

the questions posed therein. Therefore, the USDA Forest Service is extending the comment period from June 20, 2023 to July 20, 2023.

Christopher French,

Deputy Chief, National Forest System, Forest Service.

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LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. 2023–5]

Exemptions To Permit Circumvention of Access Controls on Copyrighted Works

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

ACTION: Notification of inquiry and request for petitions.

SUMMARY: The United States Copyright Office is initiating the ninth triennial rulemaking proceeding under the Digital Millennium Copyright Act (“DMCA”) to consider possible temporary exemptions to the DMCA’s prohibition against circumvention of technological measures that control access to copyrighted works. In this proceeding, the Copyright Office is again providing a streamlined procedure for the renewal of exemptions that were granted during the eighth triennial rulemaking. If renewed, those current exemptions would remain in force for an additional three-year period (October 2024–October 2027). Members of the public seeking the renewal of current exemptions should submit petitions as described below; parties opposing such renewal will then have the opportunity to file comments in response. The Office is also accepting petitions for new exemptions to engage in activities not currently permitted by existing exemptions, which may include proposals that expand on a current exemption. Those petitions, and any renewal petitions that are opposed, will be considered pursuant to a rulemaking process that includes three rounds of written comment, followed by public hearings, which the Office intends to conduct virtually.

DATES: Written petitions for renewal of current exemptions must be received no later than 11:59 p.m. Eastern Time on July 7, 2023. Written comments in response to any petitions for renewal must be received no later than 11:59 p.m. Eastern Time on August 11, 2023.

Written petitions for new exemptions must be received no later than 11:59 p.m. Eastern Time on August 11, 2023.

ADDRESSES: Written petitions for renewal of current exemptions must be completed using the form provided on the Office’s website at <https://www.copyright.gov/1201/2024/renewal-petition.pdf>. Written petitions proposing new exemptions must be completed using the form provided on the Office’s website at <https://www.copyright.gov/1201/2024/new-petition.pdf>. The Copyright Office is using the *regulations.gov* system for the submission and posting of public petitions and comments in this proceeding. All petitions and comments are therefore to be submitted electronically through *regulations.gov*. Specific instructions for submitting petitions and comments are available on the Copyright Office website at <https://www.copyright.gov/1201/2024>. If electronic submission is not feasible, please contact the Office using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT:

Rhea Efthimiadis, Assistant to the General Counsel, by email at meft@copyright.gov or telephone at 202–707–8350.

SUPPLEMENTARY INFORMATION:

I. The Digital Millennium Copyright Act and Section 1201

The Digital Millennium Copyright Act (“DMCA”) ¹ has played a pivotal role in the development of the modern digital economy. Enacted by Congress in 1998 to implement the United States’ obligations under two international treaties,² the DMCA was intended to foster the growth and development of a thriving, innovative, and flexible digital marketplace by making digital networks safe places to disseminate and use copyrighted materials.³ It did this by, among other things, providing new legal protections for copyrighted content made available in digital formats.⁴

¹ Public Law 105–304, 112 Stat. 2860 (1998).

² WIPO Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65 (1997); WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76 (1997).

³ See Staff of H. 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 4th, 1998, at 2, 6 (Comm. Print 1998) (“House Manager’s Report”); H.R. Rep. No. 105–551, pt. 2, at 21, 23 (1998); H.R. Rep. No. 105–551, pt. 1, at 10 (1998); S. Rep. No. 105–190, at 1–2, 8–9 (1998).

⁴ See House Manager’s Report at 6 (noting Congress’s intention to “support new ways of disseminating copyrighted materials to users, and to safeguard the availability of legitimate uses of those materials by individuals”).

These protections, codified in section 1201 of title 17, United States Code, seek to balance the interests of copyright owners and users, including the personal interests of consumers, in the digital environment.⁵ Section 1201 protects technological measures (also called technological protection measures or “TPMs”) used by copyright owners to prevent unauthorized access to or use of their works.⁶ Section 1201 contains three separate protections for TPMs. First, it prohibits circumvention of technological measures employed by or on behalf of copyright owners to protect access to their works (also known as access controls). Access controls include, for example, a password requirement limiting access to an online service to paying customers or an authentication code in a video game console to prevent the playing of pirated copies. Second, the statute prohibits trafficking in devices or services primarily designed to circumvent access controls. Finally, it prohibits trafficking in devices or services primarily designed to circumvent TPMs used to protect the exclusive rights of the copyright owner of a work (also known as copy controls). Copy controls protect against unauthorized uses of a copyrighted work once access has been lawfully obtained. They include, for example, technology preventing the copying of an e-book after it has been downloaded to a user’s device. Though trafficking in circumvention devices and services is prohibited, the statute does not ban the act of circumventing a copy control.⁷ All of these prohibitions supplement the preexisting rights of copyright owners under the Copyright Act of 1976 by establishing separate and distinct causes of action independent of any infringement of copyright.⁸

Section 1201 contains a number of specific exemptions to these prohibitions to avoid curtailing legitimate activities such as security testing, law enforcement activities, or the protection of personally identifying information.⁹ In addition, to accommodate changing marketplace conditions and ensure that access to copyrighted works for other lawful purposes is not unjustifiably diminished,¹⁰ the statute provides for a rulemaking proceeding where temporary exemptions to the

⁵ See H.R. Rep. No. 105–551, pt. 2, at 26.

⁶ 17 U.S.C. 1201(a)–(b).

⁷ S. Rep. No. 105–190, at 12.

⁸ See U.S. Copyright Office, Section 1201 of Title 17, at i, iii, 43–45 (June 2017) (“Section 1201 Study”), <https://www.copyright.gov/policy/1201/section-1201-full-report.pdf>.

⁹ 17 U.S.C. 1201(d)–(j).

¹⁰ H.R. Rep. No. 105–551, pt. 2, at 35–36.

prohibition on circumventing access controls may be adopted by the Librarian of Congress, on the recommendation of the Register of Copyrights after consultation with the Assistant Secretary for Communications and Information of the Department of Commerce.¹¹ In contrast to the permanent exemptions set out by statute, exemptions adopted pursuant to the rulemaking must be reconsidered every three years.¹² By statute, the triennial rulemaking process only addresses the prohibition on circumvention of access controls; the statute does not grant the authority to adopt exemptions to the anti-trafficking provisions.¹³

For an exemption to be granted through the triennial rulemaking, it must be established 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 [title 17] of a particular class of copyrighted works.”¹⁴ In evaluating the evidence, several statutory factors must be weighed: “(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.”¹⁵

II. Overview of the Rulemaking Process

To assess whether the implementation of access controls impairs the ability of individuals to make noninfringing uses of copyrighted works, the Copyright Office solicits exemption proposals from the public and develops a comprehensive administrative record using information submitted by interested parties.¹⁶ Based on that

record, the Register provides a written recommendation to the Librarian concerning which exemptions are warranted. The recommendation includes proposed regulatory text for adoption and publication in the **Federal Register**.

The rulemaking process for the ninth triennial proceeding will be generally the same as the process followed in the eighth proceeding. This includes the streamlined procedure introduced in the seventh proceeding through which members of the public may petition for temporary exemptions that were granted during the previous rulemaking to remain in force for an additional three-year period (October 2024–October 2027).

With this notification of inquiry, the Copyright Office is initiating the petition phase of the rulemaking, asking the public to submit petitions both to renew current exemptions, as well as any comments in support of or opposition to such petitions, and to propose new exemptions. After the close of the petition phase, the Office will publish a notice of proposed rulemaking (“NPRM”) to initiate the next phase of the rulemaking process, also described below.

Video tutorials explaining section 1201 and the rulemaking process can be found on the Office’s section 1201 rulemaking web page at <https://www.copyright.gov/1201>.

III. Process for Seeking Renewal of Current Exemptions

For the last two rulemakings, the Copyright Office has used a streamlined process to facilitate the renewal of previously adopted exemptions for which there was no substantive opposition.¹⁷ This process remains in effect, and parties seeking readoption of

a current exemption may petition for its renewal by submitting a required form, available on the Office’s website at <https://www.copyright.gov/1201/2024/renewal-petition.pdf>. This form is for renewal petitions only. Petitions for new exemptions must use a different form, as discussed below.

Scope of Renewal. The Office will only permit renewal of current exemptions as they are currently written in the *Code of Federal Regulations*, without modification. If a proponent seeks to engage in any activities not currently permitted by an existing exemption, they must submit a petition for a new exemption. Petitioners seeking to expand an existing exemption are encouraged to submit both a petition to renew the existing exemption and a separate petition for a new exemption. In such cases, the petition for a new exemption may focus on legal and factual issues relevant to the proposed expansion. If the Office recommends renewal of the current exemption, then it will consider only the discrete aspects relevant to its expansion as a new petition.

Automatic Reconsideration. If the Office declines to recommend renewal of a current exemption (as discussed below), proponents of renewal do not need to submit additional material. The petition to renew will automatically convert into a petition for a new exemption. If a proponent petitions for both renewal and expansion, and the Office declines to recommend renewal of the existing exemption, the expanded exemption as a whole will be treated as a new petition.

Petition Form and Contents. The petition to renew is a short form designed to let proponents identify themselves, identify the relevant exemption, and make sworn statements to the Copyright Office concerning the existence of a continuing need and justification for the exemption. Proponents are required to use the Office’s prepared form and must follow the instructions contained in this notice and on the form. Proponents seeking renewal of multiple exemptions must submit separate forms for each exemption. This requirement ensures a clear record of the basis for each renewal request.

The petition form has four components:

1. Petitioner identity and contact information. Each petitioner (*i.e.*, the individual or entity seeking renewal) must provide its name and the name of its representative, if any, along with contact information. Any member of the public capable of making the sworn declaration discussed below may submit

¹¹ 17 U.S.C. 1201(a)(1)(C); *see also id.* at 1201(a)(1)(B)–(D).

¹² *Id.* at 1201(a)(1)(C).

¹³ *Id.* at 1201(a)(1)(C), (a)(1)(E).

¹⁴ *Id.* at 1201(a)(1)(C).

¹⁵ *Id.*

¹⁶ *See* H.R. Rep. No. 105–796, at 64 (1998) (Conf. Rep.) (“It is the intention of the conferees that . . . 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.”);

see also H.R. Rep. No. 106–464, at 149 (1999) (Conf. Rep.) (“[T]he Copyright Office shall conduct the rulemaking under section 1201(a)(1)(C) . . .”).

¹⁷ *Exemptions to Permit Circumvention of Access Controls on Copyrighted Works: Notice of Inquiry*, 85 FR 37399 (June 22, 2020) (“2020 NOI”). The streamlined process was first introduced during the seventh proceeding shortly after the Office concluded a comprehensive public policy study of section 1201. *See Exemptions to Permit Circumvention of Access Controls on Copyrighted Works: Notice of Inquiry*, 82 FR 29804 (June 30, 2017); *see generally* Section 1201 Study. In that study, the Office concluded that “the statute itself requires that exemptions cannot be renewed automatically, presumptively, or otherwise, without a fresh determination concerning the next three-year period. . . . [A] determination must be made specifically for each triennial period.” Section 1201 Study at 142. The Office further determined, however, that “the statutory language appears to be broad enough to permit determinations to be based upon evidence drawn from prior proceedings, but only upon a conclusion that this evidence remains reliable to support granting an exemption in the current proceeding.” *Id.* at 143.

a petition for renewal, regardless of whether they were involved with past rulemakings. Petitioners and/or their representatives should be reachable through the provided contact information for the duration of the rulemaking proceeding. Multiple petitioning parties may jointly file a single petition.

2. Identification of the current exemption that is the subject of the petition. The form lists all exemptions currently in effect and codified at 37 CFR 201.40. Petitioners must mark the appropriate checkbox for the exemption they seek to renew.

3. Explanation of need for renewal. The petitioner must provide a brief explanation summarizing the basis for claiming a continuing need and justification for the exemption. The required showing is meant to be minimal. The Office anticipates that petitioners will provide a paragraph or two detailing this information, but there is no page limit. While it is permissible to attach supporting documentary evidence as exhibits to the petition, it is not necessary. The Office's petition form includes an example of what it regards as a sufficient explanation.

4. Declaration and signature. One of the named petitioners must sign a declaration attesting to the continued need for the exemption and the truth of the explanation provided in support. Where the petitioner is an entity, the declaration must be signed by an individual at the organization having appropriate personal knowledge to make the declaration and authority to sign on behalf of the entity. The declaration may be signed electronically.

For the attestation to be trustworthy and reliable, it is important that the petitioner make it based on his or her own personal knowledge and experience. This requirement should not be burdensome, as a broad range of individuals have a sufficient level of knowledge and experience. For example, a blind individual having difficulty finding and purchasing e-books with appropriate assistive technologies would have personal knowledge and experience to make the declaration with regard to the assistive technology exemption. The same would hold true for an organization like the American Foundation for the Blind, which advocates for the blind, visually impaired, and print disabled, is familiar with the needs of the community, and has particular knowledge of e-book accessibility. It would be improper, however, for a general member of the public to petition for renewal if he or she knows nothing more about matters

concerning e-book accessibility other than what he or she might have read in a brief newspaper article, or simply opposes the use of TPM tools as a matter of general principle.

The declaration also requires an affirmation that, to the best of the petitioner's knowledge, there has not been any material change in the facts, law, or other circumstances in the rulemaking record that resulted in the exemption being issued initially.¹⁸ By "material change," the Office means a significant change in the underlying conditions that justified the exemption when it was first granted, such as legal precedent that led the Office to conclude a use was likely noninfringing, or factual circumstances that demonstrated individuals could not engage in a noninfringing use due to the statutory prohibition on circumvention. The attestation serves as evidence that the Office can continue to rely on the prior rulemaking record and that, absent renewal of the exemption, users of copyrighted works would be adversely affected in their ability to engage in noninfringing uses.

C. Comments in Response to a Petition to Renew an Exemption

Any interested party may submit comments in response to a renewal petition. While the primary purpose of these comments is to allow for opposition to renewal requests, parties may also submit comments in support of renewal. The Office will not provide a form for such comments, and the first page of any responsive comments must clearly identify which exemption's renewal is being supported or opposed. Each submission must address only a single exemption, but participants may submit multiple comments to address multiple exemptions. For example, a party who opposes (or supports) the renewal of both the wireless device unlocking exemption and the jailbreaking exemption for routers and other networking devices must file separate comments for each.¹⁹ The Office recognizes that this format may require some parties to repeat some general information (e.g., about their

organization) across multiple submissions, but it has determined that the administrative benefits of creating self-contained, separate records for each exemption will be worth the modest amount of added effort involved.

Opposition to a renewal petition should provide evidence that the prior rulemaking record is no longer a valid basis to support recommending renewal of an exemption.²⁰ Specifically, evidence should consist of new legal or factual developments that implicate "the reliability of the previously-analyzed administrative record."²¹ For example, a change in case law might affect whether a particular use is noninfringing, new technological developments might affect the availability for use of copyrighted works, or new business models might affect the market for or value of copyrighted works. The Office may also consider whether opposition evidence casts doubt only as to renewal of part of a current exemption.

Unsupported conclusory opinion and speculation will not be enough for the Office to refuse to recommend renewing an exemption it would have otherwise recommended in the absence of any opposition, or to convert a renewal petition into a petition for a new exemption. Nor should opposition comments opine on unrelated issues, such as whether proponents have in fact engaged in "every possible use covered by an exemption" or "whether any user's activities may or may not be consistent with the exemption" as codified.²² The sole purpose of the streamlined renewal proceeding is to determine whether petitioners have made a minimal showing that the regulatory record that supported a previously issued exemption remains representative of the current environment.²³ It is not a forum to litigate other concerns.

²⁰ In the past two rulemaking cycles, the Office referred to such oppositions as "meaningful." See 2020 NOI at 37402. The Office is adopting different terminology here to avoid potential confusion about when an opposition can be considered "meaningful."

²¹ See *Exemptions to Permit Circumvention of Access Controls on Copyrighted Works: Notice of Proposed Rulemaking*, 85 FR 65293, 65295 (Oct. 15, 2020) ("2020 NPRM") (finding renewal oppositions were not meaningful where they questioned the sufficiency of the renewal petition's justifications "rather than themselves disputing the reliability of the previously-analyzed administrative record"). Opponents may also explain if a petitioner has failed to comply with the renewal process outlined above (such as because the petitioner lacks personal knowledge or experience relevant to the exemption sought to be renewed).

²² *Id.* at 65296–97.

²³ *Id.* at 65297–98 (finding proponents had made "minimal showing" required for renewal and concluding that, given a lack of opposition, "the

¹⁸ Depending on when the exemption was originally recommended by the Office, the relevant rulemaking record may be discussed in the 2015, 2018, or 2021 Register's Recommendation.

¹⁹ If a single exemption receives multiple petitions for its renewal, commenters may respond to all of those petitions in a single submission. For instance, if the Office receives six petitions in favor of readopting the current unlocking exemption, a commenter may file a single comment that addresses points made in the six petitions. That comment, however, may not address petitions to readopt the jailbreaking exemption for routers and other networking devices.

IV. Process for Seeking New Exemptions

Those seeking to engage in activities not currently permitted by an existing exemption, including activities that expand on a current exemption, may propose a new exemption by filing a petition using the fillable form, available on the Office's website at <https://www.copyright.gov/1201/2024/new-petition.pdf>. Use of the Office's prepared form is mandatory, and petitioners must follow the instructions contained in this notice and on the petition form. As in previous rulemakings, a separate petition must be filed for *each* proposed exemption. By requiring separate submissions for each proposed exemption, the Office will ensure a clear administrative record for each proposed exemption. Although a single petition may not encompass more than one proposed exemption, the same party may submit multiple petitions.

The petition form has two components:

1. *Petitioner identity and contact information.* The form asks each petitioner (*i.e.*, the individual or entity proposing the exemption) to provide its name and the name of its representative, if any, along with contact information. Petitioners and/or their representatives must be reachable through the provided contact information for the duration of the rulemaking proceeding. Multiple petitioning parties may jointly file a single petition.

2. *Description of the proposed exemption.* At this stage, the Office is only asking petitioners to briefly explain the nature of the proposed new or expanded exemption. The information that would be most helpful to the Office includes the following, to the extent relevant: (1) the types of copyrighted works sought to be accessed; (2) the physical media or devices on which the works are stored or the services through which the works are accessed; (3) the purposes for which the works are sought to be accessed; (4) the types of users who want access; and (5) the barriers that currently exist or which are likely to exist in the near future preventing these users from obtaining access to the relevant copyrighted works.

The description of the new exemption may be minimal. Petitioners do not need to propose regulatory language or fully define the contours of an exemption class. A short statement describing the nature of the activities in which petitioners seek to engage is sufficient. The Office anticipates that petitioners

will be able to adequately describe in plain terms the relevant information in a few sentences. The form includes examples of what the Office regards as a sufficient description. At this point, petitioners need not, and should not, provide a complete legal and evidentiary basis for their proposals.

The sole purpose of the petition is to provide the Office with basic information about what uses of copyrighted works petitioners believe are adversely affected by the statutory prohibition on circumvention. The Office will then use that information to organize and formulate categories of potential exemptions, grouping similar proposals together. This organization will be used in the substantive phase of the rulemaking that begins with the publication of the NPRM in the fall.

As in previous rulemakings, the NPRM will not “put forward precise regulatory language for the proposed classes.”²⁴ The Office's grouping of proposed exemption classes in the NPRM is “only a starting point for further consideration in the rulemaking proceeding,” and will be subject to “further refinement based on the record.”²⁵ Proponents will have the opportunity to further refine or expound on their initial petitions as the rulemaking progresses.

V. Notice of Proposed Rulemaking

After reviewing the petitions for new exemptions, petitions for renewal of existing exemptions, and comments on petitions for renewal, the Office will issue an NPRM addressing all of the potential exemptions to be considered in the rulemaking.

With respect to renewal petitions, the NPRM will set forth which exemptions the Register intends to recommend for renewal, along with proposed regulatory language. The NPRM will also identify any exemptions the Register declines to recommend for renewal due to an insufficient showing or evidence presented in comments opposing renewal. Those exemptions will instead be treated as a new petition and require a new administrative record. At the NPRM stage, the Register will not reject any petitioned exemption, unless it fails to meet the threshold requirements of section 1201(a).²⁶

²⁴ 2020 NOI at 37402 (quoting 82 FR 29804, 29807 (June 30, 2017)).

²⁵ *Id.*

²⁶ See *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies: Notice of Proposed Rulemaking*, 79 FR 73856, 73859 (Dec. 12, 2014) (noting that three petitions sought an exemption which could not be granted as a matter of law and declining to put them forward for comment).

For newly requested exemptions, including proposals to expand current exemptions, the NPRM will group such exemptions appropriately, describe them, and initiate at least three rounds of public comment. The Office plans to consolidate or group related and/or overlapping proposed exemptions where possible to simplify the rulemaking process and encourage joint participation among parties with common interests (though such collaboration is not required). As in previous rulemakings, the exemptions described in the NPRM will serve as a starting point for further consideration in the rulemaking proceeding and are subject to further refinement. Additionally, the NPRM will highlight specific legal and factual issues in proposed exemptions that the Office finds particularly important and should be addressed in public comments. The NPRM will also contain additional instructions and requirements for submitting comments and will detail the later phases of the rulemaking proceeding—*i.e.*, public hearings, post-hearing questions, recommendation, and final rule. The Office intends to hold virtual public hearings as in the previous rulemaking, as this format supports an efficient process and provides greater accessibility for the public and rulemaking participants.

The Office expects to follow a similar timeframe for issuance of the NPRM and submission of comments as in the eighth rulemaking.²⁷ If appropriate, the Office may issue post-hearing questions to hearing participants or hold *ex parte* meetings to discuss discrete issues in the proposed classes, including suggestions regarding regulatory language, as well as to provide opportunities for sufficient stakeholder participation.²⁸

Dated: June 5, 2023.

Suzanne V. Wilson,

General Counsel and Associate Register of Copyrights.

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²⁷ In the previous rulemaking, the NPRM was published on October 15, 2020, initial comments supporting new exemptions due on December 14, 2020, opposition comments due on February 9, 2021, and reply comments due on March 10, 2021. 2020 NPRM at 65293.

²⁸ See 2020 NOI at 37403; U.S. Copyright Office, *Ex Parte Communications*, <https://www.copyright.gov/1201/2021/ex-parte-communications.html>; U.S. Copyright Office, *Letters Between the U.S. Copyright Office and Other Agencies*, <https://www.copyright.gov/1201/2021/USCO-letters/>; Section 1201 Study at 150–51.

conditions that led to adoption of this exemption are likely to continue during the next triennial period”).