FOR [ENTER PRODUCTION COMPANY]

Signature and Date

Name of Production Company Representative:

Title and Address

Dated: September 11, 2014.

**Aaron Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

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## LIBRARY OF CONGRESS

## U.S. 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:** Notice of inquiry and request for petitions.

**SUMMARY:** The United States Copyright Office is initiating the sixth triennial rulemaking proceeding under the Digital Millennium Copyright Act, concerning possible exemptions to the Act's prohibition against circumvention of technological measures that control access to copyrighted works. The Copyright Office invites written petitions for proposed exemptions from interested parties. Unlike in previous rulemakings, the Office is not requesting the submission of complete legal and factual support for such proposals at the outset of the proceeding. Instead, in this first step of the process, parties seeking an exemption may submit a petition setting forth specified elements of the proposed exemption, as explained in this notice. After receiving petitions for proposed exemptions, the Office will consider the petitions, group and/or consolidate related and overlapping proposals, and issue a notice of proposed rulemaking setting forth the list of proposed exemptions for further consideration. The notice of proposed rulemaking will invite full legal and evidentiary submissions and provide further guidance as to the types of evidence that may be expected or useful vis-à-vis particular proposals, with the aim of producing a well-developed administrative record.

The Office believes that the adjustments it is making to its process, as discussed in this notice, will enhance public understanding of the rulemaking process, including its legal and evidentiary requirements, and facilitate more effective participation in the triennial proceeding.

**DATES:** Written petitions for proposed exemptions must be received no later than November 3, 2014.

**ADDRESSES:** Each proposal for an exemption should be submitted as a separate petition. The Copyright Office strongly prefers that petitions for proposed exemptions be submitted electronically. See the **SUPPLEMENTARY INFORMATION** section below for information about the content and format requirements for petitions. A petition submission page and a template petition form will be posted on the Copyright Office Web site at *http://www.copyright.gov/1201/*. To meet accessibility standards, all petitions must be uploaded in a single file in either the Portable Document File (PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The maximum file size is 6 megabytes (MB). The name of the submitter (and organization) should appear on both the form and the face of the comments. Petitions will be posted publicly on the Copyright Office Web site in the form they are received, along with the name of the submitter or organization. If electronic submission is not feasible, please contact the Copyright Office at 202–707–8350 for special instructions.

**FOR FURTHER INFORMATION CONTACT:** Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, by email at *jcharlesworth@loc.gov* or by telephone at 202–707–8350; Sarang V. Damle, Special Advisor to the General Counsel, by email at *sdam@loc.gov* or by telephone at 202–707–8350; or Stephen Ruwe, Attorney-Advisor, by email at *sruwe@loc.gov* or by telephone at 202–707–8350.

**SUPPLEMENTARY INFORMATION:** As contemplated by 17 U.S.C. 1201(a)(1), the U.S. Copyright Office is initiating a proceeding to determine whether there are any classes of copyrighted works for which noninfringing uses are, or in the next three years are likely to be, adversely affected by the prohibition on circumvention of technological measures that control access to copyrighted works. The Office invites submission of petitions for proposed exemptions, the requirements for which are described in part IV.B.1 below.

### I. Background

In 1998, Congress enacted the Digital Millennium Copyright Act (''DMCA'') to implement certain provisions of the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty. *See generally* Public Law 105–304, 112 Stat. 2860 (1998). The DMCA governs many aspects of the digital marketplace for copyrighted works by establishing ''a wide range of rules . . . for electronic commerce'' and ''defin[ing] whether consumers and businesses may engage in certain conduct, or use certain devices, in the course of transacting electronic commerce.'' *Report of the H. Comm. on Commerce on the Digital Millennium Copyright Act of 1998,* H.R. Rep. No. 105–551, pt. 2, at 22 (1998) (''Commerce Comm. Report'').

Among other things, title I 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 (also known as ''access controls''). Specifically, section 1201(a)(1)(A) provides in pertinent part that ''[n]o 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 descramble 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.'' 17 U.S.C. 1201(a)(3)(A). 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.'' 17 U.S.C. 1201(a)(3)(B). In enacting this prohibition, Congress noted that technological protection measures can ''support new ways of disseminating copyrighted materials to users, and to safeguard the availability of legitimate uses of those materials by individuals.'' Staff of House 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 4, 1998,* at 6 (Comm. Print 1998) (''House Manager's Report'').

As originally drafted, the prohibition in section 1201(a)(1)(A) did not provide for an exemption process.[1] The House of

[1] The original version of the bill did provide for certain permanent exemptions, including for library browsing, reverse engineering, and other activities,

Continued

Representatives Commerce Committee was concerned, however, that the lack of such an ability to waive the prohibition might undermine the fair use of copyrighted works. Commerce Comm. Report at 35–36. The Committee acknowledged that the growth and development of the internet had had a significant positive impact on the access of students, researchers, consumers, and the public at large to information, and that a ''plethora of information, most of it embodied in materials subject to copyright protection, is available to individuals, often for free, that just a few years ago could have been located and acquired only through the expenditure of considerable time, resources, and money.'' *Id.* at 35–36. At the same time, the Committee was concerned that ''marketplace realities may someday dictate a different outcome, resulting in less access, rather than more, to copyrighted materials that are important to education, scholarship, and other socially vital endeavors.'' *Id.* at 36. The Committee thus concluded that it would be appropriate to ''modify the flat prohibition against the circumvention of effective technological measures that control access to copyrighted materials, in order to ensure that access for lawful purposes is not unjustifiably diminished.'' *Id.*

Accordingly, the Commerce Committee proposed a modification of proposed section 1201 that it characterized as a '' 'fail-safe' mechanism.'' *Id.* The Committee Report noted that ''[t]his mechanism would monitor developments in the marketplace for copyrighted materials, and allow the enforceability of the prohibition against the act of circumvention to be selectively waived, for limited time periods, if necessary to prevent a diminution in the availability to individual users of a particular category of copyrighted materials.'' *Id.*

As ultimately enacted, the ''fail-safe'' mechanism in section 1201(a)(1) directs the Librarian of Congress, pursuant to a rulemaking proceeding, to publish any class of copyrighted works for which the Librarian has determined that noninfringing uses by persons who are users of a copyrighted work are, 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. *See* 17 U.S.C. 1201(a)(1). The Librarian's determination to grant an exemption is based upon the recommendation of the Register of Copyrights. *Id.* at 1201(a)(1)(C). The Register in turn is to consult with the Assistant Secretary for Communications and Information of the Department of Commerce, who oversees the National Telecommunications and Information Administration (the ''Assistant Secretary'').[2] *Id.* As explained by the Commerce Committee, ''[t]he goal of the proceeding is to assess whether the implementation of technological protection measures that effectively control access to copyrighted works is adversely affecting the ability of individual users to make lawful uses of copyrighted works.'' *See* Commerce Comm. Report at 37.

In keeping with that goal, 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 use 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 parties, and makes recommendations to the Librarian concerning whether exemptions are warranted based on that record.[3]

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 (v) such other factors as the Librarian considers appropriate.'' 17 U.S.C. 1201(a)(1)(C). As noted above, the Register must also consult with the Assistant Secretary, and report and comment on his views, in providing her recommendation. Upon receipt of the recommendation, the Librarian is responsible for promulgating the final rule setting forth any exempted classes of works.

The Librarian has thus far made five determinations under section 1201(a)(1)[4] based upon the recommendations of the Register.[5] This notice announces the commencement of the sixth triennial rulemaking under the statutory process.

## II. The Unlocking Consumer Choice and Wireless Competition Act

Earlier this year, Congress enacted the Unlocking Consumer Choice and Wireless Competition Act (''Unlocking Act''), effective as of August 1, 2014. Public Law 113–144, 128 Stat. 1751 (2014).[6] The Unlocking Act did three things. First, it changed the existing 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[7] for the narrower

which were included in section 1201 as finally enacted. *See* S. Rep. No. 105–190, at 13–16 (1998).

[2] Exemptions adopted by rule under section 1201(a)(1)(C) apply only to the prohibition on the conduct of circumventing technological measures that control ''access'' to copyrighted works, *e.g.,* decryption or hacking of access controls such as passwords. The Librarian of Congress has no authority to adopt exemptions for the prohibitions contained in subsections (a)(2) or (b) of section 1201, which concern trafficking in circumvention tools. *See* 17 U.S.C. 1201(a)(1)(E) (''Neither the exception under subparagraph (B) from the applicability of the prohibition contained in subparagraph (A), nor any determination made in a rulemaking conducted under subparagraph (C), may be used as a defense in any action to enforce any provision of this title other than this paragraph.''). The statute contains exemptions from the trafficking prohibitions for certain limited uses, such as reverse engineering or encryption research. *See* 17 U.S.C. 1201(f)(2), (g)(4).

[3] *See* H. R. Rep. No. 105–796, at 64 (1998) (''Conference Report'') (''[A]s is typical with other rulemaking under title 17, and in recognition of the expertise of the Copyright Office, the Register of Copyrights will conduct the rulemaking, including providing notice of the rulemaking, seeking comments from the public, consulting with the Assistant Secretary for Communications and Information of the Department of Commerce and any other agencies that are deemed appropriate, and recommending final regulations in the report to the Librarian.'').

[4] 77 FR 65260 (Oct. 26, 2012) (''2012 Final Rule''), *modified by* 79 FR 50552 (Aug. 25, 2014) (codified at 37 CFR 201.40); 75 FR 43825 (July 27, 2010) (''2010 Final Rule''); 71 FR 68472 (Nov. 27, 2006); 68 FR 62011 (Oct. 31, 2003) (''2003 Final Rule''); 65 FR 64555 (Oct. 27, 2000).

[5] Register of Copyrights, Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights (Oct. 2012) (''2012 Recommendation''); Recommendation of the Register of Copyrights in RM 2008–8, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (June 11, 2010) (''2010 Recommendation''); 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 (Nov. 17, 2006); Recommendation of the Register of Copyrights in RM 2002–4, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (Oct. 27, 2003); 65 FR 64555 (Oct. 27, 2000) (final rule including the full text of the Register's recommendation). The final rules and the Register's recommendations can be found at *www.copyright.gov/1201/.*

[6] Subsequently, the Librarian adopted regulatory amendments to reflect the new legislation. *See* 79 FR 50552 (Aug. 25, 2014) (codified at 37 CFR 201.40(b)(3), (c)).

[7] Although it commenced in 2008, the fourth triennial rulemaking did not conclude until 2010.

version adopted in 2012. *See* Public Law 113–144, sec. 2(a).[8] The language of the Unlocking Act makes clear, however, that the Register is to consider any proposal for a cellphone unlocking exemption according to the usual process in this triennial rulemaking. *See* Public Law 113–144, sec. 2(c)(2) (referencing the possibility of a new cellphone unlocking exemption adopted ''after the date of enactment'' of the Unlocking Act); *id.* sec. 2(d)(2) (''Nothing in this Act alters, or shall be construed to alter, the authority of the Librarian of Congress under section 1201(a)(1) of title 17, United States Code.'').

Second, the legislation provides that the circumvention permitted under the reinstated 2010 exemption, as well as any future exemptions to permit wireless telephone handsets or other wireless devices to connect to wireless telecommunications networks, 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 to enable such owner or a family member to connect to a wireless network when authorized by the network operator. Public Law 113–144, sec. 2(a), (c). This directive is permanent, and is now reflected in the relevant regulations.[9] Accordingly, circumvention under any future ''unlocking'' exemption for wireless telephone handsets and other wireless devices adopted by the Librarian may be initiated by the persons Congress identified in the Unlocking Act.

Third, the legislation directs the Librarian of Congress to consider as part of this next 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'' based upon the recommendation of the Register of Copyrights, who in turn is to consult with the Assistant Secretary. Public Law 113–144, sec. 2(b). This provision does not alter or expand the Librarian's authority to grant exemptions under section 1201(a)(1), but merely directs the Librarian to exercise his existing regulatory authority to consider the adoption of an exemption for other wireless devices. Accordingly, as part of this rulemaking, the Copyright Office is soliciting and will consider proposals for one or more exemptions to allow unlocking of wireless devices other than wireless telephone handsets.

The Office invites petitions regarding other wireless devices with the caveat that the proposals should be made with an appropriate level of specificity. The evaluation of whether an exemption would be appropriate under section 1201(a)(1)(C) is likely to be different for different types of wireless devices, requiring distinct legal and evidentiary showings. Thus, a petition proposing a general exemption for ''all wireless devices'' or ''all tablets'' could be quite difficult to support, in contrast to a petition that focuses on specific categories of devices, such as all-purpose tablet computers, dedicated e-book readers, mobile ''hotspots,'' smart watches with mobile data connections, etc.

## III. Rulemaking Standards

In adopting the DMCA, Congress imposed legal and evidentiary requirements for the section 1201 rulemaking proceeding. Participants in the proceeding are encouraged to familiarize themselves with these requirements, which are summarized below, so they can maximize the effectiveness of their submissions.

### *A. Burden of Proof*

Those who seek an exemption from the prohibition on circumvention bear the burden of establishing that the requirements for granting an exemption have been satisfied. In enacting the DMCA, Congress explained that that ''prohibition [of section 1201(a)(1)] is presumed to apply to any and all kinds of works'' until the Librarian determines that the requirements for the adoption of an exemption have been met with respect to a particular class of works. Commerce Comm. Report at 37. In other words, the prohibition against circumvention applies unless and until the Librarian determines 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 this title of a particular class of copyrighted works.'' 17 U.S.C. 1201(a)(1)(C). This approach is also consistent with general principles of agency rulemaking under the Administrative Procedure Act (''APA'').[10] *See* 5 U.S.C. 556(d) (''Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.'').

To satisfy this burden, as the Copyright Office has previously explained, the proponent ''must prove by a preponderance of the evidence that the harm alleged is more likely than not.'' 2010 Recommendation at 10. This requirement stems from the statute, which requires a demonstration that users *are,* or *are likely to be* adversely affected by the prohibition on circumvention. 17 U.S.C. 1201(a)(1)(B) (emphases added). The preponderance of the evidence standard conforms to basic principles of administrative law. The APA provides that a rule may not be issued pursuant to formal agency rulemaking ''except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the *reliable, probative, and substantial* evidence.'' *See* 5 U.S.C. 556(d) (emphasis added); *see also Steadman* v. *SEC,* 450 U.S. 91, 102 (1981) (holding that the APA ''was intended to establish a standard of proof and that the standard adopted is the traditional preponderance-of-the-evidence standard'').

### *B. De Novo Consideration of Exemptions*

Congress made clear in enacting the DMCA that the basis for an exemption must be established *de novo* in each triennial proceeding. *See* Commerce Comm. Report at 37 (explaining that for every rulemaking, ''the assessment of adverse impacts on particular categories of works is to be determined de novo.''). As Congress stressed, ''[t]he regulatory prohibition [of section 1201(a)(1)] is presumed to apply to any and all kinds of works, including those as to which a

*See* 73 FR 79425 (Dec. 29, 2008); 2010 Final Rule at 43827.

[8] The 2010 rule allowed unlocking of cellphones initiated by the owner of the copy of the handset computer program in order to connect to a wireless network in an authorized manner. 2010 Final Rule at 43839. Based on the record in the 2012 rulemaking proceeding, the 2012 rule ended the exemption with respect to new phones acquired after January 26, 2013 (90 days after the rule went into effect), but permitted the unlocking of older, or ''legacy,'' phones. 2012 Final Rule at 65263–66. Congress enacted the Unlocking Act after public calls for a broader exemption than provided in the 2012 rule. *See* We the People, Making Unlocking Cell Phones Legal, *https://petitions.whitehouse.gov/petition/make-unlocking-cell-phones-legal/1g9KhZG7* (last updated July 25, 2014).

[9] *See* 79 FR at 50554; *see also* 37 CFR 201.40(c) (''To the extent authorized under paragraph (b) of this section, the circumvention of a technological measure that restricts wireless telephone handsets or other wireless devices from connecting to a wireless telecommunications network may be initiated by the owner of any such handset or other device, by another person at the direction of the owner, or by a provider of a commercial mobile radio service or a commercial mobile data service at the direction of such owner or other person, solely in order to enable such owner or a family member of such owner to connect to a wireless telecommunications network, when such connection is authorized by the operator of such network.'').

[10] Congress indicated that the rulemaking under section 1201(a)(1) should be conducted ''as is typical with other rulemaking under title 17.'' Conference Report at 64. Thus, it is appropriate to look to the APA, which governs rulemaking under title 17. *See* 17 U.S.C. 701(e).

waiver of applicability was previously in effect, *unless, and until,* the [Librarian] makes a *new* determination that the adverse impact criteria have been met with respect to a particular class and therefore issues a *new* waiver.'' *Id.* (emphases added). Accordingly, the fact that an exemption has been previously adopted creates no presumption that readoption is appropriate. This means that a proponent may not simply rely on the fact that the Register has recommended an exemption in the past, but must instead produce relevant evidence in each rulemaking to justify the continuation of the exemption.

That said, however, where a proponent is seeking the readoption of an existing exemption, it may attempt to satisfy its burden by demonstrating that the conditions that led to the adoption of the prior exemption continue to exist today (or that new conditions exist to justify the exemption). This could include, for instance, a showing that the cessation of an exemption will adversely impact users' ability to make noninfringing uses of the class of works covered by the existing exemption. Assuming the proponent succeeds in making such a demonstration, it is incumbent upon any opponent of that exemption to rebut such evidence by showing that the exemption is no longer justified.

*C. Adverse Effects on Noninfringing Uses*

Proponents who seek to have the Librarian exempt a particular class of works from section 1201(a)(1)'s prohibition on circumvention must show: (1) That uses affected by the prohibition on circumvention are or are likely to be noninfringing; and (2) that as a result of a technological measure controlling access to a copyrighted work, the prohibition is causing, or in the next three years is likely to cause, an adverse impact on those uses. *See* 17 U.S.C. 1201(a)(1)(B). These requirements are explained below. The Register also considers potential exemptions under the statutory factors set forth in section 1201(a)(1)(C), as discussed below.

*Noninfringing Uses.* As noted above, Congress believed that it is important to protect noninfringing uses. There are several types of noninfringing uses that could be affected by the prohibition of section 1201(a)(1), including fair use (delineated in section 107), certain educational uses (section 110), certain uses of computer programs (section 117), and others.

The Register will look to the Copyright Act and relevant judicial precedents when analyzing whether a proposed use is likely to be noninfringing. A proponent must show more than that a particular use could be noninfringing. Instead, the proponent must establish that the proposed use is likely to qualify as noninfringing under relevant law. As the Register has stated previously, there is no ''rule of doubt'' favoring an exemption when it is unclear that a particular use is a fair use. *See* 2012 Recommendation at 7. Rather, the statutory language requires that the use *is* or *is likely* to be noninfringing, not merely that the use might plausibly be considered noninfringing. *See* 17 U.S.C. 1201(a)(1)(C). And, as noted above, the burden of proving that a particular use is or is likely to be noninfringing belongs to the proponent.

*Adverse effects.* The second requirement is a showing that users of the class of copyrighted works currently are, or are likely in the ensuing three-year period to be adversely affected by the prohibition against circumvention. 17 U.S.C. 1201(a)(1)(C). In weighing adverse effects, the Register must assess, in particular, ''whether the prevalence of . . . technological protections, with respect to particular categories of copyrighted materials, is diminishing the ability of individuals to use these works in ways that are otherwise lawful.'' Commerce Comm. Report at 37.

Congress stressed that the ''main focus of the rulemaking proceeding'' should be on whether a ''substantial diminution'' of the availability of works for noninfringing uses is ''actually occurring'' in the marketplace. House Manager's Report at 6. To prove the existence of such existing adverse effects, it is necessary to demonstrate ''distinct, verifiable and measurable impacts'' occurring in the marketplace, as exemptions ''should not be based upon *de minimis* impacts.'' Committee Report at 37. Thus, ''mere inconveniences'' or ''individual cases'' do not satisfy the rulemaking standard. House Manager's Report at 6.

To the extent that a proponent is relying on claimed future impacts rather than existing impacts, the statute requires the proponent to establish that such future adverse impacts are ''*likely.*'' 17 U.S.C. 1201(a)(1)(B) (emphasis added). An exemption may be based upon anticipated, rather than actual, adverse impacts ''only in extraordinary circumstances in which the evidence of likelihood of future adverse impact during that time period is highly specific, strong and persuasive.'' House Manager's Report at 6.

The proponent must also demonstrate that the technological protection measure is the *cause* of the claimed adverse impact. ''Adverse impacts that flow from other sources, or that are not clearly attributable to implementation of a technological protection measure, are outside the scope of the rulemaking.'' Commerce Comm. Report at 37. For instance, adverse effects stemming from ''marketplace trends, other technological developments, or changes in the roles of libraries, distributors or other intermediaries'' are not cognizable harms under the statute. House Manager's Report at 6.

*D. Statutory Factors*

In conducting the rulemaking, the Librarian must also examine the statutory factors listed in section 1201(a)(1)(C). Those factors are: ''(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.'' 17 U.S.C. 1201(a)(1)(C). In some cases, weighing these factors requires the consideration of the benefits that the technological measure brings with respect to the overall creation and dissemination of works in the marketplace. As Congress explained, ''the rulemaking proceedings should consider the positive as well as the adverse effects of these technologies on the availability of copyrighted materials.'' House Manager's Report at 6.

*E. Defining a Class*

Section 1201(a)(1) specifies that the exemption adopted as part of this rulemaking must be defined based on ''a particular *class* of works.'' *See* 17 U.S.C. 1201(a)(1)(B) (emphasis added). Thus, a major focus of the rulemaking proceeding is how to define the ''class'' of works for purposes of the exemption. The starting point for any definition of a ''particular class'' under section 1201(a)(1) is the list of categories appearing in section 102 of title 17, such as literary works, musical works, and sound recordings. House Manager's Report at 7. But, as Congress made clear, ''the 'particular class of copyrighted works' [is intended to] be a *narrow and focused subset* of the broad categories of works . . . identified in section 102 of the Copyright Act.'' Commerce Comm. Report at 38 (emphasis added). 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.'' House Manager's Report at 7. Thus, ''these two categories of works, while both 'literary works,' do not constitute a single 'particular class' for purposes of'' section 1201(a)(1). *Id.*

At the same time, Congress emphasized that the Librarian ''should not draw the boundaries of 'particular classes' too narrowly.'' *Id.* Thus, while the category of ''motion pictures and other audiovisual works'' in section 102 ''may appropriately be subdivided, for purposes of the rulemaking, into classes such as 'motion pictures,' 'television programs,' and other rubrics of similar breadth,'' Congress made clear that it would be inappropriate ''to subdivide overly narrowly into particular genres of motion pictures, such as Westerns, comedies, or live action dramas.'' *Id.*

The determination of the appropriate scope of a ''class of works'' recommended for exemption may also take into account the adverse effects an exemption may have on the market for or value of copyrighted works. For example, the class might be defined in part by reference to the medium on which the works are distributed, or even to the access control measures applied to them. But classifying a work *solely* by reference to the medium on which the work appears, or the access control measures applied to the work, would be inconsistent with Congress' intent in directing the Register and Librarian to define a ''particular class'' of works.[11]

Ultimately, ''[d]eciding the scope or boundaries of a 'particular class' of copyrighted works as to which the prohibition contained in section 1201(a)(1) has been shown to have had an adverse impact is an important issue to be determined during the rulemaking proceedings.'' House Manager's Report at 7. Accordingly, the Register will look to the specific record before her to assess the proper scope of the class for a recommended exemption.

## IV. Rulemaking Process

### *A. Prior Rulemakings*

The administrative process employed in the fifth triennial rulemaking largely paralleled that of prior earlier rulemakings. *See generally* 79 FR 60398 (Sept. 29, 2011). First, the Copyright Office initiated the rulemaking process by calling for the public to submit proposals for exemptions. *Id.* Notably, the Office required proponents to provide complete legal and evidentiary support for their proposals at the outset of the rulemaking process, in the proponents' initial submissions. *See id.* at 60403 (stressing that ''[p]roponents should present their *entire* case in their initial comments'' and explaining that ''the best evidence in support of an exemption would consist of concrete examples or specific instances'' of adverse effects on noninfringing uses).[12] After receiving the initial submissions containing the proposed exemptions and posting them on its Web site, the Office published a notice of proposed rulemaking describing the proposals and inviting interested parties to submit comments both in support of and in opposition to those proposals. 76 FR 78866, 78868 (Dec. 20, 2011) (asking for ''additional factual information that would assist the Office in assessing whether a Proposed Class is warranted for exemption and, if it is, how such a class already proposed should be properly tailored''). The Office then invited reply comments in support of and in opposition to the proposed classes, limited to addressing the points made earlier in the proceeding. *Id.* at 78868.

After the close of the comment period, the Office held a series of public hearings to further explore the proposed exemptions. 77 FR 15327 (Mar. 15, 2012). The first hearing was a ''technology hearing'' conducted in Washington, DC in May 2012, and was limited to demonstrations of the ''technologies pertinent to the merits of the proposals.'' *Id.* at 15328.[13] The Office requested that ''[w]itnesses wishing to present demonstrations . . . do so at this hearing rather than at the other hearings, in order to permit the other hearings to proceed on schedule.'' *Id.* Following the technology hearing, the Office held additional hearings in Los Angeles, California, and Washington, DC to hear testimony regarding the exemptions. *Id.* Those hearings ''consist[ed] of presentations of facts and legal argument, followed by questions from Copyright Office staff.'' *Id.*

After the hearing, the Office directed specific follow-up questions to a number of hearing participants in an effort to address unresolved questions regarding the proposed exemptions.[14] Then, based on the resulting record before the Office, and following consideration of the Assistant Secretary's views,[15] the Register provided a recommendation to the Librarian as to the classes of works that should be entitled to an exemption from section 1201(a)'s prohibition on circumvention.[16] The Librarian, after consideration of that recommendation, adopted a final rule announcing the exemptions. 77 FR 65260 (Oct. 26, 2012).

### *B. Sixth Triennial Rulemaking*

The Copyright Office is modifying its administrative process for the sixth triennial rulemaking. As in prior rulemakings, the overall aim of the process is to create a comprehensive record on which the Register can base her recommendation and the Librarian, in turn, can adopt final exemptions. The Office believes that the procedural changes it is making will further that objective by, among other things, making the process more accessible and understandable to the public, allowing greater opportunity for participants to coordinate their efforts, encouraging

[11] In the earliest rulemakings, consistent with the records in those proceedings, the Register rejected proposals to classify works by reference to the type of user or use (*e.g.,* libraries, or scholarly research). In the 2006 proceeding, however, the Register concluded, based on the record before her, that in appropriate circumstances a ''class of works'' that is defined initially by reference to a section 102 category of works or subcategory thereof may additionally be refined not only by reference to the medium on which the works are distributed or particular access controls at issue, but also by reference to the particular type of use and/or user to which the exemption shall be applicable. The Register determined that there was no basis in the statute or in the legislative history that required her to delineate the contours of a ''class of works'' in a factual vacuum. At the same time, tailoring a class solely by reference to the use and/or user would be beyond the scope of what a ''particular class of works'' is intended to be. *See* 2006 Recommendation at 9–10, 15–20.

[12] In the fifth triennial rulemaking, the Copyright Office provided a mechanism allowing for the submission of untimely proposed exemptions based on exceptional or unforeseen circumstances. 76 FR 60398 at 60404. However, the revised process described herein will make it substantially easier for a party to submit a proposal, as it does not require submission of a full-fledged case at the outset. Thus, the Office is not providing for a specific process for untimely petitions. The Office nevertheless reserves its ability to exercise discretion to address unanticipated concerns as appropriate.

[13] This was the first time in a triennial rulemaking that the Office had held a hearing specifically focused on the technologies involved.

[14] The post-hearing questions and responses can be found on the Copyright Office's Web site at *http://copyright.gov/1201/2012/responses/.*

[15] See Letter from Lawrence E. Strickling, Assistant Secretary for Communications and Information, U.S. Department of Commerce, to Maria Pallante, Register of Copyrights, Sept. 21, 2012, *available at http://copyright.gov/1201/2012/2012_NTIA_Letter.pdf.*

[16] The Register's 2012 recommendation can be found at *http://www.copyright.gov/1201/2012/Section_1201_Rulemaking_2012_Recommendation.pdf.*

participants to submit effective factual and legal in support for their positions, and reducing administrative burdens on both the participants and the Office.

We describe below the administrative process that will be employed for this rulemaking.

1. Petition Phase

With this notice of inquiry, the Copyright Office is calling for the public to submit petitions for proposed exemptions. In a departure from prior rulemakings, the Office is not requiring the proponent of an exemption to deliver the complete legal and evidentiary basis for its proposal with its initial submission. Instead, the purpose of the petition is to provide the Office with basic information regarding the essential elements of the proposed exemption, both to confirm that the threshold requirements of section 1201(a) can be met, and to aid the Office in describing the proposal for the next, more substantive, phase of the rulemaking proceeding. The petitions should comply with the below requirements. To assist participants, the Office has posted a recommended template form on its Web site, at *http://www.copyright.gov/1201.* If there are extenuating circumstances such that a participant cannot meet one or more of the requirements, the participant should contact the Copyright Office using the above contact information.

a. Petitions requesting a proposed exemption should be limited to five pages in length (which may be single-spaced but should be in at least 12-point type).

b. Petitions should address a single proposed exemption. That is, a separate petition must be filed for *each* proposal. Although a single petition may not encompass more than one proposed exemption, the same party may submit multiple petitions. The Office will be requiring participants in later rounds also to make separate submissions with respect to each proposed exemption (or group of related exemptions). The Office anticipates that it will receive a significant number of submissions, and requiring separate submissions for each proposed exemption will help both participants and the Office keep better track of the record for each proposed exemption. In the past, submitters sometimes combined their views on multiple proposals in a single filing, making it difficult and time-consuming for other participants and the Office to sort out which arguments and evidence pertained to which. Separating the submissions by proposal will allow for more focused responses and replies and a clearer record overall.

The Office also urges submitters to consider the appropriate level of specificity for their petitions, including the particular type of copyrighted work, and the specific medium or device at issue. For instance, as noted above, with respect to petitions to unlock wireless devices, the Office encourages participants to submit petitions that clearly identify a particular category of device.

c. The petition should concisely address each of the following elements of the proposed exemption, in separate sections as identified below, and in the below order, bearing in mind that more complete information—including legal and evidentiary support—will be permitted in later rounds of submissions.

Petition Requirements

1. Submitter and Contact Information

The petition should clearly identify the submitter and, if desired, a means for others to contact the submitter or an authorized representative of the submitter by either email or telephone. Petitions will be published on the Copyright Office's Web site, and providing such contact information in the petition will allow parties with aligned interests to more easily coordinate their efforts during later stages of the rulemaking should they wish to do so.[17] The Office believes that the opportunity for those with substantially similar proposals to combine their efforts with respect to their legal and evidentiary submissions may yield a more complete record in some cases.[18] In addition, law clinics and other organizations that may be in a position to offer assistance to others will be aware of the proposals before full submissions are due.[19]

2. Brief Overview of Proposed Exemption

The submitter should provide a brief statement describing the overall proposed exemption (ideally in one to three sentences), explaining the type of copyrighted work involved, the technological protection measure (''TPM'') (or access control) sought to be circumvented, and any limitations or conditions that would apply (*e.g.,* a limitation to certain types of users or a requirement that the circumvention be for a certain purpose). While the petition may seek to propose precise regulatory language for the exemption, it need not do so. The petition should focus instead on providing a clear description of the specific elements of the proposed exemption. The Office notes that the specific language for the regulation that the Office ultimately recommends to the Librarian will necessarily be tied to the full record at the end of the proceeding. Thus, at the petition phase, particularized regulatory language matters less than the substance of the proposal.

3. Copyrighted Works Sought to be Accessed

The petition must identify the specific class, or category, of copyrighted works that the proponent wishes to access through circumvention. The works identified should reference a category of works referred to in section 102 of title 17 (the Copyright Act) (*e.g.,* literary works, audiovisual works, etc.). Unless the submitter seeks an exemption for an entire category in section 102, the description of works should be further refined to identify the particular subset of work to be subject to the exemption (*e.g.,* e-books, computer programs, or motion pictures) and, if applicable, by reference to the medium or device on which the works reside (*e.g.,* motion pictures distributed on DVDs).

4. Technological Protection Measure(s)

The petition should describe the TPM that controls access to the work. The submitter does not need to describe the specific technical details of the access control measure, but should offer sufficient information to allow the Office to understand the basic nature of the technological measure and why it prevents open access to the work (*e.g.,* the encryption of motion pictures on DVD using the Content Scramble System or the cryptographic authentication protocol on a garage door opener).

5. Noninfringing Uses

The petition must also identify the specific noninfringing uses of copyrighted works sought to be facilitated by circumvention (*e.g.,* enabling accessibility for disabled users, or copying a lawfully owned computer program for archival purposes), and the statutory or doctrinal basis or bases that

[17] Note that apart from any contact information set forth in the petition itself, the Office requires the provision of certain contact information, including name, address, phone number, and email address, as part of the electronic submission process so that the Office may contact submitters (for example, to confirm receipt of the submission). Apart from the name of the submitter, the information requested as part of the electronic submitting process (as opposed to information contained in the petition) is not posted online.

[18] Those who oppose exemptions, too, are encouraged to coordinate their efforts at the opposition stage if they wish.

[19] Parties should keep in mind, however, that any private, confidential, or personally identifiable information appearing in their petition will be accessible to the public.

support the view that the uses are or are likely noninfringing (*e.g.,* because it is a fair use under section 107, or a permissible use under section 117). The description should include a brief explanation of how, and by whom, the works will be used. But while the petition must clearly articulate the proposed use and the legal basis for the claim that it is noninfringing under current law, it need not provide fully developed legal or factual arguments in support of the claim. Such arguments and additional legal support can and should be fleshed out in the proponents' later submissions.

6. Adverse Effects

Finally, the petition needs to describe how the inability to circumvent the TPM has or is likely to have adverse effects on the proposed noninfringing uses (*e.g.,* the TPM prevents connection to an alternative wireless communications network or prevents an electronic book from being accessed by screen reading software for the blind). The description should include a brief explanation of the negative impact on uses of copyrighted works. The adverse effects can be current, or may be adverse effects that are likely to occur during the next three years, or both. Again, while the petition must specifically describe the adverse effects of the TPM, it need not provide a full evidentiary basis for that claim. Such evidence should be presented during the public comment phase of the rulemaking.

While the Office intends to err on the side of inclusiveness in interpreting petitions for proposed exemptions, it reserves the right to decline to proceed with further consideration of a proposed exemption if the proponent fails to identify the essential elements required for an exemption. In addition, if it is apparent from the face of the petition that the proposed exemption cannot be granted as a matter of law, the Office may decline to further consider the proposal. *See, e.g.,* 77 FR 65260 at 65271–72 (concluding that a proposed exemption ''to access public domain works'' was beyond the scope of the rulemaking proceeding since section 1201's prohibition on circumvention applies only to works protected under title 17). Any such determinations will be noted in the **Federal Register** notice announcing the proposed exemptions to be considered.

2. Public Comment Phase

The Copyright Office will study the petitions and publish a notice of proposed rulemaking identifying the proposed exemptions and initiating three rounds of public comment. The Office plans to consolidate or group related and/or overlapping proposed exemptions where possible to streamline the rulemaking process and encourage joint participation among parties with common interests (though such collaboration is not required). As in previous rulemakings, the exemptions as described in the notice of proposed rulemaking will represent only a starting point for further consideration in the rulemaking proceeding, and will be subject to further refinement based on the record. *See* 76 FR 78866, 78868 (Dec. 20, 2011). The notice of proposed rulemaking will also provide guidance regarding specific areas of legal and factual interest for the Office with respect to each proposed exemption, and suggest particular types of evidence that participants may wish to submit for the record. In the past, some submissions have been lacking in evidentiary support, which is critical to the process. The Office hopes that additional guidance as to the types of evidence that might be expected or useful vis-à-vis particular proposals will yield a more robust record.

To ensure a clear and definite record for each of the proposals, as noted above, both proponents and opponents are required to provide separate submissions for each proposed exemption (or group of related exemptions) during each stage of the public comment period. Although participants may submit or comment on more than one proposal, a single submission may not address more than one exemption. The Office acknowledges that this format may require some parties to repeat certain general information (*e.g.,* about their organization) across multiple submissions, but the Office believes that the administrative benefits for both participants and the Office of creating self-contained, separate records for each proposal will be worth the modest amount of added effort involved.

In an additional departure from past rulemakings, the first round of public comment will be limited to submissions from the proponents (*i.e.,* those parties that proposed exemptions during the petition phase) and other members of the public that *support* the adoption of a proposed exemption, as well as any parties that neither support nor oppose an exemption but seek only to share pertinent information about a specific proposal. These submissions may suggest refinements to the proposed exemptions described in the notice of proposed rulemaking, but may not propose entirely new exemptions. The proponents should present their *entire* case for the exemption during this round of public comment (other than responding to any opponents), including the complete legal and evidentiary basis for the proposal. In the notice of proposed rulemaking, the Office will offer additional guidance as to the format and content of these submissions, including instructions for providing documentary evidence.

In addition to their primary written submissions, where it may be helpful to establishing their case, proponents will have the option of submitting multimedia presentations of the proposed noninfringing use, adverse effects, and/or other pertinent material. More specific guidance with respect to the kinds of demonstrations the Office would find useful and the format and method for submitting, as well as the means to access such demonstrations, will be provided in the notice of proposed rulemaking.[20]

The second round of public comment will be limited to submissions from opponents of the proposed exemptions. These, too, may include documentary evidence and/or multimedia presentations submitted in accordance with Office guidelines. The third round of public comment will be limited to supporters of particular proposals, or parties that neither support nor oppose a proposal, in either case who seek to reply to points made in the earlier rounds of comments. Reply comments shall not raise new issues, but should be limited to addressing arguments and evidence presented by others.

3. Public Hearings

The Copyright Office intends to hold public hearings following the last round of public comments. The hearings are expected to be conducted in Washington DC and California, although the specific dates and locations have not yet been determined. A separate notice providing details about the hearings and how to participate will be published in the **Federal Register**. The Office expects to identify specific items of inquiry to be addressed during the hearings, and may offer particular participants the opportunity to demonstrate technologies that are unknown or are unclear to the Office.

4. Post-Hearing Questions

Following the hearings, the Copyright Office may request additional information with respect to particular proposals from parties who have been involved in the rulemaking process. While this has been done in the past,

[20] The notice of proposed rulemaking will also provide instructions for parties who seek to present demonstrations, but lack the means to record them.

the Office may rely on this process somewhat more in this proceeding to the extent it believes it would be useful to provide a final opportunity for proponents, opponents or others to supply missing information for the record or otherwise resolve issues that the Office believes are material to particular exemptions. Such requests for responses to questions 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 will be 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 Web site as part of the public record.

5. Recommendation and Final Rule

Finally, in accordance with the statutory framework, the Register will review the record, consult with the Assistant Secretary, and prepare a recommendation with proposed regulations for the Librarian. *See* Conference Report at 64. Thereafter, the Librarian will make a final determination and publish the exemptions in the **Federal Register** for later codification in title 37 of the CFR 17 U.S.C. 1201(a)(1)(D).

6. Schedule of Proceedings

As noted above, petitions for proposed rulemaking are due on November 3, 2014. After the Office publishes the notice of proposed rulemaking, it intends to give proponents at least 45 days to prepare and file their evidentiary submissions. The opponents will then have at least 45 days to respond, followed by a reply period of at least 30 days. The Office will provide at least 30 days' notice before the public hearings begin. Parties who receive post-hearing questions will be given at least 14 days to respond. The precise dates for these future aspects of the proceeding will be provided in subsequent **Federal Register** notices.

Dated: September 11, 2014.

**Jacqueline C. Charlesworth,**

*General Counsel and Associate Register of Copyrights.*

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**LIBRARY OF CONGRESS**

**U.S. Copyright Office**

**37 CFR Part 201**

**[Docket No. 2014–08]**

## Fees for Submitting Corrected Electronic Title Appendices

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The U.S. Copyright Office published elsewhere in this issue of the **Federal Register** a final rule amending its regulations to allow remitters to submit title lists in electronic format when recording a document pertaining to 100 or more copyrighted works. As the rule explains, when a remitter submits an electronic title list along with a document for recordation, the Office will use the information in the electronic list to populate its online Public Catalog. In response to comments received during the electronic title list rulemaking, the Office also established a process to allow a remitter to correct inaccuracies in the Office's online Public Catalog resulting from errors in an electronic list submitted by the remitter. In this separate notice of proposed rulemaking, the Office seeks to establish a new fee for this correction service at the rate of seven dollars per corrected title.

**DATES:** Written comments are due on or before October 17, 2014.

**ADDRESSES:** All comments shall be submitted electronically. A comment submission page is posted on the Copyright Office Web site at *http://copyright.gov/rulemaking/etitle-fees/.* The Web site interface requires commenting parties to complete a form specifying their name and organization, as applicable, and to upload comments as an attachment via a browser button. To meet accessibility standards, commenting parties must upload comments in a single file not to exceed six megabytes (MB) in one of the following formats: A Portable Document File (PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The maximum file size is 6 megabytes. The form and face of the comments must include both the name of the submitter and organization. The Office will post the comments publicly on the Office's Web site in the form that they are received, along with associated names and organizations. If electronic submission of comments is not feasible, please contact the Office at 202–707–8350 for special instructions.

**FOR FURTHER INFORMATION CONTACT:** Sarang V. Damle, Special Advisor to the General Counsel, by email at *sdam@loc.gov* or by telephone at 202–707–8350, or Abi Oyewole, Attorney-Advisor, by email at *aoye@loc.gov* or by telephone at 202–707–8350.

**SUPPLEMENTARY INFORMATION:**

### I. Background

Over the past several years, the Copyright Office has sought public input on technological upgrades to the recordation function. *See* 78 FR 17722 (Mar. 22, 2013); 79 FR 2696 (Jan. 15, 2014). In addition to seeking written comments, the Office has held focused discussions with copyright owners, users of copyright records, technical experts, public interest organizations, lawyers, and professional and industry associations regarding the same. *See* 79 FR 6636 (Feb. 4, 2014). Participants in these processes have expressed a number of concerns about the current recordation system, including frustration with the submission process, the amount of time the Office requires to record remitted documents, and the searchability of the public record. These problems are related in part to the fact that recordation remains a paper-driven process (in contrast to most registration transactions, which occur electronically).[1]

To date, recordation specialists have had to review paper documents and manually transcribe selected information from the documents into an electronic format in order to permit indexing in the Office's online Public Catalog. Among the information that must be transcribed are the titles of copyrighted works associated with a document submitted for recordation, which are typically presented in a list appended to the document, referred to informally as a ''title appendix.'' A title appendix associated with a document can include hundreds, or even thousands, of titles. The Office attributes the long processing times associated with document recordation in considerable part to the manual entry of these titles. In an effort to reduce processing time for recorded document submissions, on July 16, 2014, the

[1] For further information, see the comments obtained during the Copyright Office's two-year Special Projects process, particularly the Special Project on Technical Upgrades to Registration and Recordation Functions. Comments pertaining to the Special Project on Technological Upgrades to Registration and Recordation Functions are available on the Copyright Office Web site at *http://www.copyright.gov/_upgrades/comments/.*