copyright should not be determining factors in whether or not an exemption should be granted. Instead, the Library and Office can easily convey the limitations of their exemption grants—just as they do not create blanket immunity from copyright infringement liability or the trafficking provisions of section 1201(a)(2) and 1201(b), they clearly lack the authority to gainsay other areas of law.

Making that distinction clear can allow exemption requests to proceed in a way that reduces uncertainty for all concerned stakeholders.

Item 6. Asserted Adverse Effects

The Inability to Make Noninfringing Uses is Itself an Adverse Effect Under the Statute

The language of the statute in assessing adverse effects is clear: the Library and the Office are to determine whether persons are likely to be "adversely affected…in their ability to make noninfringing uses" of copyrighted works.[7] In other words, proponents must show how the prohibition prevents, or creates a likelihood of preventing, a lawful use. The "adverse effect" referred to in the statute is the effect of being prohibited by law from engaging in lawful activity, not a calculation of estimated monetary or equitable damages resulting from the prohibition.

[7] 17 U.S.C. § 1201(a)(1)(B).

To the extent to which a use is in fact lawful, the effect of the prohibition is a plain legal bar. It is not merely likely to prevent a lawful use; it does. Exemption proponents should not need to make arguments of economic or other hardship beyond this, though such evidence would certainly be relevant.

Adverse Effects are Necessarily Most Evident at the Individual Level

In the NOI, the Office states that "individual cases" of adverse effects do not meet the rulemaking standard. While it may be sensible to ensure that a single, unrepeatable instance of an adverse effect not determine policy for the entire population, the Office should remain aware that the particular circumstances of the anticircumvention law and the exemption process both combine to severely limit the availability of evidence of affected parties.

First, demonstrating a non-speculative need creates a tension for a potential proponent, who must balance detailing the costs, benefits, and consequences of the proposed use against potentially advocating against their own interest by demonstrating an existing liability under section 1201(a)(1). This will naturally limit the number of proponents participating. Unless particularly bold, particularly aggrieved, or particularly desperate, rational actors will not engage in possibly illegal activity before drawing attention to themselves by placing their questionably legal deeds on record in a federal proceeding.

Quantifying the amount harm done by a circumvention measure will also necessarily require some prediction. While existing practices might be small-scale experiments, larger-scale activities could require investing large sums of money in what is necessarily a legally uncertain environment.

"Mere Inconvenience" is an Unworkable Standard for Effects Beyond the Prohibition

The Office says that "mere inconvenience" is insufficient as a showing of an adverse effect caused by the prohibition on circumvention. While a clearly *de minimis* effect need not require an exemption, The Office should be cautious about applying this term too broadly.

As noted above, the "adverse effect" that the statute requires a proponent to demonstrate is a restriction or a likely restriction upon their noninfringing use. It is not a measurement of the fiscal cost that flows from that initial legal restriction. Leaving aside the questionable wisdom of assuming what particular dollar values may be worth to affected parties, the relevant question is what the effects of the prohibition are upon user behavior. Mere inconveniences such as an occasional beeping, for instance, can cause users to, alternately, fasten their seatbelts or remove the batteries from their smoke detectors.

By the same token, it would be easy to characterize the inability to access medical data on the device of a patient's choosing as a "mere inconvenience." In conversational terms, and in an individual instance, a teenage patient might consider it merely inconvenient to carry around two different smartphones—one compatible with his implanted medical device, and the other his personal phone. Yet should that convenience lead the patient to leave the compatible device at home on a regular basis, his ability to appropriately manage his condition could become severely compromised. Although by one characterization, the adverse effect is a small matter, the end result is more than inconvenient.

Item 7. Statutory Factors

[n/a]

Public Knowledge submits the above comments in the hopes that they might help inform the Office's consideration of the exemption proposed in this docket.

Sherwin Siy

Public Knowledge
1818 N St. NW, Suite 410
Washington, DC 20036