Before the
United States Copyright Office
101 Independence Ave. S.E.
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Section 1201 Study | Docket No. 2015–8

REPLY COMMENTS OF PUBLIC KNOWLEDGE

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I. Public Knowledge believes that the toll on legitimate, non-infringing uses caused by Section 1201 is not justified by the asserted benefits of anti-circumvention.

Public Knowledge agrees with the Electronic Frontier Foundation and other commenters who call for Congress "to amend Section 1201 to make clear that neither circumvention of a technological measure, nor the development and distribution of circumvention devices, is unlawful unless those acts are done for the purpose of infringing copyright."[1] Doing so would "help prevent the misuse of section 1201 as a means of suppressing lawful competition and innovation, and freedom of expression."[2] While 1201 can be interpreted in ways that limit some of the more egregious abuses that Public Knowledge and others have noted, the ample commentary in this proceeding demonstrates that a legislative clarification that, among other things, 1201 is not intended to inhibit lawful uses of content may be beneficial.

Overbroad interpretations of Section 1201–for example, reading it to prohibit circumventions for lawful, beneficial uses–cause significant harm both by (A) obstructing public participation in the production and exchange of knowledge and culture contrary to the "traditional contours" of copyright law and (B) interfering with research, repair, competition, and user innovation in consumer products. It is these costs that need to remain "front-and-center" during this proceeding.[3] The benefit some content industries attribute to this prohibition does not justify the toll exacted on the public. The content industry routinely claims that it will cease making content available absent a legal regime entirely to its liking, and there is no reason to credit those claims more in the 1201 context than in the context of home recording, the broadcast flag, or website blocking. (Indeed, some in the content industry continue to assert that the widespread piracy continues despite the presence of Section 1201, implying that while 1201 is effective at inconveniencing or blocking ordinary lawful uses of content, it is seemingly singularly ineffective at its purported purpose.) Public Knowledge therefore urges this Office, and Congress, to support narrowly constraining the reach of Section 1201's anti-circumvention and anti-trafficking provisions to minimize their effects on noninfringing, ordinary uses of content

A. Section 1201's anti-circumvention provisions, when applied to non-infringing uses, upset copyright law's necessary balance between the rights of the authors and those of the public. Overbroad interpretations of section 1201 therefore can imperil expressive activity, and limit participation in public discourse.

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[1] Initial Comments of the Electronic Frontier Foundation at 2-3, (Mar. 4, 2016) *available at* https://www.regulations.gov/#!documentDetail;D=COLC-2015-0012-0058

[2] Id. at 3.

[3] Commenters Association of American Publishers, Motion Picture Association of America, Recording Industry of America ("AAP et al.") assert that "the importance of technological protection measures to these business models . . . must remain front-and-center during the Copyright Office's consideration of proposals to revise Chapter 12." See Initial Comments of AAP et al., at 3 (Mar. 4, 2016). Given the mounting evidence of the harm to the public wrought by over broad application of section 1201, Public Knowledge respectfully disagrees.

When copyright law is appropriately balanced, it can create economic incentives for the creation of new works while promoting public access to information and culture, and fostering participation in robust public discourse. These are values that are of foundational importance to core principles of democratic governance, embodied in the protections provided by the First Amendment to the United States Constitution.[4]

The contours of copyright law are shaped in reference to these very principles.[5] Copyright law is "an engine of free expression[:] By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[6] This economic incentive is not a pure reward to the author, however; it "must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts." [7]

To serve this cause, copyright is limited in ways that preserve the public's right of access to information, ideas, and creative works, and that promote active public participation in the production and exchange of knowledge and culture. As the Supreme Court explained, "the 'traditional contours' of copyright protection, *i.e.*, the idea/expression dichotomy' and the 'fair use' defense…are recognized in our jurisprudence 'as built-in First Amendment Accommodations.'"[8] The idea/expression dichotomy, 17 U.S.C. §1902(b), assures us that "every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication."[9] And the doctrine of fair use, 17 U.S.C. 107, "allows the public to use not only facts and ideas contained in a copyrighted work, but also [the author's] expression itself in certain circumstances."[10] Without these "built in First Amendment accommodations,"

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[4] As Justice Brandeis famously stated in his concurrence in *Whitney v. California,* "[t]hose who won our independence…believed that the freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly, discussion would be futile; that with them, discussion affords adequate protection against the dissemination of noxious doctrine; that greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government." *Whitney v. California*, 274 U.S. 357, 375 (Brandeis, J. concurring).

[5] See *Golan v. Holder*, 132 S. Ct. 873, 890, 181 L. Ed. 2d 835 (2012) (describing the idea/expression dichotomy and the fair use defense as "built-in First Amendment accommodations").

[6] Id. (citations omitted).

[7] *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156.

[8] See *Golan*, 132 S. Ct. at 890 (citations omitted).

[9] See *id*. at 890 (citations omitted); See also Feist, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 349-350 (1991) (stating "[t]he primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and the 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.")

[10] Id. (citations omitted); The Supreme Court has also observed that the fair use doctrine is also necessitated by the Constitution's Copyright Clause itself. See Campbell, 510 U.S. at 575 ((citing U.S. Const., Art I, sec. 8) and stating "[s]ome opportunity for fair use of copyrighted material has been thought necessary to fulfill copyright's very purpose, 'to promote the Progress of Science and useful Arts…'")

production of knowledge and culture risks centralization, access to information is impaired, and the ability to participate meaningfully in a public discourse is limited.

The unduly expansive interpretation of section 1201 advocated by some commenters that would prohibit all circumventions[11] – including those undertaken in pursuit of fair and non-infringing use of the underlying work may actually run afoul of the constitution. Under this reading, Section 1201 distorts the traditional contours of copyright law, and gives copyright holders the ability "to extinguish the user's privileged uses,"[12] eclipsing both the idea/expression dichotomy, and the doctrine of fair use. Because they are absent "built-in First Amendment Accommodations," overbroad readings of section 1201 are constitutionally suspect. Such readings impair both access to information and culture and public participation in the production and exchange of information and culture. As commenter New Media Rights succinctly phrased the problem, "[s]ection 1201 is impeding lawful content reuse, removing otherwise lawful speech from the public discourse" and "affects every member of the public who interacts with copyrighted works, or, in other words, absolutely everyone."[13] And, as technology and social practice evolve to primarily digital distribution models, overbroad readings of section 1201 aggravate the problems of access and participation : "[a]s creative expression becomes increasingly digital and subject to TPMs, the pressure § 1201 places on fair use and its value to free expression will only increase."[14] Perhaps the most troubling example of this effect is the limitations on access and participation encountered by persons with print-disabilities, "[d]igital accessibility is especially important for this population: gaps in resources and education can make it more difficult for these individuals to meaningfully participate in all aspects of social and democratic dialogue. Lack of accessibility can have powerfully disenfranchising effects."[15] Therefore, to the extent Section 1201's prohibitions are read to prohibit circumventions undertaken for the purposes of otherwise lawful uses or free expression, they upset the balance copyright law strikes between authors and the public, re-shape the "traditional contours" of copyright law, and jeopardize the kind of participation in public discourse that is of constitutional significance. [16]

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[12] Yochai Benkler, Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain, 74 N.Y.U. L. Rev. 354, 421 (1999).

[13] Initial Comments of New Media Rights at 5 (Mar. 4, 2016), *available at* https://www.regulations.gov/#!documentDetail;D=COLC-2015-0012-0029; see also Initial Comments of AAU, ACE, APLU, EDUCAUSE at 2 (Mar. 4 , 2016) (stating "[t]oday, we remain concerned that section 1201 is adversely affecting the ability of the educational community to access copyrighted works for the purpose of engaging in lawful, noninfringing uses of those works and using uncopyrighted materials integrated in those works") *available at* https://www.regulations.gov/#!documentDetail;D=COLC-2015-0012-0033.

[14] Initial Comments of Author's Alliance, Docket No. 2015-8 (Mar. 4, 2016) at 2, *available at* https://www.regulations.gov/#!documentDetail;D=COLC-2015-0012-0032.

[15] Initial Comments of American Foundation for the Blind at 11 (Mar. 4, 2016) *available a*t https://www.regulations.gov/#!documentDetail;D=COLC-2015-0012-0066.

[16] It's important to note that the Register has acknowledged that alleged alternatives to circumvention can be insufficient for meaningful fair uses. See Maria A. Pallante, Register of Copyright, Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to

Section 1201's text, however, does not require this interpretation. For example, it is reasonable to interpret "technological measure that effectively controls access to a work protected under this title" as only applying to works *to the extent that* they are protected under this title—that is, as being inapplicable to uses that fall outside the scope of copyright, that are fair uses, or otherwise lawful. Because where one interpretation of statute raises constitutional difficulties, "every reasonable construction must be resorted to, in order to save [the] statute from unconstitutionality,"[17] this construction of section 1201 is preferred. Nevertheless, it is clear from this proceeding and prior rulemakings, however, that clarification of the statute is warranted. Therefore Public Knowledge recommends that section 1201 be amended to make clear that it does not prohibit circumventions, or the development or distribution of circumvention devices that are not for the purpose of copyright infringement.

B. To the extent section 1201 is interpreted to prohibit circumventions for non-infringing uses, it interferes with the otherwise lawful activities of researchers and consumers, and can inhibit safety and security testing, competition, and innovation in consumer products.

Technology has changed dramatically since the DMCA's passage, as several commenters noted; ordinary consumer products now increasingly incorporate software, and many do so complete with technological measures protecting access to that software.[18] Section 1201's prohibitions in this context impair a wide range of valuable, legitimate activities that are remote from the concerns of piracy that motivated section 1201. As the register noted, these activities often "have little to do with the consumption of creative content or the core concerns of copyright."[19] And, often, technological protection measures are deployed for purposes unrelated to protecting creative works. In this context, "[a]s everyday consumer products increasingly contain computer software and firmware that enables and governs their functioning, and that restricts their functioning and their interoperability with other products, the section 1201 prohibition has had far-reaching effects,"[20] imposing a heavy tax on consumer protection, competition, and research.

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the Prohibition on Circumvention 133 (Oct. 2012) (discussing creators of noncommercial videos' "need for higher-quality source material.")

[17] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2573, 183 L. Ed. 2d 450 (2012) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

[18] See Initial Comments of the Center for Democracy and Technology at 2 (Mar. 4, 2016) (stating "[t]oday, access controls can be found on an increasingly wide variety of products that do not involve the types of creative content stored on the access-controlled digital media of the 1990s" and citing Initial Comments of Dr. Matthew Green, 5-10, Sixth Triennial Rulemaking, Proposed Class 25: Security Research) *available at* https://www.regulations.gov/#!documentDetail;D=COLC-2015-0012-0061.

[19] See U.S. Copyright Office Section: Notice and Request for Public Comment, Docket No. 2015-8, 80 Fed. Reg. 81369, 81372 (Dec. 29, 2015).

[20] Initial Comments of Consumers' Union at 1 (Mar. 4, 2016) *available at* https://www.regulations.gov/#!documentDetail;D=COLC-2015-0012-0042.

And lastly, contrary to the Copyright clause's mandate that copyright must serve to promote the progress of science and the useful arts, overly broad application of Section 1201 slows and halts technological innovation–keeping valuable, innovative technological developments out of the public's hands before they're given the chance to exist, and limiting users' ability to contribute to technological progress.[21] "End-user tinkering", the ability of technology users to adapt and modify consumer products plays a critical role in promoting technological innovation, as "[b]y innovating for themselves, end-users can obtain products not available commercially, products that may be unavailable because manufacturers have not gotten there yet or because it is not economical for manufacturers to offer the variety of items that would include all of their users' distinct individual preferences. Once lead-users have demonstrated the value of innovations and their commercial potential, however, manufacturers or a user community may develop it on a larger scale."[22]

C. Section 1201's limited benefit to copyright holders cannot justify the harm to the public.

As Public Knowledge stated in its initial comments, "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."[23] While commenters AAP et al., assert that "[w]ithout the statute's legal protections against circumventing access controls and trafficking in tools and services that enable circumvention of technological-protection measures, investment in the creation of digital content and distribution would be curtailed," [24] it is simultaneously clear that, despite the statute's protection, online infringement is ubiquitous.[25]

And, while it is inarguable that new content distribution methods have flourished, it may just as likely be the availability of access to lawful, affordable content, not Section 1201's protections, that effects a reduction in piracy and enables these services to survive. As a recent

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[21] See Wendy Seltzer, The Imperfect Is the Enemy of the Good: Anticircumvention Versus Open User Innovation, 25 Berkeley Tech. L.J. 909, 958 (2010) ("Anticircumvention forecloses end-user tinkering and innovation and cements a centralized industrial structure, just at the time when technology offers us the means and networked opportunity to do more from the distributed edges of the Internet.")

[22] *Id*. at 964.

[23] Initial Comments of Public Knowledge at 3 (Mar. 4, 2016) *available at* https://www.regulations.gov/#!documentDetail;D=COLC-2015-0012-0068, See also Wendy Seltzer, supra note 21 at 940, (stating "[t]he upshot is that copyright holders are getting little of the copyright benefit claimed – DRM is not reducing infringing reproduction – while adding hurdles to lawful but perhaps unwanted or unanticipated uses of their works.")

[24] See Initial Comments of AAP et al., supra note 3 at 3;

[25] See Initial Comments of Mozilla at 4 (Mar, 4, 2016) (stating "[m]ass scale infringement of copyrighted works continues today, including with the most valuable and most heavily protected examples of such content. Section 1201 and TPMs don't prevent all infringement: at best, they reduce its impact on market success") *available at* https://www.regulations.gov/#!documentDetail;D=COLC-2015-0012-0055.

report from the Computer and Communications Industry Association noted, "[i]nsofar as a lack of lawful, affordable, options contributes significantly to global media piracy, the availability of new outlets and platforms for content consumption helps to diminish this effect."[26] Further, it is worth noting that successful digital content distribution models do not per se require DRM to succeed, despite content industries' arguments– technological innovation can take varying forms accounting for varying legal backgrounds. For example, content industries argued that imposition of DRM through the TV broadcast flag scheme was necessary to support digital distribution of television content: as Viacom argued "if the broadcast flag is not implemented and enforced by next summer, CBS will cease providing any programming in high definition for the 2003-2004 television season. And without the security afforded by the broadcast flag, Paramount will have less enthusiasm to make digital content available."[27] But, broadcast flag was not implemented, and "the argument that the broadcast flag is necessary to encourage the broadcast of high value content and other orderly transition to digital television has been repudiated in the marketplace."[28]

It is unclear that a speculative "check" on piracy and the protection of specific business models designed to monetize content in one particular way can justify the major toll the prohibition has taken on free expression, customer protection, research, and innovation.[29][30] Therefore Public Knowledge urges that section 1201 be amended.

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[26] Communications and Computer Industry Association, Copyright Reform for a Digital Economy at 5-6 (And further explaining that "[r]esearch published by Spotify indicates that the introduction of the service into the Netherlands and Sweden substantially decreased unlawful music download in those countries, whereas it remained quite prevalent in Italy, where Spotify had only just launched. A Norwegian study found that the introduction of both Netflix and Spotify into that country were followed by a 50% reduction in video piracy and 80% reduction in music piracy. Thus, new business policies may be more effective than new public policies and ensuring future compensation and creativity" (citations omitted), *available at* https://www.ccianet.org/wp-content/uploads/2015/08/Copyright-Reform-for-a-Digital-Economy.pdf.

[27] See Comments of Viacom In the Matter of Digital Broadcast Content Protection, MM Docket No. 02-230 at 12 (December 6, 2002).

[28] "The Audio and Video Flags: Can Content Protection and Technological Innovation Coexist?" Hearing before the Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce, 109th Congress, Second Session, Serial No. 109-112 at 92 (Testimony of Gigi B. Sohn) *available at* https://www.gpo.gov/fdsys/pkg/CHRG-109hhrg30218/pdf/CHRG-109hhrg30218.pdf.

[29] See Comments of AAP et al., supra note 3 at 4 (stating "[a]lthough widespread digital piracy has significantly harmed, and continues to harm, creative industries, the use of technological protection measures has acted as a check on that harm so that it can be lessened to support the continued growth of licensed services.")

[30] See Initial Comments of Mozilla, supra note 25 at 4 (stating "not only does infringement continue, but also, a more nefarious harm is realized, in the form of restrictions on fair use and non-infringing uses of content, with resulting harm to competition, innovation, and the availability of input material for culture and creativity.")

II. The Copyright Office should work to reduce the burdens on those seeking exemptions for noninfringing uses.

The Copyright Office has also requested comments on the conduct of the Section 1201 triennial rulemaking. Numerous commenters in this study have highlighted the unduly burdensome nature of the triennial rulemaking on both participants and this Office. These burdens belie Congress's intent to create a functional "fail-safe" for non-infringing uses and limit public participation in the proceedings. As Public Knowledge stated in its initial comments in this study, Public Knowledge believes that this process "would benefit from a number of improvements in order to be more responsive to the needs of the public."

A. The Register should not impose any additional burdens on exemption seekers by considering regulatory concerns outside of the Copyright Office's expertise.

In response to the NPRM's second question addressing "How should section 1201 accommodate interests that are outside of core copyright concerns", commenters the Alliance of Automobile Manufacturers state that "when proponents of an exemption present credible evidence that the section 1201(a)(1)(A) prohibition is causing "distinct, verifiable and measurable" adverse impacts on activity with respect to copyrighted works that the record shows "is or is likely to be" non-infringing, then the Office is obligated to delve into the merits of the proposed exemption."[31] This misreads the plain language of the statute, which requires that the Librarian grant, not merely examine, exemptions in such a circumstances. Contrary to the Alliance of Automobile Manufacturer's interpretation, the statute only requires that "that the Register and Librarian identify those 'adversely affected...in their ability to make noninfringing uses,'" under the factors provided in 1201(a)(1)(C), "and provide an exemption for those uses."[32] There is no statutory requirement that proponents also demonstrate "that copyright owners are using section 1201 to suppress such activity," nor, as the Alliance of Automobile Manufacturers suggests, is there a requirement that the Register examine "whether the behaviors sought to be shielded from Section 1201 liability directly undermines other, non-copyright regulatory regimes. . ."[33] Public Knowledge reiterates that "[t]he direction to consider other factors is not an invitation to deny or limit exemptions for reasons unrelated to copyright interests."[34]

Suggesting that the Register evaluate "the merits of the exemption," beyond the statutory factors, only invites this Office to take on additional burdens, to evaluate matters outside of its expertise, and to impose yet further burdens on those persons already determined to be adversely affected in their ability to make noninfringing uses. It is far from clear that imposing such burdens on those persons already determined to be adversely affected can be justified given the

[31] Initial Comments of the Alliance of Automobile Manufacturers at 4 (Mar. 2, 2016) (emphasis added) *available at* https://www.regulations.gov/#!documentDetail;D=COLC-2015-0012-0031.
[32] Initial Comments of the Cyberlaw Clinic at Harvard Law School at 5 (Mar. 4, 2016) (citing 17 USC §1201(a)(1)(C)) *available at* https://www.regulations.gov/#!documentDetail;D=COLC-2015-0012-0052.
[33] Initial Comments of the Alliance of Automobile Manufacturers, supra note 31 at 3.
[34] Initial Comments of Public Knowledge, supra note 23 at 4

constitutional significance of the ability to make fair and noninfringing uses. Further, Public Knowledge agrees with NTIA that where such "other, non-copyright regulatory regimes" may be implicated by the behavior contemplated in a proposed exemption, "appropriate regulatory agencies will address any non-copyright issues that may arise once [an] exemption is granted."[35]

In addition, the Alliance of Automobile Manufacturers recommends, "the rulemaking process could be modified to give proponents strong incentives to approach the relevant regulatory agencies first, before they seek any DMCA exemption, to try to fashion an outcome that minimized adverse impacts on national regulatory objectives."[36] Such a proposal will only increase the burdens on those seeking exemptions and further limit participation in the proceeding - leading to even more impairment of the ability to make noninfringing and/or fair uses of copyrighted works. Clearly, granting an exemption under Section1201 does mean that those entitled to the exemption are therefore entitled to violate other laws or regulations. Public Knowledge agrees with both the Center for Democracy and Technology and NTIA that "when triennial exemptions raise substantial concerns outside the scope of copyright, clear and transparent communication can provide notice to other agencies, alerting the them to the potential need to address issues that lie within their realm of expertise."[37]

B. Public Knowledge urges the Register to adopt a meaningful presumption of renewability for previously granted exemptions, even where some opposition to the exemption is expressed.

The broad support for a presumption of renewability expressed in the comments submitted in this study is of considerable significance. However, Public Knowledge urges this Office to adopt an "effective renewal mechanism", one that substantially "relieve[s] the public of the burden of appearing and arguing their case every three years," and that allows renewal even in exemptions that garner some opposition. In our initial comments Public Knowledge described in detail how such a mechanism might function.

In addition, administrative law requires that agencies engage in reasoned decision-making, which includes, among other things, accounting for all the facts before them. While agencies are permitted to change their minds–for example, in the case of the Copyright Office, denying an exemption one year and then granting it the new cycle, or vice versa–each time, the agency must explain why it is doing what it is doing, and clearly articulating the substantive reasons why it has changed course.[38] This does not mean that agencies have a higher burden of proof each time they revisit the issue--it simply means they have to account for the record, which

[35] NTIA Letter to the Register Re: Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Docket No. 2014-07 at 62 ("NTIA Letter") (addressing the proposed exemption in class 27 (Medical Devices).
[36] Initial Comments of the Alliance of Automobile Manufacturers, supra note 31 at 6
[37] Initial Comments of the Center for Democracy and Technology supra note 18 at 4, citing NTIA Letter.
[38] See *Federal Communications Commission v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

includes all the facts, including the facts underlying their previous decisions. As applied to the Copyright Office, this means that procedures that artificially limit what kinds of evidence the Office may consider, take *de novo* approaches to issues the Office has considered time and again, or otherwise arbitrarily limit the record before the Office could violate the Administrative Procedures Act *per se*, or at least heighten the risk that particular agency decisions could be found to be arbitrary and capricious. For example, if the agency fails to renew a previously granted exemption, it must cite articulable reasons why it has changed its mind, or what specific new facts have caused it to come to a different conclusion.

C. Congress should amend section 1201 to allow exemptions to extend to the anti-trafficking provisions.

Consistent with the interpretation of Section 1201 that would exclude liability for non-infringing uses, Section 1201 should not further impair the public's ability to lawfully circumvent technological protection measures for the purpose of engaging in non-infringing or fair uses by limiting access to third-party assistance or circumvention tools that are necessary for this purpose. Public Knowledge reiterates that the appropriate legal standard for technology that may contribute to copyright-infringing technology is that developed by the United States Supreme Court in Sony Corp. v. Universal City Studios.[39] Where further clarity on this issue is clearly warranted, Congress should amend the statute to allow exemptions to extend to the anti-trafficking provisions, and to adopt the rule set forth in Sony.

III. The United States' participation in free trade agreements does not unduly limit the ability of policymakers in the US to promote policies that protect consumers and promote innovation.

Commenters AAP, et al., claim that trade agreements are "a set of international norms and baseline protections for creativity and innovation." If this is the case, then the Trans Pacific Partnership represents the latest and most broadly accepted version of these norms. Notably, while the TPP requires that signatories "provide that a violation of a measure implementing this article is independent of any infringement that might occur under the Party's law on copyright and related rights," it does not require that there be a violation when the purpose of a circumvention is for a non-infringing use. Specifically, the TPP requires signatory countries to "provide that any person that: (a) knowingly, or having reasonable grounds to know, circumvents without authority any effective technological measure that controls access to a protected work, performance, or phonogram" (emphasis added). Furthermore, the TPP expressly permits for limitations and exceptions to the prohibition on circumvention (and on the manufacture, distribution, and importation of circumvention tools and services) for non-infringing uses as approved by legislatures:

> "With regard to measures implementing paragraph 1: (a) a Party may provide certain limitations and exceptions to the measures implementing paragraph 1(a) or paragraph 1(b) in order to enable non-infringing uses if there is an actual or likely adverse impact of those measures on those non-infringing uses, as determined through a legislative,

[39] 464 U.S. 417 (1984)

> regulatory, or administrative process in accordance with the Party's law, giving due consideration to evidence when presented in that process, including with respect to whether appropriate and effective measures have been taken by rights holders to enable the beneficiaries to enjoy the limitations and exceptions to copyright and related rights under that Party's law[.]"[40]

Further, Article 18.68 acknowledges that signatory countries should have flexibility when addressing the issue of circumvention "tools."[41] Accordingly, the United States' most recent explication of its norms on circumvention clearly leave open the possibility that non-infringing uses be exempted.

More broadly, claims that particular trade agreements are inconsistent with reasonable interpretations of US law, or should prevent the reasonable evolution of US law should be weighed against statements by US trade negotiators that such trade agreements are understood to be consistent with US law, and implementing language that expressly states this.[42] While Public Knowledge has been critical of aspects of intellectual property trade agreements in the past, in general they should not impinge on the ability of policymakers in the US to promote policies that protect consumers and promote innovation.

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[40] Trans Pacific Partnership Article 18.68 (4)(a) *available at* https://ustr.gov/sites/default/files/TPP-Final-Text-Intellectual-Property.pdf.

[41] See Id.

[42] See, e.g., United States-Korea Free Trade Agreement Implementation Act, Pub. L. o. 112-41, §§ 102, 125 Stat. 430 (2011) ("No provision of the Agreement, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect."]. This is consistent with the trade negotiation objectives set for the USTR, see, e.g., Trade Act of 2002, 19 USC § 3802(b)(4)(A)(i)(II) (2012) ("The principal negotiating objectives of the United States regarding trade related intellectual property [include]...ensuring that the provisions of any multilateral or bilateral trade agreement governing intellectual property rights that is entered into by the United States reflect a standard of protection similar to that found in United States law…"; see also Bipartisan Congressional Trade Priorities and Accountability Act of 2015, 19 USC 4201(b)(5)(A)(i)(II) "The principal negotiating objectives of the United States regarding trade-related intellectual property [include]…ensuring that the provisions of any trade agreement governing intellectual property rights that is entered into by the United States reflect a standard of protection similar to that found in United States law.")