

**SECTION 1201 OF TITLE 17**

## **The Triennial Rulemaking Process for Section 1201**

Welcome to the United States Copyright Office’s informational video on section 1201 of title 17 of the United States Code.

This video will give you an overview of the triennial rulemaking process for section 1201, including what the requirements for granting an exemption are, the different phases of the process, and the Register’s Recommendation and Final Rule.

Other videos discuss the legal overview of section 1201 and renewal process in depth.

Every three years, the Copyright Office conducts a public rulemaking, so it can advise the Librarian of Congress on any proposed exemptions to the prohibition on circumventing access controls. During this process, petitioners submit necessary evidence and arguments for the Librarian to consider when evaluating whether to grant an exception.

The rulemaking has several phases: the petition phase, the written comment phase, which has multiple rounds, and the roundtable phase. After these phases are completed, the Register consults with NTIA and presents his or her recommendation to the Librarian. The Librarian will review the recommendation before issuing any exemptions. And, starting with the Seventh Triennial Rulemaking, the Copyright Office implemented a new streamlined petition process for renewing existing exemptions.

By the end of the rulemaking proceedings, a petitioner has to make four showings to get an exemption. First, the exemption must relate to at least some works protected by copyright. Second, the uses of the works must be noninfringing. Third, users must currently or in the next three years be adversely affected in their ability to make such noninfringing uses. And fourth, the technological protection measure (or “TPM”) must be the cause of such adverse effects.

Proponents of an exemption must show that the proposed class includes at least some works protected by copyright.

The law under section 1201 refers to a “class of copyrighted works” and provides that the circumvention prohibition only applies to works protected by copyright law. Thus, exemptions should not be proposed for ideas, facts, or only works in the public domain, etc.

Proponents of an exemption should identify the specific noninfringing uses of copyrighted works sought to be facilitated by circumvention and the legal basis the proponent is relying on. This information typically includes describing how the work will be used, and by whom, as well as identifying the section of the Copyright Act that permits the use and any court decisions.

There is no “rule of doubt” favoring an exemption when it is unclear that a particular use is noninfringing. It is not enough that a particular use could be noninfringing. Rather, the Register will assess whether the use is likely to be noninfringing based on current law.

Noninfringing uses include statutory exceptions for fair use, reproductions by libraries and archives, certain adaptation or repair involving computer programs, or reproduction for blind or other people with disabilities. While these are some of the more common reasons that people claim a particular use is noninfringing, this is not an exhaustive list.

Proponents of an exemption should explain how they are adversely affected in their ability to make such noninfringing uses either currently or during the next three years.

This evidence should identify distinct, verifiable, and measurable impacts to the proposed noninfringing use. Examples might include TPMs that prevent an electronic book from being accessed by screen reading software for persons who are blind or those that prevent automobile repair. Adverse effects do not include mere inconveniences.

In addition, the TPM itself must be the cause of the adverse impact, not marketplace trends, or other technological developments. For example, if a computer program does not run as fast with newer operating systems, this would be an adverse effect caused by technological developments, not the TPM.

In assessing adverse effects, the Office must balance the five statutory factors in section 1201.

Under the first statutory factor, the Office considers evidence relating to the availability for use of copyrighted works. This type of evidence will usually relate to the positive and adverse effects of the prohibition on the availability of copyrighted materials and the alternatives to circumvention, which should be real and not merely theoretical.

With the second factor, the Office will consider the availability for use of works for nonprofit archival, preservation, and educational purposes. The third factor instructs the Office to assess the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research. The fourth factor considers the effect of

circumvention of technological measures on the market for or value of copyrighted works, and is trying to determine if there is a real threat of market substitution.

If factors two through four look familiar, it is because these factors borrow from copyright law's infringement exceptions, including fair use and the exceptions for libraries and archives.

The last factor asks for evidence related to such other factors as the Librarian considers appropriate. This could include issues related to any copyright concerns not yet addressed and even some non-copyright concerns.

No single factor is determinative, and in many cases some of these factors do not apply at all.

After the Copyright Office issues a Notice of Proposed Rulemaking, parties will have the opportunity to support or oppose the proposed exemptions during several rounds of public comment. Next the Office will hold public hearings and follow up with post hearing questions or a further notice. Finally the Register will make a recommendation and the Librarian will publish the new and renewed exemptions in the Federal Register.

Note that a separate video discusses the process for streamlined petitions to renew exemptions.

During the petition phase, a party who wants a new exemption should submit a petition that sets forth basic information regarding elements of their proposed exemption. Petitioners do not have to set forth their whole case at this time; that comes during the public comment phase.

A petitioner should, if desired, provide a means for others to contact the submitter, or an authorized representative of the submitter, by email and/or telephone. Any information appearing in the petition will be accessible to the public.

The petition should include a statement describing the proposed exemption, including the type of copyrighted work needed to be accessed, the physical media or device on which the works are stored or the service through which the works are accessed, the purposes for which these works need to be accessed, and the types of users who want access. Some examples of proposed exemptions are displayed here.

During the public comment phase, the Office hears perspectives from proponents, opponents, and other parties who wish to weigh in on the proposed classes of works.

There are three rounds of public comments, which aim to give the different interests a chance to participate and respond to others' views. It is important that in this phase proponents put forward their full case for an exemption.

During the first round of comments, parties present legal and evidentiary submissions from those who support a proposed exemption as well as any parties that neither support nor oppose an exemption but seek only to share pertinent information about a specific proposal. Parties may include documentary evidence and/or multimedia presentations submitted in accordance with Office guidelines. Proponents should present their entire case for the exemption during this round and bear the burden of establishing that the requirements for granting an exemption have been satisfied.

During the second round of comments, parties present legal and evidentiary submissions from those who oppose a proposed exemption. This round may also include documentary evidence and/or multimedia presentations.

The third round is limited to supporters of particular proposals, or parties that neither support nor oppose a proposal, who seek to reply to points made in the earlier rounds of comments. These reply comments shall not raise new issues, but should be limited to addressing arguments and evidence presented by others.

The Copyright Office holds public hearings following the last round of public comments. The hearings are usually held in Washington, D.C. and in California. The hearings are not mandatory and will be webcast for remote viewing. Participation in the hearings is optional.

The Copyright Office tries to identify specific items of inquiry to be addressed during the hearings, and may offer particular participants the opportunity to demonstrate technologies that are unknown or are unclear to the Office.

Following the hearings, the Office may request additional information from participants through the form of post-hearing questions. Responding to a request is voluntary, but any response will be need to be supplied by a specified deadline. Parties are discouraged from submitting additional written evidence at the hearing.

After these phases are completed, the Register consults with NTIA and presents a recommendation to the Librarian of Congress. The Librarian will review the recommendation and issue any exemptions as a final rule in the Federal Register.

The United States Copyright Office is providing general information about section 1201 of the Copyright Act and its rulemaking proceeding.

By law, the Office cannot provide legal advice to the public.