

**BEFORE THE COPYRIGHT OFFICE**

**LIBRARY OF CONGRESS, Washington, D.C.**

<b>In the matter of Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies.</b>	Docket No. 2014-07
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**COMMENTS OF NEW MEDIA RIGHTS**

New Media Rights submits the following comments in response to the Notice of Inquiry of Exemption to the Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies.<sup>1</sup> In its Notice, the Copyright Office seeks comments on all proposed exemptions submitted before February 6, 2014. These comments address the proposed exemptions requested by the Electronic Frontier Foundation (“EFF”) and the International Documentary Association (“IDA”).

**I. Commenting Party**

New Media Rights (NMR) is an independently funded program of California Western School of Law. NMR provides expertise and advocacy on media, communications, and internet law as it applies to independent creators and internet users. NMR offers pro bono legal services to creators including artists, filmmakers, podcasters, citizen journalists, bloggers, open source software projects, as well as non-profit organizations. Further information regarding NMR’s mission and activities can be obtained at <http://www.newmediarights.org>.

**II. Comments**

These comments will provide specific support for key exemptions our creator and consumer clients rely upon. However, we must first acknowledge the need for a broader exemption of all otherwise lawful activities under Section 1201(a)(1).

One thing remains constant in the DMCA Anti-Circumvention exemption proceedings: an enormous output of time and energy by legal clinics, nonprofits, and others every three years in pursuit of broad range of worthy, but narrow exemptions. The commonality in the arguments made for the exemptions is that the circumvention should be exempted from violating federal law under the Anti-Circumvention provisions because the uses targeted are not otherwise unlawful. We maintain that an elegant way to improve the provisions, and allow otherwise lawful uses without requiring such a tremendous use of resources, is to simply exempt all uses that are otherwise lawful. Specifically, if a use is deemed a fair use, anti-circumvention should simply not be applicable to the use, and should not be available as a cause of action.

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<sup>1</sup> Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 79 Fed. Reg. 180, 55687 (Sept. 17, 2014) (to be codified at 37 C.F.R. pt. 201).

NMR requests that the Copyright Office look systematically to find ways, either through regulation or proposed legislation, to provide broad exemptions to Section 1201(a)(1) that protect otherwise lawful uses of content such as uses made in fair use.

An exemption or exception that allowed for circumvention of TPMs for any reuse that falls under fair use, would be very efficient because there would be a stable rule of law that does not change every three years. Such a broader exemption would also provide certainty because people would know that they could circumvent TPMs for reuse as long as their reuse constituted fair use; those people would not have to determine if they were included in one of many narrow class of exemptions. Video creators, for example, would know that circumvention of TPMs is legal as long as the resulting video falls under fair use. Video creators would not have to wait three years to determine whether certain activity is legal, and whether their particular use is the type excused by narrow exemptions. Instead, they would know what type of conduct is permitted, and permitted conduct would not be subject to change over time. As long as one circumvents TPMs for a noninfringing purpose, such as fair use, the circumvention should be legal. A broader exemption would ensure that anti-circumvention don't needlessly include people who have otherwise not violated the law.

With the need for a broad exemption to Section 1201(a)(1) addressed, NMR now presents its specific arguments and evidence specifically supporting four of the proposed exemptions. Our comments in support of the proposed class 6, 7, 16, and 17 exemptions follow.

**A. Proposed Class 7: An exemption to Title 17, Section 1201(a)(1) of the United States Code is necessary for remix video creators to meaningfully engage in non-infringing reuse by extracting content from DVDs, Blu-ray discs, and online distribution services without unintentionally triggering allegations that their actions are prohibited by federal Copyright law.**

Proposed Class 7 includes “lawfully made and acquired audiovisual works for the sole purpose of extracting clips for inclusion in noncommercial videos that do not infringe copyright. This exemption has been requested for audiovisual material made available on DVDs protected by CSS (Content Scrambling System), Blu-ray discs protected by AACS (Advanced Access Content System), and TPM-protected online distribution services.”

In contemporary American society, videos that utilize content from DVDs, Blu-ray discs, and online distribution services are quite common. Many Americans view these videos on a variety of online services such as YouTube and Vimeo. Often these videos, remixes, and vids<sup>2</sup> (remix videos), contain copyrighted audiovisual material. However, many times the video creator transforms the copyrighted material to serve an important purpose like noncommercial commentary, criticism of popular culture, political speech, or another legal purpose. These non-commercial remix videos are not only protected by the law through fair use, but are important mediums through which creators communicate a

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<sup>2</sup> Remixing is defined as the “taking [of] material . . . such as songs, texts, or images and remixing it into [its] own artistic creation” as defined by The Pew Internet and American Life Project on Remix. “Vids” are a combination of clips from one or more sources combined with music, usually these remix videos comment on the works in question.

message with the public.<sup>3</sup> This class of remix videos helps promote dissemination of knowledge, access to information, and cultural introspection, each very important functions that maintain a well-informed public and a healthy public debate. However, without the proposed exemptions, the Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies would prohibit this otherwise legal and valuable content. Section 1201(a)(1) burdens those seeking to make fair use of works because creators who engage in reuse covered by fair use may still be liable, or fear being liable, for circumventing technological protection measures (TPMs), even though the reuse does not infringe on another's copyright. Section 1201(a)(1), without the proposed exemption, effectively punishes creators based on the method of access to work, despite the fact that the use of that work is otherwise legal.

The Copyright Office should adopt the proposed exemptions to avoid harmfully chilling otherwise legal speech, as well as undermining the purposes of the Copyright Act and Article 1, Section 8 of the Constitution.<sup>4</sup> Section 1201(a)(1), without the proposed exemption, will deter video creators who plan to reuse video clips for lawful purposes. Those creators will fear liability under the statute and will be less likely to access lawfully obtained video clips for remix videos that are protected by fair use. Thus, strict adherence to Section 1201(a)(1) has a significant negative impact on the ability of internet users, and video creators who share online, to obtain clips from DVDs, Blu-ray discs, and online distribution services in order to create works that would otherwise be protected by fair use.

Section 1201(a)(1), without the proposed exemption, will have an adverse impact on video creators because those creators will not be able to access a wide variety of video clips for fair use purposes. Therefore, NMR agrees with and supports the Proposed Class 7 exemption to the Section 1201(a)(1) anti-circumvention laws for the following specific reasons.

First, the proposed exemption is for a very limited, narrow use. The exemption only applies to use that is noncommercial and noninfringing, such as fair use that utilizes transformative reuse for noncommercial purposes. Second, due to the exemption's narrow scope, copyright owners may still pursue individuals who infringe on the copyright holder's rights. If a copyright holder believes that a video creator's reuse does not fall under fair use, the copyright holder may still seek legal remedies against the alleged infringer. Third, creators who reuse DVD or Blu-ray content for fair use must utilize high quality video content in order to effectively communicate their message. Those creators should not have to compromise their artistic messages by settling for low quality content. Fourth, creators who reuse content from online distribution services must have access to such content because that content may either not currently be available on DVD or Blu-ray or may never be available on DVD or Blu-ray. Fifth, creators who reuse content from online distribution services usually address time sensitive issues and cannot wait for the content to become available on DVD or Blu-ray. Finally,

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<sup>3</sup> See, e.g., *Arica Institute, Inc. v. Palmer*, 970 F.2d 1067 (2<sup>nd</sup> Cir. 1992). "The 'fair use' exception applies where the Copyright Act's goal of encouraging creative and original work would be better served by allowing the use than by preventing it." *Id.* at 1077.

<sup>4</sup> See 17 USC § 107 (2014). 17 USC § 107 states that reuse of copyrighted material for criticism, comment, news reporting, teaching, scholarship, or research is not an infringement of copyright. *Id.* See also, U.S. Const. Art. 1 Sec. 8 Cl. 3.

many of these video creators usually lack access to legal counsel and are thus susceptible to intimidation by copyright holders who have legal counsel available.

**1. The proposed exemption is limited to uses that do not infringe copyright and it is intended to afford creators the opportunity to fully assert a fair use defense in a legal proceeding before such a defense becomes moot due to Section 1201(a)(1)'s imposition of liability for circumventing TPMs.**

The proposed exemption should be adopted because it protects a very narrow use that is already protected under the Copyright Act – fair use. This exemption is designed to protect remix videos that further social commentary, criticism, news reporting, teaching, and scholarship. These remix videos represent uses that Title 17, Section 107 of the United States Code mandates are protected under fair use. Such reuse of media obtained from DVDs, Blu-ray discs, and online distribution services allow the creator to convey their message to educate the public. Thus, these remix videos are included in the exact class of works that Section 107 aims to protect.

Creators who reuse video content for these purposes also engage in transformative reuse because the remixed videos add to the original work with a new message or expression. Creators often reuse video clips from videos and films that were designed to entertain. However, the remixed videos convey a different message that informs the public and criticizes or comments on the underlying work. The remixed videos are protected by fair use because the videos commonly criticize the original work, thus making the purpose and character of the reuse transformative.<sup>5</sup>

There are a broad variety of non-commercial, noninfringing remix videos that convey the creator's message to the public by using copyrighted video content in a transformative manner. Take, for example, Anita Sarkeesian who creates and produces Feminist Frequency, an online web series that analyzes popular culture from a feminist perspective. Ms. Sarkeesian transforms clips that are legally obtained from DVDs into fair use remix videos. Ms. Sarkeesian confirmed that, "increasingly, video is the medium which the younger generations engage with . . . [it] is a much more compelling and engaging experience than reading books, articles, and essays." Ms. Sarkeesian's work relies heavily on access to video clips from DVDs. Her remix videos convey educational messages to the public and critique contemporary society; the videos fall under fair use. Without the proposed exemption, her educational message and fair use criticism would be severely hindered due to Section 1201(a)(1).

Freedom of speech and expression is an essential part of American society. Indeed, the remix and reuse of content is becoming less of a subculture and more of a common way that internet users interact with the culture around them. Creators need this exemption in order to assert a fair use defense to defend otherwise lawful speech. Otherwise, much of the criticism and speech that creators such as Ms. Sarkeesian engage in would be muted.

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<sup>5</sup> See, e.g. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). "The central purpose of [a fair use inquiry] is to see . . . whether the new work merely 'supersede[s] the objects' of the original creation. . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.'" *Id.* at 579 (alteration added).

Also consider Sue Wilson, an Emmy award winning journalist who directed the media reform documentary “Broadcast Blues.” Ms. Wilson specifically makes “videos to comment on how Radio and TV are misleading the public.” She hopes to “expose lies in the media” and has stated that as a “documentarian and media critic, it is important to be able to use examples of the media to make a point of how they are behaving. Without these clips, [the criticism] means nothing.” As one can see from the perspective of creators such as Ms. Wilson, Ms. Sarkeesian, using clips from DVDs, Blu-ray, and online distribution sources is essential for creators to express themselves and share their perspectives.

Without the proposed exemption, Ms. Sarkeesian, Ms. Wilson, and other creators could not produce and distribute content that is legal but for the liability imposed under Section 1201(a)(1). Section 1201(a)(1) trumps a fair use defense and threatens to hold video creators liable for producing and distributing works that are protected under fair use. Such a result will adversely impact creators’ noninfringing uses of copyrighted materials by discouraging artists from engaging in projects that utilize content for fair use purposes. Ms. Sarkeesian and Ms. Wilson represent a growing community of video creators and everyday internet users who rely on this exemption for their projects, and for basic communication with their fellow citizens. This exemption encourages fair use and free expression because it avoids condemning behavior that is otherwise permitted by copyright law and the Constitution.

## **2. Many remix videos may not exist if the proposed exemption is not adopted**

Large media companies already pursue many remix video creators for otherwise legal remix videos.<sup>6</sup> Anti-circumvention just adds to the challenge of standing up in these David and Goliath scenarios. Strict adherence to Section 1201(a)(1), without the proposed exemption, would trump a remix video creator’s fair use defense in these situations because the creator would face liability for circumvention, regardless of whether the creator’s reuse constituted fair use. Thus, large media companies could rely on anti-circumvention to force creators to take down fair use videos. Without the proposed exemption, many remix videos would not even exist because video creators’ fair use defense would be rendered moot due to Section 1201(a)(1). Thus, the creators would have to take down their remix videos or may never even create those videos.

Jonathan McIntosh’s remix video, *Buffy v. Edward*, and his battle with Lionsgate Entertainment illustrate the importance of this exemption. Mr. McIntosh reused audiovisual media from the *Twilight* franchise and the television show *Buffy the Vampire Slayer* to create a remix video that critiqued pop culture’s representation of gender roles. Mr. McIntosh’s remix video is as clear as fair use can get; used the world over as an example of fair use, it has been presented in favor of anti-circumvention exemptions and the Register of Copyrights has even recognized the video as supporting illustrating the

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<sup>6</sup> See e.g. Joe Mullin, “Buffy vs Edward” remix is back online, but no fallout for Lionsgate, ars technica, <http://arstechnica.com/tech-policy/2013/01/buffy-vs-edward-remix-is-back-online-but-no-fallout-for-lionsgate/> (Jan. 2013).

need for access to high quality video in noncommercial video.<sup>7</sup> In order to access video clips to create *Buffy v. Edward*, Mr. McIntosh had to circumvent CSS systems on DVDs. Without this exemption, Mr. McIntosh's remix video would not exist. Even though the final video constituted fair use, the video would not exist because Mr. McIntosh would never have been able to access the content required to make the video. This exemption is necessary to ensure that video creators can continue to produce noncommercial, transformative remix videos, such as *Buffy v. Edward*. Section 1201(a)(1), without the proposed exemption, will adversely affect many video creators because those creators will not be able to access content for their remix videos and thus will not be able to create those videos and communicate with the public.

### **3. The proposed exemption does not modify existing fair use law and does not affect a copyright holder's ability to pursue those who infringe the holder's copyright**

Granting the proposed exemption will not prevent copyright holders from pursuing individuals who infringe on the holder's copyright. If a copyright holder can prove that an individual infringed on their copyright, then the holder may still seek all available legal remedies against the infringer. Copyright holders may still utilize DMCA takedown notices, cease and desist letters, and the legal process to pursue alleged copyright infringers. This exemption does not propose a defense to copyright infringement. This exemption only applies to content that has been reused *legally*; the proposed exemption merely seeks to make the *process* for obtaining that content legal.

For example, suppose that the proposed exemption is granted and an individual circumvents a DVD's CSS but then uses the video content for a purpose that infringes the owner's copyright. That individual may upload the entire video in a way that is not transformative or distribute physical copies of the content. In this situation, the copyright holder would be able to sue the individual for copyright infringement and the exemption would not apply. The copyright holder would still have a legal remedy and thus this exemption would not hinder the copyright holder's property rights.

This exemption merely seeks to legalize the process for obtaining content where reuse of the content will be legal. This exemption does not limit a copyright holder's rights against infringers and does not create an exemption to copyright infringement.

### **4. This exemption is necessary so that video creators who produce non-commercial, noninfringing remix videos have access to high quality content.**

Remix video creators require high quality video content to effectively convey their messages to their audiences. High quality content leads to more effective communication and more effective communication better informs the public. Low quality content, however, creates difficulties for video creators and spoils the creators' ideas. In contemporary American society, high definition video content is not only preferred by audiences, it is expected. A creator's ability to communicate their

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<sup>7</sup> See Recommendation of the Register of Copyrights, October 2012, 133. "[T]he Register is able to perceive that *Buffy vs Edward* and other noncommercial videos would suffer significantly because of blurring and the loss of detail in characters' expression and sense of depth."

message depends on the quality of the video content that the creator uses. This exemption, if adopted, will avoid limiting video creators to inferior quality content and thus inferior communication.

Rick Bowman, a documentary film maker, explained the importance of using high quality media in his videos. Mr. Bowman stated that quality is, “[v]ery important . . . in today’s market people are used to Hi-Def and the higher the resolution on the big screen the better it will look. My understanding is that at this past years American Film Market event in Los Angeles, distributors didn’t want to look at any films unless they had been filmed in 4k.”<sup>8</sup> As Mr. Bowman’s comments explain, many people will not view a video unless the video utilizes high quality content. Audiences may never view a creator’s videos unless the creator can access high quality audiovisual content.

Michael Singh, a documentary filmmaker who created the critically acclaimed film *Valentino’s Ghost*, and has worked on a variety of other film and video projects, also noted the importance of high quality content. In creating the film, Mr. Singh reused a wide variety of copyrighted material from movies, television, news reports, and more. On the importance of the reused content’s quality, Mr. Singh stated that “[t]he higher the quality of the reused media, the more credible our analysts seem to be. And credibility is everything.” The filmmaker noted that access to high quality content was critical for his project’s success.

To illustrate the direct impact of lower quality content, Mr. Singh noted that he could not obtain high quality content for all portions of his project and the work suffered because of lower quality content. Mr. Singh stated that, “[i]n some instances, we were unable to procure the needed quality, those sections are glaringly conspicuous.” Mr. Singh’s comments display the importance of high quality content to filmmakers. Filmmakers require high quality content to bolster the film’s credibility and keep audiences focused on the film’s message. Mr. Singh’s comments prove that filmmakers suffer adverse effects when they have to use lower quality content in their films. Lower quality content damages the film’s credibility and causes audiences to lose interest in the film. Thus, without access to high quality content, films become less effective means of spreading the creator’s message.

Filmmaker Jon Monday, who uses clips from DVDs and Blu-ray discs to create his remix videos, also understands the importance of high quality video content. After receiving a question regarding the importance of quality to him and his audience, he stated, “[quality] is extremely important, as the video quality directly translates to the ‘watch-ability’ of the final product. American consumers are very quality conscious and will pay more attention to well produced documentaries, which include high quality video.” Because content quality is strongly tied to potential viewership, high quality content is a necessity for video creators to convey their message to the public.

Remix video creators need the ability to bypass DVD and Blu-ray encryption and TPMs protecting online distribution services in order to avoid using lower quality content. Creators may obtain video through other means that do not implicate Section 1201(a)(1), but these other means are inferior to accessing the DVDs, Blu-ray discs, and high quality versions of online videos. For example, a creator

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<sup>8</sup> 4k refers to a common name for ultra-high-definition television. Content that has horizontal resolution on the order of 4,000 pixels is 4k. See Scott Alexander, 4K TV and Ultra HD: Everything you need to know, techradar, <http://www.techradar.com/us/news/television/ultra-hd-everything-you-need-to-know-about-4k-tv-1048954> (Jan. 2015).

could legally access a DVD and use a video camera to record the screen, or some other method of screen capturing. However, these alternative methods yield lower quality content than bypassing CSS, AACS, and other TPMs that protect online distribution services. An exemption that allows video creators to circumvent CSS, AACS, and TPMs that protect online distribution services will provide the creators with consistent access to high quality content.

The creators NMR works with require the highest content quality. One of NMR's clients, remix artist Jonathan McIntosh, whose work was discussed earlier, notes that access to high quality content on DVDs is very important to the remix artist community and to his work in particular. Mr. McIntosh noted that many video remix artists crop and zoom video footage in order to focus on specific portions of a scene. For some artists, cropping and zooming is a necessity because the artist will use the cropping and zooming to focus on parts of a scene that were not focused on in the original work. For example, in his remix video *Buffy v. Edward*, Mr. McIntosh used crops and zooms to cut out all characters, except Edward, from the original *Twilight* film. Mr. McIntosh also used crops and zooms to accentuate expressions on characters' faces from *Buffy the Vampire Slayer* which gave those scenes a different meaning than the original. The crops and zooms transformed the original video content in order to create a new narrative for the remix video. Through the use of crops and zooms, Mr. McIntosh created a new story; the remix video portrayed more one-on-one interaction between the two central characters, Edward and Buffy.

Effective use of crops and zooms, such as Mr. McIntosh used in *Buffy v. Edward*, is very difficult to achieve without high quality video content. Mr. McIntosh explained that the creators need a big enough picture of high enough quality in order to crop and zoom effectively. Without high quality content, the ultimate image becomes blurry and pixelated, detracting from the remix video's quality. Subpar quality will hinder the artist's message to the audience. That problem could be avoided by allowing video creators to bypass CSS, AACS, and other TPMs to access high quality content.

Adopting the proposed exemption will ensure that remix video creators do not have to resort to inferior screen capturing methods to access video content. While screen recording and other screen capturing technology provide remix video creators with alternative methods of obtaining content, those methods are inferior to circumvention. For example, Martin Leduc, a remix artist client of NMR who uses clips from DVDs, stated that "[w]hen I rip a video . . . I always try to get byte-to-byte copies of the original files rather than using a 'screen capture' program because copying the files directly helps me avoid degrading the quality of my video source." While screen capture technology provides access to video content without circumventing TPMs, it is inferior to circumvention because screen capturing yields lower quality content compared to circumvention.

As Mr. Leduc and Mr. McIntosh's comments above show, screen capture technology is not acceptable for the vast majority of remix video creators. Many remix video creators cannot effectively use content acquired via screen capturing due to that content's low quality. Remix video creators require high quality content to meaningfully incorporate the content into their videos and thus convey an effective message. For example, in *Buffy v. Edward*, Mr. McIntosh used cropping and zooming techniques to create a new narrative between the characters that commented on the underlying works. He could not have cropped and zoomed effectively without high quality content because the images



would have become too pixelated; that result would have distracted audiences and distorted the video's narrative. Mr. McIntosh could not have made such an effective video if screen capture technology was his only option to access content. Circumventing CSS technology on DVDs allowed Mr. McIntosh to access high quality content that he could crop and zoom to create his remix video. The Copyright Office should adopt the proposed exemption because it will allow remix video creators to have consistent access to high quality content and the creators will not have to resort to using lower quality content obtained from screen capturing methods.

Also, while fair use is decided on a number of specific factors, the quality of the media being reused has little to no effect on whether the reuse falls under fair use. Limiting reuse of copyrighted material to low quality content will have an adverse effect on video creators whose remix videos fall under fair use. Forcing video creators to use low quality content rather than high quality content impairs the creators' ability to comment on society and express their ideas, and condemns them to second-class status in both the quality of their work, and the interest and attention of audiences. Audiences demand high quality work, and low quality content makes an audience less likely to watch a remix video.<sup>9</sup> Such a result would defeat the purpose of creating these remix videos in the first place.

Artists such as Mr. Monday, Mr. Leduc, Mr. McIntosh, Mr. Singh, and many more, will be adversely impacted by the TPMs that protect DVDs, Blu-ray discs, and online distribution services without the proposed exemption. Without the proposed exemption, video creators will be forced to use lower quality content because federal law will prohibit circumventing TPMs that guard high quality content on DVDs, Blu-ray discs, and online distribution services. Lower quality content will prevent the artists from conveying an effective message to their audience because the poor quality will detract from the remix videos' purpose or audiences may simply not watch the remix videos due to poor quality. Without the proposed exemption, video creators will have to choose between bypassing TPMs to obtain high quality content (which will violate federal law) and using low quality content. Forcing creators to make such a Hobson's choice and ultimately forego using high quality content limits free expression and public discourse. Indeed, the Register of Copyrights once recognized that high quality content is necessary for valuable commentary and criticism when it noted that it was "able to conclude that diminished quality likely would impair the criticism and comment contained in noncommercial videos."<sup>10</sup> We encourage the Copyright Office to find similarly in this proceeding.

**5. Video creators who utilize content from online distribution services need to bypass TPMs protecting the online media because that content is either not currently available on DVD or Blu-ray or may never be available on DVD or Blu-ray.**

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<sup>9</sup> See Robert Andrews, *Growing Demand for Video Quality Tests Networks: Akami's Michel*, Beet.tv, <http://www.beet.tv/2014/09/ibcakamai.html> (Sept. 15, 2014). Akami product marketing director Kurt Michel stated that "demands of audiences are going to increase, expecting broadcast-levels of quality." *Id.* See also Ovum, *Consumer Trend Research: Quality, Connection, and Context in TV Viewing*, Ovum.com, <http://apps.avid.com/ovum-report2/assets/Ovum-Consumer-Research-Report.pdf> (July 2013). "In a rapidly evolving market where significant time and effort goes into developing new ways to approach audiences, the strongest driver of audience engagement is still high-quality content with outstanding image and audio rendering." *Id.* at 3.

<sup>10</sup> Recommendation of the Register of Copyrights, October 2012, 133.

Certain content is simply not available on DVD or Blu-ray format. Creators are thus forced to choose between accessing the content from a different source (such as online distribution services) and not using the desired content at all. Many video creators utilize content from online distribution services such as Youtube.com, Netflix, and Amazon Instant Video. As long as creators use the content for legal purposes, the source from which the creator obtains the content should not hinder the creator from using desired content.

This exemption will grant video creators access to a larger spectrum of media for reuse in their remix videos. Video creators will not be limited to content that is only available on DVDs or Blu-ray discs. Thus, creators will bolster their messages with a wider array of media and their messages to the audience will be more credible and stimulating. Limiting video creators to access media that is only available on DVDs or Blu-ray discs will curb the creators' ability to effectively communicate with the public.

**6. Even if the desired content will be available on DVD or Blu-ray in the future, many issues addressed in remix videos are time sensitive and creators cannot wait for the content to become available on DVD or Blu-ray.**

Many video creators address current issues in their remix videos. These remix videos are relevant to audiences because of current events; creators need access to certain content as soon as possible. The remix videos become less relevant if the creators must wait for the content to become available on DVDs or Blu-ray discs before reusing the content. If the creator has to wait, even for a relatively minimal amount of time, the remix video's message may become irrelevant. Such a result will adversely impact the creator's ability to communicate their message effectively.

Pop culture critic Anita Sarkeesian has expressed the importance of timely access to content. She stated that, "[i]t is of the utmost importance that I can access video clips of current events, whether it be news footage or movies still screening in theaters. If I am making a video about a current screening film, I need access footage of that film in order to provide evidence for my argument." Ms. Sarkeesian also noted that if she had to wait until certain content became available on DVD or Blu-ray, "[she] would lose [her] audience since the film is no longer current, interesting, or compelling to [her] potential viewers."

Ms. Sarkeesian's comments signify the need that many video creators have to current video content. Without current video content, many of these creators cannot convey an effective, relevant message to the audience. An exemption that allows creators to access material from non-DVD or non-Blu-ray sources will help those creators access video content in a timely manner.

Martin Leduc also discussed the importance of timely access to video content. Mr. Leduc stated that, "[s]ometimes my online remixes respond to very specific events that are being covered in the media. In these cases I need to get my clips in as timely a manner as possible so I can contribute to the

discussion about these events while they are still taking place.” Mr. Leduc’s comments reinforce the importance of timely access to video content. Many artists discuss current events through remix videos. Without access to content at the time that the artist creates a remix video, the communication between the artists and the audiences suffers.

Timely access to video content is especially important for political commentary. Political commentary is not only protected by fair use, but is regarded as one of the most valuable forms of expression.<sup>11</sup> Supreme Court Justice Hugo Black once wrote that, “[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”<sup>12</sup> Creators who use political content for fair use purposes should not be hindered due to inability to circumvent TPMs on online distribution sources.

NMR client filmmaker Jon Monday expressed the importance of having access to current video content for political speech. He stated that video clips of current events “directly relate to the objective of putting out documentaries that address timely issues. If a bill is pending before Congress, or a vote before Americans, getting timely video to illustrate the issue is at least as critical as the issue itself.” Artists such as Mr. Monday create remix videos to convey a message about current political events to the public; these artists therefore need to access media relating to politics as soon as possible. Without current video materials, these artists are unable to make effective commentary.

Many artists create remix videos relating to current events and thus require timely access to video content. Without the proposed exemption, such artists will be adversely impacted because they will have to wait for content to become available on DVDs or Blu-ray discs before reusing the content. The artists’ remix videos will become less relevant if the artists have to wait for access to content. Moreover, the value of the cultural and political conversation and introspection these remix videos offer will be lost. These artists, and our cultural and political conversation as a whole, should not be burdened by having to wait for access to certain content. The proposed exemption will help avoid that problem by allowing artists to access audiovisual content from online distribution sources that is available on DVDs or Blu-ray discs for fair use purposes.

**7. Creators who reuse content for noncommercial purposes usually do not have access to legal counsel and thus must face a lawsuit from the copyright holder unless they adhere to the copyright holder’s demands.**

Remix video creators who reuse content from DVDs, Blu-ray discs, and online distribution services usually do not have access to legal counsel. Therefore, those creators may not know whether their actions for obtaining content comply with Section 1201(a)(1). Creators who rely on fair use may be completely unaware that they are violating federal law when they circumvent TPMs. Those creators assume that as long as their reuse falls under fair use, then they may be free from liability.

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<sup>11</sup> See *Mills v. State of Alabama*, 384 U.S. 214 (1966).

<sup>12</sup> *Id.* at 218.

Without the proposed exemption, creators will be unknowingly and unwillingly violating copyright law.

The few creators who are aware of the anti-circumvention measures do not have access to legal advice that would help them understand copyright law for their benefit. Without an understanding of copyright law or access to legal counsel, these creators may face liability under 1201(a)(1), attempt to evade liability by using lower quality content, or may not post any remix videos at all. Any three of those outcomes will have obvious adverse effects on free speech in the video creator community, as well as cultural and political conversation throughout our society.

**B. Proposed Class 6: An exemption to Title 17, Section 1201(a)(1) of the United States Code is necessary for documentary filmmakers to meaningfully engage in non-infringing reuse by extracting content from DVDs, Blu-ray discs, and online distribution services without unintentionally triggering allegations that their actions are prohibited by federal copyright law.**

Proposed Class 6 includes “[l]awfully made and acquired motion pictures for filmmaking purposes. This exemption has been requested for audiovisual material made available in all formats, including DVDs protected by CSS, Blu-ray discs protected by AACS, and TPM-protected online distribution services . . . for purposes of facilitating uses of motion picture excerpts in documentary films.”

Documentary filmmakers analyze current events, discuss history, and comment on and criticize popular culture.<sup>13</sup> Documentary filmmakers reuse copyrighted material from motion pictures in their films,<sup>14</sup> but often transform this copyrighted motion picture material in ways that are excused under fair use. However, the Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies prohibits that otherwise legal and valuable reuse. Section 1201(a)(1) burdens the goals of fair use because filmmakers who, similar to video creators under Class 7, engage in otherwise fair use of motion picture material may be liable, or fear being liable, for circumventing technological protection measures (TPMs) even though the reuse does not infringe on another’s copyright. Section 1201(a)(1), without the proposed exemption, will deter documentary filmmakers from engaging in fair use and spreading their messages to the public.

As mentioned previously at the beginning of Section II, NMR acknowledges the need for a broader exemption of all otherwise lawful activities under Section 1201(a)(1). In addition to that proposed broader exemption, NMR also acknowledges the need for a broader exemption in the context of documentary films. NMR encourages the Copyright Office to pass a inclusive exemption that covers

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<sup>13</sup> A documentary filmmaker can be defined as one who produces non-fiction films that comment on and criticize society. See *In the Matter of Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, Docket No. RM 2011-07, *Comment of International Documentary Association, Kartemquin Educational Films, Inc., National Alliance for Media Arts and Culture, and Independent Filmmaker Project*, 1 (2011). Documentary filmmakers frequently provide unexplored perspectives on current issues and history. *Id.* at 35. These perspectives further and develop public discussion. *Id.* These filmmakers accomplish those services through a combination of pictures, video, and sound. *Id.*

<sup>14</sup> Motion pictures are “audiovisual works consisting of a series of related images which, when shown in succession, impact an impression of motion, together with accompanying sounds, if any.” 17 USC § 101 (2014).

any filmmaker who reuses copyrighted motion picture media for non-infringing purposes. NMR requests that the Copyright Office look systematically to find ways, either through regulation or proposed legislation, to provide broad exemptions to Section 1201(a)(1) that protect otherwise lawful uses of content such as uses made in fair use.

While one may find some guidance for how to define a documentary filmmaker, the definitions are often confusing. The definitions become especially ambiguous when one considers the “non-fiction” component of defining a documentary filmmaker. Many definitions use the word “non-fiction” to define a documentary filmmaker.<sup>15</sup> However, in current society, determining whether a particular work is fiction or non-fiction can sometimes be difficult. Where is the line between “fiction” and “non-fiction”? A work that reuses media from fictional motion pictures but makes a comment on the real world might be placed in either category.<sup>16</sup> Would the creator of such a work be considered a documentary filmmaker? The difficulty associated with defining “fiction” and “non-fiction” supports adopting a broader exemption that eliminates such ambiguity and confusion. A broader exemption would promote clarity and extend the benefits of the proposed exemption to more people who engage in non-infringing reuse of copyrighted material.

Many filmmakers create fictional and nonfictional films that are highly transformative and thus fall under fair use. Those filmmakers should be able to circumvent TPMs to access needed content regardless of what genre their films fall under. As long as creators participating in either genre reuse content for non-infringing purposes, such as fair use, then the creators should be able to circumvent TPMs. A distinction between whether a work is classified as fiction or nonfiction, even or whether the filmmaker is making a commercial or non-commercial use, should not limit a filmmaker’s access to media.

With the need for an inclusive exemption to Section 1201(a)(1) that doesn’t address, NMR now presents its specific arguments and evidence specifically supporting the proposed exemption for documentary filmmakers. First, the uses by the documentary filmmakers will be non-infringing. NMR supports an exemption that allows documentary filmmakers who seek to make fair use in filmmaking of copyrighted motion pictures to circumvent TPMs that protect DVDs, Blu-ray discs, and digitally transmitted video. Second, filmmakers need access to high quality content, which may be unavailable without circumventing TPMs, in order to communicate their message to their audience. Finally, this exemption is necessary to protect filmmakers who would be exempt under Proposed Class 7 (Audiovisual Works – Derivative Uses – Noncommercial Remix Videos) but for the fact that they receive compensation for their work.

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<sup>15</sup> See definitions, *supra* note 18.

<sup>16</sup> Take, for example, Jonathan Mcintosh, an independent video creator. Mr. Mcintosh created a video titled *Buffy v. Edward* which reused media from two fictional sources: the Twilight franchise (fictional movies) and Buffy the Vampire Slayer (a fictional television show). However, in *Buffy v. Edward*, Mr. Mcintosh utilized that fictional media to comment on how American popular culture portrayed gender roles. Was Mr. Mcintosh’s video fiction or non-fiction? This example illustrates the difficulty in providing an accurate definition of whether a work is fiction or non-fiction. That definition of fiction or non-fiction bears heavily on whether a filmmaker is a “documentary filmmaker.”

**1. The proposed exemption is limited to uses that do not infringe copyright and it is intended to afford documentary filmmakers the opportunity to fully assert a fair use defense in a legal proceeding before such a defense becomes moot due to Section 1201(a)(1)'s imposition of liability for circumventing TPMs.**

The proposed exemption is designed to protect documentary filmmakers who seek to make fair use in filmmaking of copyrighted motion pictures protected by CSS, AACS, and TPMs that protect digitally transmitted motion pictures. The support for this exemption is similar to the support provided for remix video creators in section A, subsection 1. Just like that proposed exemption, this exemption covers those who seek to bypass TPMs in order to reuse copyrighted material for non-infringing purposes, such as fair use. This exemption is designed to protect documentary films that comment on other films, criticize other films, inform the audience about certain topics in films, and comment on and criticize society. These documentary films represent uses that Title 17, Section 107 of the United States Code mandates are protected under fair use.<sup>17</sup> Documentary filmmakers reuse clips from motion pictures that were designed to entertain audiences. However, the documentary uses the original motion picture to convey an entirely new message that informs the public and criticizes or comments on the underlying work. Because documentary filmmakers reuse the original motion picture media to comment on the underlying work, the documentaries add to the original work with a new message, often making the documentaries' uses transformative.

A documentary filmmaker's most effective means of communicating with the public is often accomplished through reuse of copyrighted motion picture clips for fair use purposes. Similar to a journalist's need to quote in written news articles, a documentary filmmaker requires access to actual motion pictures in order to provide evidence for the film's argument and message. A documentary filmmaker who provides evidence for their message with actual video content conveys a much more effective message. Without access to copyrighted video content, the filmmaker's argument loses credibility.

Take, for example, *Valentino's Ghost*, a documentary film created by Michael Singh. According to Mr. Singh, *Valentino's Ghost* "provides evidence of Hollywood filmmakers' bigotry and Islamophobia, amongst other things, by offering film excerpts as proof." The film transformed copyrighted material into evidence used to criticize the underlying work, an obvious example of fair use. Mr. Singh explained that *Valentino's Ghost* "reuses a wide variety of copyrighted media. . . . These excerpts illustrate and clarify the arguments that the documentary's several analysts develop over the course of the film." Mr. Singh's film conveyed a commentary on Hollywood films to educate the public on cultural issues. Without the proposed exemption, his cultural commentary and fair use criticism would have been severely hindered due to Section 1201(a)(1); he would not have been able to access the content he required to make a credible and effective argument.

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<sup>17</sup> 17 USC § 107 (2014). "[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright." *Id.*

Mr. Singh noted that, “[i]f we had to ask studios for permission to use excerpts from their films . . . they would have never have granted it. We would have gotten nowhere.” The filmmaker thus had to circumvent CSS systems on DVDs in order to access the required media. He noted that, “[w]e took to using [various software] because they provided us with the best available copies of the media we were analyzing. Without those programs, the film would not have gotten off the ground.” Mr. Singh could not have created *Valentino’s Ghost* without this exemption because while the film obviously constituted fair use, he would have been barred from accessing vital motion picture clips due to Section 1201(a)(1). Also, Section 1201(a)(1) would trump any fair use defense raised by Mr. Singh because he would be liable for circumvention regardless of the fact that he created the film for a noninfringing purpose. Without the proposed exemption, Section 1201(a)(1) curbs free expression and undermines the goals of fair use by prohibiting video creators from accessing media for otherwise legal purposes.

The proposed exemption is necessary so that documentary filmmakers, such as Mr. Singh, can continue to access motion picture media for fair use in their documentaries. Without this exemption, documentary filmmakers would not be able to access certain motion pictures and thus would not be able to criticize or comment on the motion pictures. That result would prevent documentary filmmakers from communicating with the public, thus harmfully chilling freedom of expression. Strict adherence to Section 1201(a)(1), without the proposed exemption, also defeats any fair use defense raised by a documentary filmmaker. The proposed exemption is necessary to support the goals and purposes of fair use.

## **2. This exemption is necessary so that documentary filmmakers have access to high quality content**

Just like the remix video creators mentioned in section A, documentary filmmakers also require high quality motion picture media to effectively convey their messages to their audiences. High quality content allows documentary filmmakers to communicate with their audiences effectively. Low quality content, however, creates difficulties for documentary filmmakers and deters audiences from viewing documentaries. In contemporary American society, high definition video content is not only preferred by audiences, it is expected.<sup>18</sup> A documentary filmmaker’s ability to communicate their message effectively depends on the quality of the video content that the filmmaker uses. This exemption, if adopted, will avoid limiting documentary filmmakers to inferior quality content and thus inferior communication.

Rick Bowman, whose work is discussed in section A, explained the importance of using high quality media in his films. Mr. Bowman stated that quality is, “[v]ery important . . . in today’s market

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<sup>18</sup> See Robert Andrews, Growing Demand for Video Quality Tests Networks: Akami’s Michel, Beet.tv, <http://www.beet.tv/2014/09/ibcakamai.html> (Sept. 15, 2014). Akami product marketing director Kurt Michel stated that “demands of audiences are going to increase, expecting broadcast-levels of quality.” Id. See also Ovum, Consumer Trend Research: Quality, Connection, and Context in TV Viewing, Ovum.com, <http://apps.avid.com/ovum-report2/assets/Ovum-Consumer-Research-Report.pdf> (July 2013). “In a rapidly evolving market where significant time and effort goes into developing new ways to approach audiences, the strongest driver of audience engagement is still high-quality content with outstanding image and audio rendering.” Id. at 3.

people are used to Hi-Def and the higher the resolution on the big screen the better it will look. My understanding is that at this past year's American Film Market event in Los Angeles, distributors didn't want to look at any films unless they had been filmed in 4k."<sup>19</sup> As Mr. Bowman's comments explain, many people will not view a video unless the video utilizes high quality content. Without access to high quality content, many artists will never have the chance to communicate their message with the public.

Another NMR client who works as a filmmaker explained the importance of high quality content in films in a similar context. When asked how important it was to access high quality content, the filmmaker responded, "[v]ery, but sometimes I'm forced to make concessions on quality as a trade-off for access." This filmmaker's statements illustrate a problem that many documentary filmmakers will face without the proposed exemption. Nowhere is this need more acute than with expanding exemptions to Blu-Ray. Without the exemption, documentary filmmakers will not be able to access certain content and thus will have to forego using that content. Many documentary filmmakers will not be able to communicate their intended message with the public, which limits the filmmakers' ability to express themselves. Thus, the proposed exemption is necessary to allow communication between documentary filmmakers and the public.

Michael Singh, a documentary filmmaker whose work was discussed earlier, also noted the importance of high quality content. Mr. Singh reused a wide variety of copyrighted material from motion pictures while working on *Valentino's Ghost*. On the importance of the reused content's quality, Mr. Singh stated that "[t]he higher the quality of the reused media, the more credible our analysts seem to be. And credibility is everything." Mr. Singh also acknowledged the adverse effects related to poor quality content when he noted that, "[p]oor quality media excerpts not only provide less detail and less information, they can also undermine the audience's confidence in the documentary, and even pull them out of the film." As Mr. Singh's comments show, access to high quality content is critical to a film's success. High quality content makes the film more credible and ensures that audiences will actually watch the film.

To illustrate the direct impact of lower quality content, Mr. Singh notes that he could not obtain high quality content for all portions of his project and the work suffered because of lower quality content. Mr. Singh stated that, "[i]n some instances, we were unable to procure the needed quality, those sections are glaringly conspicuous." Mr. Singh's comments display the importance of high quality content to filmmakers. Filmmakers require high quality content to bolster the film's credibility and keep audience's focused on the film's message. Mr. Singh's comments prove that filmmakers suffer adverse effects when they have to use lower quality content in their films. Lower quality content damages the film's credibility and causes audiences to lose interest in the film. Thus, without access to high quality content, films become less effective means of spreading the creator's message. Strict adherence to Section 1201(a)(1), without this exemption, will prevent many documentary

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<sup>19</sup> 4k refers to a common name for ultra-high-definition television. Content that has horizontal resolution on the order of 4,000 pixels is 4k.



filmmakers from accessing high quality content and thus those filmmakers will not be able to communicate their otherwise lawful message effectively with their audiences.

Artists such as Mr. Bowman, Mr. Singh, and many more, will be adversely impacted by the TPMs that protect DVDs, Blu-ray discs, and online distribution services without the proposed exemption. Without the proposed exemption, documentary filmmakers will be forced to use low quality content because federal law will prohibit circumventing TPMs that guard high quality content on DVDs, Blu-ray discs, and online distribution services. Lower quality content will prevent the filmmakers from conveying an effective message to their audience because the poor quality will detract from the documentaries' credibility or audiences may simply not watch the documentaries due to poor quality. Without the proposed exemption, documentary filmmakers also may have to choose between bypassing TPMs to obtain high quality content (which will violate federal law) and using low quality content. Documentary filmmakers should not be forced to make such a choice. Instead, the proposed exemption should allow documentary filmmakers to bypass TPMs for fair use purposes which will allow the filmmakers to access high quality motion picture content.

### **3. This exemption is needed to protect documentary filmmakers who receive compensation for their work**

This proposed exemption is very similar to the proposed exemption for remix video creators in Section A. The exemption covers people who need to bypass TPMs in order to reuse copyrighted material for non-infringing purposes, such as fair use. One of the only differences between this exemption and the proposed Class 7 exemption involves compensation. This exemption is important because it will protect individuals reusing content who wouldn't qualify under Class 7 (Audiovisual Works – Derivative Uses – Noncommercial Remix Videos) simply because of the fact that they receive some form of compensation for making films. Filmmakers who receive compensation for their work still have important messages to communicate with the public and should be able to circumvent TPMs to communicate those messages. The fact that these people receive compensation should not prohibit them from being exempt from Section 1201(a)(1). Indeed, these filmmakers still engage in fair use and not exempting them would make otherwise legal uses illegal, severely limiting speech.

If documentary filmmakers are not allowed to bypass TPMs simply because they receive compensation for their work, then the filmmakers' freedom of expression will be limited and the public will lack access to important sources of criticism and commentary. Many filmmakers lack the means to create films for free; they often produce films as a passion, as well as to make a living. Many films have limited but important audiences, and being able to recoup some if not all the costs associated with making films is critical. Without adopting the proposed exemption, some films will simply not be made, and those that are still produced will have to do so in a less effective manner. The filmmakers will lack access to content protected by CSS, AACS, and other TPMs protecting digital media sources. Thus, the films will not be able to comment on or criticize certain motion picture media and the filmmakers' films will lose credibility and effectiveness. We recommend approval of Class 7 because the fact that a filmmaker simply receives some compensation for creating films should not limit their ability to access and legally reuse content through circumvention.

### **C. Proposed Class 16: Renewing the jailbreaking exemption for wireless telephone handsets**

Proposed Class 16 would permit “the jailbreaking of wireless telephone handsets to allow the devices to run lawfully acquired software that is otherwise prevented from running, or to remove unwanted preinstalled software from the device.”

The exemption in Proposed Class 16 should be renewed for wireless telephone handsets so that consumers may jailbreak their smartphone devices. The ability to jailbreak is essential for competition and innovation. According to a Pew Internet Project study, in 2014 58% of American adults owned a smartphone.<sup>20</sup> That percentage represents a 23% increase from 35% in 2011.<sup>21</sup> Another study, conducted by The Nielsen Company, concluded that 71% of all Americans own smartphones in 2014.<sup>22</sup> That percentage represents a 28% increase from 43% in 2011.<sup>23</sup> These two studies show that more and more Americans are using smartphones every year. Smartphone manufacturers have attempted to limit the use of these devices by blocking otherwise legal, independently created software applications, known as apps, which have not been approved by the device manufacturer, the operating system maker, or the wireless carrier. Consumers have been able to work around these restrictions by jailbreaking, or rooting, their devices.

Jailbreaking has allowed consumers to engage in otherwise legal activity that is blocked by the device manufacturer, operating system maker, or wireless carrier. Jailbreaking has given consumers an alternative marketplace to purchase apps, allowed consumers to gain a better understanding of how their devices work, and encouraged growth and development in the smartphone market. The increased competition and innovation that results from jailbreaking has helped combat censorship and given consumers the ability to exercise self-help. The exemption proposed in Class 16 is a narrow exemption that would not have an effect on copyright owners’ ability to pursue copyright infringement. NMR urges the Copyright Office to renew the jailbreaking exemption for wireless telephone handsets.

#### **1. Jailbreaking provides consumer protection since it fosters increased competition that leads to more choice, less censorship, and pressure for official app stores to improve their systems.**

Jailbreaking on both iOS and Android, Apple and Google’s mobile operating systems respectively, has led to increased competition. There was no Apple App Store in 2007, the year when iOS and the

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<sup>20</sup> *Mobile Technology Fact Sheet*, PEW RESEARCH CENTER, <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/> (Jan. 2014).

<sup>21</sup> Aaron Smith, *Smartphone Adoption and Usage*, PEW RESEARCH CENTER, <http://www.pewinternet.org/2011/07/11/smartphone-adoption-and-usage/> (July 2011).

<sup>22</sup> *Mobile Millennials: Over 85% of Generation Y Owns Smartphones*, NIELSEN, <http://www.nielsen.com/us/en/insights/news/2014/mobile-millennials-over-85-percent-of-generation-y-owns-smartphones.html> (Sept. 2014).

<sup>23</sup> *Generation App 62% of Mobile Users 25-34 Own Smartphones*, NIELSEN, <http://www.nielsen.com/us/en/insights/news/2011/generation-app-62-of-mobile-users-25-34-own-smartphones.html> (Nov. 2011).

iPhone first came out. Consumers could only download additional apps onto their phones by jailbreaking. Jailbreaking methods were being distributed online by August 2007, only two months after the iPhone was released.<sup>24</sup> Consumers did not have access to the Apple App Store until it was launched in July 2008, a year after Apple released the iPhone.<sup>25</sup>

Today, jailbreaking on iOS allows for an app store such as Cydia to exist. Cydia is only available on jailbroken iOS devices.<sup>26</sup> This alternative app store hosts a wide range of apps that are not available in the official Apple App Store for a variety of reasons, including Apple's strict approval process. The Apple approval process has been criticized by numerous developers as being unpredictable, unclear, and subjective.<sup>27</sup> The competition provided by Cydia allows consumers to access many otherwise legal applications that were rejected by Apple and encourages Apple to continuously improve its own App Store to compete with Cydia. On a more basic level, Cydia represents users' right to install otherwise legal software of their choice on the devices they buy.

Take, for example, the app Frash, available only on Cydia, which provides iOS users with the ability to view Adobe Flash content. Apple made a business decision to block flash from their iOS devices. That decision was motivated by Apple's desire to adopt the HTML 5 standard and control the user experience on iOS. That decision frustrated a portion of the iOS user base because it prevented iOS users from accessing certain material online; Flash based online games and flash videos were unavailable on iOS devices.<sup>28</sup> The jailbreaking community allowed consumers to make their own decisions about using Flash on their devices, and gave consumers the ability to access otherwise legal content that was delivered via Flash technology.

Jailbreaking Android phones, commonly referred to as rooting, also allows for increased competition and user choice. The process of rooting an Android phone allows a user to install applications that are not available in the Android Market, a process referred to as sideloading.<sup>29</sup> This process allows consumers to access applications that are not in the mainstream market place because Google has not approved such apps. Consumers can also access apps that are not available in the Android Market because the cell phone service provider decided to block them. For instance, Verizon blocked the app Google Wallet on the Samsung Galaxy Nexus.<sup>30</sup> Google Wallet is an application that allows users to use their phone to pay at certain locations. Some believed that Verizon blocked this application because of the company's plans for designing a similar payment system in the future.<sup>31</sup>

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<sup>24</sup> Timeline, THE IPHONE WIKI, <http://theiphonewiki.com/wiki/index.php?title=Timeline> (Jan. 2012).

<sup>25</sup> Josh Smith, *iOS and iPhone Timeline: From iPhone to iOS 5 in 5 years*, GOTTA BE MOBILE, <http://www.gottabemobile.com/2011/06/03/ios-and-iphone-timeline-from-iphone-to-ios-5-in-5-years/> (July 2011).

<sup>26</sup> Jay Freeman, *Welcome to Cydia*, CYDIA, <https://cydia.saurik.com/> (last accessed Jan. 28, 2015).

<sup>27</sup> Jim Dalrymple, *iPhone app developer quits over approval process*, CNET, [http://news.cnet.com/8301-13579\\_3-10398624-37.html](http://news.cnet.com/8301-13579_3-10398624-37.html) (Nov. 2009).

<sup>28</sup> Andy, *No Flash Support in iPhone OS: What is the Reason Behind it? Will it matter in the Future?*, IPHONE HACKS, <http://www.iphon hacks.com/2010/01/no-flash-support-in-iphone-os.html> (Jan. 2010).

<sup>29</sup> Blake Stimac, *How to sideload an app onto your Android phone or tablet*, GREENBOT, <http://www.greenbot.com/article/2452614/how-to-sideload-an-app-onto-your-android-phone-or-tablet.html> (July 2014).

<sup>30</sup> *Verizon Wireless nixes Google Waller in new phone*, ASSOCIATED PRESS, <http://www.crainsnewyork.com/article/20111206/TECHNOLOGY/111209935#> (Dec. 2011).

<sup>31</sup> *Id.*

Indeed, Verizon has since developed Softcard (formally called ISIS), its own app that allows smartphone users to pay for purchases at certain locations.<sup>32</sup> Verizon stated that it blocked Google Wallet because that app used a secure element.<sup>33</sup> However, Softcard also utilizes a secure element.<sup>34</sup> Since the secure element used by Softcard is very similar to the secure element technology used by Google Wallet, it is difficult for Verizon to argue that its behavior towards Google Wallet was due to potential harm to Verizon's network or customers, rather than simply a move to use its gatekeeper role to get an advantage over competitors in that space.<sup>35</sup>

Alternative marketplaces also provide a safety valve to censorship by Operating System (OS) makers, wireless carriers, and device manufacturers who use their gatekeeping power to control what apps and services consumers can access. In the past, Apple has denied apps such as iSinglePayer that advocated for a single payer health care system because the app carried a strong political message.<sup>36</sup> In the case of the iSinglePayer, Apple later reversed the decision after the story started circulating on the internet, but not every developer receives the same attention. Apple has denied several politically themed apps in the past, such as Obama Trampoline and MyShoe (an app where the user could throw a shoe at President Bush).<sup>37</sup> Apple rejected another politically themed app, FreedomTime, which provided a clock that counted down to the end of President Bush's term, because the content violated the Community Standards.<sup>38</sup> The Community Standard Apple cited stated, "Applications must not contain any obscene, pornographic, offensive or defamatory content or materials of any kind (text, graphics, images, photographs, etc.), or other content or materials that in Apple's reasonable judgment may be found objectionable by iPhone or iPod touch users."<sup>39</sup> Developers are forced to guess what will be seen as objectionable to "Apple's reasonable judgment." Apple rejects apps after the developers have already invested time and money into the app. That process deters developers from being creative, app developers will "play it safe" because rejected apps equate to lost time and profit.

Also, Apple's method of screening apps to determine what content is appropriate has been inconsistent. For example, Gizmodo reported on Feb. 3, 2012 that a scientific article on the penis had been rejected, while an article titled "50 kinky sex moves" had been cleared.<sup>40</sup> Magazines released through iBooks contained both articles and both articles were marketed for ages 12+. Apple stated that

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<sup>32</sup> Verizon, <http://www.verizonwireless.com/wcms/consumer/products/softcard.html> (last accessed Feb. 4, 2015).

<sup>33</sup> Jay Klimek, *Verizon refuses to change its stance on Google Wallet*, PHANDROID, <http://phandroid.com/2013/04/30/verizon-blocking-google-wallet/> (Apr. 2013). A secure element is a tamper-resistant platform that can securely host applications and their confidential and cryptographic data. *GlobalPlatform made simple guide: Secure Element*, GLOBALPLATFORM, <http://www.globalplatform.org/mediaguideSE.asp> (Last accessed Feb. 4, 2015).

<sup>34</sup> Klimek, *supra* note 31.

<sup>35</sup> *Id.*

<sup>36</sup> *iSinglePayer iPhone App censored by Apple*, LAMBDAJIVE, <http://lambdajive.wordpress.com/2009/09/26/isinglepayer-iphone-app-censored-by-apple/> (Sept. 2009).

<sup>37</sup> JR Raphael, *10 iPhone Apps That Didn't Make Apple's App Store*, PCWORLD, [http://www.peworld.com/article/159887/rejected\\_10\\_iphone\\_apps\\_that\\_didnt\\_make\\_apples\\_app\\_store.html](http://www.peworld.com/article/159887/rejected_10_iphone_apps_that_didnt_make_apples_app_store.html) (Feb. 2009).

<sup>38</sup> *Freedom Time rejected by Apple for App Store*, JUGGLEWARE DEVELOPERS' BLOG, <http://www.juggleware.com/blog/2008/09/freedomtime-rejected-by-apple-for-app-store/> (Sept. 2008).

<sup>39</sup> *Id.*

<sup>40</sup> Jesus Diaz, *Apple Censors: Kinky Sex and G-Spots Fine for 12 Year Olds, But Penis Bad*, GIZMODO, <http://gizmodo.com/5882034/apple-censors-science-magazines-article-about-penises> (Feb. 2012).

it rejected the scientific article because that material did not correspond to the age group listed, 12+. Following this logic, Apple apparently believes that a scientific article on male anatomy requires a higher age restriction than an article about kinky sex positions. The inconsistency in App Store approval leads to exclusion of otherwise legal apps, and confusion among developers as to what content Apple will find appropriate.<sup>41</sup>

The alternative marketplaces enabled by jailbreaking give consumers an option to access otherwise legal services and applications that the OS makers and wireless carriers choose to block for business and political reasons. These alternative marketplaces are only available through jailbreaking and provide a safety valve to anti-competitive and speech restrictive actions by gatekeepers including OS makers, wireless carriers, and device manufacturers.

## **2. Jailbreaking leads to increased innovation that provides consumers with new technology and methods of self-help.**

The ability for consumers to jailbreak has led to greater innovation, leading to greater consumer control over the wireless devices they use. OS Makers and device manufacturers exercise control over the apps and services we can access on our device in two ways: control of the application stores (like the Apple App Store and the Android Market) and device development.

Jailbreaking allows for faster innovation that provides new technologies and methods of self-help to consumers because these applications do not require the same delay in approval. Specifically, the ability to install non-Apple approved apps has allowed people to address their concerns regarding the software and functioning of their smartphones. For example, when Apple first released the iPhone in 2007, users had no way to disable SMS preview, which automatically displayed a preview of the actual content of a text message on the screen when it was received. An application to fix this problem arrived almost instantly in the jailbreaking community, but that feature was not included in iOS until the firmware update in 2009.<sup>42</sup> Apple's delay in addressing this privacy concern frustrated many iPhone users. Apple had made a design decision to allow the text message to preview. Without this exemption, users would have been forced to sit back and wait for Apple to correct the problem. Jailbreaking allows for users to take a proactive approach to solving these problems. Jailbreaking also pressures Apple to address concerns with its devices based on user experience and competition. The official Apple App Store is not sufficient to apply this pressure because Apple controls the app approval process.

The Apple App Store's policies often deny apps that change the user experience. The App Store bars many apps available through Cydia because of App Store policies intended to maintain a specific user experience. The app DisplayOut allows mirroring of applications over HDMI for those apps that

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<sup>41</sup> *Id.*

<sup>42</sup> Sebastian, *Hide SMS Preview in iPhone OS 3.0*, IDOWNLOADBLOG, <http://www.idownloadblog.com/2009/06/25/hide-sms-preview/> (Jun 2009).

fail to support mirroring natively.<sup>43</sup> Apple barred DisplayOut from the App Store because the app needed to run actively in the background. Apple originally did not allow any multitasking or background apps.<sup>44</sup> Apple has loosened this policy and now allows some multitasking, but still has restrictions on background activity.<sup>45</sup> Jailbreaking allows consumers to decide if they want to allow apps to run in the background, rather than being forced to accept Apple's decision.

There are also numerous apps available on Cydia that allow users to customize the home screen, such as Winterboard and Dreamboard. One of the most popular apps on Cydia is SBSettings.<sup>46</sup> SBSettings adds a pop up window of the most popular settings, like brightness and Bluetooth, allowing users to change these settings without going through the full list of settings. Apps like this are barred from the App Store because they change the user experience. These apps give consumers greater control over their devices and encourage technological advancement.

Many apps available on Cydia in 2015 also allow users to customize their devices and provide an easier, more enjoyable user experience. For example, the iOS newsstand app cannot be deleted or be placed out of sight in a folder.<sup>47</sup> However, the app NoNewsIsGoodNews allows users to hide that app, avoiding frustration from always looking at an unused app.<sup>48</sup> Cydia also allows users to download iFile, an iOS file manager.<sup>49</sup> iFile allows a user to view the files on the smartphone and organize them, similar to folders on personal computers.<sup>50</sup> When a user taps a key on their smartphone, the app Octopus Keyboard will bring up predictions for what word the user is typing.<sup>51</sup> If the user sees the word that he is looking for, then he can swipe that word to select it.<sup>52</sup>

Jailbreaking also allows consumers to learn how their devices work. Smartphones are no longer mysterious black boxes to most Americans. Consumers want to know how their devices work and what information their devices are recording. In 2011, many consumers discovered a program called Carrier IQ, a spyware program that recorded location, key presses, web history and other information, on their smart phones, both Android and iOS.<sup>53</sup> Manufacturers included this program on both Android and iPhone devices.<sup>54</sup> The only way to remove Carrier IQ was to jailbreak, or root, the phone.

Jailbreaking also allows consumers to download apps that provide for better monitoring of performance statistics, real signal levels (dB on the cell antenna), and battery conditions of their

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<sup>43</sup> Mirroring refers to an iOS device's display being duplicated onto another monitor.

<sup>44</sup> *Apple to allow third party iPhone Apps to run in the Background?*, IPHONE HACKS, <http://www.iphonhacks.com/2009/05/apple-to-allow-third-party-iphone-apps-to-run-in-the-background.html> (May 2009).

<sup>45</sup> Apple, <http://support.apple.com/en-us/HT202070> (Last accessed Feb. 4, 2015)

<sup>46</sup> Will Shanklin, *The best jailbreak apps in Cydia*, GIZMAG, <http://www.gizmag.com/best-cydia-apps/26065/> (Feb. 2013).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Elinor Mills, *Android researcher: Carrier IQ 'diagnostic' tool really a rootkit spy*, CNET, [http://news.cnet.com/8301-27080\\_3-57326974-245/android-researcher-carrier-iq-diagnostic-tool-really-a-rootkit-spy/?](http://news.cnet.com/8301-27080_3-57326974-245/android-researcher-carrier-iq-diagnostic-tool-really-a-rootkit-spy/?) (Nov. 2011).

<sup>54</sup> *Id.*

device. For examples, the app Battery Logger Plus, available for jailbroken iPhones, provides consumers with additional information of their battery usage.<sup>55</sup>

In addition to new features and performance monitoring, jailbreaking gives users the ability to ensure the security of their wireless devices and gain more understanding and control over how their phones function. Smartphones are often tied to two year contracts. Unfortunately, these two year contracts do not provide two years of operating system updates. For example, for Android devices, the cell phone service provider has the responsibility of providing operating system software updates. Often, the service provider will not continue to update Android for all the phone models, even if the phone manufacturers provide updates. The less popular phone models are abandoned, leaving consumers vulnerable to security flaws.<sup>56</sup> Jordan Kahn created a chart which illustrates that a vast number of Android-based phones under contract had operating systems that were four or more versions behind the current version.<sup>57</sup> Jailbreaking and rooting a phone allows the consumer to continue to improve their phone and ensure security throughout the device's lifetime.

Jailbreaking also provides users with alternative security options for securing and accessing their smartphone. For example, the app Stride replaces the iPhone's "slide to unlock," "Touch ID," or "Enter Passcode" requirements for access with custom unlock gestures.<sup>58</sup> Stride allows the user to create a pattern by sliding their thumb across the screen. That pattern then becomes the new way to access the smartphone – the user will be able to slide their thumb across the screen, in a pattern that only the user knows, to access the device.

Jailbreaking allows consumers to truly own their devices. Without jailbreaking, consumers would be subject to a monopoly that would lead to censorship and stagnation of technology. Wireless telephone handsets are quickly becoming a tool just as powerful and useful as personal computers, with additional benefits due to their mobility. Consumers using these devices should receive the same freedom of software choice that users have enjoyed for years with PCs. Allowing people to jailbreak wireless telephone handsets increases innovation and competition and benefits the American consumer.

#### **D. Proposed Class 17: Extending the Jailbreaking Exemption to All-Purpose Mobile Computing Devices, Specifically Tablets**

Proposed Class 17 would permit "the jailbreaking of all-purpose mobile computing devices to allow the devices to run lawfully acquired software that is otherwise prevented from running, or to

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<sup>55</sup> Golam Mostafa, *Track Battery Usage Levels of Your iPhone With BatteryLogger Plus*, THE TECH JOURNAL, <http://thetechjournal.com/electronics/iphone/track-battery-usage-levels-of-your-iphone-with-batterylogger-plus.xhtml> (Feb. 2011).

<sup>56</sup> Robin Wauters, *Charted: Android Fragmentation*, TECH CRUNCH, [http://techcrunch.com/2011/10/27/charted-android-fragmentation/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+Techcrunch+%28TechCrunch%29](http://techcrunch.com/2011/10/27/charted-android-fragmentation/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+Techcrunch+%28TechCrunch%29) (Oct. 2011).

<sup>57</sup> Jordan Kahn, *Updated report graphs Apple's dedication to supporting older iPhones vs. Android*, 9TO5MAC APPLE INTELLIGENCE, <http://9to5mac.com/2013/12/03/updated-report-graphs-apples-dedication-to-supporting-older-iphones-vs-android/> (Dec. 2013).

<sup>58</sup> Will Shanklin, *The best jailbreak apps in Cydia*, GIZMAG, <http://www.gizmag.com/best-cydia-apps/26065/> (Feb. 2013).



remove unwanted preinstalled software from the device. The category “all-purpose mobile computing device” includes all-purpose non-phone devices (such as Apple iPod touch) and all-purpose tablets (such as the Apple iPad or the Google Nexus).”

The Copyright Office has already recognized the need that many consumers have to jailbreak their wireless telephone handsets.<sup>59</sup> Wireless telephone handsets and all-purpose mobile computing devices, especially tablets, exhibit more and more similarities as time progresses and technology improves. Many all-purpose mobile computing devices are capable of carrying out the exact same functions as wireless telephone handsets. Many consumers are able to access the same data and use the same applications on both wireless telephone handsets and all-purpose mobile computing devices. Thus, the need to jailbreak wireless telephone handsets also exists for all-purpose mobile computing devices. Therefore, NMR supports an extension of the jailbreaking exemption to all-purpose mobile computing devices.

**1. All-purpose mobile computing devices and wireless telephone handsets are functionally almost the same, and consumers deserve and demand the ability to jailbreak both.**

Recent technological advances have made wireless telephone handsets and all-purpose mobile computing devices remarkably similar. Aesthetically, manufacturers are building bigger wireless telephone handsets that look a lot like tablets. For example, the iPhone 6 Plus offers a 5.5 inch display, while similarly capable devices like the newest iPod Touch and the iPad mini 3 offer 4-inch and 7.9 inch display respectively.<sup>60</sup> The similarities continue with devices like the, the Amazon Fire phone (4.7 inch screen<sup>61</sup>) and the Amazon Fire HD 6 tablet (6 inch screen<sup>62</sup>) the Amazon Fire HD 6 tablet offers a 6 inch screen. Lou Hattersley, a writer for Macworld, noted that “as iPads get smaller and iPhones get bigger, we’re reaching a point where potential buyers of the two ranges could start to overlap.”<sup>63</sup> Overall, smartphones are growing larger and tablet type devices are growing smaller, making the two types of devices look very similar. Indeed, many smartphones are so big that they do not fit in average pants pockets<sup>64</sup>, and some clothing designers have increased pants pocket sizes in order to accommodate the larger smartphones.<sup>65</sup>

Tablets and smartphones do not only look similar to one another, the two types of devices act similar to one another as well. Functionally, these two types of devices carry out many of the same tasks, such as moving data over the 4G wireless tech LTE.<sup>66</sup> LTE allows a user to use a tablet for

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<sup>59</sup> Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 208, 55687 (Oct. 26, 2012) (to be codified at 37 C.F.R. pt. 201).

<sup>60</sup> Lou Hattersley, *iPhone6/iPhone 6 Plus vs iPad mini 3 comparison: When to buy a big iPhone, and when to buy a small iPad*, MACWORLD, <http://www.macworld.co.uk/review/iphone/iphone-6-plus-vs-ipad-mini-3-review-3586185/> (Nov. 2014).

<sup>61</sup> *Fire Phone Specifications*, AMAZON, <https://developer.amazon.com/appsandservices/solutions/devices/fire-phone/docs/fire-phone-specifications> (last accessed Feb. 5 2015).

<sup>62</sup> *Amazon Fire HD 6*, PCMAG, <http://www.pcmag.com/article2/0%2c2817%2c2469747%2c00.asp?tab=Specs> (last accessed Feb. 5 2015).

<sup>63</sup> *Id.*

<sup>64</sup> Jeremy A. Kaplan, *Smartphones have outgrown the average pants pocket, designer says*, FOX NEWS, <http://www.foxnews.com/tech/2013/04/25/smartphones-have-outgrown-average-pants-pocket/> (April 2013).

<sup>65</sup> *Id.*

<sup>66</sup> Mat Honan, *Never Buy a Phone Again*, WIRED, <http://www.wired.com/2015/01/phones-are-tablets/> (Jan. 2015).



many functions that are traditionally associated with wireless telephone handsets.<sup>67</sup> Consumers can now use a tablet to send and receive calls with Skype, send text messages with services such as WhatsApp, and make calls from a user's existing mobile number via Google Voice.<sup>68</sup> One app, Line2, gives a consumer an additional phone number which allows the user to make and receive phone calls, text messages, and voice mail.<sup>69</sup> Also, T-Mobile now allows users to make calls over WiFi.<sup>70</sup> These similarities in aesthetics and functionality have led one commentator to observe that “[t]ablets and phones have essentially converged in form and function.”<sup>71</sup>

Due to the remarkable similarities between wireless telephone handsets and all-purpose mobile computing devices, the Copyright Office should extend the jailbreaking exemption to cover all-purpose mobile computing devices. Consumers who own all-purpose mobile computing devices wish to access apps that may not be approved for the Apple App Store, Google Play, or other markets, learn more about their devices, monitor their device's performance, and so on. Today, wireless telephone handsets and all-purpose mobile computing devices are so similar, that a consumer could really use either device for the exact same functions. Therefore, the jailbreaking exemption should be extended to cover all-purpose mobile computing devices.

### III. Conclusion

For the forgoing reasons, we encourage the librarian of the Copyright Office to enact the proposed exemptions in Classes 6, 7, 16, and 17 to Section 1201(a)(1). In addition, we encourage the Copyright Office in the future to seek regulatory and legislative fixes that will exempt all circumvention for purposes of fair use.

Respectfully Submitted,



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<sup>67</sup> See Daniel P. Dern, *Making Phone Calls Using Tablets And Other Mobile Devices And Apps*, CORPORATE TECH DECISIONS, [http://www.corporatetechdecisions.com/article/making\\_phone\\_calls\\_using\\_tablets\\_and\\_other\\_mobile\\_devices\\_and\\_apps](http://www.corporatetechdecisions.com/article/making_phone_calls_using_tablets_and_other_mobile_devices_and_apps) (April 2014), and Honan, *supra* note 70.

<sup>68</sup> Honan, *supra* note 70.

<sup>69</sup> Dern, *supra* note 71.

<sup>70</sup> T-Mobile, [http://www.t-mobile.com/offer/wifi-calling-wifi-extenders.html?cmpid=ADV\\_PB\\_GsISrzG2&002=2202007&004=14686016777&005=253980587233&006=47154397937&007=Search&008=&025=c&026=&gclid=CjwKEAiAo8emBRCX\\_OqU4qek6y8SJACzgf8fubhvb\\_lpw1jiN5CTUGjr\\_SnkJFVcMHv\\_aOH4fGtS1SBoC5s7w\\_wcB](http://www.t-mobile.com/offer/wifi-calling-wifi-extenders.html?cmpid=ADV_PB_GsISrzG2&002=2202007&004=14686016777&005=253980587233&006=47154397937&007=Search&008=&025=c&026=&gclid=CjwKEAiAo8emBRCX_OqU4qek6y8SJACzgf8fubhvb_lpw1jiN5CTUGjr_SnkJFVcMHv_aOH4fGtS1SBoC5s7w_wcB) (last accessed Feb. 4, 2015).

<sup>71</sup> *Id.*