Before the
Federal Trade Commission
Washington, DC 20580

In the matter of Competition and Consumer Protection in the 21st Century Hearings	Project Number P181201

COMMENTS OF PUBLIC KNOWLEDGE

8. The role of intellectual property and competition policy in promoting innovation. [1]

Consumer protection, fairness, and competition policy in today's digital economy require substantially stronger enforcement of antitrust law, more aggressive use of existing regulatory powers and new laws to fill in important policy gaps. Public Knowledge commends the FTC for launching this proceeding and a series of public hearings to examine competition and consumer protection in the 21st century, and today offers some initial observations and ideas to consider on the topics the Commission has identified as central to its inquiry. We will augment these ideas through our participation in Commission workshops and through follow up filings as the Commission refines the focus of its efforts.

The recent explosion in internet distribution of goods and services, growing dependence of democratic processes on nondiscriminatory and open digital communications platforms, and ongoing market dominance of entrenched media and communications companies makes it imperative for the FTC to become more vigilant and assertive to protect incipient and potential competition, to apply all qualitatively relevant elements to its consumer welfare analysis, and to update its consumer protection enforcement to reflect the complexities of the digital marketplace. As an expert agency with a specific mandate from Congress, it is also important for the FTC to inform lawmakers and the public of market imperfections and problems it lacks the tools and resources to address

[1] Public Knowledge staff John Bergmayer, Allie Bohm, Ryan Clough, Harold Feld, Meredith Rose, Kory Gaines, Dylan Gilbert, and Gus Rossi contributed to the comments filed in this proceeding.

and to propose policy adjustments that would more effectively address inequities in the oversight of today's economy.

Today, we are highlighting a number of the complexities and issues regarding application of FTC authority to the digital economy and the exploding internet economy in response to the Commission's request for comment. Rather than delineate precisely what deserves treatment under antitrust, consumer protection or some new legal authority, we instead highlight many of the problems that deserve careful attention, definition, further analysis and refinement before precise policy action should be considered. We offer this as a first step because we believe:

- the explosion of the digital market calls first for understanding precisely what is going wrong and therefore deserves fixing;
- identifying what are the best policy tools available to fix the problems;
- evaluating how best to apply existing policy tools; and
- proposing new policy tools to address problems that fall between the gaps under existing law.

This document contains our comments relating to the role of intellectual property and competition policy in promoting innovation.

We look forward to working with the FTC and all other stakeholders to flesh out the details of the concerns raised in our comments and propose meaningful policy adjustments and enforcement practices to help the Commission fully protect competition and consumers in the digital marketplace.

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The current dysfunction within the domestic music licensing marketplace illustrates the chilling effect that copyright policy can have on competitive innovation. The music delivery ecosystem suffers from excessive concentration, with powerful intermediaries entrenched on both the content and delivery sides. This has created a negative feedback loop in which a consolidated market artificially inflates royalty rates, thus raising barriers to entry for potential innovative new services and further distorting the market. Even new, "disruptive" services (such as Swedish streaming company Spotify) must pay significant marginal costs due to licensing fees and struggle to remain profitable. To the extent that the

U.S. market has seen recent new entry, it has been from established, well-capitalized conglomerates — e.g., Apple, Google (YouTube) — that can leverage music delivery services as a loss-leader for other, more profitable services and products.

In addition to these concerns, legislation is moving through Congress that proposes to eliminate the "801(b)" public interest rate setting standard. If passed, this law will threaten the viability of certain legacy music delivery services and, therefore, further limit consumer choice. Public Knowledge asks the Commission to examine these issues to determine how best to realign competition policy and to promote future innovation in the music delivery ecosystem.

Embedded software and its attendant copyright protections are drastically reshaping the legal landscape for innovation and ownership.

Just as software-enabled devices have changed how we go about our daily routines, so too have they changed the assumptions underlying basic legal tenets of ownership. The proliferation of "smart" objects—including cars, televisions, watches, rice cookers, and children's toys—has come with new, restrictive limits on how consumers are allowed to interact with their own property. Intellectual property law provides manufacturers with powerful tools with which to exert unprecedented control over downstream commerce.

Licensing and ownership. Software-embedded items generally come with disclaimers in the form of "click-wrap" contracts. Among other things, these contracts disclaim general liability for software malfunctions, and inform customers that the software embedded inside the physical product is subject to a highly restrictive license. This allows producers to exclude third party services and devices, limit interoperability, lock consumers into a "walled garden" of products, and enforce planned obsolescence by preventing owners from repairing their own possessions in the event of a malfunction.

Use of the Digital Millennium Copyright Act to control downstream and third-party commerce. Some of the most powerful tools available to manufacturers are the anti-circumvention provisions of the Digital Millennium Copyright Act, specifically 17 U.S.C. § 1201. This provision prohibits circumvention of a technological protection measure (TPM) "that effectively controls access to a [copyrighted] work." Through TPMs, manufacturers can set the conditions on who can interact with the product, in what capacity, and for what

purpose. Although ostensibly designed to protect against unauthorized duplication of copyrighted work, § 1201 has been interpreted in some courts (and by the U.S. Copyright Office[2]) to be a separate offense. In other words, no infringement of copyright need occur for § 1201 liability to attach. This lack of a "nexus" between the 1201 violation and copyright infringement means that any circumvention—even for the purposes of repair or research—is presumptively illegal unless explicitly exempted through onerous administrative processes adjudicated by the U.S. Copyright Office and Librarian of Congress.

As a result, manufacturers have leveraged TPMs to prevent third party services from interfacing with their product, and to limit consumers to a "walled garden" of pre-approved, licensed peripherals.[3] This practice of using the legal heft of the DMCA to arbitrarily exclude downstream competition occurs in nearly every sector with substantial software-enabled products, from printers and ink,[4] to tractor repair, to avionics software. The United States Copyright Office has acknowledged the tension in this 2015 study on Section 1201.[5]

As noted above, while exemptions to § 1201's flat prohibition on circumvention do exist, they can only be secured through a labor-intensive administrative process initiated

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[2] Register of Copyrights, Section 1201 of Title 17: A report of the Register of Copyrights (1201 Study) at 42-43 (2017) (available at https://www.copyright.gov/policy/1201/section-1201-full-report.pdf) ("In adopting section 1201(a), Congress intended to provide copyright owners with a new and independent right to prohibit the circumvention of TPMs used to prevent unauthorized access to their works.")

[3] *See, e.g.,* Eric Limer, "Here's the Chip Apple Is Using to Stop You from Buying Cheap Cables," Gizmodo (Sep 24, 2012), https://gizmodo.com/5945889/some-third-party-adapters-might-not-work-with-your-new-iphone.

[4] *Lexmark International, Inc. v. Static Control Components, Inc*., 387 F.3d 522 (6th Cir. 2004).

[5] *See* 1201 Study at 42 ("The Copyright Office shares the concern that section 1201(a)'s protections for access controls have the potential to implicate activities far outside the traditional scope of copyright law."). *See also* Register of Copyrights, Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights at 2 (2015) (available at https://www.copyright.gov/1201/2015/registers-recommendation.pdf) ("While it is clear that section 1201 has played a critical role in the development of secure platforms for the digital distribution of copyrighted works, it is also the case that the prohibition on circumvention impacts a wide range of consumer activities that have little to do with the consumption of creative content or the core concerns of copyright."); Register's Perspective on Copyright Review: Hearing Before the H. Comm. on the Judiciary, 114th Cong. 29–30 (2015) (statement of Maria A. Pallante, Register of Copyrights and Dir., U.S. Copyright Office) ("[C]onsumers have voiced discomfort that Section 1201 prevents them from engaging in activities, such as the repair of their automobiles and farm equipment, which previously had no implications under copyright law.")

once every three years by the U.S. Copyright Office, and must be renewed de novo every cycle.[6]

Damagingly long terms of protection. As a general rule, established terms for traditionally creative works are a poor fit for software, due to its rapid obsolescence. These terms provide limited to no financial benefit past the initial few decades and hinder preservation efforts. While we acknowledge that software underlies many highly expressive works (such as video games) that will almost certainly have the kind of multi-decade cultural cachet as traditional media, the law fails to meaningfully distinguish between these, and utilitarian software whose commercial viability ends when its underlying environment obsolesces. It seems an ill fit to lump in utilitarian software such as MS-DOS, which will enjoy protection until 2077, with the collected works of Cormac McCarthy.

Respectfully submitted,
Public Knowledge
August 20, 2018

[6] 17 U.S.C. § 1201(a)(1)(C). *See also* 1201 Study at 128 ("Prior participants in the rulemaking process generally characterized it as burdensome for both users and rightsholders of copyrighted works. For example, the Cyberlaw Clinic estimated that in the most recent rulemaking, its attorneys, students, and interns 'logged approximately 575 hours of work' to obtain an exemption to circumvent medical devices, and AFB estimated that law students spent 527.2 hours supporting its petition for a renewed exemption.").