



October 27, 2016

Ms. Karyn Temple Claggett, Acting Register of Copyrights
United State Copyright Office, 101 Independence Avenue S.E.
Washington, D.C. 20559

RE: Section 1201 Study, Request for Additional Comments, FR Doc. 2016-23167

Dear Ms. Temple Claggett,

Thank you for the opportunity to submit additional comments on the Copyright Office's Section 1201 Study. As noted in our initial comments in this Study,¹ 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. Copyright law, including section 1201, has significant impact on the future of the open Internet.

The centerpiece of our previous filing was to identify the impact of technical locks and section 1201 on fair use and other lawful activity, and to describe how the effective impact of the current law differs from, and undermines, the careful balance of freedom and protection crafted in copyright law generally. To the extent section 1201 restricts otherwise lawful activity, it implements policies that are both outside the intended scope of the statute, as well as harmful to the public interest.

We welcome the shift in focus in this Notice towards concrete prospective changes to section 1201, some of which would help to address this fundamental imbalance. We support generally the Notice's suggestions for improvements to increase and improve the permanent exemptions and to permit third-party assistance directly and via tools, as well as other remedies previously discussed such as presumptive renewal. Our comments identify where we believe the Notice's proposals are on point, and where they require additional thought and modification.

Finally, we urge the Copyright Office to include in its final outcomes of this proceeding a detailed evaluation of the policy differences between section 1201 and copyright law generally, and the impact of those differences. Such analysis should include both historical considerations, whether such deviation was intended by the legislature that adopted the statute, as well as policy ones, whether such deviation serves the public interest or, as we believe, harms it.

¹ <https://blog.mozilla.org/netpolicy/files/2016/03/Mozilla-comments-on-Section-1201-study.pdf>

1. Proposals for New Permanent Exemptions

The Notice proposes four specific new permanent exemptions for consideration: assistive technologies; device unlocking; appropriate actions with respect to computer programs; and obsolete technologies. We generally support all four of these proposals, as they help balance section 1201 to maximize public economic and social benefit. We also provide specific input on the second and third of the proposed exemptions in this submission.

In practice, section 1201 has established a new balance of interests between the public and copyright holders, one that is different from, and more detrimental to the public good than, the balance established in the core of copyright law. The proposed permanent exemptions would go some way towards improving the balance of section 1201 by clearly permitting specific beneficial activities. Ideally, these exemptions would be accompanied by other remedies as indicated in our prior filing, including adopting a presumption of renewal for successful applications.

a. Device unlocking

Regarding the proposed permanent exemption for device unlocking, the Notice invites comment on whether the language of the 2015 exemption would be appropriate for permanent adoption. We do not believe this is the best approach. The 2015 exemption language is highly specific in its examples. For example, it permits unlocking for mobile phones and general purpose tablets, but does not cover laptop computers with mobile wireless functionality built-in (only “portable mobile connectivity devices”). Although the specific devices listed in the exemption are laudably inclusive and relevant to today, that is no guarantee that they will cover connectivity options that are mainstream tomorrow.

When considering a permanent exemption, the Copyright Office should craft language that achieves the underlying purpose in a way that adapts to current and future technologies. Failing to do so would likely obviate the exemption in practice, possibly in a very short timeframe. We would suggest structuring the language around the activity rather than specific technologies, for example: “to circumvent access controls on a device for the purpose of enabling such device to connect to a different wireless network.”

b. Computer programs

As an organization that coordinates thousands of developers to build software that is used daily by millions, we also take particular interest in the proposal for an exception for computer programs. In practice, for software, section 1201 legally subjects the exercise of fair use rights to the whim of the software’s rightsholder. This undermines the concept of fair use entirely, as it is meant to protect certain actions without having to seek a license. This lack of practical fair use results in socially and economically harmful restriction of legal activity, and represents a

dramatic shift from current copyright law and policy. Such restriction comes without cognizable distinct protections for legitimate copyright protection interests, as a broad fair use exemption would not render any otherwise-illegal activities legal, merely shift the context of enforcement. We thus agree with those who argue that “diagnosis, maintenance or repair” is insufficiently broad, and that an exemption for any lawful modification would be more appropriate to the goal of restoring an appropriate fair use regime for software analogous to that enjoyed with other types of media.

The Notice proposes limiting a computer program exemption to exclude those uses that create or serve as a “conduit” to “protectable expression”. We oppose such a condition being placed on the exercise of the exemption. Although the objective of the proposal appears reasonable on its face, the practical effect would be far broader than intended. In practice, the scale of “protectable expression” includes a vast amount of the content of software systems, including but not limited to image files or audio clips embedded as part of any user-facing software. Limitations such as this would undermine the clarity and effectiveness of the exemption at best, and at worst could render it entirely useless.

2. Proposed Amendments to Existing Permanent Exemptions

The Notice proposes amendments to the existing permanent exemption for security research and related activity. We believe the Copyright Office’s purpose in this proposal to be to strengthen the exemption in the wake of widespread assertions of its insufficiency in practice, and we strongly support that objective. But, we believe some tweaks to the proposed language are needed to realize the intended effects.

Mozilla has a substantial security group, members of which engage in security research both for Mozilla and independently. The current exemption for security research is indeed insufficient, as noted in our initial filing. But, the specific device classes proposed in the Notice (as adopted in the 2015 exemption) are overly limiting if incorporated as scope for a permanent exemption, resulting in restrictions and chilling effects on security research into new technologies. For example, recently the Web site of a well-known security researcher was forced offline by a Denial of Service attack of unprecedented size, originating in large part from a variety of insecure connected devices (often referred to as the Internet of Things). Research to understand these attacks and prevent their future occurrence ought to be encouraged, not prohibited. It’s highly unclear that such work would be protected under the proposals in the Notice.

From our perspective, potential overbreadth in a permanent section 1201 exemption should not overly concern the Copyright Office as a policy matter, because (notwithstanding its imperfections) the CFAA continues to exist as an independent law, and operates in parallel to impose restrictions on harmful activity. Copyright law need not, and should not, be the ultimate arbiter of what is legal or illegal in the context of security research.

3. Anti-Trafficking Provisions

The Notice highlights that numerous comments identified limitations to the practical impact of broader exemptions if third parties are not permitted to provide assistance, directly and through the provision of necessary technology to use the exemptions. Some commenters oppose allowing technical assistance on the grounds that such tools could be misused for illicit purposes. This dual-use problem is not unique to copyright law. For example, spray paint can be used to commit vandalism, and motor vehicles enable countless illegal activities. The same can be said of computers and the Internet, for that matter. Similarly, circumvention technology enables basic freedoms and rights, and cannot be engineered magically to allow only lawful activities while blocking the unlawful.

Copyright law and law enforcement have the authority and ability to penalize those who act illegally, including those who misuse circumvention technologies. In addition to the many vectors for assigning liability to direct infringers, secondary copyright liability answers the question of what types of assistance and under what circumstances constitute a violation of copyright law. If third-party assistance and supportive circumvention technologies - such as those needed to help individuals with disabilities take advantage of what, hopefully, are new legal freedoms - continue to be labeled misleadingly as “trafficking” and prohibited outright, this well-developed legal history will have been uprooted.

The Notice indicates that some commenters cited an implied right to the creation of circumvention technologies for one’s own use in engaging in permitted circumvention. Such an implied right would not correct the imbalance described above. And while the gap is particularly poignant in the context of assistive technologies - not only those individuals who can code should be able to benefit from such an exemption - it is just as true in other contexts. Fair use rights are not under the law, and should not be in practice, limited to software engineers.

Similarly, an assertion that some forms of third-party assistance fall outside the scope of the law does not constitute a sufficient safeguard in a climate of high-volume litigation by copyright maximalists. Both third-party assistance and tool development rights should be stated directly: all individuals should be allowed to take advantage of exemptions and assist others, and build tools to take advantage of exemptions, and share their tools to empower others to take advantage of exemptions. All these rights are vital for the exemptions to be meaningfully available to all citizens.

4. Conclusion

The Notice suggests several changes to section 1201, which by and large would improve its ability to balance the legitimate interests of rightsholders and the public interest, particularly with a few improvements to ensure a futureproof set of exemptions and processes. We encourage you to work towards ensuring that section 1201 promotes openness, innovation, and opportunity

online, and balances the freedom to research and tinker with devices with reasonable protections for copyright-protected content. We would be pleased to answer any additional questions you might have.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Chris Riley". The signature is fluid and cursive, with the first name "Chris" written in a larger, more prominent script than the last name "Riley".

Chris Riley, Head of Public Policy
Gervase Markham, Policy Engineer
Heather West, Senior Policy Manager
Mozilla