



LIBRARY OF
CONGRESS

The Triennial Rulemaking Process

for Section 1201



Section 1201

The Rulemaking Process

- 1 Requirements for Granting an Exemption
- 2 Petition Phase
- 3 Public Comment Phase
- 4 Public Hearings Phase
- 5 Register's Recommendation and Final Rule



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Requirements

for Granting an Exemption

I

The exemption must relate to at least some works protected by copyright

II

The uses of the works must be noninfringing

III

Users must currently or in the next three years be adversely affected in their ability to make such noninfringing uses

IV

The technological protection measure (“TPM”) must be the cause of such adverse effects

Requirements

for Granting an Exemption

Required Showing: Protected Works

The proposed exemption must include at least some **works protected by copyright**

- The law refers to a “class of copyrighted works”
- Exemptions should not be proposed for ideas, facts, works in the public domain, etc.



Requirements

for Granting an Exemption

Required Showing: Noninfringing Use

The uses at issue are must be **noninfringing**, based on the Copyright Act and relevant court decisions

- It is not enough that a particular use *could be* noninfringing. Rather, the Register will assess whether the use is *likely to be* noninfringing based on current law

Noninfringing uses could include statutory exceptions for:

- Fair use (17 U.S.C. § 107)
- Reproductions by libraries and archives (17 U.S.C. § 108)
- Certain uses of computer programs (17 U.S.C. § 117)
- Reproductions for the blind or other persons with disabilities (17 U.S.C. § 121)

Requirements

for Granting an Exemption

Required Showing: Adverse Effect

Users must be **adversely affected** in their ability to make such noninfringing uses, either currently or in the **next three years**

In addition, the TPM must be the **cause** of the adverse impact, not marketplace trends or other technological developments

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

Requirements

for Granting an Exemption

Required Showing: Adverse Effects – Statutory Factors

Factor 1: the availability for **use of copyrighted works**

- This includes any positive and negative effects of the prohibition against circumvention has on the availability of copyrighted materials
- Alternatives to circumvention should be real and **not merely theoretical**

Requirements

for Granting an Exemption

Required Showing: Adverse Effects – Statutory Factors

These factors borrow from copyright law's exceptions, including fair use

Factor 2: the availability for **use of works for nonprofit archival, preservation, and educational purposes**

Factor 3: 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**

Factor 4: the effect of circumvention of technological measures on **the market for or value of copyrighted works**

Factor 5: **such other factors** as the Librarian considers appropriate

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The Rulemaking Process for Temporary Exemptions

Notice of Proposed Rulemaking

Public Comment
First Round:
Supporters and Neutral

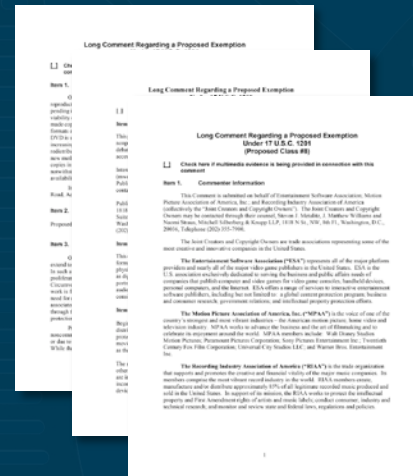
Public Comment
Second Round:
Opponents

Public Comment
Final Round:
Supporters and Neutral

Public Hearings

Post-Hearing Questions or
Further Notice

Register's Recommendation
Librarian's Final Rule



Petition Phase

Submitting Comments – Submitter and Contact Information

Identify the submitter

If desired, provide a means for others to contact the submitter, or an authorized representative of the submitter, by **email and/or telephone**

- Note that any information appearing in the petition will be accessible to the public
- The submitters' email address will be used to remind parties of the streamlined process for renewed exemptions

Petition Phase

Brief Overview of Proposed Exemption

Include a statement describing the proposed exemption

For example:

“A proposed exemption for **owners of 3D printers** to circumvent TPMs on firmware or software in 3D printers to run the printers’ operating systems to allow use of non-manufacturer-approved feedstock.”

For example:

“A proposed exemption for computer programs in tractors that use lockout codes to prevent **farmers** from repairing broken tractor parts.”

Include:

- *The type of copyrighted work needed to be accessed*
- *The physical media or device on which the works are stored or the service through which the works are accessed;*
- *The purposes for which these works need to be accessed; and*
- *The types of users who want access*

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Public Comment Phase

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

There are **three rounds** of public comments, which aim to give the different interests a chance to participate and respond to others' views

Long Comment Regarding a Proposed Exemption Under 17 U.S.C. 1201 (Proposed Class #8)

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

Item 1. Commenter Information

This Comment is submitted on behalf of Entertainment Software Association; Motion Picture Association of America, Inc.; and Recording Industry Association of America (collectively the "Joint Creators and Copyright Owners"). The Joint Creators and Copyright Owners may be contacted through their counsel, Steven J. Metalitz, J. Matthew Williams and Naomi Straus, Mitchell Silberberg & Knupp LLP, 1818 N St., NW, 8th Fl., Washington, D.C., 20036, Telephone (202) 355-7900.

The Joint Creators and Copyright Owners are trade associations representing some of the most creative and innovative companies in the United States.

The Entertainment Software Association ("ESA") represents all of the major platform providers and nearly all of the major video game publishers in the United States. ESA is the U.S. association exclusively dedicated to serving the business and public affairs needs of companies that publish computer and video games for video game consoles, handheld devices, personal computers, and the Internet. ESA offers a range of services to interactive entertainment software publishers, including but not limited to: a global content protection program; business and consumer research; government relations; and intellectual property protection efforts.

The Motion Picture Association of America, Inc. ("MPAA") is the voice of one of the country's strongest and most vibrant industries – the American motion picture, home video and television industry. MPAA works to advance the business and the art of filmmaking and to celebrate its enjoyment around the world. MPAA members include: Walt Disney Studios Motion Pictures; Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLC; and Warner Bros. Entertainment Inc.

The Recording Industry Association of America ("RIAA") is the trade organization that supports and promotes the creative and financial vitality of the major music companies. Its members comprise the most vibrant record industry in the world. RIAA members create, manufacture and/or distribute approximately 85% of all legitimate recorded music produced and sold in the United States. In support of its mission, the RIAA works to protect the intellectual property and First Amendment rights of artists and music labels; conduct consumer, industry and technical research; and monitor and review state and federal laws, regulations and policies.

Public Comment Phase

Multiple Rounds of Comments

First round: legal and evidentiary submissions from those who **support** a proposed exemption, as well as any **neutral** parties that seek only to share pertinent information about a specific proposal

Proponents of the exemption should present their entire case for the exemption during the first round of comments

Second round: legal and evidentiary submissions from those who **oppose** a proposed exemption

Third round: legal and evidentiary submissions from **supporters** of particular proposals or **neutral parties**

Submissions in the third round of comments should not raise new issues, but should be limited to addressing arguments and evidence presented by others

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Public Hearings Phase

Copyright Office holds public hearings following the last round of public comments

The hearings are usually held in Washington, D.C. and in California



Participation in the hearings is optional

Public Hearings Phase



The Office tries to identify **specific issues** for parties to address during the hearings and may offer participants the opportunity to **demonstrate technologies** that are unknown to the Office

The Office may ask for written **post-hearing questions** if it has additional questions

Parties are discouraged from submitting additional written evidence at the hearing

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Register's Recommendation and Final Rule

After the comment and hearing phases are completed, the Register consults with NTIA and presents a recommendation to the Librarian of Congress. The Librarian will review the recommendation and issue any exemptions.

SECTION 1201 RULEMAKING: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention

RECOMMENDATION OF THE REGISTER OF COPYRIGHTS

OCTOBER 2015

65944 Federal Register / Vol. 80, No. 208 / Wednesday, October 28, 2015 / Rules and Regulations

(i) Foreign relations or foreign activities of the United States, including confidential sources;
(ii) Scientific, technological, or economic matters relating to the national security;
(iii) U.S. Government programs for safeguarding nuclear materials or facilities;
(iv) Vulnerability or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security;
(v) The development, production, or use of weapons of mass destruction.
(B) [Reserved].

Dated: October 22, 2015.

Aaron Singh
Alternate OSD Federal Register Liaison
Officer, Department of Defense
P.R. Doc. 2015-2790 Filed 10-27-15; 8:45 and
BULG CODE 0001-00-P

LIBRARIAN OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. 2014-07]

Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies

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

ACTION: Final rule.

SUMMARY: In this final rule, the Librarian of Congress adopts exemptions to the provision of the Digital Millennium Copyright Act ("DMCA") that prohibits circumvention of technological measures that control access to copyrighted works, codified in section 1201(a)(3) of title 17 of the United States Code. As required under the statute, the Register of Copyrights, following a public proceeding, submitted a recommendation concerning proposed exemptions to the Librarian of Congress. After careful consideration, the Librarian adopts final regulations based upon the Register's Recommendation.

DATES: Effective October 28, 2015.

FOR FURTHER INFORMATION CONTACT: Jacqueline C. Chaffinworth, General Counsel and Associate Register of Copyrights, by email at jchaffinworth@loc.gov or by telephone at 202-707-8330; Sunny V. Hinkle, Deputy General Counsel, by email at shinkle@loc.gov or by telephone at 202-707-8330; or Stephen Rowe, Assistant General Counsel, by email at srowe@loc.gov or by telephone at 202-707-8330.

SUPPLEMENTARY INFORMATION: The Librarian of Congress, pursuant to

section 1201(a)(1) of title 17, United States Code, has determined in this sixth triennial rulemaking proceeding that the prohibition against circumvention of technological measures that effectively control access to copyrighted works shall not apply to persons who engage in noninfringing uses of certain classes of such works. This determination is based upon the Recommendation of the Register of Copyrights, which was transmitted to the Librarian on October 6, 2015.¹

The below discussion summarizes the rulemaking proceeding and Register's Recommendation, announces the Librarian's determination, and publishes the regulatory text specifying the exempted classes of works. A more complete discussion of the rulemaking process, the evidentiary record, and the Register's analysis can be found in the Register's Recommendation, which is posted at www.copyright.gov/1201/.

1. Background

A. Statutory Requirements

Congress enacted the DMCA in 1998 to implement certain provisions of the WIPO Copyright and WIPO Performances and Phonograms Treaties. Among other things, title 17 of the DMCA, which added a new chapter 12 to title 17 of the U.S. Code, prohibits circumvention of technological measures employed by or on behalf of copyright owners to protect access to their works. In enacting this aspect of the law, Congress observed that technological protection measures ("TPMs") can "support new ways of disseminating copyrighted materials to users, and . . . safeguard the availability of legitimate uses of those materials by individuals."²

Section 1201(a)(1) provides in pertinent part that "no person shall circumvent a technological measure that effectively controls access to a work protected under [title 17]." Under the statute, to "circumvent a technological measure" means "to describe a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner."³ A technological measure that "effectively

controls access to a work" is one that "in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work."⁴

Section 1201(a)(1), however, also includes what Congress characterized as a "fail-safe" mechanism, which requires the Librarian of Congress, following a rulemaking proceeding, to publish any class of copyrighted works as to which the Librarian has determined that noninfringing uses by persons who are users of a copyrighted work use, or are likely to be, adversely affected by the prohibition against circumvention in the succeeding three-year period, thereby exempting that class from the prohibition for that period.⁵ The Librarian's determination to grant an exemption is based upon the recommendation of the Register of Copyrights, who conducts the rulemaking proceeding.⁶ Congress directed the Register, in turn, to consult with the Assistant Secretary for Communications and Information of the Department of Commerce, who oversees the National Telecommunications and Information Administration ("NTIA"), in the course of formulating her recommendation.⁷

The primary responsibility of the Register and the Librarian in the rulemaking proceeding is to assess whether the implementation of access controls impairs the ability of individuals to make noninfringing uses of copyrighted works within the meaning of section 1201(a)(1). To do this, the Register develops a comprehensive administrative record using information submitted by interested members of the public, and makes recommendations to the Librarian concerning whether exemptions are warranted based on that record.⁸

Under the statutory framework, the Librarian, and thus the Register, must consider "(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

¹ Register of Copyrights, Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention of Technological Measures of the Register of Copyrights (Oct. 21, 2015) ("Register").

² Staff of H. Comm. on the Judiciary, 105th Cong., Section 1201 of the Copyright Act of 1998, H.R. REP. NO. 105-351, pt. 2, at 18 (1998), by the United States House of Representatives on August 4, 1998, at 9 (Committee Print 1998).

³ 17 U.S.C. 1201(a)(3).

⁴ 17 U.S.C. 1201(a)(3).

⁵ 17 U.S.C. 1201(a)(1).

⁶ 17 U.S.C. 1201(a)(2).

⁷ 17 U.S.C. 1201(a)(2).

⁸ 17 U.S.C. 1201(a)(2).



Disclaimer:

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

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