

UNITED STATES COPYRIGHT OFFICE



Long Comment Regarding a Proposed Exemption Under 17 U.S.C. § 1201

Please submit a separate comment for each proposed class.

NOTE: This form must be used in all three rounds of comments by all commenters not submitting short-form comments directly through [regulations.gov](https://www.regulations.gov), whether the commenter is supporting, opposing, or merely providing pertinent information about a proposed exemption.

When commenting on a proposed expansion to an existing exemption, you should focus your comments only on those issues relevant to the proposed expansion.

[] Check here if multimedia evidence is being provided in connection with this comment

Commenters can provide relevant multimedia evidence to support their arguments. Please note that such evidence must be separately submitted in conformity with the Office's instructions for submitting multimedia evidence, available on the Copyright Office website at <https://www.copyright.gov/1201/2021>.

ITEM A. COMMENTER INFORMATION

The Organization for Transformative Works (OTW) is a nonprofit organization established in 2007 to protect and defend fans and fanworks from commercial exploitation and legal challenge. We represent artists who make works commenting on and transforming existing works, adding new meaning and insights—from reworking a film from the perspective of the “villain,” to using storytelling to explore racial dynamics in media, to retelling the story as if a woman, instead of a man, were the hero. We represent individuals who find community and common ground in shared affection for and criticism of media in a world that is all too often divided and isolating. The OTW’s nonprofit website hosting transformative noncommercial works, the Archive of Our Own, has over 3 million registered users, hosts over 6 million unique works, and receives almost 350 million page views per week.

The OTW’s contact information is: Betsy Rosenblatt, betsy_rosenblatt@post.harvard.edu, or legal@transformativeworks.org.

ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 1: Audiovisual Works—Criticism and Comment

ITEM C. OVERVIEW

The OTW proposes the following language for the exemption for noncommercial video:

Privacy Act Advisory Statement: Required by the Privacy Act of 1974 (P.L. 93-579)

The authority for requesting this information is 17 U.S.C. §§ 1201(a)(1) and 705. Furnishing the requested information is voluntary. The principal use of the requested information is publication on the Copyright Office Web site and use by Copyright Office staff for purposes of the rulemaking proceeding conducted under 17 U.S.C. § 1201(a)(1). NOTE: No other advisory statement will be given in connection with this submission. Please keep this statement and refer to it if we communicate with you regarding this submission.

Motion pictures (including television shows and videos), as defined in 17 U.S.C. 101, where circumvention is undertaken solely in order to make use of short portions of the motion pictures for the purpose of criticism or comment in noncommercial videos, 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. For purposes of this exemption, “noncommercial videos” includes videos created pursuant to a paid commission, provided that the commissioning entity’s use is noncommercial.

ITEM D. TECHNOLOGICAL PROTECTION MEASURE(S) AND METHOD(S) OF CIRCUMVENTION

The TPMs and methods of circumvention addressed are the same as those in the existing exemption. More detail is available in the records of previous rulemakings.

ITEM E. ADVERSE EFFECTS ON NONINFRINGING USES

This proposal is based on the 2010 Recommendation, as amended by later clarification in the 2012 Recommendation about the meaning of “noncommercial” and the 2015 Recommendation’s reformulation of the exemption to encompass non-DVD sources in recognition of the rise of Blu-Ray and streaming as increasingly the only feasible means of access to many works.

As explained in the petition for renewal of the existing exemption, the factual bases for granting the exemption remain stable. The law remains clear that many such uses will be fair.¹ In addition, the non-legal facts remain as they were: licensing of audiovisual clips is generally unavailable to noncommercial users; available licenses restrain criticism of exactly the type most likely to be fair use; and alternatives to circumvention still do not provide the necessary quality for fair criticism and comment.² The OTW is prepared to present testimony from individuals familiar with the exemption, current vidding community practices, and the practical and legal reasons why the suggested revision will have no adverse effects on noninfringing uses, including Francesca Coppa and Tisha Turk. However, the evidence from prior rulemakings also supports the suggested revision and is not stale because nothing of substance has changed.³ The suggested language is all language the Copyright Office has used in the past.

The real issue is whether the overly complex structure of the existing exemption serves the purposes for which it was granted and renewed. It does not, instead retaining traps for the unwary, who are the ones most in need of its protection.

¹ Along with the cases previously cited, see *Hughes v. Benjamin*, 2020 WL 528704 (S.D.N.Y. Feb. 3, 2020) (finding 6 video clips, juxtaposed without additional commentary beyond disparaging title, to be fair use).

² This comment incorporates by reference previous submissions to prior rounds of the rulemaking, including the examples, testimony, and exhibits.

³ The distribution mechanisms have expanded to services such as TikTok, but the young women making transformative works in which they add themselves to *Harry Potter* movies are still using the same kind of editing software and techniques such as keying, masking and color correction. Lena Wilson, ‘Harry Potter’ and the Prisoners of Quarantine, N.Y. Times, Nov. 17, 2020, <https://www.nytimes.com/2020/11/17/movies/harry-potter-tiktok.html>.

The division of exemptions into screencapture/not screencapture is not justified by the record or by the law.

I. There Is No Technological or Statutory Basis for the Distinction

First, no participant in these proceedings can distinguish screencapture from other technologies. To date, no participant in the exemption proceedings has been able to look “under the hood” of screencapture software. The Office has therefore proceeded by declaring that advertising will be used as a proxy for whether a program is a screencapture program, but it has not justified that conclusion with references to the statute or to the purposes served by the exemption.

For example, although exemption opponents have long touted screencapture as an “alternative” to circumvention, they will not commit to that position in a way that would bind them in court against a fair user, nor can they bind other copyright owners, any of whom could assert that screencapture is itself circumvention.⁴ Many video sources attempt to—and do—block screencapture software from working.⁵ The Copyright Office does not have the statutory authority to bind litigants or courts on this issue, and so it should not proceed as if screencapture is a preferable alternative from the perspective of anticircumvention law.

There has never been any explanation of why encouraging use of screencapture is better for any copyright purpose. Indeed, the uniform testimony has always been that a “good enough” copy created by screencapture may often be suitable for unauthorized consumptive uses even when it is unsuitable for editing or close reading.

Given that both screen capture and other methods of circumvention are subject to TPMs in the current environment, people who are entitled to an exemption on the merits of their uses should

⁴ See, e.g., *UMG Recordings, Inc. v. PMG Technologie UG*, No. 16-cv-07210 (C.D. Cal., filed Sept. 26, 2016) (including §1201 claim against software provider allowing capture of audio from YouTube); Abby Vollmer, *Standing up for developers: youtube-dl is back*, Github, November 16, 2020, <https://github.blog/2020-11-16-standing-up-for-developers-youtube-dl-is-back/> (discussing §1201 claim sent to Github by RIAA for code that allows downloads of Youtube videos).

⁵ As Gizmodo explains, “There’s only one big block on screenshots on Android and indeed iOS: when DRM-protected video is playing, with Netflix the best example. Right now there’s no way around this restriction, even using the desktop applications we’ve mentioned.” David Nield, *How to Take Screenshots of Anything (Even When They're Blocked)*, Jan. 23, 2017, <https://fieldguide.gizmodo.com/how-to-take-a-screenshot-of-anything-even-when-theyre-1791505218>; see also <https://www.dvd-cloner.com/knowledge/about-dvd-copy-for-mac/how-to-take-screenshots-in-mac-os-x-s-dvd-player-application.html>; <https://support.techsmith.com/hc/en-us/articles/203732478-Snagit-Mac-Cannot-capture-DVD-video-on-OS-10-7-or-later>; Open Broadcaster Software, *Recording Netflix get sound but only black screen video*, Sept. 19, 2017, <https://obsproject.com/forum/threads/recording-netflix-get-sound-but-only-black-screen-video.74657/>; see also *iOS 11 Prevent Screen Record like Netflix*, <https://stackoverflow.com/questions/46319665/ios-11-prevent-screen-record-like-netflix/46370265#46370265> (explaining the technical steps used by Netflix and others on iOS).

not be limited to capturing the video at a particular point in its journey through the computer. The statutory factors do not provide the Office with reasons to determine that people entitled to an exemption must use a particular technology to do so.⁶

II. There Is No Practical Basis for the Distinction

Fundamental principles of due process counsel in favor of recognizing the fact that the screencapture distinction is one that ordinary fair users of video do not make. The uniform testimony, uncontroverted by opponents for more than a decade, is that—with the exception of the participants in these proceedings—remixers generally use the tools that work for them, because they are unaware of §1201. Indeed, as past submissions have explained, even federal prosecutors and experienced trademark attorneys are unaware of §1201’s potential constraints.⁷ Given the actual uses that are being made, the only way to protect concededly fair users such as the attorneys who don’t know the DMCA exists is to make the exemption technology-neutral. The vast majority of the people whose works are protected by the exemption are not copyright lawyers, are not advised by copyright lawyers, and only find out about §1201 when they receive a copyright claim and wish to assert fair use, when it is too late for them to choose a technology.

The situation is similar for National History Day students making educational videos examining historical events. In 2015, the Copyright Office rejected the example of such students because, although the competition requirements made clear that video quality would be part of the

⁶ The Office has indicated that it intends to follow the Administrative Procedure Act. Under the APA, a decision is arbitrary and capricious where “the agency has ... entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency” *Nat. Res. Def. Council v. U.S. E.P.A.*, 658 F.3d 200, 215 (2d Cir. 2011) (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Simply put, “the agency must explain why it decided to act as it did.” *Butte Cty. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010); see also *Nat’l Ass’n of Clean Water Agencies v. EPA*, 734 F.3d 1115, 1136–38 (D.C. Cir. 2013) (rejecting agency rule under APA substantial evidence standard where group challenging rule presented credible evidence contrary to agency findings and agency offered only “mere assertion” that rule accounted for contrary evidence in reply); *Butte Cty.*, 613 F.3d at 194 (rejecting agency finding under APA substantial evidence standard where agency failed to “articulate a satisfactory explanation” and agency “ignore[d] evidence contradicting its position” (internal quotation marks and citations omitted)); *N.L.R.B. v. E-Systems, Inc.*, 103 F.3d 435, 439 (5th Cir. 1997) (agency must not “ignore[] relevant evidence without explaining and justifying its decision to do so”); *Water Quality Insurance Syndicate v. United States*, 225 F. Supp. 3d 41, 68-69 (D.D.C. 2016) (APA’s substantial evidence standard isn’t met “when an agency ignores factual matters or fails to respond adequately to meritorious arguments raised in opposition to the agency’s action;” agency “is not free to ignore, without explanation, the record evidence”).

⁷ See, e.g., Comments of the Electronic Frontier Foundation, *New Media Rights, Organizational*

for Transformative Works on Proposed Class 1 – Audiovisual Works – Criticism and Comment, at 10 & nn. 20-21 (2017), https://lca.x0x8kvd0-liquidwebsites.com/wp-content/uploads/2018/04/EFF_NMR_OTW_1201_Comment__proposed_class_1.pdf.

assessment, top quality video was not *absolutely* required to win. That conclusion, wrong in itself (since it required students to impair their own persuasiveness) missed the point. It is uncontested that knowledge of the DMCA is highly limited, and that the National History Day instructions direct students to consider factors relevant to fair use, but not to §1201. As a result, students attempting to do well will make the best video they can. Only when challenged—for example, when they post their videos on TikTok and wish to contest a DMCA takedown—will they discover they are lawbreakers. This unnecessary, accidental legal exposure is a substantial harm to lawful uses.

The idea that it could be unlawful to perform the steps necessary to take a lawful act is mystifying to most people. It is particularly notable that, over six rounds of rulemaking, exemption opponents have developed no evidence that anticircumvention law is known to creators.⁸ As researcher Katharina Freund discovered in her empirical work interviewing remixers: “The complexity of copyright law makes it very difficult for non-experts to understand, particularly, the anti-circumvention requirements of the DMCA.”⁹ Indeed, as researcher Lucas Hilderbrand observed, “when people learn about the extent of the DMCA restrictions, they respond with shock and outrage, which tends to turn either to pessimism or to willful disregard for the law.”¹⁰

In its substantive consideration of whether an exemption is needed, the Office considers alternatives to circumvention. In this evaluation, the Office should weigh not just whether alternatives exist in theory, but whether the relevant group understands and practically can and will use those alternatives. We’ve had over twenty years for knowledge of §1201 to permeate ordinary consciousness. It hasn’t. It’s not going to. Denying coverage by an exemption because an alternative is theoretically available, when the relevant user group doesn’t know about it and won’t use it, is inconsistent with the statute, which asks for evidence about harms to noninfringing uses in the real world. Looking at reality on the ground would provide a more innovation-friendly environment.

Many fair users are not part of preexisting artistic or political communities, and have no reason to know about the specialized requirements of §1201. Successful fair users like the anti-abortion group Center for Bio-Ethical Reform¹¹ or a critic of an anti-Muslim speaker¹² made speech about

⁸ See also Krzysztof Bebenek, Strong Wills, Weak Locks: Consumer Expectations and the DMCA Anticircumvention Regime, 26 Berkeley Tech. L.J. 1457 (2011) (“[B]ecause the DMCA’s anticircumvention regime relies on a combination of complex law and porous technology that fails to reflect consumer expectations, there is good reason to believe that it is also fairly ineffectual.”).

⁹ See Katherine Freund “Fair use is legal use”: Copyright Negotiations and Strategies in the Fan-Vidding Community, 17 New Media & Society 1, 5 (2014).

¹⁰ Lucas Hilderbrand, Inherent Vice: Bootleg Histories of Videotape and Copyright 79 (2009).

¹¹ See Northland Family Planning Clinic, Inc. v. Ctr. for Bio-Ethical Reform, 868 F. Supp. 2d 962, 972, 982-93 (C.D. Cal. 2012) (re-edited video critiquing original video was fair use).

¹² Caner v. Autry, 2014 WL 2002835 (W.D. Va. May 14, 2014). As explained in the EFF/OTW comment, Autry was sued over multiple critical videos, including his remix video, though the court only ultimately ruled on one video. EFF/OTW 2014 Comment, at 9.

specific matters, using circumvention to do so, rather than starting from an intent to make transformative works. Likewise, the anti-Redskins video highlighted by the Office in a prior exemption proceeding was made within a political community, not by people who routinely deal with technical copyright issues.¹³

When assessing the evidence of risk from exemptions, it is important to recall that, just as the MPAA predicted that the VCR would destroy the film industry,¹⁴ the MPAA, along with like-minded organizations, repeatedly claimed that any exemption at all to §1201 would lead to the collapse of TPMs.¹⁵ Indeed, they specifically predicted that the 2006 exemption for college film studies would, like the VCR before it, destroy the film industry.¹⁶ They've been wrong each

¹³ Section 1201 Rulemaking: Sixth Triennial Proceeding, Recommendation of the Register of Copyrights 86 (Oct. 2015).

¹⁴ “[T]he VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone.” Jack Valenti, the MPAA lobbyist who made this claim, conceded a few minutes later that he owned and used a video tape recorder. 1982 Home Recording Hearing, Home Recording of Copyrighted Works: Hearing on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcomm. on Courts of the H. Comm. on the Judiciary, 97th Cong. (1982), at 8, 10 (testimony of Jack Valenti, Motion Picture Association of America); *see also* Michael A. Carrier, *Innovation for the 21st Century: Harnessing the Power of Intellectual Property and Antitrust Law* 107 (1st Ed. 2009) (recounting the content industries’ grim and inaccurate history of predicting that new technologies—including player pianos and records—would destroy the production of creative works).

¹⁵ Transcript of Testimony at 76, Section 1201 Rulemaking, Docket No. RM 2005-11A (U.S. Copyright Office Apr. 3, 2006), available at <http://www.copyright.gov/1201/2006/hearings/transcript-april03.pdf> (testimony of Fritz Attaway, Motion Picture Ass’n of Am.) (opposing any exemptions as threats to the effectiveness of entire 1201 regime); Comments of Motion Picture Ass’n of Am. (MPAA) at 11, Section 1201 Rulemaking, Docket No. RM 2008-8 (U.S. Copyright Office Feb. 2, 2009), available at <http://www.copyright.gov/1201/2008/responses/mpaa-46.pdf> (same); Comments of DVD Copy Control Ass’n, Inc. at 2, Section 1201 Rulemaking, Docket No. RM 2002-3 (U.S. Copyright Office Feb. 19, 2003), available at <http://www.copyright.gov/1201/2003/reply/028.pdf> (“even . . . ‘limited exemptions’ will essentially render CSS ineffective as a means of protecting copyrighted content”); *see also* Comments of the DVD Copy Control Ass’n, Inc. at 14, Section 1201 Rulemaking, Docket No. RM 2005-11 (U.S. Copyright Office Feb. 2006), available at http://www.copyright.gov/1201/2006/reply/01taylor_DVDCCA.pdf (nearly identical argument); Comments of Time Warner, Inc. at 10-11, Section 1201 Rulemaking, Docket No. RM 2005-11 (U.S. Copyright Office Feb. 2006), available at http://www.copyright.gov/1201/2006/reply/18aistars_TWI.pdf (“Granting [an exemption] with respect to any particular [DRM] technology would be tantamount to outlawing the use of that technology.”).

¹⁶ Joint Reply Comments of Ass’n of Am. Publishers et al. at 30, Section 1201 Rulemaking, Docket No. RM 2005-11 (U.S. Copyright Office Feb. 2, 2006), available at http://www.copyright.gov/1201/2006/reply/11metalitz_AAP.pdf (“[T]he very medium that educators have grown to appreciate and desire to use in their classrooms would be threatened by the recognition of the requested exemption.”).

time, and in the 2015 proceedings abandoned opposition to the renewal of many existing exemptions, conceding their prior errors. Five years later, the video market was exploding even before the pandemic appeared.¹⁷

The Office should additionally consider the overriding objective of understanding of and respect for the law. As Lucas Hildebrand observed above, the DMCA's provisions create contempt for the law. One reason so many laypeople are dismissive of copyright law is because it is counterintuitive and arcane, resulting in seeming unfairness and futility. Jessica Litman has explained:

The less workable a law is, the more problematic it is to enforce. The harder it is to explain the law to the people it is supposed to restrict, the harder it will be to explain to the prosecutors, judges, and juries charged with applying it. The more burdensome the law makes it to obey its prescriptions, and the more draconian the penalties for failing, the more distasteful it will be to enforce. The more people the law seeks to constrain, the more futile it can be to enforce it only sporadically. Finally, the less the law's choices strike the people it affects as legitimate, the less they will feel as if breaking that law is doing anything wrong. In other words, if a law is bad enough, large numbers of people will fail to comply with it, whether they should or not.¹⁸

The United Kingdom's Intellectual Property Office surveyed numerous copyright stakeholders, and heard the same point that simple rules promote understanding and compliance:

[Some stakeholders] saw the complexity of copyright as the main challenge to lawful use of works. In their view, the current situation online was too confusing to understand and as a result many people gave up trying. Even some long-time professionals in the creative industries indicated a lack of knowledge of all relevant copyright developments in their area.

The copyright system suffers from a marked lack of public legitimacy. . . . The system is often unable to accommodate certain uses of copyright works that a large proportion of the population regards as legitimate fair and reasonable. . . . The problems become more pronounced as people feel a sense of ownership or attachment to material in which the copyright is owned by others. Consumers may have strong ties to material . . . because of the time and effort they have devoted to it¹⁹

¹⁷ The Sky Is Rising, <https://skyisrising.com/TheSkyIsRising2019.pdf>, at 13-24 (2019).

¹⁸ Jessica Litman, *Digital Copyright* 195 (2001); see also Joyce E. Cutler, *On Copyright's 300th Anniversary, Scholars Question Effectiveness of Current Formulation*, 15 *Electronic Com. & L. Rep.* 641 (2010) ("Copyright law is 'out of balance' and action must be taken to restore the public's respect for copyright, [then-]Register of Copyrights Marybeth Peters said. . . . '[W]e have lost the respect of the public in many ways,' Peters said. . . . Copyright law should be understandable so that people will obey and respect it, Peters said. Further, the way copyright is viewed has changed, and there are lots of new players, including consumers, who Peters said 'are really key in the copyright debate.'").

¹⁹ U.K. Intellectual Prop. Office, *© the Way Ahead: A Strategy for Copyright in the Digital Age* 24, 27 (2009), available at <http://www.ipso.gov.uk/c-strategy-digitalage.pdf> (citations omitted).

While they encourage disrespect from some people, incomprehensible rules also deter risk-averse creators from making fair uses. The solution, as the UK IPO report put it, is to “hid[e] the wiring”—to simplify copyright law so that it comes into better alignment with ordinary logic.²⁰

The Office has simplified the exemption renewal process in the name of greater public accessibility and transparency. This simplification should extend to the resulting exemptions themselves, as the Office has recognized.²¹ The proposed language would clarify the exemption for ordinary users and further the Office’s stated policies.

The proposal is not different in substance from the existing exemptions the Office has already indicated its intent to renew. The proposal seeks to recognize that the existing limits on those exemptions aren’t serving the purpose the Office intended for them; instead, they create arbitrary barriers and traps for the unwary.

²⁰ U.K. Intellectual Prop. Office, *supra*, at 33 (“Calls have been made for solutions which lessen or remove a non-commercial consumer’s need to understand copyright law. The analysis above would suggest that ‘hiding the wiring’ by simplifying the situation for users could help tackle some of the problems of the copyright system.” (citation omitted)).

²¹ See U.S. Copyright Office, Section 1201 of Title 17 vii (June 2017), <https://www.copyright.gov/policy/1201/section-1201-full-report.pdf> (describing Office’s commitment to “simplified regulatory language”); 151 (“[D]rafting the section 1201 regulatory language in plain language is a worthy goal, echoing efforts from the Legislative and Executive Branches to promote clear communication to the public”).