BEFORE THE COPYRIGHT OFFICE

LIBRARY OF CONGRESS, Washington, D.C.

In the Matter of Section 1201 Study: Notice and Request for Public Comment	Docket No. 2015–8

Comments of New Media Rights

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I. Commenting Party

New Media Rights is a non-profit program that provides preventative, one-to-one legal services to creators, entrepreneurs, and internet users whose projects require specialized internet, intellectual property, privacy, media, and communications law expertise. These legal services include counsel regarding section 1201 of the DMCA. NMR is an independently funded program of California Western School of Law, a 501(c)3 non-profit. Further information regarding NMR's mission and activities can be obtained at http://www.newmediarights.org.

II. Comments

The Digital Millennium Copyright Act Section 1201 Anti-Circumvention provisions are failing the American public. Section 1201 broadly prohibits circumvention for otherwise lawful uses, and has established an ineffective rulemaking process. These comments are based on direct work with clients who rely on lawful content reuse. This comment will be divided into two broad categories: Part 1 will address key problems with section 1201 and offer a proposal for legislative reform as the only viable long-term solution. Part 2, acknowledging that legislative reform may take time, will focus on ways in which the triennial rule-making process can be improved more quickly by regulatory change at the Copyright Office.

Specifically, Part 1 (A) will begin by providing an overview of the specific problems with section 1201's Anti-Circumvention provisions and the triennial process, including 1) the high demands on time and resources for proving exemptions; 2) the unnecessarily high burden for proving exemptions; 3) examples of the ways in which exemptions routinely fail creators making lawful uses of content; and 4) lastly, the significance of excluding fair use from exempt status. Next, Part 1(B) will propose an amendment to section 1201 that accounts for fair uses of copyrighted works, solving many of the problems listed above. To conclude, Part 1 (C) will explain that such an amendment is compatible with U.S. international treaty obligations.

Part 2 will focus on ways in which the triennial process should be reformed at the regulatory level while we await legislative reform. Part 2 (A) will suggest changes to the interpretation of the burden of proof for proponents of exemptions; Part 2 (B) will look at possible replacements for the current *de novo* standard for review; and Part 2 (C) will provide suggestions for dealing with issues of confidentiality in the rulemaking process.

These comments are filed in response to the Notice of Inquiry issued by the U.S. Copyright Office on December 29th, 2015 addressing several of the current *Areas of Concern* with regards to section 1201 of the Digital Millennium Copyright Act ("DMCA"). New Media Rights has previously argued in favor of various Section 1201 exemptions,[1] and also has previously advocated for reform of Section 1201.[2] In accordance with the Office's requests, the

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[1] Comments of New Media Rights :
(2009) Docket No. RM 2008-08, at <http://www.copyright.gov/1201/2008/responses/new-media-rights-40.pdf >;
(2012) Docket No. RM 2011-7, at <http://www.newmediarights.org/sites/newmediarights.org /files/NewMediaRightsAnti-Circumventioncomment.pdf >;
(2015) Docket No. RM 2014-07, at http://copyright.gov/1201/2015/comments-020615/InitialComments_LongForm_New_Media_Rights_Class16.pdf

[2] Comments of New Media Rights to the Request for Comments on Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy, Docket No. 130927852-3852-01, at < http://www.newmediarights.org/sites/newmediarights.org/files/Comments >

subjects addressed will include questions 3, 4, 5, 8, 10 and 11. Answers to these questions will be addressed within the main sections and subsections of this comment, and for convenience will be referenced in the headings where applicable.

Part 1: (NOI Questions 8, 10, 11)

A. What's wrong with the DMCA 1201 Anti-Circumvention provisions and triennial process

The Digital Millennium Copyright Act's Anti-Circumvention provisions (Section 1201) and the triennial rulemaking it created need to be comprehensively revisited. Section 1201 layers unnecessary complexity over existing copyright law, failing those who wish to legally reuse content.

Section 1201 consumes vast resources and sets an unreasonably high standard for purposes of exempting otherwise lawful uses

Every three years, proponents of exemptions to Section 1201 make significant expenditures of time and money simply to ensure that individuals can lawfully access copyrighted works for a narrow subset of otherwise lawful purposes such as fair use. This high demand on resources places an unnecessary and unfair burden on proponents. There is also a gap of resources between proponents and opponents of Section 1201 exemptions. Proponents of exemptions often include small law school clinics and interest groups that have one or at most a few attorneys on staff. Law school clinics typically also have a variety of other clients they are serving in addition to arguing for important exemptions in the 1201 proceeding. In contrast, for example, the Motion Pictures Association of America (MPAA), which has participated as an opponent in the exemption proceedings on many occasions, had an overall budget of over $65 million in 2013.[3]

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[3] Guidestar Premium, *Report Generated for Motion Pictures Association of America*, http://www.guidestar.org/ViewPdf.aspx?PdfSource=0&ein=13-1068220 (last visited Feb. 11, 2016).

Similarly, the current *de novo* standard ensures that proponents carry a heavy load and that this outpouring of resources is repeated every three year cycle.[4] Even exemptions without opposition must be proven anew with extensive evidence every successive triennial review, with the burden never shifting to the opposition.[5] For example, in the 2015 triennial rulemaking proceeding, renewal of the previously approved portions of an exemption for documentary filmmaking was unopposed, and opponents only opposed *expansion* of the rule.[6] The de novo standard was an unnecessary burden, as it was already conceded by opponents that this class of work was appropriate and necessary.[7] Nevertheless, proponents and supporters of the class were required to produce extensive filings to prove anew portions of the exemption that were briefed thoroughly in past proceedings and faced no opposition.

Section 1201 is failing those who wish to legally reuse content

At New Media Rights we routinely provide direct legal services to individuals and businesses that reuse copyrighted works without permission, but for lawful purposes. We call this broad range of creators and organizations "remix creators." Sometimes, remix creators take one or more copyrighted works and transform them into something new, creative and original. However, the specific bounds of remix culture are limited only by human imagination, and content reuse is simply part of everyday communication in our culture. Remix creators often rely on their own creativity and fair use to create their work, although sometimes remix creators do use public domain work or get licenses (including open licenses) to use copyrighted content.

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[4] Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 80 Fed. Reg. 65952, 65957 (Oct. 26, 2015).
[5] *Id.*
[6] Register of Copyrights, Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights at 66 (Oct. 2015).
[7] AACS LA Class 6 Opp'n at 2; DVD CCA Class 6 Opp'n at 2; Joint Creators Class 6 Opp'n at 2; *see also* Tr. at 60:17-61:03 (May 20, 2015) (Williams, Joint Creators).

We are constantly impressed by the creativity of the remix creators we work with on a daily basis at New Media Rights. However, Section 1201 is impeding lawful content reuse, removing otherwise lawful speech from the public discourse. Section 1201 affects every member of the public who interacts with copyrighted works, or in other words, absolutely everyone.

Specifically, Section 1201 of the DMCA prevents creators from breaking any form of Technological Protection Measures ("TPM")[8] to access copyrighted content without a specific exemption. This is true even in cases where the creator lawfully obtained the product and is using it for lawful purposes.

If an individual or business wants to reuse content under an exemption, the sheer number and specificity of exemptions can even be a barrier. Since the initiation of the rule-making process in 2000, the number of class exemptions has increased significantly from the first triennial rule-making proceeding, which granted only 2 exemptions, to at least 22 exemptions as of 2015.[9] While an increase in exemptions is a positive development for the public within the system we have the system itself is failing. The high evidentiary standards in place demand that proposed exemptions must be narrowly tailored to particular classes of works.[10] The exemptions actually granted by the Copyright Office tend to be severely limited in scope.

This is problematic because of the painstaking specificity required to receive an exemption. To better understand this problem let's look at one of the most recent exemptions approved in the 6th triennial rule-making hearing. In a long and detailed rule, the new exemption permits circumvention of DVDs and Blu-ray discs for the use of short portions of motion pictures for the following uses: documentary filmmaking; non-commercial videos; non-fiction multi-media e-books offering film analysis; by college and university faculty and students in film

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[8] Also known as Digital Rights Management ("DRM").
[9] *See generally*, 2015 Final Rule, 80 Fed. Reg. 65952 (Oct. 26, 2015).
[10] Section 1201 Study: Notice and Request for Public Comment, NOI, 80 Fed. Reg. 81369, 81370 (Dec. 29, 2015).

studies or courses requiring close analysis of film and media excerpts; by the faculty of massive open online courses; and by k-12 educators for educations purposes.[11]

Two aspects of this exemption are particularly concerning: first, individuals are limited to working with specific types of media; and second, even if the type of media is deemed appropriate, many different types of users are needlessly excluded from using them. Both limitations have the effect of creating uncertainty, which in turn discourages creators from reusing content for fear of violating section 1201. If the law were amended and clarified to ensure access to copyrighted works if the use of the work is otherwise legal, those attempting to reuse content for legal purposes would be able to spend less time analyzing their works with lawyers and more time innovating and creating.

As mentioned above, limitation in the type media used is especially problematic. By limiting the exemption to specific types of media, the exemption is in a sense restricting creators to using only that specified media for the next three years. Three years is an eternity in technological time, so all too often remix creators are barred from using a new technology or forms of media for up to three years because it is impossible to specifically identify technology and media that do not currently exist to craft an exemption around. Indeed, before online content was added in October 2012, remix creators were confined to DVD content under then existing exemptions to Section 1201. Similarly, during the same 2012 rulemaking process, the Copyright Office denied exempting access to Blu Ray discs[12]. Thus, remix creators were unable to access content on Blu Ray until the exemption was expanded in October 2015.[13] Each of these decisions

[11] Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 80 Fed. Reg. 65952, 65962 (Oct. 26, 2015).
[12] Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 77 Fed. Reg. 65260, 65271 (Oct. 26, 2012).
[13] Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 80 Fed. Reg. 65952, 65962 (Oct. 26, 2015).

has had the effect of stifling creativity and innovation by making popular forms of media off limits to those seeking to reuse content for otherwise legal purposes.

The second major problem with Section 1201 is the specificity that's required for those reusing content for otherwise legal purposes to fit within the exemption. When the exemption limits those covered to specific categories, such as "for use in noncommercial videos, including videos for a paid commission, if the commissioning entity's use is non-commercial," or is limited to only "documentary" filmmakers it leaves out critical categories of otherwise legal reuses of content. If a reuse of content is protected by fair use, the access to the work should simply not be illegal. Now let's take a look at a specific example of how users who are making otherwise legal uses of content are unfairly excluded from exemptions.

Example: How Genre Distinction Fails filmmakers who Re-use Content

During the 2015 rulemaking process, New Media Rights submitted comments and testimony strongly urging the Copyright Office to expand upon the current exemption allowing the specific genre of documentary filmmakers to circumvent TPM's to include broader protections for all films seeking to make a fair use[14]. Although the Copyright Office expanded the exemption for documentary filmmakers to have the right to access content protected on Blu Rays, the Library declined to expand those exemptions to non-documentary films. The result is the existence of a genre distinction that makes using this exemption difficult for the many online video creators and filmmakers.

Joint Filmmakers, a separate party who proposed and supported an expanded exemption, described the political and social functions of filmmaking that is prevalent in both documentary

[14] New Media Rights Responses to Post Hearing Questions Regarding Proposed Class 6, Docket No. 2014-07, at <http://copyright.gov/1201/2015/post-hearing/answers/Class_6_Hearing_Response_New_Media_Rights_Docket_No_2014-07_2015.pdf>

and non-documentary films[15]. Both genres of film can provide criticism and commentary, awareness of particular issues, and the expression of ideas.[16] During the 2015 triennial rulemaking process, the Copyright Office called for comments regarding its post hearing questions about the definitions of various film genres. However, the lines between these genres are often blurred and sometimes open to subjective interpretation. In the New Media Rights answer to this question, we provided insight into the very different way genre is treated in the film community, noting that "[t]here is no central authority of film genres, no universally agreed upon definition for any of these descriptors, and the subject is one of contention among academics and audiences alike."[17]

In order to use copyrighted material to achieve these goals, filmmakers have routinely relied on fair use. However, the new rule artificially distinguishes between documentary films and non-documentary films by allowing only the former the ability to circumvent TPM's to make fair use of copyrighted work.

Sorting different genres of film into documentary and non-documentary films becomes difficult for at least two reasons. The first being that YouTuber's and other video creators of the like who do qualify under the documentary exemption might not even consider themselves "documentarians" due to the informal nature of their videos, nor would they be likely to include themselves in the category. The second is the sheer number of sub-genres that are equivocally situated between the blurred lines distinguishing documentary and non-documentary film. Examples of these subgenres include, but are not limited to biopics, "inspired by,"

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[15] *See* Comment of Joint Film Makers, Docket No. 2014-07, at <http://copyright.gov/1201/2015/comments-020615/InitialComments_LongForm_IDA_Class06.pdf>, (2015).
[16] *Id*.
[17] New Media Rights Responses to Post Hearing Questions Regarding Proposed Class 6, Docket No. 2014-07, at 1 (2015).

"imaginative," and "based on a true story" type films, as well as those shot in a "documentary" style.

Such delineation between genres of film is no easy task, and unnecessarily complicates the law. Not only would a filmmaker have to abide by traditional copyright law and establish fair use before using copyrighted material, but she would also have to determine the genre of her film in order to figure out if she qualifies under the exemption. The anti-circumvention provisions of the DMCA add complicated layers to the question of fair use, shifting the focus from "How do I make appropriate use of copyrighted work?" to a complicated and layered initial analysis of "Can I even gain access to this material for fair use at all?"[18]

The rationale behind granting exempt status to only documentary films is as unclear as it is unfair. Back in 2012, when granting the exemption for documentary films, the Register provided the following justification:

> . . . [N]ot making any judgment as to whether any particular use offered by the proponents is in fact fair, and <u>it is conceivable that some may not be</u>.[19] Nonetheless there is ample basis to conclude that some significant number (and probably many) of the proposed uses likely would qualify as non-infringing under section 107.

Then, the Librarian in its 2015 Final Rule stated, " . . . the Register could not conclude, based on the record, that the use of motion picture clips in narrative films was, on balance, likely to be non-infringing, especially in light of the potential effects on existing licensing markets for motion picture excerpts."[20] Simply based on this language, the fact that narrative films are being analyzed "on balance" implies that there are plenty of narrative films that make uses of content

[18] *Id.* at 8.
[19] Recommendation of the Register, at 129 (2012).
[20]Final Rule, 80 Fed. Reg. 65952, 65949 (2015).

that the Copyright Office believes would qualify as fair use, making them non-infringing and therefore worthy of an exemption. In fact, many narrative films make fair use. Proponents and supporters such as Joint Filmmakers and New Media Rights, cited more than 30 non-documentary films that relied heavily on fair use, to illustrate the need for all filmmakers to have these anti-circumvention exceptions, regardless of whether they're making a documentary or another type of film.[21]

The root of this problem is the reliance on determining the "likelihood" of a use being non-infringing. Such an arbitrary standard erroneously forces the Librarian to foresee all the uses within a class of work, and determine its probability of being non-infringing. That inquiry has no value. Realistically, if a film is making fair use, it should be exempted under Section 1201 regardless of its genre.

Additionally, in her 2015 recommendation, the Register voiced a concern, about the adverse impact that the expanded exemption might have on the licensing market for motion picture clips.[22] We have direct evidence to explain why such a concern is not justified. At New Media Rights we work with both documentary and non-documentary filmmakers. Filmmakers in both groups regularly make uses we deem to be fair use. That said, filmmakers in both groups who want to reuse protected content in ways that are not protected by fair use regularly acquire licenses. The demand for licenses will not be impacted because an expanded exemption would only apply to films making fair use. As we discuss in the next section, fair use is a non-infringing use and therefore does not require a license. An expansion of exemptions allowing fair use will never have an effect on any legitimate licensing market, because protected fair uses do not need to be licensed in the first place.

[21] Recommendation of the Register, at, 41 (2015).
[22] *Id*. at 79.

Fair Use is Non-Infringing Use and Should Be Exempted From Section 1201

Fair use is sometimes erroneously perceived as merely being infringement that is "excused" by the law, when in fact it is authorized by the law and not infringing.[23] Section 1201's biggest flaw is the way it treats the doctrine of fair use. Users making fair use may still be held liable simply for circumventing TPM's under Section 1201, despite no infringing behavior. Such an outcome is inconsistent with the idea that, " . . . [A]nyone who . . . makes a fair use of the work is not an infringer of the copyright with respect to such use." [24] It turns out that Section 1201 gets the law wrong, and unnecessarily impinges upon speech protected by fair use. Instead, as we and others[25] have said, individuals seeking to make any non-infringing use such as fair use should be permitted to circumvent TPM's without violating federal law.

By exempting all fair use, the process will be simplified by focusing only on infringing behavior, and will not have the terrible side effect of chilling otherwise legal conduct. Unfortunately, efforts to exempt all fair use in past rulemakings fell flat due to the procedural requirements needed for satisfying an exemption.[26] Particularly, the requirement of pointing to a "particular type of use."[27] Since fair use implicates numerous types of uses, the Library of Congress has been unable to pass such a broad exemption. As a more complete fix, policymakers must

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[23] *Lenz v. Universal Music* Corp., 801 F.3d 1126, 1132 (2015).
[24] *Sony Corp. of Am. v. Universal City Studios, Inc*., 464 U.S. 417, 433 (1984).
[25] *See generally,* Comment of Free Software Foundation at <http://copyright.gov/1201/2015/comments020615/FreeSoftwareFoundation/InitialComments_ShortForm_FreeSoftwareFoundation_Class6.pdf>(2015).
[26] Bill D. Herman, et al., *Catch 1201: A Legislative history and Content Analysis of the DMCA Exemption Proceedings,* 24 Cardozo Arts & Ent. LJ. 121,140 (2005).
[27] *Id*.

encourage the Congress to amend Section 1201 in order to adopt a means to allow fair uses to circumvent technological restrictions to protected content.

B. Proposal To Amend DMCA Section 1201 To Help Clarify The Role Of Fair Use

We would propose a simple legislative solution that would negate much of the uncertainty we have described and categorically allow for circumvention of TPMs in cases where the circumvention is used for fair use. Here's our proposal to include new language for 17 USC §1201(c)(1) (new text appears in brackets):

> Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title. [Specifically, nothing in this section shall prohibit access to copyrighted works for otherwise lawful purposes, including fair use. If a person circumvents a TPM as defined in this act and that person acted with a good faith belief that his or her acts constituted fair use as defined by 17 U.S.C. §107, the court shall not award damages or provide for any other penalties under 17 U.S.C. §1201.]

By explicitly exempting fair use purposes from section 1201, anyone simply accessing copyrighted content for fair use purposes will no longer have to fear facing potential civil and criminal penalties under section 1201. This provision would also make the expensive and time consuming exemption process more efficient, conserving valuable government and private resources because fewer exemptions would be required.

Since fair use can be very unpredictable and reasonable copyright attorneys can easily disagree about whether a remixed work is fair use, we have proposed rewriting the statute in such a way that those creators who had a good faith belief that their acts constituted a fair use are still protected even if a court later finds that their work is not fair use. If a court reaches that point, there are already a wide variety of civil copyright damages and remedies available to the

copyright owner. Adding on the additional civil and criminal penalties of section 1201 for individuals acting in good faith is simply unnecessary.

C. An Amended Section 1201's Implications On International Treaties

The United States has created obligations under foreign treaties regarding intellectual property, specifically, the circumvention of TPMs. If the recommended amendment to the language of 17 USC §1201(c)(1) set out above were to be presented to Congress and subsequently passed as new legislation, the new anti-circumvention provision to the DMCA would satisfy the requirements of these international treaties.

The World Intellectual Property Organization (WIPO) administers a number of international treaties involving copyright law, in which the United States participates as a member. A few of these treaties that address anti-circumvention include the WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonogram Treaty (WPPT). Both treaties incorporate the same language regarding the circumvention of TPM's:

> Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.[28]

The WCT and WPPT don't clearly define "adequate legal protections" and leave signatories the ability to develop anti-circumvention laws they deem appropriate within this language.[29] Currently, the DMCA already goes beyond what is mandated by these treaties

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[28] WORLD INTELLECTUAL PROPERTY ORGANIZATION COPYRIGHT TREATY art.11, Dec. 20, 1996, 36 I.L.M. 65; WORLD INTELLECTUAL PROPERTY ORGANIZATION PERFORMANCES AND PHONOGRAM TREATY art. 18, Dec. 20, 1996, 36 I.L.M. 76.
[29] *Id*.

regarding prohibiting access controls.[30] Both the WCT and WPPT allow member countries the freedom to protect access controls as they choose to.[31] Amending the DMCA provisions regarding anti-circumvention access controls to include a carve-out for fair use would still allow the United States to comply with the requirements of both WIPO treaties.

Outside the WIPO treaties, the United States may be bound by its participation in different free-trade agreements. The World Trade Organization (WTO) administers the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), which sets forth obligations in the context of multilateral trade agreements.[32] Although TRIPS does not address anti-circumvention provisions itself, the multilateral trade agreements may individually set the guidelines involving circumvention of TPMs. For example, in February 2016, the Trans-Pacific Partnership (TPP) was signed by all twelve of the member countries, but however remains to be ratified.[33] The TPP provides access and trafficking control provisions similar to those of Section 1201 of the DMCA.[34] The TPP also allows an avenue for member countries to grant exceptions or limitations for non-infringing uses, but is not as specific as the DMCA's triennial rulemaking process.[35] Regardless of the similarities between the anti-circumvention provisions within the TPP and Section 1201, an amendment to the latter would not render them incompatible.

Even after ratification, an amendment as suggested above to Section 1201 of the DMCA, would still allow the United States to meet the requirements set out in the TPP. The TPP itself allows parties of the agreement to provide for certain limitations and exceptions to their anti-

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[30] Dana Beldiman, FUNCTIONALITY, INFORMATION WORKS, AND COPYRIGHT, 32 (Yorkhill Law Pub. 2008).
[31] *Id*. at 28.
[32] U.S. Copy. Office, Circular 38a, *International Copyright Relations of the United States*, (2015), http://www.copyright.gov/circs/circ38a.pdf.
[33] *Trans Pacific Partnership Trade Deal Signed In Auckland*, bbc.com, Feb. 4, 2016, http://www.bbc.com/news/business-35480600
[34] TRANS-PACIFIC PARTNERSHIP art. 18.68, Feb. 4, 2016 at, <https://www.mfat.govt.nz/assets/_securedfiles/Trans-Pacific-Partnership/Text/18.-Intellectual-Property.pdf>
[35] *Id*.

circumvention provisions, " . . . 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, regulatory, or administrative process in accordance with the party's law, giving due consideration to evidence when presented in that process…."[36]

The amendment to Section 1201 would simply allow individuals to circumvent TPM's in order to make fair use. As previously discussed, fair use is non-infringement.[37] All the TPP would require is that in the process of amending Section 1201, Congress will need to hold a hearing in order to determine an actual or likely adverse impact on fair use due to the anti-circumvention provisions, since the text of the agreement requires a legislative, regulatory, or administrative process to make such a determination.[38] The amendment would still treat circumvention of TPM's and copyright infringement, as separate violations as the TPP requires, but would ensure an important non-infringing use, fair use, is properly and fully exempted Section 1201.[39] Therefore, an amended Section 1201 can remain compatible with the anti-circumvention provisions under the TPP.

Part II (Response to NOI Questions 3, 4, 5)

We've discussed the fact that aany use qualifying as fair uses is non-infringing use, and that the statute must be amended to reflect that fact. While we await broad based legislative reform, we can look at ways to improve the current process.

A. "Substantial adverse impact" should be revised to require a "likelihood" of an adverse impact

[36] *Id*.
[37] *Lenz,* 801 F.3d at 1132.
[38] TRANS-PACIFIC PARTNERSHIP art. 18.68
[39] *Id*.

As it stands, the standard for even getting an exemption, as interpreted by the Copyright Office, is unnecessarily high. The language of Section 1201 states that decisions shall be based on whether users of copyrighted works are or are likely to be "adversely affected by the prohibition."[40] With respect to demonstrating an "adverse impact," the Office has chosen to use a higher standard than the statute suggests on its face, requiring that proponents of a particular class demonstrate that prohibition has a "substantial adverse impact" on the non-infringing use in question.[41]

Aside from the fact that Section 1201 makes no mention of the word "substantial," it is unclear that this approach is even an accurate representation of the legislative intent behind it. The Commerce Committee--notably concerned with Congress' commitment to fair use--described the burden in a completely different manner.[42] The Commerce Report noted that the rulemaking should focus on "distinct, verifiable, and measurable impacts, and should not be based upon *de minimus* impacts."[43] These two descriptions represent opposing ends of the "adverse impact" spectrum. A proponent of a class of exemptions could demonstrate the "distinct, verifiable and measurable impact of a prohibition" of that class, while failing to demonstrate a "substantial adverse impact." Thus, a rulemaking body could emphasize either description of the burden while simultaneously claiming it corresponds with legislative intent.

In an effort to address this ambiguity, New Media Rights urges the Copyright Office to more closely track the statutory language provided in Section 1201 as well as the legislative history that simply requires measurable impact. While the legislative reform described in Section 1

[40] 17 U.S.C. § 1201(a)(1)(C).
[41] Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 77 Fed. Reg. 65260, 65261 (Oct. 26, 2012).
[42] CHRISTOPHER WOLF, THE DIGITAL MILLENIUM COPYRIGHT ACT: TEXT, HISTORY AND CASELAW 439 (2003).
[43] *Id*. at 440.

above represents the optimal solution for accommodating non-infringing uses of copyrighted works, such an adjustment would help to balance the important need for public access to these works. Thus, the current burden of proof should require *only* a showing of the "likelihood" of an adverse impact, rather than that of a "substantial" adverse impact.

B. Renewal of existing exemptions can be accomplished without requiring proponents to prove them *de novo*

Section 1201(a)(1)(C) of the DMCA states that the Librarian determines whether users of copyrighted works are likely to be adversely affected by prohibition of non-infringing uses of a particular class in the succeeding 3-year period. This language essentially sets the standard that proponents of an exemption must meet in order to qualify for an exemption. Accordingly, if the Librarian determines that a class of use is likely to be non-infringing, Section (a)(1)(D) provides that prohibition will not apply to that class for the ensuing 3-year period. Although this language clearly specifies a finite duration for the exemption, none of the language in Section 1201 requires proponents meet their initial burden anew once the 3-year period has expired.

The current *de novo* standard is based, not on statutory language, but on one committee report issued during the legislative process. [44] The operative sentence states that "the assessment of adverse impacts on particular categories of works is to be determined de novo."[45] While these reports typically carry weight, they are not legally binding on the Copyright Office.[46] As the Supreme Court has cautioned, committee reports may be unrepresentative of the views of Congress and even misleading.[47]

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[44] H.R. Rep. No. 105-551, pt. 2, at 37 (1998) ("Commerce Comm. Report").
[45] Jonathan Band, *What's Missing from the Register's Proposals,* ALR Policy Notes (April 30, 2015), http://policynotes.arl.org/?p=1024.
[46] Exxon Mobile Corp. v. Allapattah Servs., Inc., 545 U.S. 546 (2005).
[47] *Id*.

In light of the fact that the Register has conceded the need for a presumption in favor of renewal, the Copyright Office could eliminate the requirement for proving exemptions anew while still operating within the bounds of statutory language in Section 1201.[48] This would then place the burden on opponents of already existing exemptions, which would in turn create a much more efficient rule-making process. Proponents, typically vast in number, would save the absurd amounts of time and money that are currently being poured into proving exemptions anew. In the event a claim arises that a class of exemptions is substantially impacting particular copyrighted works, opponents would still have recourse available. By bringing forth evidence that demonstrates a "substantial impact on the market for or value of copyrighted works," the Librarian could deny extension of the renewal of the exemption for that particular class.[49]

Even if the Copyright Office decides to give weight to the Committee Report referenced above, it's worth noting that Section 1201 requires the *Librarian* to determine whether or not non-infringing users are being adversely affected by the prohibition.[50] If the Committee Report were followed, it is still the Librarian that is obligated to conduct a *de novo* review of evidence, and this could include evidence previously presented by proponents of a class of works. Unless opponents have brought forth adequate evidence to the contrary, the Librarian could base a decision for renewal off of evidence provided during the previous triennial proceeding.[51] While we prefer the automatic renewal approach discussed, the changes in this paragraph would modestly reduce the negative impact that the current *de novo* review has on proponents.

C. The rulemaking process should account for the confidentiality concerns of proponents

[48] *Register's Perspective on Copyright Review Hearing* at 27 (statement of Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office).
[49] 17 U.S.C. § 1201(a)(1)(C)(iv).
[50] *Band*, *supra* note 7.
[51] *Id*.

Under the current Rulemaking process, proponents and supporters of exemptions face an additional obstacle with regards to the issue of confidentiality. New Media Rights, as well as other attorneys and supporters of exemptions, have concerns surrounding restrictions on providing confidential client information while simultaneously providing detailed evidence that supports the need for an exemption. This issue presents itself in a variety of ways: clients may not want the details of their business dealings made available on the public record; attorneys may not be able to respond to questions from the Copyright Office due to their confidential nature; and even where confidentiality is waived, attorneys acting on their client's behalf may be reluctant to provide information that could expose them to liability.

The following example from the 2015 rulemaking hearings illustrates the difficulties supporters may have in the public hearing setting. During the hearings in Los Angeles, Jacqueline Charlesworth, General Counsel for the Copyright Office, attempted to inquire into specific examples of filmmakers whose distributors rejected their work due to the low resolution of the video content used. While detailed answers may have helped to further establish the affect that prohibition of circumvention of Blu-Rays was having on this class of filmmakers, the name of the distributor, the filmmaker, and other specifics were not provided because the information was privileged and the deal was ongoing, with a substantial amount of money was on the line for both parties involved.[52]

One possible solution is to adopt an administrative mechanism for submitting confidential information. This would be very useful in situations where proponents and supporters are forced to withhold otherwise pertinent information for proving an exemption due to confidentiality. As illustrated above, it would also be useful in instances where representatives of the Copyright Office make specific informational requests at public hearings.

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[52] Sixth Triennial 1201 Rulemaking Hearings, Proposed Classes 19, 20, 23, 6, at 51 (May 2015).

Currently, a number of federal agencies accommodate these types of submissions. For instance, the FDA allows for submission of "Drug Master Files" that are used to provide confidential detailed information about facilities, processes or articles used in the drug manufacturing process; this information is then used to bolster support for new drug applications.[53] Similarly, the Federal Communications Commission (FCC) allows for certain submissions to be withheld from public inspection if, for example, the information in question is commercial, financial, contains a trade secret, or could result in substantial competitive harm.[54]

Were a comparable administrative procedure implemented in the 1201 rulemaking process, it is highly likely that proponents and supporters would be more willing to share the detailed ways in ways in which they are being affected by the anti-circumvention laws. A process for submitting confidential information in select circumstances would allow the Copyright Office to root its exemption decisions in a more complete record.

III. Conclusion

We appreciate the opportunity to share our observations based on firsthand experience with clients who navigate section 1201 every day. There are reforms that can and must be made at the legislative and regulatory levels to ensure section 1201 respects the doctrine of fair use, and we strongly encourage the Copyright Office to take the lead in making these reforms a reality.

Respectfully Submitted,

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[53] Drug Master Files: Guidelines, U.S. Food and Drug Administration (Sept. 1989), http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/ucm122886.htm.
[54] 47 CFR § 0.459(b).