

Understanding the Section 1201 Anticircumvention Rulemaking Proceeding

In 1998, Congress enacted the Digital Millennium Copyright Act (DMCA), codified in part in Section 1201 of Title 17 of the U.S. Code (Section 1201). The DMCA makes it unlawful to circumvent technological measures (also known as “access controls”) used by, or on behalf of, copyright owners to protect their works, including copyrighted computer programs. Section 1201 provides that every three years, the Librarian of Congress, upon the recommendation of the Register of Copyrights – who in turn obtains input from the public and the Assistant Secretary for Communications and Information of the Department of Commerce – determine classes of works that should be exempted from the prohibition.

The rulemaking process, described more fully below, often serves as a barometer for issues that may be ripe for further discussion, but are outside the legal scope of the rulemaking. As appropriate, the Librarian and the Register have acknowledged such issues and encouraged Congress to explore them through the legislative process. The most recent rulemaking, completed in October 2012, illustrates this dynamic: issues relating to cell phone jailbreaking and unlocking, as well as space shifting of DVDs, involve technologies and markets that have evolved dramatically since Congress enacted the DMCA. Because the rulemaking process does not permit the Register or Librarian to change the terms of the DMCA – including the requirements for an exemption – certain issues such as these would likely benefit from legislative attention.

What is the anticircumvention rulemaking?

The rulemaking (provided for by Section 1201(a)(1)(C) of Title 17 of the U.S. Code) is a legal proceeding designed by Congress that is included within the provisions of the DMCA that make it illegal to circumvent access controls protecting copyrighted works. Section 1201 requires that every three years the Librarian of Congress, upon the recommendation of the Register of Copyrights – who in turn receives input from the public and from the Assistant Secretary for Communications and Information of the Department of Commerce – determine classes of works that should be exempted from the prohibition. In other words, notwithstanding the general prohibitions of the law, the Librarian may grant exemptions under which certain persons may circumvent certain access controls under certain circumstances for a three year period, based on the results of the rulemaking and the Register’s recommendation as to both the law and the facts at issue. As noted below, the rulemaking involves a lengthy public process, and in keeping with the standards of the Administrative Procedure Act, is one that is based on public notice and comment.

How does the public participate in the rulemaking?

The triennial rulemaking is always 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. The Office commenced the most recent rulemaking by publishing a notice in the Federal Register on September 29, 2011. The Office received nearly 700 comments and reply comments on the proposals, which were examined and analyzed by legal staff. The Office then held a series of public hearings in 2012, in Washington, D.C. on May 11th and 31st, and June 4th and 5th, and in Los Angeles, California on May 17th during which proponents and opponents of the proposals, as well as legal staff from the Office, 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, in addition to consultations with the Department of Commerce. As in prior years, the Register's recommendation is very comprehensive (165 pages). As discussed below, the law requires proponents of proposals to satisfy certain legal thresholds. The law does not allow either the Register or the Librarian to grant exemptions where these legal thresholds have not been met. Nor may they decline to act on exemptions put before them by proponents if the proposals meet the requirements of Section 1201. Copies of the comments, transcripts of the hearings, and Register's analysis are available at www.copyright.gov/1201.

What are the relevant legal standards?

17 U.S.C. § 1201(a)(1)(C) requires the Librarian upon the recommendation of the Register, who shall consult with the Assistant Secretary of Communications and Information at of the Department of Commerce, to determine whether 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 exception to copyright protection, such as the fair use doctrine.

The law provides that the proponent of an exemption bears the burden of showing that the use at issue is noninfringing and that such activity is, or is likely to be, adversely affected by the prohibition on circumvention. *See* 17 U.S.C. § 1201(a)(1)(C). It is not sufficient to demonstrate that a use could conceivably be noninfringing, or that the absence of an exemption possibly could result in an adverse impact. The question of noninfringing use is a question of statutory law and legal precedent. Neither the Librarian nor the Register has the authority to create new law, though either may suggest (and has suggested) legislative action outside the confines of the rulemaking. If the proponent establishes that there is a harm, the Register proceeds to weigh several factors described specifically in the statute, including: (1) the availability for use of copyrighted works; (2) the availability for use of works for nonprofit archival, preservation, and educational purposes; (3) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comments, news reporting, teaching, scholarship or research; (4) the effect of circumvention of

technological measures on the market for or value of copyrighted works; and (5) such other factors as appropriate. 17 U.S.C. §§ 1201(a)(1)(C)(i)-(v).

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

17 U.S.C. § 1201(a)(1)(C) 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, to begin 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, nor can proponents rely solely on facts put forth during prior rulemakings. 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 in the 2012 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 below:

- Literary works distributed electronically, to permit blind and other persons with print disabilities to use screen readers and other assistive technologies
- Computer programs on wireless telephone handsets, to enable interoperability of software applications (“jailbreaking”)
- Computer programs on wireless telephone handsets that were acquired within ninety days of the effective date of the exemption, for the purpose of connecting to alternative networks (“unlocking”)
- Motion pictures on DVDs or distributed by online services, for purposes of criticism in comment in noncommercial videos, documentary films, nonfiction multimedia ebooks offering film analysis, and certain educational uses by college and university faculty and students and kindergarten through twelfth grade educators

- Motion pictures and other audiovisual works on DVDs or distributed by online services, for the purpose of research to create players capable of rendering captions and descriptive audio for persons who are blind, visually impaired, deaf or hard of hearing.

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: literary works in the public domain to enable access to digitally distributed works (the basis for which is described on pages 13-15 of the Register’s recommendation); video game consoles for purposes of software interoperability (pages 26-51); computer programs on personal computing devices, for purposes of software interoperability (pages 52-64); and motion pictures and other works on DVDs and other media for purposes of space shifting (pages 157-166). The Register and the Librarian are required to consider the proposed exemptions based on the record developed by the proponents and other interested parties, and within the contours of existing law. As noted above, the rulemaking has come to serve as a barometer for issues that may be ripe for further discussion, but are outside the legal scope of the rulemaking. As appropriate, the Librarian and the Register acknowledge such issues and encourage Congress to explore them through the legislative process.

Why are the Copyright Office and the Librarian of Congress involved in issues regarding consumer electronics?

As noted above, the nature and subject matter of the exemptions considered by the Register and the Librarian come from the members of the public. This year the Register and Librarian were asked to consider several exemptions that involved consumer electronics, such as cell phones. Such devices contain copyrighted computer programs that are protected by technological protection measures, which, under the DMCA, cannot be legally circumvented. That same law provides that the Librarian of Congress, upon the recommendation of the Register of Copyrights, may designate certain classes of works to be exempt from the prohibition.

The DMCA, including the rulemaking, was enacted nearly fifteen years ago. At that time, Congress could not have known of all the technologies and markets that have become commonplace today. As noted previously, the rulemaking was intended to be a safety valve to the anticircumvention provisions of the DMCA. Certain applications of the prohibition on circumvention of technological measures – and perhaps the exemption procedure itself – may not fully accommodate the needs of 21st century technologies and the user communities that have developed around them. At the same time, the rulemaking process offers an opportunity to identify those areas where the law is not properly serving its intended purpose and may be ripe for legislative review.