

March 3, 2016

Ms. Maria Pallante, Register of Copyrights
United State Copyright Office, 101 Independence Avenue S.E.
Washington, D.C. 20559

RE: Section 1201 Study, Notice and Request for Public Comment, FR Doc. 2016-03515

Dear Ms. Pallante,

Thank you for the opportunity to submit comments on the Copyright Office's Section 1201 Study. Mozilla's mission as a non-profit organization is to promote openness, innovation, and opportunity online. As a core principle, we believe that the open Internet, as the most significant social and technological medium of our time, is an invaluable public resource that must be protected. It is from this perspective that we offer our comments.

In practice, the combination of law and technology associated with technological protection measures establishes a different, and more restrictive, balance of interests than that of existing copyright law, posing risk of harm to fair use, competition, and innovation. We encourage the Copyright Office to revise the Section 1201 exemptions process to improve this balance, and to advocate for greater changes in the law and surrounding policy framework going forward. In particular, the Copyright Office can help by establishing a presumption of renewal for exemptions, providing a broader scope for granted exemptions, and raising awareness and understanding of copyright and the exemptions process for a wider audience.

[Section 1201\(a\) overly restricts openness online.](#)

[Broad definitions in Section 1201\(a\) restrict activities that do not otherwise infringe copyright law.](#)

[The restrictions of Section 1201\(a\) in practice impact broader socio-economic interests than just core copyright concerns.](#)

[Existing statutory exceptions do not sufficiently protect reverse engineering and security research.](#)

[Rights management technology and law should be aligned with copyright law, limiting infringing uses without prohibiting non-infringing uses.](#)

[The Copyright Office can promote openness by improving the section 1201 exemption process.](#)

[A presumption of renewal will streamline the process and maintain beneficial exemptions, and objectors should prove a lack of public interest.](#)

[Exemptions should allow third-party actions.](#)

[The Copyright Office can also educate around the exemption process.](#)

[The Copyright Office should oppose the use of trade negotiations to pre-empt copyright policy discussions.](#)

Section 1201(a) overly restricts openness online.

Broad definitions in Section 1201(a) restrict activities that do not otherwise infringe copyright law.

Question 1 of the Notice asks for observations about the role and effectiveness of Section 1201(a). In creating new liability for otherwise non-infringing acts, it is important to balance broad definitions with exceptions and limitations to protect competition, innovation, and creativity and maintain the Internet as a powerful public resource.

The scope of Section 1201 covers a broad range of activities within the scope of circumvention of technological protection measures (TPMs), including “otherwise to avoid, bypass, remove, deactivate, or impair” a measure that “requires the application of information... to gain access to the work.” Thus, its historical scope ranges from security checks, to video game servers, to downloaded or streaming audiovisual works with encryption.

Mozilla’s primary product experience with TPMs is with Digital Rights Management (DRM), used to restrict distribution and use of media works. Two years ago, we expressed our view that encryption-based [DRM is a poor balance between empowering users and protecting content](#); that sentiment remains true today. A year ago, [we enabled the integration of third-party DRM into our core Firefox product](#), and although we believe we have built a comparatively good implementation of a fundamentally bad model, we nevertheless continue to study the possibility of alternatives.

Section 1201’s prohibition on circumvention encompasses all access to content, for either infringing or non-infringing use, including for example de minimis copying and other uses of protected works that would fall under fair use, as well as licensed copying. This combination of restrictive technical controls and circumvention liability functions as an extra-legal mechanism allowing copyright owners to establish the boundaries of acceptable and prohibited uses of content and technology, above and beyond those established under the law alone. The result, if not carefully balanced through exceptions and limitations, is harm to competition, innovation, and creativity - the very things that make the Internet such a powerful public resource. Although the statutory language includes some permanent exemptions, presumably written with an intention of balancing the interests of content users and rightsholders, in practice, the combination of technical locks and legal risks restricts too many activities that do not infringe on copyright exclusionary rights.

The restrictions of Section 1201(a) in practice impact broader socio-economic interests than just core copyright concerns.

Question 2 of the Notice of Inquiry asks about the impact of Section 1201(a) on interests outside traditional, core copyright concerns. The breadth of impact here implicates broader cultural,

market, and growth considerations that relate to the core of copyright's purpose "to promote the progress of science and useful arts" yet deviate significantly from the narrower scope of interests typically examined in policy analysis.

As indicated above, we are concerned that the mechanisms established by TPMs and circumvention liability erect a barrier to competition, innovation, and creativity, with broad impact for openness online. These mechanisms create new walled gardens, in a sense; rather than restricting access itself, they restrict legitimate use of that content beyond a predetermined and prescribed form of consumption. And the result is risk of harm to competition and innovation with the potential for significant market and growth impact. Historically, in many cases where competitors or innovators have tried to build interoperable pieces of technology, such as ink cartridges or batteries designed to work with another company's printer or laptop computer, the result has been extensive litigation with its inherently uncertain outcomes – despite the statute's inclusion of reverse engineering for interoperability as a clear and permanent exemption.

Furthermore, Section 1201 has a particularly deleterious effect for creative, transformative works building on copyrighted content. Securing content through encryption renders it inaccessible for modification, even to the degree that would be considered fair use as a transformative work, or lawful as a result of expiration of the copyright term. Over time, more media has been, and will continue to be, delivered through digital stream and download formats, and secured through TPMs that include encryption. This media represents copyrighted works, but it also represents cultures, and the building blocks for future works. As these building blocks become more and more locked down, future creators will have less and less material that they can work with.

Existing statutory exceptions do not sufficiently protect reverse engineering and security research.

Question 8 asks whether existing categories of exemptions are sufficient. The current exceptions do not cover all non-infringing, socially beneficial activities under their nominal scope of security research and reverse engineering for interoperability.

Section 1201 does include permanent exemptions for two categories of behavior considered to be worth explicit protections: security research (1201(g) and (j)) and reverse engineering for the purpose of interoperability (1201(f)). In practice, these exemptions are insufficient even for their intended purposes – and they certainly do not extend to cover other categories of desirable, non-infringing end-user activity.

The current exceptions do not cover all non-infringing, socially beneficial security research activities. The Notice quotes the Register as concurring with this observation. NTIA came to the same conclusion in its strong [fall 2015 recommendations](#). The NTIA comments (at page 72, footnote 357) highlight one security researcher, Mark Stanislav of Rapid7, who identified security vulnerabilities in "Internet of Things" devices, and was threatened with legal action

under Section 1201 for attempting to engage with the device manufacturers to report and resolve the issues. Temporary exemptions under the current process are not sufficient to alleviate the harms imposed by this policy oversight.

The exception for reverse engineering under section 1201(f) is similarly flawed. The NTIA recommendations articulate a range of gaps related to mobile devices. Mozilla has previously supported temporary exemptions for mobile devices, exemptions that have not been universally granted, resulting in a considerable lack of clarity for users and for industry.

Rights management technology and law should be aligned with copyright law, limiting infringing uses without prohibiting non-infringing uses.

Question 11 asks for any pertinent issues not referenced in previous questions. Generally, the Copyright Office should consider the gap in practice between copyright law's balance and that permitted to be imposed unilaterally by copyright holders as a result of the combination of technical measures and liability against circumvention under Section 1201.

The pairing of TPMs and circumvention liability effectively prohibits fair use of copyrighted works. Rather than providing blanket prohibitions on certain types of circumventions, an ideal legal and technical realization of section 1201 would explicitly allow circumvention for non-infringing purposes, but not for infringing purposes. This would put section 1201 more in line with the balance drawn by indirect, or secondary, copyright liability. However, in practice, the functional result of circumvention measures is access to the content for uses not directly offered to the user, and it's impossible to design technologies that can perfectly identify and separate fair uses from infringing uses, allowing the former while blocking the latter at a technical level.

But perfect differentiation through technology is an unnecessary problem to solve. The current framework for TPMs is built on an illusion: that technology can completely prevent all infringement. Mass 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. And it's not clear that the current framework is the most effective way to achieve the goal of reducing the impact of infringement on market success. Other approaches may be able to achieve substantial benefit with fewer or no restrictions on fair use, for example relying more on investigatory actions to identify and hold accountable direct infringers, or other means.

The purpose of Section 1201 is to support the policy balance of copyright law by protecting the use of technology to limit the harm of infringement. But as it exists today, 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. Legislative and administrative changes

to permit broader and more reliable exceptions for non-copyright-infringing activities are necessary (but not sufficient) to achieve a better balance.

The Copyright Office can promote openness by improving the section 1201 exemption process.

We appreciate the Copyright Office's clear intention to seek improvements to the current three-year exemption process. We suggest three improvements to help restore balance.

A presumption of renewal will streamline the process and maintain beneficial exemptions, and objectors should prove a lack of public interest.

Question 3 asks whether Section 1201 should be adjusted to presume renewal of previously granted exemptions or otherwise streamline the exemption process. Mozilla supports this presumption of renewal.

Exemptions which encounter no substantive opposition, or which are granted twice in succession over objections, should be automatically considered (without any party needing to file an affirmative request), and should receive a **presumption of renewal**. The burden of proof should in these instances shift to the objectors to demonstrate that the balance of interests favors non-renewal.

Objectors to renewal should be required to **demonstrate what circumstances have changed** that make the exemption no longer in the public's interest, and in particular, to **identify actual harm** (cognizable under copyright law) as a result of the exemption. Objectors to a new exemption should be required to articulate the harms that would result from granting of the exemption, and the alleged harms must not be speculative in nature.

Exemptions should allow third-party actions.

Question 7 asks whether the adoption of exemptions should extend to exemptions to anti-trafficking provisions. Mozilla supports this as well as extensions to other third-party actions.

Exemptions should automatically **cover third-party actions**, including actions taken for others as well as the development and supply of tools to perform the actions. When an exemption covers an action such as unlocking phones, for example, it should also cover the action when done for others (e.g. unlocking a family member's phone), whether directly or through the development and distribution of relevant tools. In practice, omitting this exemption extension, as currently happens, risks worsening a social divide - technically savvy users would have even more advantages over non-savvy users, as they are the only ones who have the skills to engage in the socially beneficial exempted action without help.

The Copyright Office can also educate around the exemption process.

Question 5 asks for further suggestions to improve the rulemaking process.

In addition to our substantive recommendations, the Copyright Office should also undertake education, advocacy, and media efforts regarding the rulemaking process, and should endeavor to make it easy for non-copyright experts to propose exemptions and to engage in discussions over potential exemptions. In the digital world, copyright touches the lives of everyone, and so it is vital that the process be as broadly understood and useable as possible.

The Copyright Office should oppose the use of trade negotiations to pre-empt copyright policy discussions.

Question 10 asks about how Section 1201 amendments might implicate U.S. trade and treaty obligations. While we do not comment on potential changes, we urge the Copyright Office to preserve open processes for this and other topic Internet policy challenges.

Without question, trade and copyright policy intersect in complex ways. The recently negotiated [Trans-Pacific Partnership \(TPP\)](#) includes numerous provisions related to copyright law. If the text of trade agreements like TPP does ultimately prohibit the Copyright Office and Congress from making key changes to Section 1201, then the democratic, multistakeholder principles that ought to guide Internet policy development have been violated. Negotiations behind closed doors would have “resolved” Internet policy issues without allowing all stakeholders to be heard. The result would be poor policy, [reflecting a skewed balance away from the interests of users](#), unable to adapt to changing circumstances in the future.

We deeply appreciate this open Inquiry conducted by the Copyright Office in this request for comments. To preserve the spirit of this open process, we encourage the Register of Copyrights and the Office to oppose the use of closed-door trade negotiations as vehicles to address complex Internet policy challenges, such as those raised in this proceeding.

Respectfully submitted,

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Mozilla