United States Copyright Office
Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

May 4, 2021

Mark Raza
Acting Chief Counsel
U.S. Food and Drug Administration
Mark.Raza@fda.hhs.gov

Re: Section 1201 Rulemaking – Proposed Exemptions Pertaining to Medical Devices

Dear Mr. Raza:

I am writing to inform you of a regulatory proceeding pending before the U.S. Copyright Office that relates to medical devices.

Section 1201 of title 17, United States Code generally prohibits the circumvention of technological protection measures that control access to copyrighted works, including software. Section 1201, however, allows the Librarian of Congress, upon the recommendation of the Register of Copyrights, to exempt certain classes of works from the prohibition, based upon a rulemaking proceeding held every three years. The statute requires the Copyright Office to consult with the National Telecommunications and Information Administration of the Department of Commerce, which represents the Administration in the rulemaking. Because, however, certain participants in the current rulemaking have specifically noted the FDA's regulatory authority in this area, and because the FDA provided views to the Copyright Office in a prior section 1201 rulemaking, we wanted to reach out to you directly to make you aware of the pendency of this proceeding.

Under consideration in the current rulemaking are two proposed exemptions that involve medical devices. The first proposal seeks to expand an existing exemption under which a patient may, under certain circumstances, access compilations of data generated by medical devices that are wholly or partially implanted in the body or by their corresponding personal monitoring systems.[1] This exemption was first adopted in the 2015 rulemaking, during which the Copyright Office advised the FDA of the proposal and the FDA provided its views (see Attachments A and B). The current proposal seeks to remove certain restrictions in the current regulation,

[1] 37 C.F.R. § 201.40(b)(4).

specifically (1) the limitation to wholly or partially implanted devices, (2) the prohibition against circumvention by persons other than the patient, (3) the requirement that access be accomplished solely through passive monitoring of wireless transmissions that are already being produced by the device or system, and (4) the requirement that circumvention not constitute a violation of other applicable laws.

The second proposed exemption would allow access to computer programs and data files that are contained in and control the functioning of medical devices for the purpose of diagnosis, maintenance, or repair of such devices. The parties seeking this exemption have indicated that covered devices would include, but not be limited to, ventilators, CT scanners, ultrasound devices, and x-ray systems.

The Office has received comments in opposition to both proposed exemptions. Opponents have noted the FDA's regulatory authority for ensuring that medical devices are safe and effective and have expressed concern over potential impacts on health and safety. Although any exemptions granted under section 1201 have no effect on the applicability of other laws or regulations, and the Copyright Office ordinarily limits its analysis to copyright-related concerns, we believe it is appropriate to make the FDA aware of this proceeding in light of opponents' specific reference to its regulatory authority and its past participation in the section 1201 rulemaking.

I have included as Attachment C the notice of proposed rulemaking, which describes the proposed exemptions in this proceeding. The two proposals at issue are identified as Class 9 and Class 12. The full record of the rulemaking to date, including public comments related to these proposed exemptions, are available at https://www.copyright.gov/1201/2021/.

Please do not hesitate to contact me if you have any questions. Please submit any responses to me at regans@copyright.gov, and to Nick Bartelt at niba@copyright.gov and Melinda Kern at mkern@copyright.gov.

Sincerely,

Regan A. Smith
General Counsel and Associate Register of Copyrights

cc: Stacy M. Cheney, Senior Attorney Advisor, Office of the General Counsel, National Telecommunications and Information Administration

Attachment A

United States Copyright Office
Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

May 12, 2015

Elizabeth H. Dickinson
Chief Counsel
U.S. Food and Drug Administration
elizabeth.dickinson@fda.hhs.gov

Re: Section 1201 Rulemaking – Proposed Exemption for Medical Devices

Dear Ms. Dickinson:

I am writing to inform you of a regulatory proceeding pending before the U.S. Copyright Office that relates to medical devices.

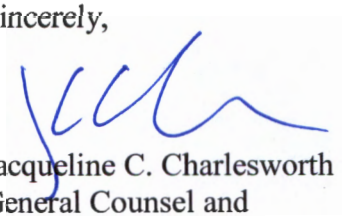
Section 1201 of title 17, United States Code (added as part of the Digital Millennium Copyright Act) generally prohibits the circumvention of technological protection measures ("TPMs") that control access to copyrighted works, including software. Section 1201, however, allows the Librarian of Congress, upon the recommendation of the Register of Copyrights, to exempt certain classes of works from that prohibition, based upon a rulemaking proceeding held every three years. The statute requires the Copyright Office, in formulating its recommendation to the Librarian, to consult with the National Telecommunications & Information Administration of the Department of Commerce, which represents the Administration in the rulemaking. Because the Copyright Office oversees the rulemaking process, however, we thought it might be helpful to reach out to you directly.

The Office is currently engaged in the sixth triennial rulemaking proceeding under section 1201. One of the proposed exemptions that is under consideration addresses access to software in "networked medical devices." This proposal, filed by a coalition of medical device patients and researchers, would allow circumvention of TPMs in the firmware or software of medical devices and their corresponding monitoring systems. The proposal covers devices such as pacemakers, implantable cardioverter defibrillators, insulin pumps, and continuous glucose monitors. This potential exemption has been opposed by other rulemaking participants, who have noted the FDA's regulatory authority for ensuring that medical devices are safe and effective, and suggested that the FDA may have views concerning this matter. This letter is to ensure that you are aware of the pendency of the proceeding.

I have attached to this letter the notice of proposed rulemaking, which describes the proposed exemption.[1] The full record of the rulemaking proceeding to date, including comments by participants and an agenda of upcoming public hearings to take place later this month, can be found at *http://copyright.gov/1201/*.

Please do not hesitate to contact me if you have any questions.

Sincerely,



Jacqueline C. Charlesworth
General Counsel and
Associate Register of Copyrights
jcharlesworth@loc.gov
202-707-8772

cc: John B. Morris, Associate Administrator and Director of Internet Policy, National Telecommunications & Information Administration

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[1] *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 79 Fed. Reg. 73,856, 73,871 (Dec. 12, 2014) ("Proposed Class 27: Software—Networked Medical Devices").

Attachment B

DEPARTMENT OF HEALTH & HUMAN SERVICES Public Health Service

Food and Drug Administration
10903 New Hampshire Avenue
Silver Spring, MD 20993

August 18, 2015

Ms. Jacqueline C. Charlesworth
General Counsel and Associate Register of Copyrights
United States Copyright Office
Library of Congress
101 Independence Avenue SE
Washington, DC 20559

Re: Section 1201 Rulemaking – Proposed Exemption for Medical Devices

Dear Ms. Charlesworth:

You sent a letter May 12, 2015, to FDA's Chief Counsel to inform FDA of a regulatory proceeding pending before the U.S. Copyright Office that relates to, among other things, medical devices. This is a rulemaking proceeding under 17 U.S.C. 1201 regarding potential exemptions to the general prohibition on circumvention of technological protection measures. You explained that one of the potential exemptions, relating to software in "networked medical devices," had been opposed by other rulemaking participants, who noted the FDA's regulatory authority for ensuring that medical devices are safe and effective. The potential exemption, filed by a coalition of medical device patients and researchers, would allow circumvention of TPMs in the firmware or software of medical devices and their corresponding monitoring systems. It covers devices such as pacemakers, implantable cardioverter defibrillators, insulin pumps, and continuous glucose monitors. You suggested that the FDA may have views concerning this matter.

Because this pertains to technical considerations for devices, my office was asked to respond. To the extent relevant to your regulatory proceeding, here are our views, which were prepared in consultation with FDA's Office of the Chief Counsel.

We note that while allowing circumvention of TPMs will not affect FDA's jurisdiction over products that continue to meet the device definition under 201(h) of the Federal Food, Drug, and Cosmetic Act (the FDCA) (21 USC 321(h)), and the entities that manufacture them, granting such an exemption for such devices could potentially create regulatory confusion for FDA, medical device manufacturers, and third party software developers that choose to modify medical devices.

1. Modifying or adding new software/firmware to a medical device already in commercial distribution may require the submission of a new premarket notification or premarket approval application.

Under the FDCA, products that meet the 201(h) definition of a device are required to have marketing authorization from FDA before being commercially distributed. Depending on the class of the device, which is based on risk, a person wishing to market a new device is, unless exempt, required to either submit a premarket notification under section 510(k) of the FDCA, 21 USC 360(k), or a premarket approval application (PMA) under section 515(a) of the FDCA, 21 USC 360e(a). The exemption, as we understand it, would allow third parties to circumvent the TPMs of devices that are within FDA's jurisdiction and are legally in commercial distribution. However, under FDA's regulations, a new premarket notification is required when a change or modification is made to a legally marketed device that that could significantly affect the safety or effectiveness of the device or changes/modifies the intended use of a device. See 21 CFR 807.81(a)(3)(i)-(ii). Similarly, a new PMA or PMA supplement is required when, among other things, changes are made to an approved device that affect safety and effectives or change the intended uses of the device. See 21 CFR 814.39(a).

From our discussion with Library of Congress staff, we understand the potential exemption to allow, among other things, third parties to access the software of medical devices that are currently on the market. From the discussion, it appears that it would be very difficult for third parties to fundamentally change the source code of the existing software, but it would be possible to add or modify software that expands and/or changes the intended uses of the device in ways that would, under the regulations cited above, require a new premarket notification or PMA be submitted to FDA before the modified device could be distributed.

Circumvention in this way may put third party developers in a position where, by virtue of modifying/adding device software, they would become the person responsible for obtaining marketing authorization (or an investigational device exemption (IDE) under section 520(g) of the FDCA, 21 U.S.C. § 360j(g)) before the modified device is distributed or used on patients. While it appears that, at least partially, the intent of exempting networked medical devices is to do lab/bench testing and research that does not involve or impact patients, the proposed rule specifically states that the exemption seeks to allow "circumvention of TPMs in the firmware or software of medical devices and their corresponding monitoring systems at *patient discretion*." 79 FR 73871 (emphasis added).

The proposed rule asks whether a third party—rather than the owner of the device—may lawfully offer or engage in the proposed circumvention activities with respect to that device pursuant to an exemption granted under 17 U.S.C. 1201(a)(1). If FDA's understanding of the potential exemption is correct, it would appear that the answer could be no, at least in some circumstances. For example, if a third party were to modify the software of a device in a way that expands or otherwise modifies the intended uses or significantly affects safety and effectiveness of the device, and then offers the modified software to consumers without FDA marketing authorization, the third party would be in violation of sections 501(f)(1)(B) and 502(o) of the FDCA.

From a public health perspective, modified devices in distribution will cause confusion to users (patients, health care providers and caregivers) who may not be able to tell the difference between a modified device and an original device. Additionally, the users may have a difficult time in identifying the appropriate entity when attempting to obtain support and maintenance for such devices. Lack of clarity in determining the manufacturer and the functionality of the medical device can cause delays in timely resolution of malfunctions with a device and potentially lead to patient harm.

2. If a patient is injured by a device whose software has been modified, it may be difficult for FDA to determine responsibility from a medical device reporting standpoint.

Under section 519 of the FDCA, both manufacturers and user facilities[1] are required to submit a report to FDA when they receive or become aware of information that reasonably suggests that a device may have caused or contributed to a death or serious injury, or has malfunctioned in a way that similar devices are likely to cause or contribute to a death or serious injury. If the device's software has been modified by a third party, it may be much more difficult to understand how or why the device malfunctioned, and who is responsible for submitting a report to the FDA.

Similar to concerns expressed in the first point, third party developers may not understand that by modifying the functionality of a device, they have potentially stepped into the role of a device manufacturer[2] such that they would be required to meet not only the premarket authorization requirements described above, but postmarket ones as well, including reporting (21 CFR Part 803, Subpart E), quality system regulations (21 CFR Part 820), registration/listing (21 CFR Part 807 Subpart B), unique device identification (21 CFR Part 830), etc. These regulations are intended to, for example, correct adverse events and prevent adverse impact to public health. If a third party developer is not complying with these requirements, particularly premarket authorization and registration/listing requirements, device user facilities may submit the name of the original manufacturer in a report to FDA without knowing that the device had been modified. Furthermore, if a third party is subject to and not complying with the "unique device identifier" requirements (which provide for unique identification of each new version or model of a device), adverse events associated with the third party's new version or model may be improperly assigned to the previous version or model. From FDA's perspective, if the agency becomes aware that serious injuries are occurring from the use of particular device without knowing it has been modified, it may be difficult for the agency to ascertain the cause of the problem and to take appropriate actions to protect the public health.

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[1] Device user facility means a hospital, ambulatory surgical facility, nursing home, outpatient diagnostic facility, or outpatient treatment facility as defined in this section, which is not a physician's office, as defined in this section. School nurse offices and employee health units are not device user facilities. 21 CFR 803.3.

[2] Manufacturer means any person who designs, manufactures, fabricates, assembles, or processes a finished device. Manufacturer includes but is not limited to those who perform the functions of contract sterilization, installation, relabeling, remanufacturing, repacking, or specification development, and initial distributors of foreign entities performing these functions. 21 CFR 820.3(o).

3. The exemption for software security research can have implications on human subject protections and related regulatory requirements.

Section III(G)(1) "Proposed Class 25: Software-Security Research" does not seem to make a distinction between bench top testing of device security and testing of a device in clinical use (i.e., an implant in an actual patient, a device in a hospital, etc.). These latter situations carry greater risk to patients and public health and may present challenges to FDA with respect to devices that have been manipulated (i.e., issues related to FDA's ability to hold manufacturers responsible once their device has been manipulated).

On October 1, 2014, the FDA released a final guidance for the Content of Premarket Submissions for Management of Cybersecurity in Medical Devices. The guidance recommends that manufacturers consider cybersecurity risks as part of the design and development of a medical device, and submit documentation to the FDA about the risks identified and controls in place to mitigate those risks. Based on the discussion with Library of Congress staff, one could interpret that including controls as part of the design can be considered TPMs. Circumventing these TPMs through the exemptions raises concerns from both regulatory expectations and public health perspective. The FDA notes that there could be risks and benefits of enabling "good-faith" research for the purpose of identifying, disclosing, and fixing malfunctions, security flaws, or vulnerabilities. For example, it could better harness the power of collaboration, in that if multiple stakeholders employ a common approach to identifying and mitigating cybersecurity vulnerabilities, the community at-large might benefit from a more efficient and thorough resolution of vulnerabilities. However, a risk to opening technology in this way is the difficulty for regulators and others to distinguish "good-faith" research efforts from malevolent third-party actors. In other words, leveraging the exemptions in the proposed rule could allow persons to gain unilateral access to proprietary software/source code to achieve objectives that might cause harm to public health, harm to specific patients, or compromise the data and systems that support these products in a healthcare setting.

In addition, from a regulatory perspective, this exemption may cause confusion for stakeholders that have been advised through FDA guidance to put appropriate cybersecurity controls in place to prevent third parties from manipulating the software of the device.

4. Other unintended public health concerns related to 3D printing, personal health information, and unlocking.

Regarding 3D Printing, manufacturers who utilize 3D printing to ultimately manufacture medical devices need to ensure that their products are safe and effective for their intended use. For example, if a 3D printed medical device is intended for insertion into the body, then the manufacturer under FDA regulations would have to demonstrate that the products are safe and effective for that intended use.

The proposed rule also refers to the term "data." If this term alludes to Patient Health Information (PHI), or Personal Identifiable Information (PII), then such information is regulated

by other Federal Institutions and Agencies. FDA strongly urges that these Institutions and Agencies are actively sought after for comment on the proposed rule.

Additionally, FDA would like to highlight Section III(c)(4) titled "Proposed Class 14: Unlocking – Wearable Computing Devices," which references the term "health monitoring devices," and Section III(c)(5) titled "Proposed Class 15: Unlocking – Consumer Machines," which references the terms "consumer machines" and "Internet of Things." Based on the information in the proposed rule, the FDA is unclear whether any of these terms include devices as defined in the FDCA (section 201(h), 21 USC 321(h)). Exemptions for such devices may have unintended public health consequences. For example, mobile phones and tablet computers appear to benefit from "unlocking" to provide consumers with access to the wireless networking marketplace. Conversely, by "unlocking" a medical device, one might actually modify the intended use of the product beyond the product's intended use, ultimately impacting the safety and effectiveness of the device.

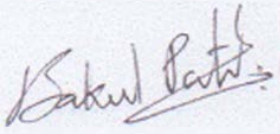
We offer the following recommendations if the potential exemptions are finalized:

A. FDA recommends that the final rule explain that nothing in the rule will affect the regulation of products that fall within the jurisdiction of other federal agencies. As stated above, third parties that modify medical devices may become regulated manufacturers under the FDCA. As such, it may be useful for those who might circumvent TPMs to understand that other federal laws may apply and that the circumvention exemption is not an exemption from other applicable regulations.

B. We recommend that any final rule make a distinction between bench top testing of devices (where the unit tested is not in clinical use and will not be in clinical use in the future) and testing of devices during clinical use unless, for the latter, institutional review board (IRB) oversight is provided and investigational device exemptions (IDE) regulations are followed, as appropriate.

Thank you for informing FDA of this proceeding. Please let us know if you have any questions.

Sincerely yours,



Bakul Patel
Associate Director for Digital Health
Center for Devices and
Radiological Health

Attachment C

the kind of public notice given, and other information the Lead Executive finds pertinent to the analysis of the referendum and its results.

§ 1500.107 Confidential information.

The ballots and other information or reports that reveal, or tend to reveal, the vote of any person covered under the order and the voter list shall be strictly confidential and shall not be disclosed.

§ 1500.108 OMB control number.

The control number assigned to the information collection requirement in this subpart by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.,* is OMB control number xxxx.

Dated: September 4, 2020.

Kenneth White,

Senior Policy Analyst, Under Secretary for Economic Affairs.

[FR Doc. 2020–20035 Filed 10–14–20; 8:45 am]

BILLING CODE 3510–20–P

LIBRARY OF CONGRESS

U.S. Copyright Office

37 CFR Part 201

[Docket No. 2020–11]

Exemptions To Permit Circumvention of Access Controls on Copyrighted Works

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of proposed rulemaking.

SUMMARY: The United States Copyright Office is conducting the eighth triennial rulemaking proceeding under the Digital Millennium Copyright Act (''DMCA''), concerning possible temporary exemptions to the DMCA's prohibition against circumvention of technological measures that control access to copyrighted works. In this proceeding, the Copyright Office is considering petitions for the renewal of exemptions that were granted during the seventh triennial rulemaking along with petitions for new exemptions to engage in activities not currently permitted by existing exemptions. On June 22, 2020, the Office published a notification of inquiry requesting petitions to renew existing exemptions and comments in response to those petitions, as well as petitions for new exemptions. Having carefully considered the comments received in response to that notification, in this notice of proposed rulemaking (''NPRM''), the Office announces its intention to recommend each of the existing exemptions for readoption. This NPRM also initiates three rounds of public comment on the newly-proposed exemptions. Interested parties are invited to make full legal and evidentiary submissions in support of or in opposition to the proposed exemptions, in accordance with the requirements set forth below.

DATES: Initial written comments (including documentary evidence) and multimedia evidence from proponents and other members of the public who support the adoption of a proposed exemption, as well as parties that neither support nor oppose an exemption but seek to share pertinent information about a proposal, are due December 14, 2020. Written response comments (including documentary evidence) and multimedia evidence from those who oppose the adoption of a proposed exemption are due February 9, 2021. Written reply comments from supporters of particular proposals and parties that neither support nor oppose a proposal are due March 10, 2021. Commenting parties should be aware that rather than reserving time for potential extensions of time to file comments, the Office has already established what it believes to be the most generous possible deadlines consistent with the goal of concluding the triennial proceeding in a timely fashion.

ADDRESSES: The Copyright Office is using the *regulations.gov* system for the submission and posting of comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov*. The Office is accepting two types of comments. First, commenters who wish briefly to express general support for or opposition to a proposed exemption may submit such comments electronically by typing into the comment field on regulations.gov. Second, commenters who wish to provide a fuller legal and evidentiary basis for their position may upload a Word or PDF document, but such longer submissions must be completed using the long-comment form provided on the Office's website at *https://www.copyright.gov/1201/2021.* Specific instructions for submitting comments, including multimedia evidence that cannot be uploaded through regulations.gov, are also available on that web page. If a commenter cannot meet a particular submission requirement, please contact the Office using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Regan A. Smith, General Counsel and Associate Register of Copyrights, by email at *regans@copyright.gov,* Kevin R. Amer, Deputy General Counsel, by email at *kamer@copyright.gov,* or Terry Hart, Assistant General Counsel, by email at *tehart@copyright.gov.* Each can be contacted by telephone by calling (202) 707–8350.

SUPPLEMENTARY INFORMATION: On June 22, 2020, the Office published a notification of inquiry requesting petitions to renew current exemptions, oppositions to the renewal petitions, and petitions for newly proposed exemptions in connection with the eighth triennial section 1201 rulemaking.[1] In response, the Office received thirty-two renewal petitions, eight comments in opposition to renewal of a current exemption, and seven comments supporting renewal of a current exemption.[2] These comments are discussed further below. In addition, the Office received twenty-six petitions for new exemptions or expansion of previously granted exemptions.

With this NPRM, the Office sets forth the exemptions that it intends to recommend for readoption without the need for further development of the administrative record, and outlines the proposed classes for new exemptions for which the Office initiates three rounds of public comment.

I. Standard for Evaluating Proposed Exemptions

As the notification of inquiry explained, for a temporary exemption from the prohibition on circumvention to be granted through the triennial rulemaking, it must be established that ''persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition . . . in their ability to make noninfringing uses under [title 17] of a particular class of copyrighted works.'' [3] To define an appropriate class of copyrighted works, the Office begins with the broad

[1] 85 FR 37399 (June 22, 2020).

[2] The comments received in response to the notification of inquiry are available at *https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=COLC-2020-0010* and on the Copyright Office website. Renewal petitions are available at *https://www.copyright.gov/1201/2021/petitions/renewal/,* and petitions for new exemptions are available at *https://www.copyright.gov/1201/2021/petitions/proposed/.* References to renewal petitions and comments are by party name (abbreviated where appropriate) and a brief identification of the previously granted exemption, followed by either ''Renewal Pet.,'' ''Supp.'' (for comments supporting an exemption), or ''Opp.'' (for comments opposing an exemption). References to petitions for new exemptions are by party name (abbreviated where appropriate), the Office's proposed class number, and ''Pet.''

[3] 17 U.S.C. 1201(a)(1)(C).

categories of works identified in 17 U.S.C. 102 and then refines them by other criteria, such as the technological protection measures (''TPMs'') used, distribution platforms, and/or types of uses or users.[4]

In evaluating the evidence, the statutory factors listed in section 1201(a)(1)(C) are weighed: (i) The availability for use of copyrighted works; (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes; (iii) 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; (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and (v) such other factors as the Librarian considers appropriate.[5] After developing a comprehensive administrative record, the Register makes a recommendation to the Librarian of Congress concerning whether exemptions are warranted based on that record.

The Office has previously articulated the substantive legal and evidentiary standard for the granting of an exemption under section 1201(a)(1) multiple times, including in video and PowerPoint tutorials, its 2017 policy study for Congress on section 1201, and in prior recommendations of the Register concerning proposed classes of exemptions, each of which is accessible from the Office's section 1201 rulemaking web page at *https://www.copyright.gov/1201/*. In considering whether to recommend an exemption, the Office must inquire: ''*Are users of a copyrighted work adversely affected by the prohibition on circumvention in their ability to make noninfringing uses of a class of copyrighted works, or are users likely to be so adversely affected in the next three years?*'' [6] This inquiry breaks down into the following elements:

- The proposed class includes at least some works protected by copyright.
- The uses at issue are noninfringing under title 17.
- Users are adversely affected in their ability to make such noninfringing uses or, alternatively, users are likely to be adversely affected in their ability to make such noninfringing uses during the next three years. This element is analyzed in reference to section 1201(a)(1)(C)'s five statutory factors.
- The statutory prohibition on circumventing access controls is the cause of the adverse effects.[7]

The Register will consider the Copyright Act and relevant judicial precedents when analyzing whether a proposed use is likely to be noninfringing.[8] When considering whether such uses are being adversely impacted by the prohibition on circumvention, the rulemaking focuses on ''distinct, verifiable, and measurable impacts'' compared to ''*de minimis* impacts.'' [9] Taking the administrative record as a whole, the Office will consider whether the preponderance of the evidence shows that the conditions for granting an exemption have been met.[10]

II. Review of Petitions To Renew Existing Exemptions

As with the previous rulemaking proceeding, the Office is using a streamlined process for recommending readoption of previously-adopted exemptions to the Librarian. As the Office explained in its 2017 policy study, the ''Register must apply the same evidentiary standards in recommending the renewal of exemptions as for first-time exemption requests,'' and the statute requires that ''a determination must be made specifically for each triennial period.'' [11] The Office further determined that ''the statutory language appears to be broad enough to permit determinations to be based upon evidence drawn from prior proceedings, but only upon a conclusion that this evidence remains reliable to support granting an exemption in the current proceeding.'' [12] The Office first instituted this streamlined renewal process in the seventh triennial rulemaking, which concluded in 2018.[13] The process elicited requests to renew each of the exemptions that had been previously exempted, none of which were meaningfully contested.[14] As a result, the Office was able to recommend renewal of all previously granted exemptions.[15] The streamlined renewal process was praised by participants during the ensuing rulemaking phases.[16]

Following the same procedure that was successfully implemented in the last cycle, for this rulemaking, the Office solicited petitions for the renewal of exemptions as they are currently formulated, without modification. As noted, streamlined renewal is based upon a determination that, due to a lack of legal, marketplace, or technological changes, the factors that led the Office to recommend adoption of the exemption in the prior rulemaking will continue into the forthcoming triennial period.[17] That is, the same facts and circumstances underlying the previously-adopted regulatory exemption may be relied on to renew the exemption. Accordingly, to the extent that any renewal petition proposed uses beyond the current exemption, the Office disregarded those portions of the petition for purposes of considering the renewal of the exemption, and instead focused on whether it provided sufficient information to warrant readoption of the exemption in its current form.

The Office received thirty-two petitions to renew existing exemptions, including at least one petition to renew each currently-adopted exemption. Each

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[4] *See* H.R. Rep. No. 105–551, pt. 2, at 38 (1998) (''Commerce Comm. Report''); U.S. Copyright Office, Section 1201 Rulemaking: Seventh Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Acting Register of Copyrights 13–14 (2018) (''2018 Recommendation''); U.S. Copyright Office, Section 1201 of Title 17, at 26, 108–10 (2017), *https://www.copyright.gov/policy/1201/section-1201-full-report.pdf* (''Section 1201 Study''); *see also* 82 FR 49550, 49551 (Oct. 26, 2017) (same).

[5] 17 U.S.C. 1201(a)(1)(C).

[6] Section 1201 Study at 114.

[7] *Id.* at 115; *see also id.* at 115–27.

[8] *Id.* at 115–17. While controlling precedent directly on point is not required to justify an exemption, there is no ''rule of doubt'' favoring an exemption when it is unclear that a particular use is fair or otherwise noninfringing. *See* U.S. Copyright Office, Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights 15 (2015) (''2015 Recommendation'').

[9] Commerce Comm. Report at 37; *see also* Staff of H. Comm. on the Judiciary, 105th Cong., Section-by-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4th, 1998, at 6 (Comm. Print 1998) (using the equivalent phrase ''substantial adverse impact'') (''House Manager's Report''); *see also, e.g.,* Section 1201 Study at 119–21 (discussing same and citing application of this standard in five prior rulemakings).

[10] *See* 17 U.S.C. 1201(a)(1)(C) (asking whether users ''*are, or are likely to be* in the succeeding 3-year period, adversely affected by the prohibition [on circumvention] in their ability to make noninfringing uses'') (emphasis added); Section 1201 Study at 111–12; *see also Sea Island Broad. Corp.* v. *FCC,* 627 F.2d 240, 243 (D.C. Cir. 1980) (noting that ''[t]he use of the 'preponderance of evidence' standard is the traditional standard in civil and administrative proceedings''); 70 FR 57526, 57528 (Oct. 3, 2005); 2018 Recommendation at 18; 2015 Recommendation at 13–14; U.S. Copyright Office, Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights 6 (2012) (''2012 Recommendation''); U.S. Copyright Office, Section 1201 Rulemaking: Second Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights 19–20 (2003).

[11] Section 1201 Study at 142, 145.

[12] *Id.* at 143.

[13] 2018 Recommendation at 17.

[14] *Id.* at 22.

[15] *Id.* at 19.

[16] *See, e.g., id.* at 19 n.80 (collecting transcript testimony from 2018 rulemaking).

[17] Section 1201 Study at 143–44.

petition to renew an existing exemption included an explanation summarizing the basis for claiming a continuing need and justification for the exemption. In each case, petitioners also signed a declaration stating that, to the best of their personal knowledge, there has not been any material change in the facts, law, or other circumstances set forth in the prior rulemaking record such that renewal of the exemption would not be justified.

The Office received fifteen comments in response to the renewal petitions; seven of these supported renewal of a specific exemption. Eight raised discrete concerns with specific petitions, but none opposed the verbatim readoption of an existing regulatory exemption. Rather, many of these comments address whether the petitions received were sufficient for the Office to consider renewal of the full scope of an exemption, rather than themselves disputing the reliability of the previously-analyzed administrative record.[18] These comments are specifically addressed in the context of the relevant exemption below.

The Office has generally not required petitions to speak to each and every type of use, but rather generally aver that the overall conditions persist.[19] Requiring a fulsome showing would undermine the goal of the streamlined process. The impetus for instituting the streamlined process was to create a more efficient process for unopposed exemptions, and the Office was mindful in shaping the streamlined renewal process to avoid recreating the requirements of the full rulemaking process.[20] In outlining potential mechanics in its Section 1201 Study, the Office envisioned brief filings,[21] with a ''minimal'' evidentiary showing required.[22] The Office has previously advised that it is sufficient for petitioners to declare that ''there had not been any material change in the facts, law, or other circumstances set forth in the prior rulemaking record such that renewal of the exemption would not be justified.'' [23] In the current proceeding, the Office explained that it expects petitioners would need only ''a paragraph or two'' to explain the need for renewal and that documentary evidence at this stage of the process is accepted but not necessary.[24] Petitioners must also ''sign a declaration attesting to the continued need for the exemption and the truth of the explanation provided in support'' and attest that ''there has not been any material change in the facts, law, or other circumstances set forth in the prior rulemaking record . . . that originally demonstrated the need for the selected exemption, such that renewal of the exemption would not be justified.'' [25] That attestation also serves as a basis for the Office to evaluate whether the entirety of the prior administrative record supporting a given exemption continues to obtain. The Office thus concludes that the petitions received are formally and substantively sufficient for the Office to consider in evaluating whether renewal of the existing exemptions is appropriate.

To the extent a commenter questions whether there is a continued need for a specific exempted use or otherwise believes that the scope of an exemption should be narrowed, that commenter should come forward and oppose the exemption. As explained in the notification of inquiry, opposition to a renewal request asks opponents to provide evidence that would make it ''reasonable for the Office to conclude that the prior rulemaking record and any further information provided in the renewal petition are insufficient to support recommending renewal of an exemption.'' [26] The Office will then consider such statements and, as appropriate, will notice the issue for subsequent comment phases to ensure the administrative record remains reliable in light of current developments. But in this rulemaking, the Office has not received comments actually disputing whether there is a continued basis for any exemptions.

In the next rulemaking, the Office may consider whether to include a mechanism for petitioners to disclaim types of uses or other aspects of an exemption if they believe only partial renewal is appropriate. As detailed below, after reviewing the petitions for renewal and comments in response, the Office concludes that it has received a sufficient petition to renew each existing exemption, and it does not find any meaningful opposition to such renewal. Accordingly, the Office intends to recommend readoption of all existing exemptions in their current form.

A. Audiovisual Works—Criticism and Comment—Universities and K–12 Educational Institutions

Multiple organizations petitioned to renew the exemption for motion pictures [27] for educational purposes by college and university or K–12 faculty and students (codified at 37 CFR 201.40(b)(1)(ii)(A)).[28] The petitions demonstrated the continuing need and justification for the exemption, stating that educators and students continue to rely on excerpts from digital media for class presentations and coursework. Peter Decherney, Katherine Sender, John Jackson, Console-ing Passions, the American Association of University Professors (''AAUP''), International Communication Association (''ICA''), Library Copyright Alliance (''LCA''), and Society for Cinema and Media Studies (''SCMS'') (collectively ''Joint Educators I'') provide several examples of professors using DVD clips in the classroom; for example, ''Cornell University Communication professor Lee Humphreys samples short segments of movies and television shows for her lectures in her 'Media Communication' class'' and has ''shifted from using clips from YouTube because she wants to show higher quality clips and to avoid

[18] *See, e.g.,* DVD Copy Control Ass'n (''DVD CCA'') & Advanced Access Content Sys. Licensing Adm'r (''AACS LA'') AV Educ. Opp'n at 4 (''the failure of any proponent to provide any example of use by K–12 students should result in the Copyright Office finding in this streamlined renewal process that the exemption may not be renewed as to such uses''); DVD CCA & AACS LA Nonfiction Multimedia Ebooks Opp'n at 2 (''To the extent the proponents are requesting renewal of the full exemption, the failure to provide any example of use of this expansion to all nonfiction works beyond film analysis should render the exemption's expanded nonfiction uses ineligible for the streamlined renewal process''); ESA, MPA & RIAA Noncom. Video Opp'n at 1 (''the Register should . . . carefully scrutinize OTW's petition, and all of the streamlined renewal petitions, to consider whether the examples of alleged exemption use provided in the petitions fall within the parameters of the existing exemptions'').

[19] *See* 85 FR at 37401 (''The petitioner must provide a brief explanation summarizing the basis for claiming a continuing need and justification for the exemption. The required showing is meant to be minimal.''); Section 1201 Study at 144 (''The Office believes that the evidentiary showing required in a declaration can be minimal, as the aim is only to show that the harm that existed when the exemption was first granted continues to occur or would return but for the exemption, thus providing a sufficient justification for the Office to rely upon the prior rulemaking record in making a new recommendation supporting renewal of the exemption. Moreover, this approach appears consistent with relevant case law upholding determinations based upon a single sworn affidavit.'').

[20] Section 1201 Study at 144 (also noting that ''some stakeholders expressed wariness that, in practice, a short-form filing might recreate the requirements of the current rulemaking'').

[21] *See id.* at 143 (Office will request ''parties seeking renewal of an exemption to submit a short declaration outlining the continuing need for an exemption''); *see also id.* at 144 (referring to ''a short-form filing'').

[22] *Id.* at 144.

[23] 2018 Recommendation at 18.

[24] 85 FR at 37401.

[25] *Id.*

[26] *Id.* at 37402; *see also* 2018 Recommendation at 18.

[27] Unless otherwise noted, all references to motion pictures as a category include television programs and videos.

[28] Joint Educators I AV Educ. Renewal Pet.; Brigham Young Univ. & Brigham Young Univ.—Idaho (collectively, ''BYU'') AV Educ. Renewal Pet.

showing the attached advertisements to her students.'' [29] In addition, co-petitioner Peter Decherney declares that he ''continues to teach a course on Multimedia Criticism'' where his students ''produce short videos analyzing media.'' [30] Indeed, Joint Educators I broadly suggest that the ''entire field'' of video essays or multimedia criticism ''could not have existed in the United States without fair use and the 1201 educational exemption.'' [31] Through these submissions, petitioners demonstrated personal knowledge and experience with regard to this exemption based on their representation of thousands of digital and literacy educators and/or members supporting educators and students, combined with past participation in the section 1201 triennial rulemaking.

DVD CCA and AACS LA filed comments that do not object to the renewal of this exemption but ask the Office to address several purported deficiencies in the renewal petitions.[32] Because DVD CCA and AACS LA expressly disclaim opposition to streamlined renewal of this exemption, the Office does not treat the concerns raised as meaningful opposition. It does, however, provide brief additional comment on the points raised by DVD CCA and AACS LA regarding the sufficiency of the petition. Regarding the lack of evidence of use of the exemption by K–12 educators or students, DVD CCA and AACS LA argue that ''the failure of any proponent to provide any example of use by K–12 students should result in the Copyright Office finding in this streamlined renewal process that the exemption may not be renewed as to such uses.'' [33] As explained above, petitioners need not address every possible use covered by an exemption when seeking to renew an exemption, and the Office has concluded that the petition was submitted in a sufficient manner.[34]

A similar conclusion applies to DVD CCA and AACS LA's complaint that ''the users ignore the threshold requirement to consider alternatives to circumvention.'' [35] DVD CCA and AACS LA are correct in noting that, although the 2018 rulemaking eliminated prior language limiting the exemption to circumstances where ''close analysis'' of video is required, it retained the requirement that the user ''reasonably believe[ ] that non-circumventing alternatives are unable to produce the required level of high-quality content.'' [36] From their comment, it appears that DVD CCA and AACS LA believe that the ''close analysis'' requirement should be reinstated, but wish to reiterate a ''lack of opposition'' to the exemption in light of recognition that schools are currently ''wrestling with implementing distance learning.'' [37]

The Office has examined the record and finds the petitions sufficient. As explained above, it does not follow that petitioners seeking renewal must provide an ''explanation why screen capture technology could not suffice to capture and show'' for each and every one of the film clips they seek to use.[38] Petitioners made that showing in the prior rulemaking, and their renewal petition attests that there has been no material change in the facts. Indeed, Joint Educators I reference the need of a communication professor to embed clips in PowerPoint rather than played from YouTube ''because she wants to show higher quality clips and to avoid showing the attached advertisements to her students.'' [39] The same petition also provides multiple examples asserting a continued need to make use of the exemption for purposes of engaging in film analysis, precisely the kind of pedagogy that has been discussed in connection with the prior ''close analysis'' limitation.[40] This is sufficient. It then becomes opponents' burden to establish a basis for concluding that the prior findings no longer obtain. DVD CCA and AACS LA AV have provided no such evidence here.

Based on the information provided in the renewal petitions and the lack of meaningful opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, the Office intends to recommend renewal of this exemption.

B. Audiovisual Works—Criticism and Comment—Massively Open Online Courses (''MOOCs'')

Brigham Young University and Peter Decherney, Katherine Sender, John Jackson, Console-ing Passions, ICA, LCA, and SCMS (collectively ''Joint Educators II'') petitioned to renew the exemption for motion pictures for educational uses in MOOCs (codified at 37 CFR 201.40(b)(1)(ii)(B)).[41] No oppositions were filed against readoption of this exemption. The petition demonstrated the continuing need and justification for the exemption, stating that instructors continue to rely on the exemption to develop, provide, and improve MOOCs, as well as increase the number of (and therefore access to) MOOCs in the field of film and media studies—with Joint Educators II noting that the ''exemption has never been so relevant as it is now during the COVID–19 pandemic and the universal shift of our education systems to online learning.'' [42]

In response to the renewal petition, DVD CCA and AACS LA filed a comment noting that they did not oppose renewal of the exemption but asking the Office to address what they described as the ''apparent failure of the proponents'' to employ technological measures preventing retention and redistribution of MOOC content.[43] The comment suggests that this does not reflect any changed circumstances, and notes that the Office suggested in the seventh rulemaking that the proper method to air DVD CCA and AACS LA's concerns would be to oppose the renewal.[44] Again, they have not done so. The Office declines to address whether any user's activities may or may not be consistent with the exemption. The relevant exemption language is not in dispute, and interpreting compliance with or eligibility for the exemption is outside the scope of this proceeding. If DVD CCA and AACS LA believe that the exemption should be adjusted or eliminated in light of abuse or difficulty in complying with the condition that

[29] Joint Educators I AV Educ. Renewal Pet. at 3.

[30] *Id.*

[31] *Id.*

[32] DVD CCA & AACS LA AV Educ. Opp'n.

[33] *Id.* at 4.

[34] To the extent the eighth rulemaking has received information relating to whether the exemption remains necessary for K–12 educational activities, Joint Educator's petition for expansion of this exemption also suggests it continues to be necessary, especially in light of the ongoing pandemic. *See* Decherney, Sender, Jackson, Stein, Gaglani, Wisbauer, Berg, Siddiqui, Robertson, Console-ing Passions, AAUP, ICA, LCA & SCMS (collectively ''Joint Educators III) Class 1 Pet. at 2.

[35] DVD CCA & AACS LA AV Educ. Opp'n at 7.

[36] 37 CFR 201.40(b)(1).

[37] DVD CCA & AACS LA AV Educ. Opp'n at 6–7.

[38] *Id.* at 6.

[39] Joint Educators I AV Educ. Renewal Pet. at 3.

[40] *See also, e.g.,* 2015 Recommendation at 92 (citing examples where high-definition quality is necessary, including close analysis of ''*The Wizard of Oz* (to highlight prop wires and other 'stage-like' elements), *Citizen Kane* (to appreciate depth of field, chiaroscuro effects, and subtle narrative elements), Jacques Tati's *Playtime* (to better approximate the intended 70mm viewing experience and appreciate the film's very detailed and complex composition), and *Saving Private Ryan* (to experience the enhanced color and contrast effect of bleach bypass film processing, hyper-realism, and complex soundscapes)'').

[41] BYU AV Educ. MOOCS Renewal Pet.; Joint Educators AV Educ. MOOCs Renewal Pet.

[42] Joint Educators II AV Educ. MOOCs Renewal Pet. at 3.

[43] DVD CCA & AACS LA AV Educ. MOOCs Opp'n at 1.

[44] *Id.* at 2 n.3.

exemption beneficiaries reasonable technological measures, the proper response would be to submit an opposition to this exemption so the Office can determine whether fuller airing through notice and comment to evaluate this issue is appropriate.

Based on the information provided in the renewal petition and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, the Office intends to recommend renewal of this exemption.

C. Audiovisual Works—Criticism and Comment—Digital and Media Literacy Programs

LCA and Professor Renee Hobbs petitioned to renew the exemption for motion pictures for educational uses in nonprofit digital and media literacy programs offered by libraries, museums, and other nonprofits (codified at 37 CFR 201.40(b)(1)(ii)(C)).[45] No oppositions were filed against readoption of this exemption. The petition demonstrated the continuing need and justification for the exemption, and petitioners demonstrated personal knowledge and experience with regard to this exemption. For example, the petition stated that librarians across the country have relied on the current exemption and will continue to do so for their digital and media literacy programs.[46]

Based on the information provided in the renewal petitions and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, the Office intends to recommend renewal of this exemption.

D. Audiovisual Works—Criticism and Comment—Multimedia E-Books

Multiple petitioners jointly sought to renew the exemption for the use of motion picture excerpts in nonfiction multimedia e-books (codified at 37 CFR 201.40(b)(1)(i)(C)).[47] The petition demonstrated the continuing need and justification for the exemption. In addition, the petitioners demonstrated personal knowledge through Professor Buster's continued work on an e-book series based on her lecture series, ''Deconstructing Master Filmmakers: The Uses of Cinematic Enchantment,'' which, they said, ''relies on the availability of high-resolution video not available without circumvention of technological protection measures.'' [48]

In response, DVD CCA and AACS LA filed a comment that did not object to renewal of an exemption limited to ''e-books offering filming analysis,'' but did object to renewing the existing exemption as it is currently formulated.[49] DVD CCA and AACS LA asserted that the renewal petition failed to ''provide any example of use of this expansion to all nonfiction works beyond film analysis.'' [50] As a result, they argue that the evidence is only sufficient to support an exemption for use in e-books offering film analysis.

As noted above, however, in making a petition to renew an exemption, it is sufficient for petitioners to declare that to their knowledge, ''there had not been any material change in the facts, law, or other circumstances set forth in the prior rulemaking record such that renewal of the exemption would not be justified.'' [51] Petitioners are not required to provide examples that pertain to every type of use covered by the exemption. To the extent an opponent of renewal seeks to narrow an exemption, it should ''provide evidence that would allow the Acting Register to reasonably conclude that the prior rulemaking record and any further information provided in the petitions are insufficient for her to recommend renewal without the benefit of a further developed record.'' [52]

In this case, the Office determined in the 2018 proceeding that the record was sufficient to justify recommending an exemption that includes nonfiction uses beyond film analysis.[53] The Office concludes that the renewal petition, which seeks renewal of the exemption as previously adopted, is sufficient to support renewal. Although DVD CCA and AACS LA note that the statements in the renewal petition are limited to examples related to e-books offering film analysis, this opposition does not amount to evidence in the form of legal, marketplace, or technological changes that render the prior rulemaking record insufficient to support recommending renewal.

Based on the information provided in the renewal petition and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, the Office intends to recommend renewal of this exemption.

E. Audiovisual Works—Criticism and Comment—Filmmaking

Multiple organizations petitioned to renew the exemption for motion pictures for uses in documentary films or other films where use is in parody or for a biographical or historically significant nature (codified at 37 CFR 201.40(b)(1)(i)(A)).[54] The petitions summarized the continuing need and justification for the exemption, and the petitioners demonstrated personal knowledge and experience with regard to this exemption. For example, the International Documentary Association, Film Independent, and Kartemquin Educational Films (collectively ''Joint Filmmakers'')—which represent thousands of independent filmmakers across the nation—stated that TPMs such as encryption continue to prevent filmmakers from accessing needed material, and that this is ''especially true for the kind of high fidelity motion picture material filmmakers need to satisfy both distributors and viewers.'' [55] Petitioners state that they personally know many filmmakers who have found it necessary to rely on this exemption and will continue to do so.[56]

DVD CCA and AACS LA filed comments that did not oppose renewal of the exemption but did object to the characterization of the exemption filed by the filmmaking proponents.[57] Specifically, DVD CCA and AACS LA noted that the exemption is limited to criticism or comment, documentary filmmaking, or any filmmaking that would make use of a clip in a parody or for its biographical or historical nature; in their view, petitioners suggest the exemption covers all fair use or noninfringing uses.[58] The Office does not find it necessary to opine on the characterization of the petitions by DVD CCA and AACS LA and believes that petitioners' declarations have met the minimal showing sufficient to support renewal of the exemption without modification.

Based on the information provided in the renewal petitions and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during

[45] LCA & Hobbs AV Educ. Nonprofits Renewal Pet.

[46] *Id.*

[47] Buster, Authors Alliance & AAUP Nonfiction Multimedia E-Books Renewal Pet.

[48] *Id.* at 3.

[49] DVD CCA & AACS LA Nonfiction Multimedia E-Books Opposition Pet.

[50] *Id.* at 2.

[51] 2018 Recommendation at 18.

[52] *Id.*

[53] *Id.* at 64.

[54] Joint Filmmakers Documentary Films Renewal Pet.; New Media Rights (''NMR'') Documentary Films Renewal Pet.

[55] Joint Filmmakers Documentary Films Renewal Pet. at 3.

[56] *Id.;* NMR Documentary Films Renewal Pet. at 3.

[57] DVD CCA & AACS LA Documentary Filmmaking Opp'n.

[58] *Id.* at 2.

the next triennial period. Accordingly, the Office intends to recommend renewal of this exemption.

F. Audiovisual Works—Criticism and Comment—Noncommercial Videos

Two organizations petitioned to renew the exemption for motion pictures for uses in noncommercial videos (codified at 37 CFR 201.40(b)(1)(i)(B)).[59] The petitions demonstrated the continuing need and justification for the exemption, and the petitioners demonstrated personal knowledge and experience with regard to this exemption. For example, one of the petitioners, the Organization for Transformative Works (''OTW''), has advocated for the noncommercial video exemption in past triennial rulemakings, and has heard from ''a number of noncommercial remix artists'' who have used the exemption and anticipate needing to use it in the future.[60] OTW included an account from an academic stating that footage ripped from DVDs and Blu-ray was preferred for ''vidders'' (noncommercial remix artists) because ''it is high quality enough to bear up under the transformations that vidders make to it.'' [61] Similarly, NMR stated that its staff personally knows ''many video creators that have found it necessary to rely on this exemption during the current triennial period'' and who intend to make these types of uses in the next triennial period.[62]

OTW contends that ''the exemption should be renewed using the relatively simple language defining the exempted class from the 2008 rulemaking, covering both DVDs and Blu-Ray (and streaming where necessary) 'when circumvention is accomplished solely in order to accomplish the incorporation of short portions of motion pictures into new works for the purpose of criticism or comment, and where the person engaging in circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use.' '' [63] OTW asserts that this change would not constitute ''an expansion of the existing exemption, but a more understandable restatement.'' [64] Two comments, one from DVD CCA and AACS LA and the other from the Entertainment Software Association (''ESA''), Motion Picture Association (''MPA''), and Recording Industry Association of America (''RIAA'') did not object to the renewal of the exemption for noncommercial videos but did object to the proposed change in the language sought by OTW, arguing that it involves a modification of the current exemption.[65] The Office agrees that OTW's proposed modifications are appropriately addressed as part of the full rulemaking proceeding, and therefore the Office has included this request with the proposed classes discussed below.[66]

Based on the information provided in the renewal petitions and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, the Office intends to recommend renewal of this exemption.

G. Audiovisual Works—Accessibility

Multiple organizations petitioned to renew the exemption for motion pictures for the provision of captioning and/or audio description by disability services offices or similar units at educational institutions for students with disabilities (codified at 37 CFR 201.40(b)(2)(i)(A)).[67] No oppositions were filed against readoption of this exemption.

The petition demonstrated the continuing need and justification for the exemption, and the petitioners demonstrated personal knowledge and experience. For example, Brigham Young University asserts that its disability services offices ''sometimes need to create accessible versions of motion pictures'' to accommodate its students with disabilities.[68] Both petitions stated that there is a need for the exemption going forward; indeed, one group of petitioners states that ''the need is likely to increase significantly in light of the ongoing COVID–19 pandemic as many educational institutions shift to online learning and the use of digital multimedia by faculty increases.'' [69]

Based on the information provided in the renewal petition and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, the Office intends to recommend renewal of this exemption.

H. Literary Works—Accessibility

Multiple organizations petitioned to renew the exemption for literary works distributed electronically (*i.e.,* e-books), for use with assistive technologies for persons who are blind, visually impaired, or have print disabilities (codified at 37 CFR 201.40(b)(3)).[70] No oppositions were filed against readoption of this exemption. The petitions demonstrated the continuing need and justification for the exemption, stating that individuals who are blind, visually impaired, or print disabled are significantly disadvantaged with respect to obtaining accessible e-book content because TPMs interfere with the use of assistive technologies.[71] Petitioners noted that the record underpinning this exemption ''has stood and been re-established in the past six triennial reviews, dating back to 2003,'' and that the ''accessibility of ebooks is frequently cited as a top priority'' by its members.[72] In addition, petitioners noted the unique challenges COVID–19 poses to the blind, visually impaired, and print disabled due to limited physical access to libraries and the shift to virtual learning.[73] Finally, the petitioners demonstrated personal knowledge and experience with regard to the assistive technology exemption; they are all organizations that advocate for the blind, visually impaired, and print disabled.

Based on the information provided in the renewal petitions and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, the Office intends to recommend renewal of this exemption.

I. Literary Works—Medical Device Data

Hugo Campos petitioned to renew the exemption covering access to patient data on networked medical devices (codified at 37 CFR 201.40(b)(4)).[74] No oppositions were filed, and Consumer

[59] NMR Noncom. Videos Renewal Pet.; OTW Noncom. Videos Renewal Pet.

[60] OTW Noncom. Videos Renewal Pet. at 3.

[61] *Id.*

[62] NMR Noncom. Videos Renewal Pet. at 3.

[63] OTW Noncom. Videos Renewal Pet. at 4.

[64] *Id.*

[65] DVD CCA & AACS LA Noncom. Videos Opp'n; ESA, MPA & RIAA Noncom. Videos Opp'n.

[66] The Office notes that much of the language that has been added to the exemption since 2008 was sought by proponents of the exemption, *e.g.,* the addition of a reference to the statutory definition of motion pictures was sought by EFF. *See* 2012 Recommendation at 105. In some cases, the addition of such language was supported by OTW itself. *See, e.g., id.* at 110 (adding clarification that commissioned videos are included within exemption if ultimate use is noncommercial, a proposal that was supported by OTW).

[67] Ass'n of Transcribers and Speech-to-Text Providers (''ATSP''), Ass'n on Higher Educ. and Disability (''AHEAD'') & LCA Captioning Renewal Pet.; BYU Captioning Renewal Pet.

[68] BYU Captioning Renewal Pet. at 3.

[69] ATSP, AHEAD & LCA Captioning Renewal Pet. at 3.

[70] Am. Council for the Blind (''ACB''), Am. Fed'n for the Blind (''AFB''), Nat'l Fed'n of the Blind (''NFB''), LCA, American Association of Law Libraries (''AALL''), Benetech/Bookshare, and HathiTrust Assistive Technologies Renewal Pet.

[71] *Id.* at 3.

[72] *Id.* at 3–4.

[73] *Id.* at 4.

[74] Campos Medical Devices Renewal Pet.

Reports submitted a comment in support.[75] Mr. Campos's petition demonstrated the continuing need and justification for the exemption, stating that patients continue to need access to data output from their medical devices to manage their health.[76] Mr. Campos demonstrated personal knowledge and experience with regard to this exemption, as he is a patient needing access to the data output from his medical device and is a member of a coalition whose members research, comment on, and examine the effectiveness of networked medical devices.

Based on the information provided in the renewal petition and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, the Office intends to recommend renewal of this exemption.

J. Computer Programs—Unlocking

Multiple organizations petitioned to renew the exemption for computer programs that operate cellphones, tablets, mobile hotspots, or wearable devices (*e.g.,* smartwatches), to allow connection of a new or used device to an alternative wireless network (''unlocking'') (codified at 37 CFR 201.40(b)(5)).[77] No oppositions were filed against the petitions seeking to renew this exemption; Consumer Reports filed in support of renewal.[78] The petitions demonstrate the continuing need and justification for the exemption, stating that consumers of the enumerated products continue to need to be able to unlock the devices so they can switch network providers. For example, ISRI stated that its members continue to purchase or acquire donated cell phones, tablets, and other wireless devices and try to reuse them, but that wireless carriers still lock devices to prevent them from being used on other carriers.[79] In addition, the petitioners demonstrated personal knowledge and experience with regard to this exemption. CCA and ISRI represent companies that rely on the ability to unlock cellphones. Both petitioners also participated in past 1201 triennial rulemakings relating to unlocking lawfully-acquired wireless devices.

Based on the information provided in the renewal petitions and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, the Office intends to recommend renewal of this exemption.

K. Computer Programs—Jailbreaking

Multiple organizations petitioned to renew the exemptions for computer programs that operate smartphones, tablets and other portable all-purpose mobile computing devices, smart TVs, or voice assistant devices to allow the device to interoperate with or to remove software applications (''jailbreaking'') (codified at 37 CFR 201.40(b)(6)–(8)).[80] The petitions demonstrate the continuing need and justification for the exemption, and that petitioners had personal knowledge and experience with regard to this exemption. For example, regarding smart TVs specifically, the Software Freedom Conservancy (''SFC'') asserts that it has ''reviewed the policies and product offerings of major Smart TV manufacturers (Sony, LG, Samsung, etc.) and they are substantially the same as those examined during the earlier rulemaking process.'' [81] The petitions state that, absent an exemption, TPMs applied to the enumerated products would have an adverse effect on noninfringing uses, such as being able to install third-party applications on a smartphone or download third-party software on a smart TV to enable interoperability.[82] For example, EFF's petition outlined its declarant's experience with instances where it was necessary to replace the software on a smartphone, smart TV, and tablet.[83] Consumer Reports filed a comment in support of the exemption,[84] and no one opposed renewal.

Based on the information provided in the renewal petitions and the lack of meaningful opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, the Office intends to recommend renewal of this exemption.

L. Computer Programs—Repair of Motorized Land Vehicles

Multiple organizations petitioned to renew the exemption for computer programs that control motorized land vehicles, including farm equipment, for purposes of diagnosis, repair, or modification of a vehicle function (codified at 37 CFR 201.40(b)(9)).[85] The petitions demonstrated the continuing need and justification for the exemption. For example, the Motor & Equipment Manufacturers Association (''MEMA'') stated that over the past three years, its membership ''has seen firsthand that the exemption is helping protect consumer choice and a competitive market, while mitigating risks to intellectual property and vehicle safety.'' [86] The Auto Care Association (''ACA'') stated that ''[u]nless this exemption is renewed, the software measures manufacturers deploy for the purpose of controlling access to vehicle software will prevent Auto Care members from lawfully assisting consumers in the maintenance, repair, and upgrade of their vehicles.'' [87] SEMA stated that it ''is unaware of any factor, incident or reason to change the exemption and the need for the exemption remains valid and imperative.'' [88] The petitioners demonstrated personal knowledge and experience with regard to this exemption; each either represents or gathered information from individuals conducting repairs or businesses that manufacture, distribute, and sell motor vehicle parts, and perform vehicle service and repair. Consumer Reports filed in support of the petition.[89]

Although not opposing readoption of this exemption, the Alliance for Automotive Innovation (''AAI'') submitted comments raising concerns with the ACA and MEMA petitions.[90] Specifically, the AAI argued that the two petitions ''mischaracterize the scope of the existing exemption and appear to argue for an expanded exemption, rather than for renewal of the existing exemption as it is 'currently formulated, without modification.' '' [91] It states that both ACA and MEMA suggest ''that the existing exemption permits third party repair shops to circumvent access controls on vehicle software in order to provide commercial repair services.'' [92] AAI asserts that ''[p]roviding a commercial service that

[75] Consumer Reports Medical Devices Supp.

[76] Campos Medical Devices Renewal Pet. at 3.

[77] Competitive Carriers Ass'n (''CCA'') Unlocking Renewal Pet.; Inst. of Scrap Recycling Industries (''ISRI'') Unlocking Renewal Pet.

[78] Consumer Reports Unlocking Supp.

[79] ISRI Unlocking Renewal Pet. at 3.

[80] EFF Jailbreaking Renewal Pet.; NMR Jailbreaking Renewal Pet.; SFC Jailbreaking Renewal Pet.

[81] SFC Jailbreaking Renewal Pet. at 3.

[82] EFF Jailbreaking Renewal Pet. at 3; NMR Jailbreaking Renewal Pet. at 3; SFC Jailbreaking Renewal Pet. at 3.

[83] EFF Jailbreaking Renewal Pet. at 3–4.

[84] Consumer Reports Jailbreaking Supp.

[85] ACA Vehicle Repair Renewal Pet.; Am. Farm Bureau Fed'n Vehicle Repair Renewal Pet.; Consumer Tech. Ass'n Vehicle Repair Renewal Pet.; MEMA Vehicle Repair Renewal Pet.; Specialty Equip. Mkt. Ass'n (''SEMA'') Vehicle Repair Renewal Pet.

[86] MEMA Vehicle Repair Renewal Pet. at 3.

[87] ACA Vehicle Repair Renewal Pet. at 3.

[88] SEMA Vehicle Repair Renewal Pet. at 3.

[89] Consumer Reports Vehicle Repair Supp.

[90] AAI Vehicle Repair Opp'n.

[91] *Id.* at 1.

[92] *Id.* at 2.

requires circumventing access controls or copy controls (*e.g.,* using or providing certain engine tuning software) is indisputably trafficking in an unlawful service under Sections 1201(a)(2) and (b) and, therefore, is clearly outside the scope of the existing exemption.'' [93]

The Office addressed the relationship of this exemption to the anti-trafficking provisions in some detail in the 2018 Recommendation. In response to petitioners' requests, the Office recommended removal of the language in the prior repair exemption requiring that circumvention be ''undertaken by the authorized owner.'' [94] That change, the Office explained, was intended to ''account[] for the possibility that certain third parties may qualify as 'user[s]' eligible for an exemption from liability under section 1201(a)(1).'' [95] In making this recommendation, which the Librarian accepted, the Office declined to express any ''view as to whether particular examples of assistance do or do not constitute unlawful circumvention services''—specifically, ''whether vehicle or other repair services may run afoul of the anti-trafficking provisions when engaging in circumvention on behalf of customers.'' [96] The Office adheres to this position and accordingly expresses no view as to the activities described by ACA and MEMA.

Based on the information provided in the renewal petitions and the lack of opposition to the specific exemption, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, the Office intends to recommend renewal of this exemption.

M. Computer Programs—Repair of Smartphones, Home Appliances, and Home Systems

Multiple organizations petitioned to renew the exemption for computer programs that control smartphones, home appliances, or home systems, for diagnosis, maintenance, or repair of the device or system (codified at 37 CFR 201.40(b)(10)).[97] The petitions demonstrated the continuing need and justification for the exemption. For example, EFF, the Repair Association, and iFixit asserted that ''[m]anufacturers of these devices continue to implement technological protection measures that inhibit lawful repairs, maintenance, and diagnostics, and they show no sign of changing course.[98] Consumer Reports filed in support of the petition.[99]

In comments filed in response to the petitions, DVD CCA and AACS LA did not object to renewal of the exemption, but did request that the Office ''expressly . . . reject the implied assertion that some of the activity used as examples in the renewal petition . . . is permitted under the current exemption.'' [100] Specifically, they pointed to an example in which petitioners stated a purported need to ''repair any disrupted functionality'' in Sonos smart speakers for which the manufacturer had ceased to provide software updates.[101] DVD CCA and AACS LA contend that such activity does not constitute ''repair'' under the exemption because, under relevant licensing schemes, a manufacturer ''may outright deactivate one or more functions due to the product's TPM being compromised. These results are not the consequences of the product falling out of repair or breaking.'' [102]

DVD CCA and AACS LA do not appear to be arguing that the use of this example renders the renewal petitions insufficient with respect to home systems. The Office agrees that the sufficiency of the petitions do not depend on whether this specific example qualifies under the current exemption. Even if this example were excluded, the petitions attest to a continuing need for the exemption and the continued validity of the prior record.[103] To the extent DVD CCA and AACS LA are asking the Office to opine on examples of particular uses, such a request is beyond the scope of the renewal phase, though they are free to raise such concerns in the comment phase to the extent they relate to proposed expansions of the current rule.

Based on the information provided in the renewal petitions and the lack of opposition to renewal, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, the Office intends to recommend renewal of this exemption.

N. Computer Programs—Security Research

Multiple organizations and security researchers petitioned to renew the exemption permitting circumvention for purposes of good-faith security research (codified at 37 CFR 201.40(b)(11)).[104] The petitioners demonstrated the continuing need and justification for the exemption, as well as personal knowledge and experience with regard to this exemption. For example, the petition from Professor J. Alex Halderman, the Center for Democracy and Technology (''CDT''), and the U.S. Technology Policy Committee of the Association for Computing Machinery (''ACM'') highlighted a number of concerns justifying the continuing need for the exemption, including the need to find and detect vulnerabilities in voting machines and other election systems, the increased proliferation of consumer Internet of Things devices, and the increasing reliance on digital systems combined with greater aggressiveness on the part of threat actors, including other nation states.[105] The petition from Professors Matt Blaze and Steven Bellovin asserted that in the past three years ''one of us has received threats of litigation from copyright holders in connection with his security research on software in voting systems.'' [106] Finally, MEMA stated that its membership ''experienced firsthand that the exemption is helping encourage innovation in the automotive industry while mitigating risks to intellectual property and vehicle safety.'' [107]

No oppositions were filed against readoption of this exemption, while Consumer Reports filed in support of renewal.[108] A petition seeking renewal of a separate exemption submitted by Hugo Campos, a member of a coalition of medical device patients and researchers, also noted support for this exemption.[109]

Based on the information provided in the renewal petitions and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly,

[93] *Id.*

[94] 2018 Recommendation at 223–25.

[95] *Id.* at 225.

[96] *Id.*

[97] EFF Device Repair Renewal Pet.; EFF, Repair Ass'n & iFixit Device Repair Renewal Pet.

[98] EFF Device Repair Renewal Pet. at 3; EFF, Repair Ass'n & iFixit Device Repair Renewal Pet. at 3.

[99] Consumer Reports Device Repair Supp.

[100] DVD CCA & AACS LA Device Repair Opp'n at 1.

[101] *Id.* at 3.

[102] DVD CCA & AACS LA Device Repair Opp'n at 4.

[103] *See, e.g.,* EFF Device Repair Renewal Pet. at 3 (''Manufacturers of these devices continue to implement technological protection measures that inhibit lawful repairs, maintenance, and diagnostics, and they show no sign of changing course.'').

[104] Blaze & Bellovin Security Research Renewal Pet.; Halderman, CDT & ACM Security Research Renewal Pet.; MEMA Security Research Renewal Pet.

[105] Halderman, CDT & ACM Security Research Renewal Pet. at 4.

[106] Blaze & Bellovin Security Research Renewal Pet. at 3.

[107] MEMA Security Research Renewal Pet. at 3.

[108] Consumer Reports Security Research Supp.

[109] Campos Medical Device Renewal Pet. at 4.

the Office intends to recommend renewal of this exemption.

O. Computer Programs—Software Preservation

The Software Preservation Network (''SPN'') and LCA petitioned to renew the exemption for computer programs other than video games, for the preservation of computer programs and computer program-dependent materials by libraries, archives, and museums (codified at 37 CFR 201.40(b)(13)).[110] The petitions state that libraries, archives, and museums continue to need the exemption to preserve and curate software and materials dependent on software. For example, the petition asserts that ''researchers at UVA designed a project in order to access the 'Peter Sheeran papers'—a collection of drawings and plans from a local Charlottesville architecture firm,'' and that without the exemption, ''the outdated Computer Aided Design (''CAD'') software used to create many of the designs in the Sheeran papers may have remained inaccessible to researchers, rendering the designs themselves inaccessible, too.'' [111] In addition, the petitioners demonstrated personal knowledge and experience with regard to this exemption through past participation in the section 1201 triennial rulemaking relating to access controls on software, and/or representing major library associations with members that have relied on this exemption. Readoption of this exemption was unopposed.

Based on the information provided in the renewal petitions and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, the Office intends to recommend renewal of this exemption.

P. Computer Programs—Video Game Preservation

SPN and LCA petitioned to renew the exemption for preservation of video games for which outside server support has been discontinued (codified at 37 CFR 201.40(b)(12)).[112] Consumer Reports supported the petition.[113] The petitions state that libraries, archives, and museums continue to need the exemption to preserve and curate video games in playable form. For example, the petition highlights the Georgia Tech University Library's Computing Lab, retroTECH, which has a significant collection of recovered video game consoles, made accessible for research and teaching uses pursuant to the exemption.[114] In addition, the Museum of Digital Arts and Entertainment in Oakland, California, relied on the exemption to restore a recent PC game, in collaboration with Microsoft and the original developers, despite potential DRM issues.[115] The petitioners demonstrated personal knowledge and experience with regard to this exemption through past participation in the section1201 triennial rulemaking, and/or through their representation of members that have relied on this exemption. Readoption of this exemption was unopposed.

Based on the information provided in the renewal petitions and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, the Office intends to recommend renewal of this exemption.

Q. Computer Programs—3D Printing

Michael Weinberg petitioned to renew the exemption for computer programs that operate 3D printers to allow use of alternative feedstock (codified at 37 CFR 201.40(b)(14)).[116] No oppositions were filed against readoption of this exemption. The petition demonstrated the continuing need and justification for the exemption, and the petitioner demonstrated personal knowledge and experience. Specifically, Mr. Weinberg declared he is a member of the 3D printing community and has been involved with this exemption request during each cycle it has been considered by the Office.[117] In addition, the petition states that 3D printers continue to limit the types of materials used, and new companies and printers may consider implementing similar restrictions in the future, thereby requiring renewal of the exemption.[118]

Based on the information provided in the renewal petition and the lack of opposition, the Office believes that the conditions that led to adoption of this exemption are likely to continue during the next triennial period. Accordingly, the Office intends to recommend renewal of this exemption.

III. Analysis and Classification of Proposed New or Expanded Exemptions

Having addressed the petitions to renew existing exemptions, the Office now turns to the petitions for new or expanded exemptions. The Office received twenty-six petitions,[119] which it has organized into seventeen proposed classes, as described below. Before discussing those classes, the Office first explains the process and standards for submission of written comments.

A. Submission of Written Comments

Persons wishing to address proposed exemptions in written comments should familiarize themselves with the substantive legal and evidentiary standards for the granting of an exemption under section 1201(a)(1), which are also described in more detail on the Office's form for submissions of longer comments, available on its website. In addressing factual matters, commenters should be aware that the Office favors specific, ''real-world'' examples supported by evidence over speculative, hypothetical observations. In cases where the technology at issue is not apparent from the requested exemption, it can be helpful for commenters to describe the TPM(s) that control access to the work and method of circumvention.

Commenters' legal analysis should explain why the proposal meets or fails to meet the criteria for an exemption under section 1201(a)(1), including, without limitation, why the uses sought are or are not noninfringing as a matter of law. The legal analysis should also discuss statutory or other legal provisions that could impact the necessity for or scope of the proposed exemption. Legal assertions should be supported by statutory citations, relevant case law, and other pertinent authority. In cases where a class proposes to expand an existing exemption, participants should focus their comments on the legal and evidentiary bases for modifying the exemption, rather than the underlying exemption; as discussed above, the Office intends to recommend each current temporary exemption for renewal.

To ensure a clear and definite record for each of the proposals, commenters are required to provide a separate submission for each proposed class during each stage of the public comment period. Although a single comment may

[110] SPN & LCA Software Preservation Renewal Pet.

[111] *Id.* at 3.

[112] SPN & LCA Abandoned Video Game Renewal Pet.

[113] Consumer Reports Abandoned Video Game Supp.

[114] SPN & LCA Abandoned Video Game Renewal Pet. at 3.

[115] *Id.*

[116] Weinberg 3D Printers Renewal Pet.

[117] *Id.* at 3.

[118] *Id.*

[119] In addition, as noted, OTW's renewal petition seeks to amend the current regulatory language. The Office is treating that request as a petition for expansion.

not address more than one proposed class, the same party may submit multiple written comments on different proposals. The Office acknowledges that the requirement of separate submissions may require commenters to repeat certain information across multiple submissions, but the Office believes that the administrative benefits of creating a self-contained, separate record for each proposal will be worth the modest amount of added effort.

The first round of public comment is limited to submissions from proponents (*i.e.,* those parties who proposed new exemptions during the petition phase) and other members of the public who support the adoption of a proposed exemption, as well as any members of the public who neither support nor oppose an exemption but seek only to share pertinent information about a specific proposal.

Proponents of exemptions should present their complete affirmative case for an exemption during the initial round of public comment, including all legal and evidentiary support for the proposal. Members of the public who oppose an exemption should present the full legal and evidentiary basis for their opposition in the second round of public comment. The third round of public comment will be limited to supporters of particular proposals and those who neither support nor oppose a proposal, who, in either case, seek to reply to points made in the earlier rounds of comments. Reply comments should not raise new issues, but should instead be limited to addressing arguments and evidence presented by others.

B. The Proposed Classes

As noted above, the Office has reviewed and classified the proposed exemptions set forth in the twenty-seven petitions received in response to its notification of inquiry. Any exemptions adopted must be based on ''a particular class of works,'' [120] and each class is intended to ''be a narrow and focused subset of the broad categories of works . . . identified in Section 102 of the Copyright Act.'' [121] As explained in the Notice of Inquiry, the Office consolidates or groups related and/or overlapping proposed exemptions where possible to simplify the rulemaking process and encourage joint participation among parties with common interests (though collaboration is not required). Accordingly, the Office has categorized the petitions into seventeen proposed classes of works.

Each proposed class is briefly described below; additional information can be found in the underlying petitions posted on the Office website. As explained in the notification of inquiry, the proposed classes ''represent only a starting point for further consideration in the rulemaking proceeding, and will be subject to further refinement based on the record.'' [122] The Office further notes that it has not put forward precise regulatory language for the proposed classes, because any specific language for exemptions that the Register ultimately recommends to the Librarian will depend on the full record developed during this rulemaking. Indeed, in the case of proposed modifications to existing exemptions, as stated above, the Register may propose altering current regulatory language to expand the scope of an exemption, where the record suggests such a change is appropriate.

After examining the petitions, the Office has preliminarily identified some initial legal and factual areas of interest with respect to certain proposed classes. The Office stresses, however, that these areas are not exhaustive, and commenters should consider and offer all legal argument and evidence they believe necessary to create a complete record. These early observations are offered without prejudice to the Office's ability to raise other questions or concerns at later stages of the proceeding. Finally, ''where an exemption request resurrects legal or factual arguments that have been previously rejected, the Office will continue to rely on past reasoning to dismiss such arguments in the absence of new information.'' [123]

Proposed Class 1: Audiovisual Works—Criticism and Comment

Three petitions seek to expand the existing exemptions for circumvention of access controls protecting motion pictures on DVDs, Blu-ray discs, and digitally transmitted video for purposes of criticism and comment, including for educational purposes by certain users. Because these petitions raise some shared concerns, the Office has grouped them into one class, as it did during the seventh triennial proceeding. This grouping is without prejudice to possible further refinement of this class, including dividing it into subclasses based on specific uses.

First, as noted, OTW filed a renewal petition requesting that the exemption regarding the creation of noncommercial videos be amended to incorporate the language of the exemption for such uses adopted in the 2010 rulemaking.[124] That exemption permitted circumvention undertaken ''solely in order to accomplish the incorporation of short portions of motion pictures into new works for the purpose of criticism or comment, and where the person engaging in circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use.'' [125] Noting that the current exemption is longer than this formulation, OTW contends that ''the complexity of [the current] provisions substantially increases the difficulty of communicating and implementing the exemptions in practice.'' [126] In OTW's view, reverting to the 2010 language would not expand the scope of the existing rule but merely would help ''clarify the exemption for ordinary users.'' [127] The exemption, however, has been expanded since 2010, including by encompassing works on a Blu-ray disc or received via a digital transmission, and by including language clarifying that the exemption includes ''videos produced for a paid commission if the commissioning entity's use is noncommercial.'' [128] The Office seeks comment on whether, or to what extent, commenters believe the suggested language would alter the substance of the current provision. As part of that analysis, commenters should discuss the extent to which the evidence submitted in the prior rulemaking may be relied upon to support the proposed change.

Second, Joint Educators III seek to expand the current exemption for educational uses to allow a greater number of users to engage in ''online instructional learning.'' [129] They acknowledge that the existing exemption already covers the use of short clips in distance learning by certain users—college and university faculty and students, K–12 educators

[120] 17 U.S.C. 1201(a)(1)(B).

[121] Commerce Comm. Report at 38; *see also* Section 1201 Study at 109–10 (noting that while ''in some cases, [the Office] can make a greater effort to group similar classes together, and will do so going forward,'' ''in other cases, the Office's ability to narrowly define the class is what enabled it to recommend the exemption at all, and so the Office will continue to refine classes when merited by the record'').

[122] 85 FR at 37403.

[123] Section 1201 Study at 147; *see also* 79 FR 55687, 55690 (Sept. 17, 2014).

[124] OTW Noncomm. Videos Renewal Pet. at 3. OTW's petition refers to that proceeding as the ''2008 rulemaking,'' but the Office generally identifies each proceeding by its year of completion.

[125] 75 FR 43825, 43827 (2010).

[126] OTW Noncomm. Videos Renewal Pet. at 3.

[127] *Id.*

[128] 37 CFR 201.40(b)(1). *See* 2015 Recommendation at 103–06 (expanding exemption to include Blu-ray and digital transmission).

[129] Joint Educators III Class 1 Pet. at 2.

and students, and faculty of accredited massive open online courses (MOOCs).[130] Indeed, the 2018 Recommendation specifically described the exemption language pertaining to college and university and K–12 users as ''broad enough to encompass exempted uses under sections 110(1) and 110(2) (*i.e.,* face-to-face and distance teaching).'' [131] Joint Educators III, however, seek to expand the exemption to other online learning platforms that offer ''supplemental education, upskilling, retraining, recharging, and lifelong learning,'' such as Khan Academy, LinkedIn Learning, Osmosis.org and Code.org.[132] To enable these providers to exercise the exemption, they propose an expansion allowing ''educators and preparers of online learning materials to use short portions of motion pictures (including television shows and videos), as defined in 17 U.S.C. 101, for the purpose of criticism, comment, illustration and explanation in offerings for registered learners on online learning platforms when use of the film and media excerpts will contribute significantly to learning.'' [133]

Third, BYU requests to expand the class of eligible users to include ''college and university employees,'' instead of ''college and university faculty.'' [134] In addition, it seeks to broaden the permitted uses from ''criticism, comment, teaching, or scholarship'' to ''a noninfringing use under 17 U.S.C. 107, 110(1), 110(2), or 112(f).'' [135] BYU's proposal also would remove the current reference to screen-capture technology and the requirement that the exempted use be limited to ''short portions'' of motion pictures.[136]

With respect to both BYU's and Joint Educators III's petitions, the Office notes that certain proposals to remove the limitations on eligible users of this exemption were considered during the 2015 and 2018 rulemakings, and invites comment on any changed legal or factual circumstances with respect to these provisions.[137] In particular, the Office seeks specific examples where the presence of TPMs is resulting in an adverse effect on users who are not already included in the existing regulatory language. Further, with respect to BYU's request to expand the types of permitted uses, the Office notes that it has previously rejected similar proposed classes as overbroad.[138] And in the previous rulemaking, the Office declined a proposed exemption by BYU that would permit circumvention for nonprofit educational purposes in accordance with sections 110(1) and 110(2) and eliminate the ''criticism and comment'' limitation and references to screen-capture technology.[139] The Office invites comment on whether any changed circumstances warrant altering that determination.

Proposed Class 2: Audiovisual Works—Texting

SolaByte Corp. petitions for a new exemption to access ''licensed audio/video works stored on optical disc media for the purpose of creating short (10 seconds or less) A/V clips that enhance communication effectiveness and understanding when using TEXTing messages.'' [140] The proposed class ''[i]ncludes movies, TV shows, music video, other copyrighted works'' that are stored on ''[p]ackaged and replicated DVD or Blu-ray discs playable on computer or CE player hardware.'' [141] Eligible users would include persons ''who want to create expressive clips that convey their thoughts when texting.'' [142]

Because these proposed activities do not appear to be limited to criticism and comment or educational uses, the Office has classified this proposal as a separate proposed class. The Office seeks additional detail about the scope of the proposed exemption from SolaByte or others, such as whether the exemption would be available for commercial services. Commenters should describe with specificity the relevant TPMs and whether their presence is adversely affecting noninfringing uses, including identifying whether eligible users may access expressive clips through alternate channels that do not require circumvention and the legal basis for concluding that the proposed uses are likely to be noninfringing. Similarly, commenters should address any anticipated effect that circumvention of TPMs would have on the market for or value of the relevant copyrighted works, which appears to extend to the same broad swatch of motion pictures as Class 1.

Proposed Class 3: Audiovisual Works—Accessibility

ATSP, AHEAD, and LCA petition to expand the existing exemption relating to the creation of accessible versions of motion pictures for students with disabilities. They propose several changes to the existing exemption language, which includes the following requirements:

- Circumvention is undertaken by a disability services office or other unit of a kindergarten through twelfth-grade educational institution, college, or university engaged in and/or responsible for the provision of accessibility services to students, for the purpose of adding captions and/or audio description to a motion picture to create an accessible version as a necessary accommodation for a student or students with disabilities under an applicable disability law, such as the Americans With Disabilities Act, the Individuals with Disabilities Education Act, or Section 504 of the Rehabilitation Act;
- The educational institution unit has, after a reasonable effort, determined that an accessible version cannot be obtained at a fair price or in a timely manner; and
- The accessible versions are provided to students or educators and stored by the educational institution in a manner intended to reasonably prevent unauthorized further dissemination of a work.[143]

First, petitioners seek to expand the exemption ''to allow for the remediation of video for faculty and staff, as well as students.'' [144] They recommend that the current language be revised to read: ''to create an accessible version as a necessary accommodation for students, faculty, and staff with disabilities.'' [145] Second, to clarify that a covered educational institution unit (''EIU'') may create accessible versions ''proactively,'' petitioners suggest removing the phrase ''as a necessary accommodation'' and requiring only that the creation of an accessible version be ''consistent with'' an applicable disability law.[146] Third, petitioners ask the Office to clarify that the ''reasonable effort'' requirement applies ''only where an 'accessible version' is available that contains captions and descriptions of sufficient quality to satisfy applicable disability

[130] *Id.* at 2–3.

[131] 2018 Recommendation at 86.

[132] Joint Educators III Class 1 Pet. at 2.

[133] *Id.*

[134] BYU Class 1 Pet. at 2.

[135] *Id.*

[136] *Id.*

[137] 2018 Recommendation at 53–55; 2015 Recommendation at 102.

[138] *See* 2015 Recommendation at 100 (citing Recommendation of the Register of Copyrights in RM 2005–11, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies at 17–19 (Nov. 17, 2006) (''2006 Recommendation'')).

[139] 2018 Recommendation at 32, 52–53.

[140] SolaByte Class 2 Pet. at 2.

[141] *Id.*

[142] *Id.*

[143] 37 CFR 201.40(b)(2)(i).

[144] ATSP, AHEAD & LCA Class 3 Pet. at 2.

[145] *Id.*

[146] *Id.* at 3.

law.'' [147] The Office notes that in recommending the existing regulatory language, it stated that an EIU may proceed after reaching a conclusion ''that it must create an accessible version as a necessary accommodation for a student with disabilities.'' [148] Fourth, petitioners recommend qualifying the ''reasonable effort'' requirement in circumstances where ''no accessible version of a video included with a textbook exists, but a publisher might be willing to generate an accessible version of the video at extra cost,'' by eliminating this requirement when a publisher does not include an accessible version of materials with purchased materials.[149] The Office would welcome comment upon whether petitioners believe that the extra costs should be of an unreasonable amount, or whether they contend that every offer carrying additional cost should be dismissed, along with any thoughts from copyright owners or licensors on this issue. Finally, petitioners recommend ''altering the current exemption language to make clear that an EIU can reuse stored accessible versions instead of re-circumventing and re-remediating inaccessible media when complying with an accommodation request.'' [150]

The Office seeks comment on whether this exemption, including petitioners' suggested regulatory language, should be adopted.

Proposed Class 4: Audiovisual Works—Livestream Recording

FloSports, Inc. petitions for an exemption ''for circumvention of technology used in the digital storage of audiovisual works originating as a livestream of sports and other competitive events.'' [151] The exemption ''would enable a livestreaming service to provide individual viewers, via a virtual digital video recorder ('vDVR'), with access to a recording on a server for fair use purposes.'' [152]

The petition indicates that circumvention is necessary to alter the functioning of HTTP Live Streaming (''HLS''), ''a live-video streaming technique that enables high quality streaming of media content over the internet from web servers.'' [153] According to FloSports, the use of HLS to stream content ''results in only an ephemeral copy in addition to the live broadcast.'' [154] FloSports seeks to enable ''copies of the audio and video data files [to] be stored on a longer-term basis and synchronized for later replay by the viewer.'' [155] It states that ''[t]he cost and practical difficulty of obtaining synchronization licenses, combined with the cost and technical challenges of creating individualized audio and visual stored files for each viewer seeking to access the stored files, effectively control viewers access to the material for fair use purposes.'' [156]

FloSports contends that the recording of such material constitutes fair use on the following basis:

> Individual recordings of audiovisual performances, historically, had been used by directors of the groups in such recordings to instruct, teach, and otherwise educated [*sic*] the participants in the recordings on what went right, what went wrong, and how each could improve. Generally, the individual performances in the audiovisual streams this petition considers are a very small percentage of the entire copyrighted work (*e.g.,* all individual performances combined for an entire copyrighted broadcast). Further, there is no current market for educational recordings at the moment. Granting this exemption, or the performance of such a recording, would not adversely affect the market for the copyrighted recordings.[157]

The Office invites comment on this proposal but notes at the outset that the description of the proposed class in the petition is insufficiently clear to meet the statutory requirement to identify ''a *particular class* of copyrighted works.'' [158] While the petition generally describes the class as covering livestreams of ''sports and other competitive events,'' elsewhere it states that the relevant works are ''audiovisual recordings of musical performances as identified in 17 U.S.C. 102(a)(6) and 17 U.S.C. 106(a)(5).'' [159] It then states that the proposed class ''incorporates any and all works for which audiovisual recordings may be made and used as fair use. This includes individual school performances.'' [160] Given this inconsistent information, the Office is unable to determine whether, for example, the petition is intended to cover the use of copyrighted broadcasts owned by another party or simply musical or other works that may be captured in broadcasts owned by FloSports. Without further clarification, the petition does not seem to relate to a particular class of works.

Nor is it apparent to what extent the asserted adverse effects are attributable to ''[t]he cost and practical difficulty of obtaining synchronization licenses,'' [161] as opposed to TPMs. As noted, the Office will only recommend an exemption where causation has been established; that is, where the Office can conclude that the statutory prohibition on circumventing access controls is the cause of the adverse effects.[162]

Finally, the Office seeks additional information regarding the intended noninfringing uses, including whether it would be appropriate to clarify that the petition is directed at facilitating educational, noncommercial uses. Petitioner appears to operate a commercial livestreaming service,[163] and it is unclear whether this exemption is intended to facilitate growth in that market. In addition to factual development regarding the intended uses, the Office welcomes information on the legal basis for finding that such uses would be fair. For example, in connection with petitioner's statement that ''the individual performances in the audiovisual streams this petition considers are a very small percentage of the entire copyrighted work,'' [164] commenters should address the well-established principle that copying even a quantitatively ''insubstantial portion'' of a work may weigh against fair use where the material is qualitatively significant to that work.[165] These factual and legal issues should be described with sufficient particularity to enable the Office to determine whether the specific uses are likely to be fair. As it has done in the past, the Office is inclined to reject overbroad proposed classes such as ''fair use works'' or ''educational fair use works.'' [166] Absent such clarification, the Office will decline further consideration of the petition.[167]

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147 *Id.*

148 2018 Recommendation at 109–10.

149 *Id.* The petition refers to a purchased textbook, but the Office queries if that was petitioner's intent, since the exemption concerns access to audiovisual works.

150 *Id.*

151 FloSports Class 4 Pet. at 2.

152 *Id.*

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.* at 3.

158 17 U.S.C. 1201(a)(1)(C) (emphasis added); *see supra* Section I.

159 FloSports Class 4 Pet. at 2.

160 *Id.*

161 *Id.*

162 *See* Section 1201 Study at 115 (''The statutory prohibition on circumventing access controls [must be] the cause of the adverse effects.'').

163 *See Flosports, https://www.flosports.tv/join-now/* (advertising ''plans starting from $12.49/mo'') (last visited Oct. 8, 2020).

164 FloSports Class 4 Pet. at 3.

165 *See Harper & Row Publrs., Inc.* v. *Nation Enters.,* 471 U.S. 539, 564–65 (1985).

166 *See* 2015 Recommendation at 100 (citing 2006 Recommendation at 17–19).

167 *Cf.* 79 FR 73856, 73859 (Dec. 12, 2014) (declining to put forward exemption proposals that could not be granted as a matter of law).

Proposed Class 5: Audiovisual Works—Preservation

LCA proposes a new exemption to facilitate preservation of audiovisual works stored on DVDs or Blu-ray discs. a class that would include ''[m]otion pictures (including television shows and videos), as defined in 17 U.S.C. 101, where the motion picture is lawfully acquired on a DVD protected by the Content Scramble System, or on a Blu-ray disc protected by the Advanced Access Content System, and is no longer reasonably available in the commercial marketplace, for the purpose of lawful preservation of the motion picture, by a library, archives, or museum.'' [168] The petition is quite terse, consisting of a single sentence, and so the Office encourages proponents to develop the legal and factual administrative record in their initial submissions.

The Office seeks comment on whether this proposed exemption should be adopted, including any proposed regulatory language.

Proposed Class 6: Audiovisual Works—Space-Shifting

Somewhat related to LCA's petition, but not cabined to preservation activities conducted by libraries, archives, or museums, SolaByte proposes a broader exemption that would be available to ''[t]he legitimate owner of the DVD or blu-ray disc and licensee of the content'' for the purpose of ''making a usable personal back up copy.'' [169] The exemption ''would apply to any title of audio/visual works 5 years after its public release date.'' [170] SolaByte notes that ''[i]ncomplete licensing of titles by internet media service providers requires the owner of the disc to subscribe to multiple service providers at high personal cost to cover a fraction of their library titles.'' [171]

The Office seeks comment on whether this proposed exemption should be adopted, including any proposed regulatory language. The Office notes that in the 2006, 2012, 2015, and 2018 rulemakings, the Librarian rejected proposed exemptions for space-shifting or format-shifting, finding that the proponents had failed to establish under applicable law that space-shifting is a noninfringing use.[172] The Office invites comment on whether, in the past three years, there has been any change in the legal or factual circumstances bearing upon that issue.

Proposed Classes 7(a): Motion Pictures and 7(b): Literary Works—Text and Data Mining

Authors Alliance, AAUP, and LCA petition for an exemption ''for researchers to circumvent technological protection measures on lawfully accessed literary works distributed electronically as well as on lawfully accessed motion pictures, in order to deploy text and data mining techniques.'' [173] Petitioners believe that these two categories of works ''should be grouped together in a single exemption because they involve the same petitioners, the same proposed use, and implicate the same arguments for an exemption.'' [174] The proposed class includes both works embodied in physical discs and those transmitted digitally.[175] The users seeking access include ''researchers engaged in text and data mining in the humanities, social sciences, and sciences.'' [176]

For reasons of administrative efficiency, the Office has grouped these proposals into one category that encompasses two proposed classes pertaining to motion pictures and literary works, respectively (*i.e.,* Classes 7(a) and 7(b)). Commenters therefore may submit a single comment addressing one or both aspects of the petition. It is important to emphasize, however, that proponents are required to make the statutorily required showing with respect to each category of works. As discussed above, the statute requires that exemptions describe ''a *particular class* of copyrighted works.'' [177] Congress made clear that such a class may not encompass more than one of the categories of works set out in section 102; to the contrary, the ''particular class'' language refers to ''a *narrow and focused subset*'' of the section 102 categories.[178] This means that for each type of work for which an exemption is sought, petitioners must demonstrate an actual or likely adverse impact on a noninfringing use as a result of the statutory prohibition on circumvention. In the case of this proposal, to the extent proponents believe the relevant factual and legal issues are similar as to the two classes of works, the supporting comments should describe those matters in detail. For example, commenters may wish to address the extent to which there is overlap with respect to the types of TPMs applied to these works, the nature of the proposed research activities, the relevant markets for the works, and the availability of potential alternatives to circumvention.

Proposed Class 8: Literary Works—Accessibility

ACB, AFB, NFB, LCA, AALL, Benetech/Bookshare, and HathiTrust petition to expand the current exemption for the use of assistive technologies by visually impaired persons in connection with electronically distributed literary works. The current regulatory language applies to literary works, distributed electronically, that are protected by technological measures that either prevent the enabling of read-aloud functionality or interfere with screen readers or other applications or assistive technologies:

- When a copy of such a work is lawfully obtained by a blind or other person with a disability, as such a person is defined in 17 U.S.C. 121; provided, however, that the rights owner is remunerated, as appropriate, for the price of the mainstream copy of the work as made available to the general public through customary channels; or
- When such work is a nondramatic literary work, lawfully obtained and used by an authorized entity pursuant to 17 U.S.C. 121.[179]

The proposed exemption would amend this language to reflect recent changes to U.S. law to implement the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (''Marrakesh Treaty'').[180] These include updates to the Chaffee Amendment, codified at section 121 of title 17, and the newly adopted section 121A, which pertains to the import and export of works in accessible formats. Petitioners propose the following changes:

- Updating the description of eligible users from ''blind or other person with a disability'' to ''eligible person, as such a person is defined in 17 U.S.C. 121'';
- Updating the description of eligible works to ''literary works and previously published musical works that have been fixed in the form of text or notation''; and
- Adding the phrase ''or 121A'' to the end of 37 CFR 201.40(b)(3)(ii). As an

[168] LCA Class 5 Pet. at 2.

[169] SolaByte Class 6 Pet. at 2.

[170] *Id.*

[171] *Id.*

[172] *See* 83 FR 54010, 54026–27 (Oct. 26, 2018); 80 FR 65944, 65960 (Oct. 28, 2015); 77 FR 65260, 65276–77 (Oct. 26, 2012); 71 FR 68472, 68478 (Nov. 27, 2006).

[173] Authors Alliance, AAUP & LCA Class 6 Pet. at 2.

[174] *Id.*

[175] *Id.* at 3.

[176] *Id.*

[177] 17 U.S.C. 1201(a)(1)(C) (emphasis added); *see supra* Section I.

[178] Commerce Comm. Report at 38 (emphasis added).

[179] 37 CFR 201.40(b)(3).

[180] Marrakesh Treaty, art. 7, June 27, 2013, 52 I.L.M. 1312.

alternative, petitioners request clarification that exercising the rights described in section 121A does not implicate section 1201.[181]

In addition, petitioners request that the Office ''eliminate the reference to the price of 'mainstream' copies of works . . . and replace this term with a more inclusive phrase such as 'market price of an inaccessible copy.' '' [182]

The Office seeks comment on whether this proposed exemption, including petitioners' suggested regulatory language, should be adopted.

Proposed Class 9: Literary Works—Medical Device Data

Hugo Campos, a member of a coalition of medical device patients and researchers, requests two modifications to the current exemption permitting circumvention to access compilations of data generated by medical devices or corresponding personal monitoring systems. First, he seeks removal of the language limiting the exemption to devices ''that are wholly or partially implanted in the body.'' [183] He notes that ''[m]any current and upcoming devices obtain medical data about a patient without the need to be fully or partially implanted in the body,'' including smart watches, personal EKG monitors, and non-implanted glucose meters.[184] And he argues that ''there is no relevant difference between implanted and non-implanted devices with respect to copyright.'' [185]

Second, Mr. Campos requests that the exemption ''permit third parties to perform the circumvention, with permission, on behalf of the patient.'' [186] He notes that the Office and the Library ''have structured other exemptions so that the identity of the person doing the circumvention does not matter.'' [187]

The Office seeks comment on whether this proposed exemption should be adopted, including any proposed regulatory language. With respect to the request to permit third-party assistance, the Office notes that it has addressed this issue on several occasions, most recently in the 2018 Recommendation's discussion of the current exemptions for repair of software-enabled motor vehicles and devices. There, the Office recommended removal of the prior requirement that circumvention be ''undertaken by the authorized owner'' of the vehicle or device, noting participants' concern that such language ''improperly excludes other users with a legitimate interest in engaging in noninfringing diagnosis, repair, or modification activities.'' [188] But the Office emphasized the limited nature of the change:

> To be clear, removal of the ''authorized owner'' language should in no way be understood to suggest that the exemption extends to conduct prohibited by the anti-trafficking provisions; such an exemption is beyond the Librarian's authority to adopt. . . . The recommended revision simply accounts for the possibility that certain third parties may qualify as ''user[s]'' eligible for an exemption from liability under section 1201(a)(1). Such parties still will be required to consider whether their activities could separately give rise to liability under section 1201(a)(2) or (b). Given the legal uncertainty in this area, services electing to proceed with circumvention activity pursuant to the exemption do so at their peril.[189]

The Office invites comment on the extent to which this analysis may be relevant to the current proposal.

Proposed Class 10: Computer Programs—Unlocking

ISRI submitted two separate petitions to expand the current exemption for ''unlocking''—*i.e.,* connecting a wireless device to an alternative wireless network. The current exemption permits circumvention of the following lawfully acquired devices for unlocking purposes:

- Wireless telephone handsets (*i.e.,* cellphones);
- All-purpose tablet computers;
- Portable mobile connectivity devices, such as mobile hotspots, removable wireless broadband modems, and similar devices; and
- Wearable wireless devices designed to be worn on the body, such as smartwatches or fitness devices.[190]

In its first petition, ISRI seeks to add ''laptop computers (including chromebooks) with 4G LTE or 5G or other cellular connection capabilities'' to the list of covered devices.[191] In its second petition, ISRI seeks to remove the enumeration of devices altogether and extend the exemption to ''any other devices with 4G LTE or 5G or other cellular connection capabilities,'' including, but not limited to, ''Smart TVs, Internet of Things (IoT) devices, immersive extended reality (XR) headsets, desktop computers, and drones.'' [192]

The Office seeks comment on whether this proposed exemption should be adopted, including any proposed regulatory language. The Office notes that in the seventh triennial rulemaking it considered a similar petition to remove the list of enumerated device categories, but concluded that the proponents had failed to carry their burden of demonstrating adverse effects on noninfringing uses with respect to all types of wireless devices with cellular connection capability.[193] Comments responding to this petition should address the extent to which factual and legal issues pertaining to certain categories of devices may be relevant to wireless devices more generally.

Proposed Class 11: Computer Programs—Jailbreaking

Two petitions seek to expand or clarify the categories of devices covered by the exemptions for jailbreaking, which currently include smartphones and portable all-purpose mobile computing devices, smart televisions, and voice assistant devices.[194] SFC petitions for a new exemption to enable the installation of alternative firmware in ''routers and other networking devices.'' [195] EFF proposes a clarification of the current exemption regarding smart televisions. In EFF's view, it is ''unclear whether that exemption includes hardware devices that enable the viewing of video streams, along with other software applications, when such devices are not physically integrated into a television.'' [196] The petition refers to such hardware as ''streaming devices'' and cites ''the Roku line of products, the Amazon Fire TV Stick, and the Apple TV'' as examples.[197]

The Office seeks comment on whether these proposed exemptions should be adopted, including any proposed regulatory language to define the types of devices that would be covered.

Proposed Class 12: Computer Programs—Repair

Multiple organizations petition for new or expanded exemptions relating to diagnosis, repair, and modification of software-enabled devices. As noted, the current regulations include two repair-related exemptions, covering (1) computer programs that are contained in and control the functioning of a lawfully acquired motorized land vehicle, when circumvention is a

[181] ACB, AFB, NFB, LCA, AALL, Benetech/Bookshare & HathiTrust Class 8 Pet. at 4.

[182] *Id.*

[183] Campos Class 9 Pet. at 2 (citing 37 CFR 201.40(b)(4)).

[184] *Id.* at 2.

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] 2018 Recommendation at 229.

[189] *Id.* at 225.

[190] 37 CFR 201.40(b)(5).

[191] ISRI Class 10 Pet. #1 at 2.

[192] ISRI Class 10 Pet. #2 at 2.

[193] 2018 Recommendation at 162.

[194] 37 CFR 201.40(b)(6)–(8).

[195] SFC Class 11 Pet. at 2.

[196] EFF Class 11 Pet. at 2.

[197] *Id.*

necessary step to allow the diagnosis, repair, or lawful modification of a vehicle function; and (2) computer programs that are contained in and control the functioning of a lawfully acquired smartphone or home appliance or home system, when circumvention is a necessary step to allow the diagnosis, maintenance, or repair of such a device or system.[198]

Three petitions seek to expand the current exemptions to include additional types of devices. Summit Imaging, Inc. and Transtate Equipment Co., Inc. separately petition for an exemption allowing circumvention of TPMs for purposes of diagnosis, modification, and repair of medical devices.[199] iFixit and Public Knowledge jointly petition for an exemption permitting circumvention ''to repair video game consoles and replace damaged hardware.'' [200] With respect to the latter petition, the Office notes that in prior rulemakings it has declined to recommend exemptions for jailbreaking and repair of video game consoles in light of evidence that circumvention of TPMs in such devices may adversely affect the value of the affected software, as well as a lack of evidence of adverse effects on noninfringing uses.[201] The Office invites comment on whether, in the past three years, there has been any change in the legal or factual circumstances bearing upon these issues.

Two additional petitions request removal of the limitation to specific categories of devices, along with further changes to the current regulatory text.[202] EFF seeks to expand the exemption to permit circumvention for purposes of *modification* of a device, in addition to repair-related activities. iFixit and the Repair Association propose to remove the current requirement that circumvention of TPMs protecting software in motor vehicles not constitute a violation of applicable law.[203] The Office notes that it considered similar requests regarding these issues in the 2018 rulemaking.[204] Therefore, as with the above petitions, comments addressing these proposals should include discussion of any relevant changed circumstances.

Finally, the Office notes that all of the petitions in this class appear to request that the users eligible to exercise these exemptions include third-party service providers.[205] As above, the Office invites comment on the extent to which its prior analysis of that issue may be applicable here.[206]

Proposed Class 13: Computer Programs—Security Research

Two petitions seek to expand the current exemption permitting circumvention for purposes of good-faith security research. Professor J. Alex Halderman, CDT, and ACM propose removal of several limitations in the current regulation: (1) The requirement that circumvention be undertaken on a ''lawfully acquired device or machine on which the computer program operates'' and ''not violate any applicable law''; (2) both instances of the term ''solely'' (*i.e.,* ''solely for the purpose of good-faith security research'' and ''solely for purposes of good-faith testing, investigation, and/or correction of a security flaw or vulnerability''); and (3) the requirement that the information derived from the activity be used ''primarily to promote the security or safety of the class of devices or machines on which the computer program operates, or those who use such devices or machines, and is not used or maintained in a manner that facilitates copyright infringement.'' [207] As petitioners note, the Office considered these proposed changes in the 2018 rulemaking and provided interpretive guidance as to the regulatory language's intended scope.[208] Petitioners state, however, that they ''intend to further develop the record in favor of these changes in the current rulemaking period.'' [209]

SFC petitions for an expansion to ''clarify that the definition of 'good faith security research' . . . includes good-faith testing, investigation, and/or correction of privacy issues (including flaws or functionality that may expose personal information) and permits the owner of the device to remove software or disable functionality that may expose personal information.'' [210] Eligible users under this proposal would include ''privacy and security researchers who investigate and publish information about privacy flaws in computing devices; and individual consumers and hobbyists who wish to prevent their private data from being disclosed by the devices they own.'' [211]

The Office seeks comment on whether these proposed changes should be adopted. With respect to SFC's petition, comments should include discussion of the extent to which the proposed activities may or may not be addressed by permanent statutory exemptions or current regulatory exemptions.

Proposed Classes 14(a): Computer Programs and 14(b): Video Games—Preservation

SPN and LCA filed two petitions to expand the current exemptions for preservation of software and video games by eligible libraries, archives, and museums.[212] Both of these exemptions currently require that the covered works not be ''distributed or made available outside of the physical premises of the eligible library, archives, or museum.'' [213] The proposed exemptions would remove those requirements.[214] The Office welcomes further elaboration on how proponents of the exemptions would envision these works to be distributed or made available in a manner likely to be noninfringing, respectively. For example, the current exemptions are focused on circumvention to enable preservation uses, in contrast to enabling provision of lending copies for users, a preliminary distinction that the Office has found critical in the past when analyzing potential legislative reforms to the section 108 exception for libraries and archives.[215] Would the proposed modification maintain this distinction, and if so, how? Would there be conditions on access restrictions to registered users of an eligible library, archives, or museum or would material be made available more generally to members of the public? The Office notes that in the 2018 rulemaking, it declined to recommend a proposal to expand the video game preservation exemption to allow circumvention by affiliate archivists outside the premises of a covered institution, concluding that the

[198] 37 CFR 201.40(b)(9)–(10).

[199] Summit Imaging, Inc. Class 12 Pet. at 2; Transtate Equip. Co. Class 12 Pet. at 2.

[200] iFixit & Public Knowledge Class 12 Pet. at 2.

[201] *See* 2018 Recommendation at 206, 219–20; 2015 Recommendation at 199–201; 2012 Recommendation at 44, 47.

[202] EFF Class 12 Pet. at 2–3; iFixit & Repair Ass'n Class 12 Pet. at 2–3.

[203] iFixit & Repair.org Class 12 Pet. at 3.

[204] *See* 2018 Recommendation at 189–94, 206–09, 310–11.

[205] Summit Imaging, Inc. Class 12 Pet. at 3; Transtate Equip. Co. Class 12 Pet. at 2; iFixit & Public Knowledge Class 12 Pet. at 2; EFF Class 12 Pet. at 2–3; iFixit & Repair Ass'n Class 12 Pet. at 2.

[206] *See* 2018 Recommendation at 225.

[207] Halderman, CDT & ACM Class 13 Pet. at 3.

[208] *See* 2018 Recommendation at 283–314.

[209] Halderman, CDT & ACM Class 13 Pet. at 3.

[210] SFC Class 13 Pet. at 2.

[211] *Id.*

[212] 37 CFR 201.40(b)(12), (13).

[213] *Id.* at § 201.40(b)(12)(ii), (b)(13)(i).

[214] SPN & LCA Class 14(a) Pet. at 2; SPN & LCA Class 14(b) Pet. at 2.

[215] U.S. Copyright Office, Revising Section 108: Copyright Exceptions for Libraries and Archives at 24–34 (addressing preservation uses), 35–41 (addressing user copies) (2017), *https://www.copyright.gov/policy/section108/discussion-document.pdf*.

proponents had failed to establish that such activity was likely noninfringing.[216] Commenters responding to these petitions should address the extent to which the legal and factual issues relevant to this class may differ from those considered previously.

Although these proposed classes both involve computer programs (which constitute literary works under the Copyright Act), the petition regarding video games involves an additional category of works insofar as video games also constitute audiovisual works.[217] Therefore, the Office is following the same procedure discussed above in relation to the proposed TDM exemption: the Office has grouped these petitions into a single category encompassing two proposed classes. Commenters addressing these proposals may submit a single comment addressing both computer programs and video games, but the supporting evidence must be sufficient to establish an adverse effect on noninfringing uses with respect to each category of works. In particular, the Office is interested in the extent to which licensing markets for video games may be similar or different from those for software more generally, and whether any such differences may be relevant under the fair use analysis or the expected effect of circumvention of technological measures on the market for or value of copyrighted works.[218] The Office seeks comment on these and other relevant issues, including any proposed regulatory language.

Proposed Class 15: Computer Programs—3D Printing

Michael Weinberg petitions to amend the current exemption permitting circumvention to enable the use of alternative feedstock in 3D printers. The current exemption allows access to ''[c]omputer programs that operate 3D printers that employ microchip-reliant technological measures to limit the use of feedstock, when circumvention is accomplished solely for the purpose of using alternative feedstock and not for the purpose of accessing design software, design files, or proprietary data.'' [219] Mr. Weinberg seeks two changes to this language. First, he proposes to ''replace the term 'feedstock' . . . with the term 'material,' '' stating that the latter ''is more commonly used to describe the substances used by 3D printers within the 3D printing community and industry.'' [220] Second, he proposes to remove the term ''microchip-reliant.'' In his view, there is no ''justification to narrow the scope of the exemption to a specific subset of technological measures tied to microchip-based verifications,'' and ''the inclusion of the limiting language creates unnecessary ambiguity.'' [221] As noted, to recommend an exemption, the Office requires a showing that the statutory prohibition on circumventing access controls is yielding adverse effects on non-infringing uses. The current reference to ''microchip-reliant'' was based on the record of relevant TPMs submitted in connection with the exemption request.[222] In particular, the Office now solicits descriptions and examples of the prevalence of TPMs that are not microchip-based verifications, and descriptions of adverse effects stemming from such TPMs.[223]

In general, the Office seeks comment on whether these proposed changes should be adopted.

Proposed Class 16: Computer Programs—Copyright License Investigation

SFC petitions for a new exemption to permit circumvention of TPMs protecting computer programs for purposes of ''(a) investigating potential copyright infringement of the computer programs; and (b) making lawful use of computer programs (*e.g.,* copying, modifying, redistributing, and updating free and open source software (FOSS)).'' [224] The proposed exemption does not appear to be limited to particular users or types of devices. SFC states that the users seeking access include:

> software authors and publishers, including the authors of FOSS computer programs (which are frequently incorporated in embedded computing devices in an infringing manner); and individual consumers who are lawful owners of embedded computing devices and licensees of the computer programs embedded therein, and who wish to make lawful use of computer programs protected by technological protection measures (*e.g.* the right granted by certain FOSS licenses to install modified versions of the FOSS computer programs).[225]

It is somewhat unclear whether the requested exemption for ''lawful use of computer programs'' would apply to *any* lawful use or seeks merely to allow licensed uses of FOSS software. To the extent the former is intended, the proposed exemption appears beyond the Librarian's authority to grant. As the Office has consistently noted, the rulemaking requires a showing of ''distinct, verifiable and measurable'' adverse impacts on noninfringing uses.[226] Such evidence ''cannot be hypothetical, theoretical, or speculative, but must be real, tangible, and concrete.'' [227] In light of that requirement, ''the Register has previously rejected broad proposed categories such as 'fair use works' or 'educational fair use works' as inappropriate.'' [228] SFC and any other proponents of this request therefore must narrow or clarify the specific uses of computer programs that the proposed exemption seeks to permit, so that participants and the Office may fairly assess whether they are likely to be noninfringing and adversely affected by the prohibition on circumvention. The Office also welcomes additional detail regarding the first subpart of SFC's intended uses ''investigating potential copyright infringement of the computer programs, including the statement ''FOSS computer programs ([ ] are frequently incorporated in embedded computing devices in an infringing manner).''

Proposed Class 17: All Works—Accessibility Uses

Multiple organizations representing persons with disabilities (''Accessibility Petitioners'') jointly filed a petition proposing ''a more comprehensive exemption to resolve the shortcomings of the current, piecemeal approach to Section 1201 exemptions for accessibility.'' [229] The proposed exemption would permit circumvention to access ''all cognizable classes of works under Section 102 (a) of the Copyright Act'' to facilitate accessibility for persons with disabilities. Accessibility Petitioners state that this

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[216] 2018 Recommendation at 271–75.

[217] U.S. Copyright Office, Compendium of U.S. Copyright Office Practices sec. 807.7(A)(1) (3d ed. 2017) (''Generally, a videogame contains two major components: the audiovisual material and the computer program that runs the game.'').

[218] *See* 17 U.S.C. 107; 1201(a)(1)(C)(iv).

[219] 37 CFR 201.40(b)(14).

[220] Weinberg Class 15 Pet. at 2.

[221] *Id.*

[222] 2015 Recommendation at 376.

[223] *See Lexmark Int'l Inc.* v. *Static Control Components, Inc.,* 387 F.3d 522, 547 (6th Cir. 2004) (''Because the statute refers to 'control[ling] access to a work protected under this title,' it does not naturally apply when the 'work protected under this title' is otherwise accessible.'').

[224] SFC Class 16 Pet. at 2.

[225] *Id.*

[226] Commerce Committee Report at 37; *see also* Section 1201 Study at 119–21.

[227] Section 1201 Study at 120.

[228] 2015 Recommendation at 100 (citing 2006 Recommendation at 17–19).

[229] ACB, AFB, Ass'n of Late-Deafened Adults, ATSP, AHEAD, Benetech/Bookshare, Gallaudet U., HathiTrust, Hearing Loss Ass'n of Am., LCA, Nat'l Ass'n of the Deaf, Nat'l Fed'n of the Blind, Telecomm. for the Deaf and Hard of Hearing, Inc. (collectively ''Accessibility Petitioners'') Class 17 Pet. at 4.

exemption would allow such users, as well as ''advocates[ ] and organizations that produce accessible versions of copyrighted works protected by technological protection measures[,] to press ahead on accessibility without the burden of engaging in a complex, situation-specific analysis.'' [230] They state that the relevant barriers to access include ''(1) the access controls that inhibit accessibility and (2) failures of producers, publishers, and other rightsholders to authorize access for accessibility purposes or to produce accessible versions of their works.'' [231]

As presently suggested, this proposed exemption is beyond the Librarian's authority to adopt because it does not meet the statutory requirement to describe ''a *particular class* of copyrighted works.'' [232] As discussed above, the legislative history confirms that this language is intended to refer to ''a *narrow and focused subset* of the broad categories of works . . . identified in section 102 of the Copyright Act.'' [233] Therefore, the Office uses the section 102 categories as a starting point and refines the proposed classes by other criteria, such as the types of TPMs used or the types of uses.[234] For example, while the category of ''literary works'' under section 102(a)(1) ''embraces both prose creations such as journals, periodicals or books, and computer programs of all kinds,'' Congress explained that ''[i]t is exceedingly unlikely that the impact of the prohibition on circumvention of access control technologies will be the same for scientific journals as it is for computer operating systems.'' [235] Thus, ''these two categories of works, while both 'literary works,' do not constitute a single 'particular class' for purposes of'' section 1201(a)(1).[236]

Further, petitioners are required to establish ''distinct, verifiable and measurable impacts'' on noninfringing uses,[237] and those impacts must be caused by the statutory prohibition on circumvention.[238] While TPMs undoubtedly have such impacts with respect to many accessibility uses (as reflected by the exemptions adopted for such uses in prior rulemakings), it is not clear to what extent various TPMs are effectively applied to every category of work in section 102, some of which may not readily lend themselves to such measures (*e.g.,* sculptural works). In addition, the availability of accessible-format versions of works in the marketplace is a relevant consideration in determining adverse effects,[239] and it is not clear that that factor applies equally to all categories of works.

The Office notes its continuing discretion to decline to put forward proposals for public comment that are unlikely to yield consideration of exemptions consistent with the standards of section 1201(a)(1).[240] In light of the important public policy considerations raised by this request and past exemptions adopted with respect to facilitating accessibility uses, however, the Office is noticing this category for public comment while flagging the need to further develop and refine petitioners' request into separate proposed classes. Accordingly, Accessibility Petitioners and any other proponents in this category must provide evidence and legal analysis sufficient to enable the Office to make a particularized assessment as to each class of works for which an exemption is sought. Based on prior exemptions adopted, the Office anticipates Accessibility Petitioners to be seeking exemptions related to TPMs protecting literary works as well as motion pictures distributed electronically, and proponents should provide evidence and proposed regulatory language with respect to these and any other relevant classes, and clearly identify and propose contours for each such class. For example, the Office is not inclined to recommend an exemption for printed copies of literary works, for which no TPMs are employed. Nor is the Office empowered to recommend regulatory language that extends to sound recordings, musical works, architectural works, etc. without development of an adequate administrative record demonstrating that an exemption is appropriate for each of these classes.[241]

Accessibility Petitioners should also include, with respect to each class, evidence of an actual or likely adverse effect on accessibility uses resulting from TPMs applied to that type of work. While the Office recognizes the vital importance of ensuring accessibility for persons with disabilities, and indeed has recommended legislation to make permanent the current exemption regarding assistive technologies for electronically-distributed literary works,[242] its authority in this proceeding is bound by the provisions of the statute. Subject to these requirements, the Office invites comment on this proposed class(es).

IV. Future Phases of the Eighth Triennial Rulemaking

As in prior rulemakings, after receipt of written comments, the Office will continue to solicit public engagement to create a comprehensive record. Described below are the future phases of the administrative process that will be employed for this rulemaking, so that parties may use this information in their planning.

A. Public Hearings

The Copyright Office intends to hold public hearings in spring 2021 following the last round of written comments. The hearings will allow for participation by videoconference and will be streamed online. In addition, the Office will determine at a later date, based on applicable public health guidelines, whether in-person participation will be possible. A separate notice providing details about the hearings and how to participate will be published in the **Federal Register** at a later date. The Office will identify specific items of inquiry to be addressed during the hearings.

B. Post-Hearing Questions

As with previous rulemakings, following the hearings, the Copyright Office may request additional information with respect to particular classes from rulemaking participants. The Office may rely on this process in cases where it would be useful for participants to supply missing information for the record or otherwise resolve issues that the Office believes are material to particular exemptions. Such requests for information will take the form of a letter from the Copyright Office and will be addressed to individual parties involved in the proposal as to which more information is sought. While responding to such a request will be voluntary, any response

[230] *Id.* at 5.

[231] *Id.*

[232] 17 U.S.C. 1201(a)(1)(C) (emphasis added).

[233] Commerce Committee Report at 38 (emphasis added).

[234] *See supra* Section I.

[235] House Manager's Report at 7.

[236] *Id.* As noted, the Office has repeatedly declined to recommend proposed exemptions that have failed to define the class of works to be covered with sufficient particularity. *See, e.g.,* 2018 Recommendation at 131–32; 79 FR at 73859; 2006 Recommendation at 17–19.

[237] Commerce Committee Report at 37.

[238] 17 U.S.C. 1201(a)(1)(C); *see also* Section 1201 Study at 115, 117.

[239] *See, e.g.,* 2018 Recommendation at 110 (including market check requirement in exemption for accessibility uses of audiovisual works ''to prevent copies being made of works already available in accessible formats, while supporting the motion picture industry's effort to further expand the availability of accessible versions in the marketplace'').

[240] 79 FR at 73859 (declining to notice three proposals for public comment).

[241] *See supra* Section I (outlining four elements to the evidentiary standard applied by the Office in evaluating requests).

[242] *See* Section 1201 Study at 84–88.

will need to be supplied by a specified deadline. After the receipt of all responses, the Office will post the questions and responses on the Office's website as part of the public record.

C. Ex Parte Communication

In the seventh triennial rulemaking, in response to stakeholder requests, the Office issued written guidelines under which interested non-governmental participants could request informal communications with the Office during the post-hearing phase of the proceeding. The Office expects to follow substantially the same process in this proceeding. To ensure transparency, participating parties will be required to submit a list of attendees and a written summary of any oral communications, which will be posted on the Office's website. Specific guidelines for this proceeding will be made available following the public hearings. No *ex parte* communications with the Office regarding this proceeding will be permitted prior to the post-hearing phase.

Dated: October 9, 2020.

Regan A. Smith,

General Counsel and Associate Register of Copyrights.

[FR Doc. 2020–22893 Filed 10–14–20; 8:45 am]

BILLING CODE 1410–30–P

POSTAL SERVICE

39 CFR Part 20

International Mailing Services: Proposed Product and Price Changes—CPI

AGENCY: Postal Service™.

ACTION: Proposed rule; request for comments.

SUMMARY: The Postal Service proposes to revise *Mailing Standards of the United States Postal Service,* International Mail Manual (IMM®), to reflect changes coincident with the recently announced mailing services price adjustments.

DATES: We must receive your comments on or before November 16, 2020.

ADDRESSES: Mail or deliver comments to the manager, Product Classification, U.S. Postal Service®, 475 L'Enfant Plaza SW, RM 4446, Washington, DC 20260–5015. You may inspect and photocopy all written comments at USPS® Headquarters Library, 475 L'Enfant Plaza SW, 11th Floor N, Washington DC by appointment only between the hours of 9 a.m. and 4 p.m., Monday through Friday by calling 1–202–268–2906 in advance. Email comments, containing the name and address of the commenter, to: *PCFederalRegister@usps.gov,* with a subject line of ''January 2021 International Mailing Services Price Change—CPI.'' Faxed comments are not accepted.

FOR FURTHER INFORMATION CONTACT: Kathy Frigo at 202–268–4178.

SUPPLEMENTARY INFORMATION:

International Price and Service Adjustments

On October 9, 2020, the Postal Service filed a notice of mailing services price adjustments with the Postal Regulatory Commission (PRC), effective on January 24, 2021. The Postal Service proposes to revise Notice 123, *Price List,* available on Postal Explorer® at *https://pe.usps.com,* to reflect these new price changes. The new prices are or will be available under Docket Number R2021–1 on the Postal Regulatory Commission's website at *www.prc.gov.*

This proposed rule describes the price changes for the following market dominant international services:

- International extra services and fees.

International Extra Services and Fees

The Postal Service plans to increase prices for certain market dominant international extra services including:

- Certificate of Mailing
- Registered Mail™
- Return Receipt
- Customs Clearance and Delivery Fee
- International Business Reply™ Mail Service

CERTIFICATE OF MAILING

	Fee
Individual pieces	
Individual article (PS Form 3817)	$1.55
Duplicate copy of PS Form 3817 or PS Form 3665 (per page)	1.55
Firm mailing sheet (PS Form 3665), per piece (minimum 3), First-Class Mail International only	0.44
Bulk quantities	
For first 1,000 pieces (or fraction thereof)	$8.80
Each additional 1,000 pieces (or fraction thereof)	1.10
Duplicate copy of PS Form 3606	1.55

Registered Mail

Fee: $16.30.

Return Receipt

Fee: $4.25.

Customs Clearance and Delivery

Fee: per piece $6.65.

International Business Reply Service

Fee: Cards $1.55; Envelopes up to 2 ounces $2.05

Following the completion of Docket No. R2021–1, the Postal Service will adjust the prices for products and services covered by the International Mail Manual. These prices will be on Postal Explorer at *pe.usps.com.*

Accordingly, although exempt from the notice and comment requirements of the Administrative Procedure Act (5 U.S.C. 553(b), (c)) regarding proposed rulemaking by 39 U.S.C. 410(a), the Postal Service invites public comment on the following proposed changes to *Mailing Standards of the United States Postal Service,* International Mail Manual (IMM®), which is incorporated by reference in the *Code of Federal Regulations* in accordance with 39 CFR 20.1, and to associated changes to Notice 123, *Price List.*

List of Subjects in 39 CFR Part 20

Foreign relations, International postal services.

Accordingly, 39 CFR part 20 is proposed to be amended as follows:

PART 20—[AMENDED]

■ 1. The authority citation for 39 CFR part 20 continues to read as follows:

Authority: 5 U.S.C. 552(a); 13 U.S.C. 301–307; 18 U.S.C. 1692–1737; 39 U.S.C. 101,