

Understanding the Section 1201 Rulemaking

In 1998, Congress enacted the Digital Millennium Copyright Act (DMCA) to foster the development of the digital marketplace for copyrighted works. Among other things, the DMCA, as codified in section 1201 of title 17, United States Code, makes it illegal to circumvent technological measures used to prevent unauthorized access to copyrighted works, including copyrighted computer programs. For example, the DMCA makes it illegal for a person to decrypt a DVD containing a copyrighted motion picture, or to bypass a password control to access a subscription video streaming service. Section 1201, however, also instructs the Librarian of Congress, upon the recommendation of the Register of Copyrights, to conduct a rulemaking proceeding every three years to evaluate and, as appropriate, adopt limited exemptions from the general prohibition against circumvention of access controls.

The rulemaking process, described more fully below, often highlights broader policy issues that fall outside the narrow confines of the section 1201 rulemaking, and can only be addressed through legislative action. The most recent rulemaking, completed in October 2015, illustrates this dynamic: while section 1201 has played a critical role in the development of secure platforms for the digital distribution of copyrighted works, it is equally evident that the prohibition on circumvention impacts a wide range of consumer activities that have little to do with the consumption of creative content or the core concerns of copyright. The sixth triennial rulemaking thus soundly affirms Congress's substantial efforts over the past two years to review the Copyright Act and assess where it is in need of updates. The Register of Copyrights supports reevaluation of section 1201 in particular, as set forth in the Recommendation.

How does the Librarian decide what exemptions to grant?

Potential exemptions are proposed by members of the public, and are evaluated as part of a public process, including several rounds of public notices, written comments, and public hearings. The Librarian of Congress then adopts exemptions based upon the recommendation of the Register of Copyrights—who in turn receives input from the public and from the National Telecommunications and Information Administration (NTIA).

After receiving the evidence, the Register and the Librarian must determine whether the proposed exemptions meet the specific legal standards Congress established. As discussed below, the law requires proponents of proposals to satisfy certain legal thresholds. The law does not authorize either the Register to recommend or the Librarian to grant exemptions where these legal thresholds have not been met.

How does the public participate in the rulemaking?

The triennial rulemaking is a highly visible and public process, commenced every three years by a request from the U.S. Copyright Office to the public for proposals. Proposals may specify certain classes of works that should be exempt from the anticircumvention

provisions of the DMCA. In the present rulemaking, the Copyright Office implemented several procedural changes to make the process more accessible and understandable to the public, allow greater opportunity for participants to coordinate their efforts, encourage participants to submit effective factual and legal support for their positions, and reduce administrative burdens on both the participants and the Office.

The Office commenced the most recent rulemaking by publishing a notice in the Federal Register on September 17, 2014 inviting interested parties to submit petitions for proposed exemptions that set forth basic information regarding elements of the proposed exemptions. The Office then reviewed and grouped the 44 petition requests into 27 classes and published the proposals, after which proponents and opponents of the proposals had the opportunity to submit written comments offering specific legal and factual support for their respective positions. The Office provided detailed guidance to assist the public during this process, including template forms. During the course of the rulemaking, the Office received nearly 40,000 comments.

The written submissions were followed by seven days of public hearings in Los Angeles and Washington, D.C., at which the Office received testimony from sixty-three witnesses. At the hearings, the proponents and opponents of the proposals, as well as legal staff from the Copyright Office and NTIA, engaged in a discussion about the proposals to learn more about the facts surrounding the proposals and the interested parties' legal arguments.

The written record and the testimony presented at the hearings formed the primary basis of the Register's Recommendations. This sixth triennial rulemaking has been the most extensive and wide-ranging to date and is carefully documented and addressed in the Register's Recommendation, which spans over 400 pages.

Copies of the comments, transcripts of the hearings, and the Register's analysis are available at www.copyright.gov/1201.

What are the relevant legal standards?

Before an exemption can be granted, the statute requires the Librarian, upon the recommendation of the Register, to first find that, absent the proposed exemption, persons who are users of copyrighted works are, or are likely to be in the succeeding three-year period, adversely affected in their ability to make noninfringing uses, *i.e.*, uses permitted by some legal limitation to copyright protection, such as the fair use doctrine. The law requires the proponent of an exemption to show that the use at issue is noninfringing under statutory law or established legal precedents. Neither the Librarian nor the Register has the authority to create new law, though they may suggest (and have in the past suggested) legislative action outside the confines of the rulemaking to clarify what activities are noninfringing. In addition, the proponent must establish that the noninfringing use is, or is likely to be, adversely affected by the prohibition on circumvention. Accordingly, a proposed exemption will not be granted if there are alternatives to circumvention that permit the noninfringing use.

In evaluating proposed exemptions, the Librarian must also weigh several specific factors set forth in the statute, such as the availability for use of works for nonprofit archival, preservation, and educational purposes, and the effect of circumvention on the market for or value of copyrighted works. In addition, the statute authorizes the Librarian to broadly consider such other factors as he considers appropriate.

Why do proponents have to reapply for an exemption every three years?

The statute requires a new determination every three years to ensure that the rulemaking sufficiently considers changes in both technology and markets. The law also requires that the Librarian and the Register undertake the necessary review *de novo*—that is, beginning with a clean slate—and consider the facts before them during the particular proceeding. The law does not permit the Librarian to simply “renew” an exemption from the last rulemaking unless a proponent puts forth an evidentiary and legal basis for doing so. As noted below, however, the Register has called for Congress to revise this aspect of the law, so that uncontroversial exemptions can be easily renewed.

Moreover, as stated above, the Librarian and the Register are bound by existing law and may not independently determine that a use is a fair use or otherwise noninfringing without a statutory or precedential basis. Thus, every three years, the Register will carefully review the state of the law—including developments in the fair use doctrine—with respect to the facts presented by each proposal in order to accurately assess the threshold question of noninfringing use.

What classes of works did the Register recommend and the Librarian adopt in the 2015 rulemaking?

Based on the record evidence in this proceeding, the Register recommended that the Librarian adopt exemptions with respect to the following categories, as further described and more specifically set forth in the Recommendation:

- Motion pictures (including television programs and videos):
 - For educational uses by college and university faculty and students
 - For educational uses by K-12 instructors and students
 - For educational uses in massive open online courses (“MOOCs”)
 - For educational uses in digital and literacy programs offered by libraries, museums and other nonprofits
 - For multimedia e-books offering film analysis
 - For uses in documentary films
 - For uses in noncommercial videos
- Literary works distributed electronically (*i.e.*, e-books), for use with assistive technologies for persons who are blind, visually impaired or have print

disabilities

- Computer programs that operate the following types of devices, to allow connection of a used device to an alternative wireless network (“unlocking”):
 - Cellphones
 - Tablets
 - Mobile hotspots
 - Wearable devices (*e.g.*, smartwatches)
- Computer programs that operate the following types of devices, to allow the device to interoperate with or to remove software applications (“jailbreaking”):
 - Smartphones
 - Tablets and other all-purpose mobile computing devices
 - Smart TVs
- Computer programs that control motorized land vehicles, including farm equipment, for purposes of diagnosis, repair and modification of the vehicle (effective in 12 months)
- Computer programs that operate the following devices and machines, for purposes of good-faith security research (effective in 12 months or, for voting machines, immediately):
 - Devices and machines primarily designed for use by individual consumers, including voting machines
 - Motorized land vehicles
 - Medical devices designed for implantation in patients and corresponding personal monitoring systems
- Video games for which outside server support has been discontinued, to allow individual play by gamers and preservation of games by libraries, archives and museums (as well as necessary jailbreaking of console computer code for preservation uses only)
- Computer programs that operate 3D printers, to allow use of alternative feedstock
- Literary works consisting of compilations of data generated by implanted medical devices and corresponding personal monitoring systems

Were there any proposed classes of works that the Register declined to recommend?

Yes. The Register did not recommend, and the Librarian declined to adopt, exemptions with respect to the following proposed categories:

- Audiovisual works, for broad-based space-shifting and format-shifting (declined due to lack of legal and factual support for exemption)
- Computer programs in video game consoles, for jailbreaking purposes (declined due to lack of legal and factual support for exemption)
- Literary works distributed electronically (e-books), for space-shifting and format shifting (declined because incomplete record presented)
- Computer programs that operate “consumer machines,” for unlocking (declined because incomplete record presented)
- Computer programs that operate dedicated e-book readers, for jailbreaking (declined because incomplete record presented)
- Computer programs consisting of specific music recording software that is no longer supported, to allow continued use of the software (declined because incomplete record presented)

Why are the Copyright Office and the Librarian of Congress involved in issues regarding automobiles, medical devices, and other consumer products?

As noted above, members of the public propose exemptions for consideration as part of the section 1201 rulemaking. In this rulemaking, the Copyright Office was asked to consider several exemptions that involved consumer devices including consumer electronics, automobiles, 3D printers, smart TVs, and medical devices. Such devices contain copyrighted computer programs that are protected by technological measures, which, under the DMCA, cannot be legally circumvented unless an exemption allows for it.

The Register has recommended, and the Librarian has adopted, a number of exemptions permitting access to software in consumer devices. As noted in the Recommendation, the rulemaking process has highlighted aspects of the Copyright Act that have not kept up with changing technologies, and the Register shares the concern of many that the prohibition on circumvention today impacts a wide range of consumer activities that have little to do with the consumption of creative content or the core concerns of copyright. The Register accordingly has expressed support for broader legislative reevaluation of section 1201 to address this issue and others.

How did the Unlocking Consumer Choice and Wireless Competition Act affect the 2015 rulemaking?

The Unlocking Consumer Choice and Wireless Competition Act (“Unlocking Act”), effective as of August 1, 2014, did three things that affected the 2015 rulemaking. First, it changed the exemption allowing circumvention of technological measures that control access to computer programs that enable wireless telephone handsets to connect to wireless communication networks—a process commonly known as “cellphone

unlocking”—by substituting the version of the exemption adopted by the Librarian in 2010 for the narrower version adopted in 2012. The Unlocking Act did not, however, establish a permanent cellphone unlocking exemption, and instead directed the Register to consider any proposal for a cellphone unlocking exemption according to the usual process in the 2015 rulemaking. Second, the Unlocking Act provided that for the reinstated 2010 exemption and any future exemptions to permit wireless telephone handsets or other wireless devices to connect to wireless telecommunications networks, the unlocking may be initiated by the owner of the handset or device, by another person at the direction of the owner, or by a provider of commercial mobile radio or data services. This directive is permanent, and is now reflected in the relevant regulations. Third, the legislation directed the Librarian of Congress to consider as part of the 2015 triennial rulemaking proceeding whether to “extend” the reinstated 2010 cellphone unlocking exemption “to include any other category of wireless devices in addition to wireless telephone handsets.”

Accordingly, as part of the 2015 rulemaking, the Copyright Office solicited proposals for one or more exemptions to allow unlocking of wireless devices, including but not limited to cellphones. Based on the public record, the Register ultimately recommended that exemptions be granted to permit the unlocking of cellphones, tablets, mobile hotspots, and wearable devices (*e.g.*, smartwatches). The exemption for “unlocking” various wireless devices, unlike the other exemptions granted in this rulemaking, permit circumvention by another person at the direction of the owner in addition to the owner of the device.

Who can use the exemptions the Librarian has adopted?

Each exemption specifies the persons who may initiate circumvention of technological measures. For example, one exemption permits college and university faculty and students to engage in circumvention of certain technological protection measures to make use of short portions of motion pictures if required for educational uses in film studies or other courses requiring close analysis of film and media excerpts. The exemption addressing diagnosis, repair, or modification of vehicles is limited to circumvention undertaken by the authorized owner of the vehicle.

Typically, the exemptions do not authorize acts of circumvention undertaken on behalf of another person, which would implicate separate provisions of the DMCA (codified in sections 1201(a)(2) and 1201(b)) that prohibit “trafficking” in circumvention tools and services. Any exemption granted by the Librarian on the Register’s recommendation may not override these provisions, and applies only to the provision prohibiting the circumvention of technological measures that control access to copyrighted works (codified in section 1201(a)(1)).

Third-party assistance is, however, explicitly permitted with respect to the exemption to permit wireless telephone handsets or other wireless devices to connect to wireless telecommunications networks (*e.g.*, “unlocking”). This is because Congress, as part of the Unlocking Consumer Choice and Wireless Competition Act, included a permanent

directive allowing circumvention to be initiated by the owner of the handset or device, by another person at the direction of the owner, or by a provider of commercial mobile radio or data services. The fact that Congress felt compelled to include this language in the Unlocking Act suggests that extending the reach of an exemption to cover third-party actors requires a legislative amendment.

In the Recommendation, however, the Register has called on Congress to consider clarifications to section 1201 to ensure that the beneficiaries of exemptions are able to take full advantage of them even if they need assistance from third parties. This could include, for example, expressly allowing the Librarian to adopt exemptions that permit third-party assistance when justified by the record.

When do the exemptions become effective?

The Librarian of Congress has published a new rule providing the classes of copyrighted works that shall for a three-year period be subject to the exemption provided in 17 U.S.C. 1201(a)(1)(B) from the prohibition against circumvention of technological measures that effectively control access to copyrighted works set forth in 17 U.S.C. 1201(a)(1)(A). This rule becomes effective October 28, 2015.

For certain exemptions—namely those related to vehicle diagnosis, repair and modification and security research (except for voting machines)—the Librarian has determined, upon the recommendation of the Register, that circumvention must be initiated no earlier than 12 months after the effective date of the rule (*i.e.*, October 28, 2016). The public record for these exemptions revealed serious policy concerns raised by federal agencies and others regarding potential safety and environmental impacts of the exemptions. Different parts of the Administration have expressed varying views on the wisdom of permitting circumvention in these areas: NTIA has endorsed broad exemptions, while the Environmental Protection Agency is opposed to any exemption for vehicles, and the Food and Drug Administration and Department of Transportation have expressed substantial reservations.

To be sure, safety and environmental concerns have a tenuous nexus to copyright protection, and so the Register has recommended and the Librarian has adopted exemptions for the relevant activities. But in light of the serious concerns raised by these other expert federal agencies, the Librarian and Register have concluded that it is appropriate to exercise a degree of caution by giving those agencies an opportunity to consider and respond to the new exemptions before they come into effect.