

Before the
LIBRARY OF CONGRESS
United States Copyright Office

In the Matter of)
)
)
Section 1201 Study:) Docket No. 2015-08
Notice and Request for Public Comment)
)

COMMENT
OF
INTERNATIONAL DOCUMENTARY ASSOCIATION
FILM INDEPENDENT
KARTEMQUIN EDUCATIONAL FILMS

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ABOUT THE COMMENTERS

The International Documentary Association (IDA) is a non-profit 501(c)(3) organization that promotes nonfiction filmmaking, and is dedicated to increasing public awareness for the documentary genre. At IDA, we believe that documentary storytelling expands our understanding of shared human experience, fostering an informed, compassionate, and connected world, and we exist to serve the needs of those who create this art form. Our major program areas are: Advocacy, Filmmaker Services, Education, and Public Programs and Events. For over 30 years, IDA has worked to support documentary filmmaking as a vital art form. We continue to seek ways to ensure that the artists, activists and journalists who make documentaries receive the resources that they need and deserve.

Film Independent is a non-profit arts organization and our mission is to champion the cause of Independent film and support a community of artists who embody diversity, innovation and a uniqueness of vision. We help independent filmmakers tell their stories, build an audience for their projects and diversify the voices in the film industry, supporting filmmakers at every experience level with a community in which their works can be appreciated and sustained. With over 200 annual screenings and events, Film Independent provides access to a network of likeminded artists who are driving creativity in the film industry. Our free Filmmaker Labs for selected writers, directors, producers and documentary filmmakers and year-round educational programs serve as a bridge from film school to the real world of filmmaking—one with no defined career ladder. Project Involve is Film Independent's signature program dedicated to fostering the careers of talented emerging filmmakers from communities traditionally underrepresented in the film industry. We also produce the weekly Film Independent at LACMA film series, the Los Angeles Film Festival in June and the annual awards programs for the finest independent films of the year—the Film Independent Spirit Awards.

Kartemquin Educational Films is a not-for-profit collaborative center for documentary media makers who seek to foster a more engaged and empowered society. In 2016, Kartemquin will celebrate 50 years of sparking democracy through documentary. Best known for producing *Hoop Dreams* and *The Interrupters* among over 50 other documentaries that examine and critique society through the lives of ordinary people, Kartemquin has won every major almost every available prize for documentary filmmaking, including multiple Emmy, Peabody, duPont-Columbia and Robert F. Kennedy journalism awards, Independent Spirit, IDA, PGA and DGA awards, and an Oscar nomination. A revered resource on issues of ethics and storytelling, Kartemquin is internationally recognized for crafting quality documentaries backed by comprehensive audience engagement, and for its innovative programs and advocacy designed to elevate the documentary community.

INTRODUCTION

As participants in the three most recent section 1201 anticircumvention rulemakings, we applaud the Register's request for comments on section 1201 of the Digital Millennium Copyright Act ("DMCA"). We are pleased that the Register has recognized that section 1201's triennial rulemaking process consumes an inordinate amount of time and resources for all involved, and we agree with the Register's suggestion that the process contain a presumption of renewability. We respectfully submit this comment to provide further suggestions about how the rulemaking process can be improved, and how the statute can be amended to better account for the digital world we live in today. We recommend that:

- The Register urge Congress to amend section 1201 to include a requirement that circumvention of an access control is not a violation of section 1201 unless there is a connection between the circumvention and infringing conduct.
- In the alternative, the Register should revise the triennial rulemaking in the following ways:
 - Establish a presumptive renewal of previously granted exemptions;
 - Structure the proceeding as a rulemaking rather than an adjudication;
 - Impose a workable standard for what constitutes a likely noninfringing use and ensure that the standard does not interfere with the development of fair use law in the courts; and
 - Strongly favor exemptions involving merged access and use controls, particularly where the merged control prevents a use such as copying, and the user does not seek to obtain the material unlawfully.

Filmmaking has a uniquely important role in society because filmmakers explore, analyze, and comment on politics, history, and culture using the predominant form of communication of our time. In today's media ecosystem, independent filmmaking is particularly significant because independent and documentary filmmaking are playing a greater role as traditional print investigative journalism faces increasing economic pressure. In addition, filmmaking gives voice to marginalized communities in order to shed light on stories and experiences outside the mainstream.

As creators, we depend on copyright law to protect our works. In the eighteen years since the DMCA was enacted, we have seen enormous shifts in our industry including changes in broadcast and theatrical distribution, new online business models, and of course, massive online copyright infringement. These are serious problems that bear close examination, and we applaud the Register's work toward finding solutions to them.

Yet despite the profound difficulty these problems present for our community, Congress's signature law designed to address them has done virtually nothing to remedy them. Our

eighteen years of experience with the law is that rather than curb copyright infringement, the DMCA's prohibition on circumvention has instead made it vastly more difficult to make films. As we have shown in previous rulemakings, section 1201 chills freedom of expression by preventing criticism, commentary, and other forms of fair use. That effect has never been more pronounced than it is today when more content than ever is protected by technological protection measures ("TPMs") that contain access controls—as the Register has recognized.

This disconnect between the goal of reducing infringement and the actual effect of the anticircumvention provisions was not intended—but it was certainly foreseeable. Indeed, throughout the legislative process, members of Congress and stakeholders alike expressed concern about the possibility that the DMCA would inhibit lawful uses, particularly fair use. In establishing the triennial rulemaking process, Congress intended to provide a "fail-safe" mechanism that would allow noninfringing uses. While that process has led to exemptions that do help to preserve our ability to make fair use in the digital age, the process has been inordinately burdensome and has led to exemptions that are unduly narrow, difficult to apply, and out of sync with the rapid technological innovation.

We commend the Register for pointing out to Congress the difficult, time-consuming nature of the exemption process. In this Comment, we urge the Register to recommend that Congress amend the statute, and we offer several suggestions for ways she should use the discretion provided by the statute to modify the exemption process.

First, we agree with the Register that there should be a presumptive renewal of previously granted exemptions. We believe, however, that the presumption does not need to be constrained to situations in which there is no opposition. Such a presumption would not harm the process because it could always be rebutted; an exemption should be reissued until and unless the Register finds that the adverse effects complained of in previous rulemakings no longer exist. In fact, the statute affords the Librarian substantial discretion to structure the burden of proof, burden of persuasion, and standard of proof in ways that maximize fairness and efficiency. For example, even if the Librarian determined that *de novo* review is required in each rulemaking, that standard does not require the exclusion of all previous evidence in each new rulemaking proceeding. Nothing in the legislative history prevents this approach.

Second, the Register should exercise discretion to modify the exemption process in ways that make it less burdensome on all parties involved in the process. The exemption process requires a great deal of time, effort, and resources on the part of commenters proposing exemptions largely because it has been administered like an adjudication instead of a rulemaking. The process should be run like a rulemaking, as the statute requires, and as such should not impose the burden of proof on a subset of participants.

Third, the Register should impose a workable standard for what constitutes a likely noninfringing use. In past rulemakings, the Register has required proof by a

“preponderance of the evidence,” and has applied that standard unevenly at times. This approach has the unfortunate effect of preventing the evolution of fair use law in the courts. The Register should structure the rulemaking in a way that does not restrict fair use law from developing in the courts.

Finally, the Register should recognize that while Congress acted to prohibit circumvention of access controls, it also intentionally permitted circumvention of use controls. This important balancing has been ignored in the law’s implementation, with significantly adverse effects on myriad noninfringing uses. The Register should use her discretion in the rulemaking process to restore that balance. Rather than considering merged access and use controls to be essentially the same as access controls, the Copyright Office should treat merged access and use controls as highly suspect. At a minimum, where such controls are present, that fact should weigh heavily in favor of an exemption under the fifth statutory factor, “such other factors as the Librarian considers appropriate.” In addition, the Register should apply the following test when considering whether to issue an exemption: If there is a finding that (a) a noninfringing use is being adversely affected even though users are lawfully obtaining and consuming copyrighted material, e.g. do not seek to circumvent a TPM in order to access material they have not paid for; (b) the users cannot make copies of the material without violating a merged access and use control; and (c) no substantial evidence exists to suggest that the proposed exemption will cause significant copyright infringement, then the Librarian should be inclined to issue an exemption without further examination. If the exemption process were revised in this way to align with the statutory scheme established by Congress, it would solve many of the problems with section 1201.

More fundamentally, given the costs of the exemption process and section 1201’s negligible effect on copyright infringement, we question whether a triennial rulemaking is the appropriate fail-safe mechanism. As numerous legislators and commentators have pointed out, adding the simple requirement that there be a connection between the infringing conduct and the circumvention would obviate the need for an exemption process. We urge the Register to recommend this fix, which would have no effect on infringement while removing section 1201’s adverse impacts on noninfringing uses.

We deeply appreciate the time, careful effort, and deliberation that the Copyright Office has put into the exemption process. The anticircumvention provisions cause fear and befuddlement for many in the independent filmmaking community, and constrain a wide range of criticism and commentary. And while the exemption process has been extremely important to independent filmmakers, it has not come close to fulfilling its promise as a fail-safe mechanism. We respectfully urge the Register to take this opportunity to recommend statutory fixes and adjustments to the rulemaking process that will take into account the DMCA’s real-world effects.

ANSWERS TO SELECTED QUESTIONS POSED BY THE REGISTER

1. Please provide any insights or observations regarding the role and effectiveness of the prohibition on circumvention of technological measures in section 1201(a).

The experience of independent filmmakers is that section 1201 has had little effect on copyright infringement, but instead inhibits filmmakers' ability to make criticism and commentary in their films.

We now have eighteen years of experience with the DMCA's prohibition on circumvention. In that time, it has become quite clear that section 1201 has had little to no effect on copyright infringement.¹ Virtually every TPM that protects consumer media that has been released to the public has been broken,² while independent filmmakers continue to find their own copyrighted works infringed online. Infringers do not distinguish between films based on films' budgets,³ even though the damaging effects of infringement are exacerbated for independent filmmakers who tend to gross significantly less revenue from their films than filmmakers backed by large studios do.⁴

¹ *Measuring the Digital Millennium Copyright Act Against the Darknet: Implications for the Regulation of Technological Protection Measures*, 24 LOY. L.A. ENT. L. REV. 635, 636 (2004) (“[T]he DMCA fails in light of its stated goal—namely, reducing the threat of copyright infringement in the digital age.”).

² See Pamela Samuelson, *Digital Rights Management {and, or, vs.} the Law*, 46 *Comm. ACM* (2003); Nathan Grayson, *Interview: CD Projekt's CEO on Witcher 2 piracy, why DRM's still not worth it* (Nov. 28, 2011), <http://www.pcgamer.com/interview-cd-projekt-ceo-on-witcher-2-piracy-why-drms-still-not-worth-it/> (“We of course experimented with all available DRM/copy protection, but frankly nothing worked. Whatever we used was cracked within a day or two, massively copied and immediately available on the streets for a fraction of our price.”); Patricia Akester, *Technological Accommodation of Conflicts between Freedom of Expression and DRM: The First Empirical Assessment* at 74 (May 5, 2009) (quoting Steve Jobs as saying “DRM systems haven't worked, and may never work, to halt music piracy”); John T. Holland, *Making Money Instead of Excuses: A Market-Based Alternative to the Digital Millennium Copyright Act That Protects Copyrights Without Diminishing Expression*, 7 *GEO. J.L. & PUB. POL'Y* 279, 293-94 (2009) (“As expected, no DRM has been developed, nor is one likely to be developed, that is invulnerable to circumvention; however, the DMCA even failed to prevent user-friendly circumvention technologies from entering mainstream markets.”).

³ Tim League & Ruth Vitale, *Guest Post: Here's How Piracy Hurts Indie Film*, *Indiewire* (July 11, 2014), <http://www.indiewire.com/article/guest-post-heres-how-piracy-hurts-indie-film-20140711>; Adam Leipzig, *Sundance Infographic 2016: Ample Distribution, Paltry Deals, And The Cost Of Piracy* (2016), <http://www.culturalweekly.com/sundance-infographic-2016-ample-distribution-paltry-deals-and-the-cost-of-piracy/> (analyzing fourteen films that were shown at Sundance Film Festival in 2014 and 2015 and demonstrating that each film had been illegally downloaded from hundreds of thousands of times to over twelve million times.).

⁴ Paula Bernstein, *'Expendables 3' Leaked Online. What Does It Mean for Indie Filmmakers?*, *Indiewire* (July 25, 2014), <http://www.indiewire.com/article/expendables-3-leaked-online-what-does-it-mean-for-indie-filmmakers-20140725>.

Instead of preventing piracy, section 1201's anticircumvention provisions have had a serious detrimental effect on freedom of speech, fair use, and other lawful uses. According to Gordon Quinn, the founder and artistic director of Kartemquin Films, who participated in the three most recent rulemaking proceedings, the DMCA does not impact piracy, but instead "inadvertently chills fair use and other lawful activities that are central to free expression in a democracy and the livelihoods of other filmmakers" like himself.⁵

Congress anticipated and was concerned about exactly these ill effects. The House Commerce Committee expressed concerns about potential abuses of the DMCA when considering the legislation in 1998:

[T]he Committee is 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. This result could flow from a confluence of factors, including the elimination of print or other hard-copy versions, the permanent encryption of all electronic copies, and the adoption of business models that depend upon restricting distribution and availability, rather than upon maximizing it. In this scenario, it could 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.⁶

Much of this has come to pass. TPMs that include access controls are now ubiquitous,⁷ and when filmmakers seek to comment on, criticize, or analyze cultural materials, fear of violating section 1201 prevents them from making copies for that purpose. As we have shown in previous section 1201 rulemakings, viable alternatives to circumvention are not available.⁸ In particular, rightsholders often refuse to license content, charge prohibitively expensive fees, or require "non-disparagement clauses" restricting what the filmmaker can say.⁹

Although Congress intended for the exemption process to act as a fail-safe mechanism to protect lawful uses, it has not successfully done so. The filmmakers who have participated

⁵ Gordon Quinn, *The DMCA is Broken for Filmmakers Like Me* (Feb. 14, 2016), <http://motherboard.vice.com/read/the-dmca-is-broken-for-filmmakers-like-me>.

⁶ H.R. REP. NO. 105-551, pt. 2, at 44 (1998) ("Commerce Comm. Report").

⁷ *Register's Perspective on Copyright Review: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 23–24 (2015) (*Register's Perspective on Copyright Review Hearing*) (statement of Maria A. Pallante, Register of Copyrights and Dir., USCO).

⁸ See 2015 Joint Filmmakers Comment at 12 (Feb. 6, 2015), http://copyright.gov/1201/2015/comments-020615/InitialComments_LongForm_IDA_Class06.pdf ("2015 Joint Filmmakers Comment").

⁹ *Id.* at Apps. D, E; 2012 Comment at Apps. F, G (2012), http://www.copyright.gov/1201/2011/initial/IDA_Mark_Berger.pdf.

in the process have found it extremely burdensome, unpredictable, limited in scope, at times incomprehensible, and ill-suited to keep up with changes in technology.¹⁰ The ultimate result is that section 1201 stifles fair use, creative expression, and technological innovation.

We ourselves are copyright owners; we understand the value and importance of intellectual property and seek to abide by the rules. Yet it seems that section 1201 effectively punishes only those like us who seek to follow the law, while failing to deter rampant copyright infringement.

The Register¹¹ should recommend that Congress amend the statute to account for the past eighteen years of experience. We urge the Register to approach the section 1201 rulemaking process with this reality firmly in mind, and to use her discretion to make changes to the process as we suggest below.

The Register should recommend that Congress amend section 1201 to require a connection between the circumvention and infringing conduct in order for a violation to occur.

There should be a requirement that circumvention of an access control is not a violation of section 1201 unless there is a connection, or nexus, between the circumvention and infringing conduct. A nexus requirement would prevent section 1201 from continuing to prevent myriad lawful uses, by refining the scope of a 1201 violation to include only the circumvention of an access control for an unlawful purpose. The inclusion of a nexus requirement would be beneficial for many reasons.¹² First, section 1201 would still prohibit circumvention committed to further infringing conduct, but would also prevent lawsuits brought for anticompetitive reasons.¹³ As the court in *Chamberlain Group v. Skylink*

¹⁰ Quinn, *The DMCA is Broken for Filmmakers Like Me*.

¹¹ The statute requires that “the Librarian of Congress, upon the recommendation of the Register of Copyrights, who shall consult with the Assistant Secretary for Communications and Information of the Department of Commerce and report and comment on his or her views in making such recommendation, shall make the determination in a rulemaking proceeding.” 17 U.S.C. § 1201(a)(1)(C). We assume for the purposes of this Comment that the Librarian will continue to vest the authority for conducting the triennial rulemaking with the Register. We therefore refer throughout this document to the Register rather than the Librarian.

¹² Eric Wanner, *Navigating the Nexus: DMCA Anti-Circumvention Protection of Computer Software*, 43 ARIZ. ST. L.J. 1081, 1106 (2011) (“The *Chamberlain* nexus requirement, if uniformly adopted, would solve many of the problems that courts have been addressing, allowing expanded definitions of access and effectiveness without the need for exceptions such as the unauthorized use of an authorized password doctrine, all without giving the DMCA broad, overreaching results. Furthermore, it is consistent with standard statutory interpretation, the stated policy goal of Congress to discourage access to perfect copies of works, and allows the rejection of claims aiming to monopolize other markets without resorting to technicalities that future plaintiffs may trivially avoid.”).

¹³ See *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178 (Fed. Cir. 2004).

Technologies noted, the absence of a nexus requirement “would allow any manufacturer of any product to add a single copyrighted sentence or software fragment to its product, wrap the copyrighted material in a trivial ‘encryption’ scheme, and thereby gain the right to restrict consumers’ rights to use its products in conjunction with competing products.”¹⁴ Next, the requirement would obviate the need for an exemption process. As a result, the requirement would reduce the burden of time, effort, and resources that the exemption process places on commenters, such as filmmakers, and the Copyright Office.

With respect to the burdensome nature of the exemption process, the Register has recognized that “a wide range of stakeholders have expressed frustration that the section 1201 statutory framework requires that, to continue an existing exemption, proponents must bear the legal and evidentiary burden of justifying the exemption anew in each subsequent rulemaking proceeding” and has stated that “[t]he Copyright Office agrees that the process of renewing existing exemptions should be adjusted.”¹⁵ Further, participants share common frustrations with the length of the exemption process (particularly the 2010 rulemaking proceeding which lasted close to twenty-two months), the redundancies caused by the current interpretation of the *de novo* standard of review, and the sheer complexity of the exemption process, which usually forces members of the public to seek legal counsel to help them navigate the proceeding.¹⁶ A nexus requirement would eliminate all of these issues.

For all of these reasons, there should be a Congressional fix similar to legislation that has been introduced previously. For example, the Unlocking Technology Act of 2013 was designed in part to add a copyright infringement requirement to the anticircumvention prohibition, primarily by (1) amending section 1201(a) to read “[n]o person shall, in order to infringe or facilitate infringement of a copyright in a work protected under this title, circumvent a technological measure that effectively controls access to that work”; and (2) adding that “[i]t shall not be a violation of this section to circumvent a technological measure in connection with a work protected under this title if the purpose of such circumvention is to engage in a use that is not an infringement of copyright under this title.”¹⁷

¹⁴ *Id.* at 1201.

¹⁵ *Register’s Perspective on Copyright Review Hearing* at 21 (statement of Maria A. Pallante, Register of Copyrights and Dir., USCO).

¹⁶ See Maryna Koberidze, *The DMCA Rulemaking Mechanism: Fail or Safe?*, 11 WASH. J.L. TECH. & ARTS 211, 215-17 (2015); Arielle Singh, *Agency Regulation in Copyright Law: Rulemaking Under the DMCA and Its Broader Implications*, 26 BERKELEY TECH. L.J. 527, 566-67 (2011).

¹⁷ Unlocking Technology Act of 2013 H.R. 1892, 113 Cong. (2013), § 2(a)(1).

3. Should section 1201 be adjusted to provide for a presumptive renewal of previously granted exemptions—for example, when there is no meaningful opposition to renewal—or otherwise be modified to streamline the process of continuing an existing exemption. If so, how?

There should be a presumption of renewability for previously granted exemptions, which would be more equitable and allow commenters and the Register to focus on the most important factual questions.

The Register should establish a presumptive renewal of previously granted exemptions because such a presumption would ease the burden of continuing an exemption on both the Copyright Office and participants in the rulemaking.

In previous rulemakings, the Register has required that all exemptions, even those previously granted, be proven *de novo*, and that no previously submitted evidence can be considered.¹⁸ A presumption of renewability would ease the burden on all involved and allow the Copyright Office to focus its resources on evaluating whether new exemptions should be granted.

The exemption process is especially burdensome on independent filmmakers. Our work and livelihood depend on the exemptions, without which we cannot make fair use and enrich society with valuable commentary and criticism. But the process consumes an inordinate amount of resources. The requirement to reapply *de novo* for the same previously granted exemptions detracts from our time, attention, and resources to enriching society with documentary films.

¹⁸ 79 Fed. Reg. 55,689–90 (Sept. 17, 2014) (explaining in the Notice of Inquiry for the most recent exemption process: “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.”). *See also* U.S. Copyright Office, Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights 88 (2012), http://copyright.gov/1201/2012/Section_1201_Rulemaking_2012_Recommendation.pdf (“2012 Recommendation”) (refusing recommendation for wireless telephone handset “unlocking” because “[m]erely citing to conclusions drawn by the Register in past rulemakings does not itself create a factual record for purposes of a current rulemaking. As the Register has noted many times in the past, the record must be developed and reviewed *de novo* in each proceeding; a proponent is required to present a *prima facie* case, based on current evidence, that it is entitled to the proposed exemption.”).

We agree with the Register's call for a presumptive renewal of previously granted exemptions.¹⁹ However, limiting such a presumption to "when there is no opposition"²⁰ or "when there is no meaningful opposition to renewal"²¹ would render such a presumption largely ineffective, because anyone could remove the presumption by simply filing an opposing comment, for which the Copyright Office has not thus far required a burden of proof or persuasion. An exemption should be reissued until and unless the Register finds that the adverse effects complained of in previous rulemakings no longer exist.

The Register has indicated that, in her view, she cannot establish a presumptive renewal without Congressional action.²² But the legislative history, and principles of administrative law, permit her to establish such a presumption immediately, without further input from Congress. Section 1201 is silent as to the *de novo* issue and properly entrusts the administering agency to decide how to implement the exemption process. It is true that, as the Register notes, a May 1998 House Commerce Committee Report provided that "the assessment of adverse impacts on particular categories of works is to be determined *de novo*."²³ But the Register is not bound by that one sentence from a report issued early in the legislative history,²⁴ and even if she were, the text states only that the assessment of adverse impact is to be determined *de novo*—not that all evidence must also be presented *de novo*. Filmmakers and others reapplying for an exemption should be permitted to assert that the conditions present in a previous rulemaking continue to exist, and from there the burden of proof should shift to opponents or the agency to determine that they no longer do.

If the Register determines that she does not have the authority to implement these changes, then she should urge Congress to amend section 1201 to recognize that those seeking exemptions for lawful uses of copyrighted materials should not have to reapply for the same exemptions in subsequent proceedings.

¹⁹ *Register's Perspective on Copyright Review Hearing* at 21 (statement of Maria A. Pallante, Register of Copyrights and Dir., USCO).

²⁰ *Id.*

²¹ 80 Fed. Reg. 81,373 (Dec. 29, 2015).

²² 79 Fed. Reg. 55,689 (Sept. 17, 2014).

²³ Commerce Comm. Report at 37.

²⁴ *See Am. Hosp. Assn. v. NLRB*, 499 U.S. 606 (1991) (explaining that statements in committee reports do not have the force of law).

4. Please assess the current legal requirements that proponents of an exemption must satisfy to demonstrate entitlement to an exemption. Should they be altered? If so, how? In responding, please comment on the relationship to traditional principles of administrative law.

The exemption process should be structured as a rulemaking rather than an adjudication, in accordance with Congress’s intent and in order to more effectively conduct the fact-finding process.

The DMCA section 1201 exemption process should be structured as a rulemaking, rather than as an adjudication, as specified by the plain language of the statute.²⁵

Despite these explicit instructions from Congress, the Copyright Office has structured the exemption process more like an adjudication than a rulemaking. The problem with this approach is that it places too much of a burden on commenters and unnecessarily restricts the Register’s factual inquiry. Commenters have been placed into adversarial positions of “proponent” and “opponent”,²⁶ the burden of proof is on the proponent;²⁷ and the standard of proof for the proponent is to show “substantial” adverse effects.²⁸ The statute does not mention proponents or opponents, specify who must bear the burden of proof, or require “substantial” adverse effects.

The Copyright Office has explained that its decision to impose the preponderance of the evidence standard is based on principles of agency rulemaking found in the Administrative Procedure Act (“APA”).²⁹ However, the part of the APA to which the Office cites, Section 556(d), only applies when the statute specifically requires that an agency hold a hearing on the record.³⁰ The proper section for an agency holding a “rulemaking” is section 553, which does not require adversarial positions or assigning the burden of proof to a subset of

²⁵ 17 U.S.C. § 1201(c) (“[T]he Librarian of Congress, upon the recommendation of the Register of Copyrights, who shall consult with the Assistant Secretary for Communications and Information of the Department of Commerce and report and comment on his or her views in making such recommendation, shall make the determination in a rulemaking proceeding . . . whether 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. In conducting such rulemaking, the Librarian shall examine . . .”).

²⁶ 79 Fed. Reg. 55,690 (Sept. 17, 2014).

²⁷ *Id.* at 55,689.

²⁸ U.S. Copyright Office, Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights 15–16 (2015), <http://copyright.gov/1201/2015/registers-recommendation.pdf> (“2015 Recommendation”).

²⁹ 79 Fed. Reg. 55,698 (citing 5 U.S.C. § 556(d)).

³⁰ See 5 U.S.C. § 556(d); *Am. Trucking Ass’n v. U.S.*, 344 U.S. 298, 319–20 (1953) (holding that section 7 of the APA (codified as section 556(d)) “applies only when hearings were required by the statute under which they were conducted to be made on the record and with opportunity for oral hearing.”).

participants.³¹ Congress intended to create a notice and comment rulemaking governed by section 553 of the APA, not an adjudication governed by section 556, as evinced by its use of the term “rulemaking” in the enabling statute.³²

Bedrock principles of administrative law support structuring the exemption process like a rulemaking, with greater responsibility of the agency to seek out all pertinent facts. First, as Copyright Office staff have recognized, section 1201 exemptions apply to everyone across the country, not just to the parties who comment in the rulemaking.³³ Second, the exemption process is filled with determinations that assess conditions as they exist all across the land. These include analysis of TPMs and their effect on the market for copyrighted works, and whether works are sufficiently available for nonprofit and other purposes. In particular, the open-ended fifth factor, “such other factors as the Librarian considers appropriate,” explicitly invites the Register to consider other copyright-related policy questions.³⁴ Such considerations are most appropriate for a rulemaking. Finally, the exemption process announces rules of prospective applicability that will take place in the future, not retrospective rules as take place in adjudication.

Each of these characteristics supports a conventional rulemaking procedure, with its sweeping fact-finding procedures that permit a wide range of participation.³⁵ The Register should not impose burdens of production and persuasion solely on the parties or structure the process like litigation; nor should she look to section 556 of the APA to establish the burden of proof. Rather, the Register, as an informed and unbiased representative of the public, should conduct her own fact-finding investigation, informed by the comments but not reliant solely on those who have the resources to participate.³⁶ As the leading treatise

³¹ See 5 U.S.C. § 553.

³² H.R. REP. NO. 105-796, at 64 (1998) (“Conference Report”) (“The determination will be made in a rulemaking proceeding on the record. It is the intention of the conferees that, as 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, . . .”).

³³ See Transcript, U.S. Copyright Office, Hearing on Exemptions to the Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies 46:25–47:2 (May 20, 2015) (statement of Jacqueline Charlesworth, General Counsel, Copyright Office) (“And that is part of what we where [sic] driving at here, is we have to create an exemption which applies in a general way, which is an unusual thing. Courts usually decide specific cases with a lot of specific facts.”).

³⁴ 17 U.S.C. § 1201(a)(1)(C); 2015 Recommendation at 10.

³⁵ 1 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 2:33[3] (3d ed., 2010).

³⁶ U.S. Copyright Office, 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 262 (June 11, 2010), <http://www.copyright.gov/1201/2010/initialed-registers-recommendation-june-11-2010.pdf> (“2010 Recommendation”) (“[T]he Register finds no factual basis for designating this proposed class of works for the ensuing three-year period. While the Register’s recommendations in previous rulemakings made clear that the Register understands and accepts the legal and policy reasons for such an exemption, under the constraints established by Congress in this rulemaking proceeding, the Register cannot recommend designation of the class in the absence of a factual record that supports the need for the exemption. No such showing has been made in this proceeding.”).

Administrative Law and Practice observes, it is well-accepted that in a rulemaking, “[t]he agency and its staff cannot sit by passively and let interested persons develop a record. Holes or imbalance in the record is the agency’s responsibility and not that of private participants.”³⁷

Nothing in the legislative history undermines this conclusion, especially in light of the plain language of the statute. If, however, the Register chooses to move forward with a more adjudication-like process, she should at a minimum do so only after articulating well-defined elements that have a clear basis in the language of section 1201. Along similar lines, any factfinding inquiry in a notice-and-comment rulemaking should be confined to copyright-related matters squarely within the statutory scheme of Chapter 12.

When determining whether a use is likely noninfringing, the Register should refrain from imposing a restrictive “preponderance of the evidence” standard or one that requires near-certainty. In setting the standard, the Register should ensure that the exemption proceeding not interfere with the development of fair use law in the courts.

In previous rulemakings the Copyright Office has announced a “preponderance of the evidence”³⁸ standard for determining whether a use is noninfringing. At times, the Office has taken an even stricter approach requiring near-certainty. We urge the Register to reconsider her position on the standard of proof required to show that a use is likely to be noninfringing. The statute and legislative history provide wide latitude to make this determination and in doing so, the Register should keep in mind that an unduly restrictive standard hampers the natural development of the law, which runs counter to Congress’s clearly expressed intent.³⁹

Under section 1201, 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.”⁴⁰ The Register has interpreted this standard to require that a proponent “must prove by a preponderance of the evidence that the harm alleged is more likely than not.”⁴¹ This is a stricter standard than what the statute requires. As we discuss above at pages 113-13,

³⁷ 1 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 4:33[4] (3d ed., 2010) (citing Nat. Res. Def. Council, Inc., v. Herrington, 768 F.2d 1355, 1420–21 n.63 (D.C. Cir. 1985).

³⁸ 79 Fed. Reg. 55,689 (citing 2010 Recommendation at 10).

³⁹ Nowhere in the legislative history does Congress signal an intention to remove the ongoing development of fair use and other areas of copyright law from the courts and vest the Copyright Office with that status. Indeed, Congress signaled exactly the opposite intention in section 1201(c)(1) (“Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.”).

⁴⁰ 17 U.S.C. 1201(a)(1)(C).

⁴¹ 79 Fed. Reg. 55,689 (Sept. 17, 2014).

the Copyright Office does not need to rely on a provision of the APA that is meant for a different type of administrative procedure in order to determine which burden of proof to apply; in fact, the Office has wide latitude to craft rulemaking procedures that fit the unique requirements of the statute.⁴² In any event, given that whether a use is noninfringing is primarily a legal determination, a standard designed for evidentiary inquiries in the context of adjudication is ill-suited for such a question. We think the most plausible reading of the statute, and the most workable standard, is that for a proposed noninfringing use to qualify, there merely needs to be some likelihood that a desired use is noninfringing—not that one has shown by a preponderance of the evidence⁴³ that it is noninfringing.

In addition, we urge the Register to apply the standard more uniformly. On several occasions in previous exemption proceedings, the Copyright Office applied a standard more restrictive even than the “preponderance of the evidence” standard. For example, in 2012, the Copyright Office rejected an exemption for jailbreaking of video game consoles after “consider[ing] whether proponents have satisfied their burden of demonstrating that the uses in question are, *in fact*, noninfringing.”⁴⁴

The same occurred in the most recent rulemaking with respect to the suggested exemption for criticism and commentary in narrative filmmaking.⁴⁵ There, the Register added to the “preponderance of the evidence” standard three additional layers of scrutiny that have no basis in case law or the statute. First, the Register chose not recommend an exemption for narrative filmmaking in part “because there is no presumption that their primary purpose is to offer criticism or commentary, as opposed to being included for entertainment purposes.”⁴⁶ But in conducting a fair use analysis, courts have never considered the “primary purpose” of the genre to which the work belongs as a determining factor, instead looking at the specific use being made.⁴⁷ Second, the Copyright Office reasoned that “none of the case law examples provided by proponents considered the use of motion picture excerpts in narrative films,”⁴⁸ despite no real dispute that fair use in narrative films is widespread in practice and recognized in the case law.⁴⁹ The statute does not require having

⁴² See 1 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 2:35 (3d ed., 2010).

⁴³ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Comments of New America’s Open Technology Institute, at *6 (Feb. 6, 2015).

⁴⁴ *Id.* at *7 (Feb. 6, 2015) (quoting Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, *Recommendation of the Register of Copyrights and Determination of the Librarian of Congress* 39 (2012), http://copyright.gov/1201/2012/Section_1201_Rulemaking_2012_Recommendation.pdf).

⁴⁵ 2015 Recommendation at 79.

⁴⁶ *Id.*

⁴⁷ 2015 Joint Filmmakers Comment at 6.

⁴⁸ 2015 Recommendation at 80.

⁴⁹ Letter from Jack I. Lerner and Michael C. Donaldson to Maria A. Pallante (Oct. 15, 2015), <http://www.law.uci.edu/faculty/full-time/lerner/pdfs/Docket-No-2014-7-Proposed-Class-6-Update-Fair-Use-in-Narrative-Filmmaking.pdf>; 2015 Joint Filmmakers Comment at 5; 2015 Joint Filmmakers Reply Comment at 5 (May 1, 2015) http://copyright.gov/1201/2015/reply-comments-050115/class%206/ReplyComments_LongForm_IDAEtAl_Class06.pdf

an exact case on point, which is a far more conservative approach even than a “preponderance of the evidence” standard. Finally, the Office noted concern that the exemption could “supplant the existing, robust licensing market for motion picture clips,”⁵⁰ even though it is well-established that rights holders have no claim to the derivative market for criticisms of their works.⁵¹

Each of these considerations raised the bar beyond what the law requires, supplanting Congress’s intent not to disturb the evolution of case law with respect to fair use and other lawful uses. This is an especially important point because, absent an exemption, section 1201 works to put those who wish to make fair use on the wrong side of the law before they even have a chance to make their case to a court.

We urge the Register to use her discretion to impose a workable standard for what constitutes a likely noninfringing use and to make sure that the triennial rulemaking process does not interfere with the ongoing development of the law.

Congress instructed that circumvention of access controls is prohibited, but that circumvention of use controls is not. This choice was integral to Congress’s efforts to ensure that section 1201 did not impair fair use and other noninfringing uses. The Register should revise the rulemaking process to ensure that technologies that merge access and use controls do not subvert Congress’s clear intent.

The Register should strongly favor exemptions involving merged access and use controls, particularly where the merged control prevents a use such as copying, and the user does not seek to access the material unlawfully.

Section 1201 prohibits circumvention of access controls, but not use controls (sometimes called “copy controls,” “rights controls,” or “infringement-prevention technology”).⁵² The distinction between access controls and use controls is subtle but important. In the statutory scheme Congress devised, an access control limits a user’s ability to obtain, consume, or perceive copyrighted material, examples being password protection,⁵³ an authentication sequence,⁵⁴ or limitations on playback.⁵⁵ Section 1201(a)(1), of course, prohibits circumvention of such controls. A use control, by contrast, limits a user’s ability to copy or make some other use of copyrighted material besides accessing it. Congress chose not

⁵⁰ 2015 Recommendation at 79.

⁵¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

⁵² 17 U.S.C. § 1201.

⁵³ S. REP. NO. 105-190 at 11 (1998).

⁵⁴ *RealNetworks, Inc. v. Streambox, Inc.*, No. 2:99CV02070, 2000 WL 127311, at *1 (W.D. Wash. Jan. 18, 2000).

⁵⁵ R. Anthony Reese, *Will Merging Access Controls and Rights Controls Undermine the Structure of Anticircumvention Law?*, 18 BERKELEY TECH. L.J. 619, 644 & n.85 (2003) (discussing Divx technology).

to prohibit circumvention of such a control in significant part because it thought that drawing this distinction would preserve fair use.⁵⁶

A merged access and use control is one that combines both an access control and a use control. Such controls allow rightsholders to undermine Congress's statutory scheme, because by simply combining use controls with access controls, they can prevent other users from making lawful use of a work. Eighteen years on, it is clear that this is exactly what has happened on a massive scale. Most participants in the triennial rulemakings who have suggested exemptions have sought not to circumvent access controls in the sense of a password or control that affects playback, but to make copies in order to engage in a lawful use. That is certainly the case with independent filmmakers.

We urge the Register to pay closer attention in future rulemakings to the role of merged access and use controls. At a minimum, the Register should consider such controls under the fifth statutory factor, "such other factors as the Librarian considers appropriate," as she has in the past.⁵⁷ In future rulemakings, that fact should weigh very heavily in favor of an exemption under the fifth factor.

The issue of merged access and use controls is so important that the Register go further. The Register should apply a new test when considering whether to issue an exemption. First, the Register should inquire as to whether a noninfringing use is being adversely affected even though users are lawfully obtaining and consuming the copyrighted material in question. A typical example would be situations in which users have lawfully purchased the media in question as well as display devices (such as DVD or Blu-ray players) but still cannot make the noninfringing use in question. Second, the Register should inquire as to whether the users can make copies of the material without violating a merged access and use control. Finally, the Register should inquire as to whether any substantial evidence exists to suggest that the proposed exemption will cause significant copyright infringement. If the answer to the first two questions is "yes," and the answer to the third question is "no,"

⁵⁶ H.R. REP. NO. 105-551, pt. 1, at 18 (1998) ("[A]n individual would not be able to circumvent in order to gain unauthorized access to a work, but would be able to do so in order to make fair use of a work which he or she has acquired lawfully."); *WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act: Hearing on H.R. 2281 and H.R. 2280 Before the Subcomm. on Courts and Intell. Prop. of the House Comm. on the Judiciary*, 105th Cong. 47 (1997) (statement of Marybeth Peters) ("The Copyright Office firmly believes that the fair use doctrine is a fundamental element of the copyright law, and that its continued role in striking an appropriate balance of rights and exceptions should not be diminished. We also believe that it is possible to provide effective protection against circumvention without undermining this goal. . . . Section 1201 seeks to accomplish this result in several ways. First, it treats access- prevention technology separately from infringement-prevention technology, and does not contain a prohibition against individual acts of circumvention of the latter. As a result, an individual would not be able to circumvent in order to gain unauthorized access to a work, but would be able to do so in order to make fair use of a work which she has lawfully acquired."); R. Anthony Reese, *Will Merging Access Controls and Rights Controls Undermine the Structure of Anticircumvention Law?*, 18 *BERKELEY TECH. L.J.* 619, 647–50 (2003) (showing that the decision not to prohibit circumvention of use controls was a central component of Congress's efforts to ensure that Section 1201 did not undermine important rights such as fair use).

⁵⁷ 17 U.S.C. § 1201(a)(1)(C); 2015 Recommendation at 10.

then the Librarian should be strongly inclined to issue an exemption without further examination.

We urge the Register to take a closer look at the way that merged access and use controls are undermining the statutory scheme of Chapter 12 and to use the discretion that the statute and the APA provide her to address the problem.

CONCLUSION

For the reasons set forth above, we respectfully recommend that:

- The Register urge Congress to amend section 1201 to include a requirement that circumvention of an access control is not a violation of section 1201 unless there is a connection between the circumvention and infringing conduct.
- In the alternative, the Register should revise the triennial rulemaking in the following ways:
 - Establish a presumptive renewal of previously granted exemptions;
 - Structure the proceeding as a rulemaking rather than an adjudication;
 - Impose a workable standard for what constitutes a likely noninfringing use and ensure that the standard does not interfere with the development of fair use law in the courts; and
 - Strongly favor exemptions involving merged access and use controls, particularly where the merged control prevents a use such as copying, and the user does not seek to obtain the material unlawfully.