

Fixing Section 1201: Legislative and Regulatory Reforms for the DMCA’s Anti-Circumvention Provisions

Art Neill*

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* © 2016 Art Neill. Mr. Neill is the founder and Executive Director of New Media Rights, a nonprofit program at California Western School of Law that provides pro bono and reduced fee legal services to underserved clients in the areas of Internet, intellectual property, privacy, and media law. Art is also a clinical professor teaching the courses Internet & Social Media Law as well as the Internet & Media Law Clinic.

Mr. Neill has drafted comments and testimony to support various exemptions for remix creators and consumers under § 1201 of the DMCA in the 2009, 2012, and 2015 Anti-circumvention proceedings.

In 2011, 2013, and 2015 Mr. Neill was appointed as a member of the Federal Communication Commission’s Consumer Advisory Committee, where he has served as Co-chair of the Broadband Working Group. Art received his J.D. from University of San Diego School of Law in 2006, and his B.A. from the College of William & Mary in 2001. You can learn more about Art, including publications, interviews, honors, and presentations, at http://www.newmedia rights.org/about_us/nmr_staff/art_neill. The author would like to thank California Western School of Law students and New Media Rights team members Nicholas Petruolo and Rayman Khan for their able assistance in preparing this Article.

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I. INTRODUCTION

The Digital Millennium Copyright Act's (DMCA's) anti-circumvention provisions, codified in part in 17 U.S.C. § 1201, unnecessarily prohibit lawful speech by making circumvention for otherwise noninfringing uses of copyrighted content illegal under federal law. At the same time, the current rulemaking process for granting exemptions to § 1201 of the DMCA is ineffective and cumbersome.

Currently, the Copyright Office is conducting a comprehensive review of § 1201 of the DMCA,¹ providing an opportunity to identify reforms at the legislative and regulatory levels that can ensure that § 1201 of the DMCA does not unnecessarily restrict lawful speech.

This Article is divided into three broad categories: Part I addresses key problems with § 1201 of the DMCA. Part II proposes and analyzes potential legislative reforms. Acknowledging that legislative reforms may take time, Part III focuses on ways in which the triennial rulemaking process can be improved more quickly through regulatory change at the Copyright Office.

Part I also provides an overview of the specific problems with § 1201 of the DMCA's anti-circumvention provisions and the Copyright Office's triennial rulemaking process. More specifically, Part I discusses: (1) the high demands on time and resources as well as the unnecessarily steep burden facing proponents who want to prove a class of work should be exempted from § 1201; (2) the ways in which exemptions routinely fail creators of noninfringing content; and lastly, (3) the significance of excluding fair use from § 1201 of the DMCA's exemptions.

Part II proposes to amend § 1201 of the DMCA to account for fair uses of copyrighted works and addresses many of the problems listed above. Part II also explains how such an amendment would be compatible with the United States' international treaty obligations.

1. Section 1201 Study: Notice and Request for Public Comment, 80 Fed. Reg. 81369, 81369 (Dec. 29, 2015) (to be codified at 48 C.F.R. pt. 1) [hereinafter Section 1201 Study].

Finally, Part III focuses on ways in which the triennial rulemaking process should be reformed at the regulatory level. Section III.A proposes that the Copyright Office and the Librarian of Congress reinterpret the burden of proof necessary to show the need for an exemption; Section III.B examines possible replacements for the current *de novo* standard of review; and Section III.C provides suggestions for managing issues of confidentiality in the rulemaking process.

II. PROBLEMS WITH THE DMCA'S ANTI-CIRCUMVENTION PROVISIONS AND ITS TRIENNIAL RULEMAKING PROCESS

Section 1201 of the DMCA, as well as the triennial rulemaking process it created, needs to be comprehensively revisited. Section 1201 of the DMCA layers unnecessary complexity over existing copyright law, failing those who wish to legally use content.

A. *Section 1201 of the DMCA Consumes Vast Resources and Sets an Unreasonably High Standard for Proponents*

Every three years, proponents of exemptions to § 1201 of the DMCA make significant expenditures of time and money simply to ensure that individuals can lawfully access copyrighted works for a narrow subset of otherwise noninfringing purposes, such as fair use.² This high demand on resources places an unnecessary and unfair burden on proponents.

A gap of resources divides proponents and opponents of § 1201 of the DMCA exemptions. Proponents of exemptions often include small law school clinics and interest groups³ that have one,⁴ or at most, a few

2. Letter from Art Neill et al., New Media Rights, to Nat'l Telecomm. & Info. Admin. 14 (Nov. 13, 2013), https://www.ntia.doc.gov/files/ntia/new_media_rights_comments.pdf [hereinafter New Media Rights Letter].

3. Such proponents include, UCI Intellectual Property, Arts, and Technology Clinic; the University of Southern California's Intellectual Property & Technology Law Clinic; Harvard Law's Cyberlaw Clinic at the Berkman Klein Center for Internet & Society; and the University of Colorado School of Law's Samuelson-Glushko Technology Law & Policy Clinic. See *Section 1201 Exemptions to Prohibition Against Circumvention of Technological Measures Protecting Copyrighted Works: Comments*, U.S. COPYRIGHT OFFICE (Nov. 9, 2016), <http://www.copyright.gov/1201/2015/comments-020615/>; *Section 1201 Exemptions to Prohibition Against Circumvention of Technological Measures Protecting Copyrighted Works: Second Round of Comments*, U.S. COPYRIGHT OFFICE (Nov. 9, 2016), <http://www.copyright.gov/1201/2015/reply-comments-050115/>.

4. See, e.g., *Our Team* USC INTELL. PROP. & TECH L. CLINIC, http://iptlc.usc.edu/?page_id=11 (last visited Nov. 14, 2016)(listing one staff member, the director of the clinic).

attorneys on staff.⁵ Law school clinic attorneys typically also have a variety of other clients they serve, and thus have little time to write comments or testify in favor of important exemptions during the § 1201 of the DMCA rulemaking proceedings.⁶ In contrast, the Motion Picture Association of America (MPAA), which has participated as an opponent in the rulemaking proceedings on many occasions,⁷ had an overall budget of over \$65 million in 2013.⁸

The current *de novo* standard of review ensures that proponents carry a heavy burden and expend vast amounts of resources every three years.⁹ Even exemptions without opposition must be reapproved every three years.¹⁰ Proponents must provide extensive evidence to prove anew that the class of work should be exempted every successive triennial review, with the burden never shifting to opponents.¹¹

5. See, e.g., *Staff*, HARVARD LAW SCHOOL: CYBERLAW CLINIC AT THE BERKMAN KLEIN CENTER FOR INTERNET & SOCIETY, <http://clinic.cyber.harvard.edu/staff/> (last visited Nov. 14, 2016) (listing only six staff members); *Intellectual Property, Arts, and Technology Clinic*, UNIVERSITY OF CALIFORNIA, IRVINE SCHOOL OF LAW, <http://www.law.uci.edu/academics/real-life-learning/clinics/ipat.html> (last visited Nov. 14, 2016) (listing contact information for only a clinic director and an law clinic administrator).

6. Cf. *About the Clinic*, UNIVERSITY OF MICHIGAN: MICHIGAN LAW ENTREPRENEUR CLINIC, <http://www.law.umich.edu/clinical/entrepreneurshipclinic/about/Pages/default.aspx> (last visited Nov. 10, 2016) (stating that the clinic provides no-cost legal services to hundreds of real, entrepreneurial clients each year); *Entrepreneurship, Intellectual Property & Cyberlaw Program*, BOSTON UNIVERSITY SCHOOL OF LAW, <http://www.bu.edu/law/academics/jd-degree/clinics-externships-practicums/entrepreneurship-ip-cyberlaw/> (last visited Nov. 10, 2016) (stating that law students the opportunity to advise inventors and entrepreneurs on a variety of legal issues); *Intellectual Property Clinic*, University of North Carolina School of Law, <http://www.law.unc.edu/academics/clinic/ip/> (last visited Nov. 10, 2016) (stating that “[m]uch of the clinic’s work will involve representing independent non-profits, educational institutions, and small businesses before the USPTO.”).

7. See, e.g., Transcript of Pub. Hearing at 56, Pub. Hearing on Exemption to Prohibition on Circumvention of Copyright Prot. Sys. for Access Control Tech. (Apr. 2006) (No. RM 2005-11A), <http://www.copyright.gov/1201/2006/hearings/transcript-april03.pdf> (illustrating MPAA’s participation in a public hearing on access control technology exemptions, in which MPAA argued that there are “many ways of exercising fair use without violating and hacking CSS”); see also Fritz E. Attaway, *Comments of Motion Picture Association of America*, COPYRIGHT.GOV (Feb. 2, 2009), <http://www.copyright.gov/1201/2008/responses/mpaa-46.pdf> (arguing against exemption requests); see also Steven J. Metalitz, *Joint Comments of AAP: Association of American Publishers, et. al.*, COPYRIGHT.GOV (Feb. 10, 2012), http://www.copyright.gov/1201/2012/comments/Steven_J._Metalitz.pdf (arguing again against exemption requests).

8. GUIDE STAR USA, GUIDE STAR PREMIUM REPORT GENERATED FOR MOTION PICTURES ASSOCIATION OF AMERICA, <http://www.guidestar.org/ViewPdf.aspx?PdfSource=0&ein=13-1068220> (last visited Feb. 11, 2016) (login information required for access).

9. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 80 Fed. Reg. 65944, 65945 (Oct. 28, 2015) (to be codified at 37 C.F.R. pt. 201) [hereinafter 2015 Final Rule].

10. See *id.*

11. See *id.*

For example, during the 2015 rulemaking proceeding, opponents opposed the expansion of an exemption for documentary filmmaking, but not the renewal of a previously approved portion of the proposed exemption.¹² The de novo standard was an unnecessary burden, as it was already conceded by opponents that this class of work was appropriate and necessary to exempt from § 1201 of the DMCA's provisions.¹³ Nevertheless, proponents of the class of work were required to produce extensive filings in support of portions of the exemption that had already been briefed thoroughly in past proceedings and faced no opposition in the current proceeding.¹⁴

B. Section 1201 of the DMCA Fails Those Who Wish To Legally Reuse Content

Individuals and businesses that reuse copyrighted works without permission, but for noninfringing purposes, can be broadly categorized as “remix creators.” Remix creators take one or more copyrighted works and transform them into something new, creative, and original.¹⁵ The specific bounds of remix culture are limited only by human imagination. Content reuse is simply part of everyday communication in our culture. Remix creators often rely on their own creativity and fair use to create their work, although sometimes remix creators use works already in the public domain or get licenses (including works open licensed under licenses like Creative Commons) to use copyrighted content.¹⁶

Section 1201 of the DMCA impedes this noninfringing use of content and removes otherwise lawful speech from public discourse. Specifically, it prohibits creators from breaking any form of Technological Protection Measures (TPMs)¹⁷ to access copyrighted content, unless there is a specific exemption.¹⁸ “This is true even in cases

12. U.S. COPYRIGHT OFFICE, SECTION 1201 RULEMAKING: SIXTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS 70 (2015) [hereinafter 2015 RECOMMENDATION].

13. *See id.*

14. *See* Jonathan Band, *What's Missing from the Register's Proposals*, ARL POLICY NOTES BLOG (Apr. 30, 2015), <http://policynotes.arl.org/?p=1024>; H.R. Rep. No. 105-551, pt. 2, at 37 (1998).

15. *See* DEP'T OF COMM., INTERNET POLICY TASK FORCE, COPYRIGHT POLICY, CREATIVITY, & INNOVATION IN THE DIGITAL ECONOMY 28 (2013).

16. *Id.* at 29.

17. Also known as Digital Rights Management (DRM).

18. 2015 RECOMMENDATION, *supra* note 12, at 8-9; *see also* New Media Rights Letter, *supra* note 2, at 14.

where the creator lawfully obtained the product and is using it for lawful purposes.”¹⁹

If an individual or business wants to reuse content that falls under a class of work exempted from § 1201 of the DMCA’s provision’s exemption, the sheer number and specificity of exemptions can be a barrier. Since the initiation of the rulemaking process in 2000, the number of classes of works granted exemptions has increased significantly. The Librarian of Congress granted only two exemptions during the first rulemaking proceeding, but granted at least twenty-two exemptions during the 2015 rulemaking proceeding.²⁰ While an increase in exemptions is a positive development, the system is failing. The high evidentiary standards in place demand that proposed exemptions must be narrowly tailored to include specific classes of works.²¹ This is problematic because of the painstaking specificity required to receive an exemption. The exemptions actually granted by the Copyright Office tend to be severely limited in scope.²²

To better understand this problem, consider one of the most recent exemptions approved in the sixth triennial rulemaking hearing. In a long and detailed rule, the Librarian of Congress approved a new exemption that permits circumvention of DVDs and Blu-ray discs under specific circumstances.²³ Documentary filmmakers, creators of non-commercial videos and non-fiction multi-media e-books offering film analysis, college and university faculty and students in film studies or courses requiring close analysis of film and media excerpts, faculty of massive open online courses, and K-12 education providers may now use short portions of motion pictures under the exemption.²⁴

However, three aspects of this exemption are particularly concerning. First, individuals are limited to working with specific types of media. Second, even if the type of media is exempted, many different types of users are needlessly excluded from the exemption. Lastly, both limitations create uncertainty, which in turn discourages creators from reusing content for fear of violating § 1201 of the DMCA. If the law were amended to ensure access to copyrighted works for noninfringing purposes, those attempting to reuse content for such legal purposes

19. New Media Rights Letter, *supra* note 2, at 14.

20. Section 1201 Study, *supra* note 1, at 81370.

21. *See id.*

22. Maryna Koberidze, *The DMCA Rulemaking Mechanism: Fail or Safe?*, 11 WASH J.L. TECH. & ARTS 211, 216 (2015).

23. *See* 2015 Final Rule, *supra* note 9, at 65949.

24. *Id.* at 65949-65950.

would be able to spend less time analyzing their works with lawyers and more time innovating and creating.

As mentioned above, the limitation by media type is especially problematic. By limiting the exemption to specific media types, the exemption is, in a sense, allowing creators to only use those specific media types for the next three years. All too often this leaves remix creators barred from using a new technology for significant periods of time. It is impossible to specifically identify technology and media that do not exist to craft an exemption around during a rulemaking proceeding. Indeed, before Internet content was added during the October 2012 rulemaking proceeding, remix creators were confined to DVD content under then existing exemptions to § 1201 of the DMCA.²⁵

Similarly, during the same 2012 rulemaking process, the Copyright Office denied a proposal to exempt Blu-ray discs from the circumvention provisions.²⁶ Thus, remix creators were unable to access content on Blu-ray discs until the exemption was expanded in October 2015.²⁷ Each of these decisions has had the effect of stifling creativity and innovation by making popular forms of media off limits to those seeking to reuse content for noninfringing purposes.

The second major problem with § 1201 of the DMCA is the specificity that is required for those reusing content for noninfringing purposes to fit within the exemption. When the exemption limits coverage to specific categories of use, such as “for use in noncommercial videos, including videos for a paid commission, if the commissioning entity’s use is noncommercial,” or is limited to only “documentary” filmmakers, it leaves out critical noninfringing categories of use. If a reuse of content is protected by fair use, the access to the work should simply be legal.

Now let us take a look at a specific example of how users making otherwise legal uses of content are unfairly excluded from exemptions and how genre distinction fails filmmakers who reuse content.

During the 2015 rulemaking process, parties, including this author, submitted comments and testimony strongly urging the Copyright Office to expand the current exemption to allow documentary filmmakers to

25. New Media Rights Letter, *supra* note 2, at 15.

26. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65260, 65271 (Oct. 26, 2012) (to be codified at 37 C.F.R. pt. 201) [hereinafter 2012 Final Rule].

27. See 2015 Final Rule, *supra* note 9, at 65948.

circumvent TPMs and to broaden protections for all films seeking to make a fair use.²⁸

Although the Copyright Office expanded the exemption for documentary filmmakers to allow them to access content protected on Blu-ray discs, the Library declined to expand those exemptions to non-documentary filmmakers.²⁹ The result is the existence of a genre distinction that makes using this exemption difficult for the many online video creators and filmmakers.

Joint Filmmakers, a separate party who proposed and supported an expanded exemption, described the political and social functions of filmmaking prevalent in both documentary and non-documentary films.³⁰ Both genres of film can provide criticism and commentary, raise awareness of particular issues, and facilitate the expression of ideas.³¹ During the 2015 rulemaking process, the Copyright Office called for comments on the definitions of various film genres.³² However, the lines between film genres are often blurred and sometimes open to subjective interpretation.³³ Genre is treated quite differently in the film community, where “[t]here is no central authority of film genres, no universally agreed upon definition for any of these descriptors, and the subject is one of contention among academics and audiences alike.”³⁴

In order to use copyrighted material to achieve these goals, filmmakers have routinely relied on fair use.³⁵ However, this new rule artificially distinguishes between documentary films and non-documentary films by allowing only the former the ability to circumvent TPMs to make fair use of copyrighted work.³⁶

28. Art Neill & Emory Roane, New Media Rights Responses to Post-Hearing Questions Regarding Proposed Class 6, COPYRIGHT.GOV, http://copyright.gov/1201/2015/post-hearing/answers/Class_6_Hearing_Response_New_Media_Rights_Docket_No_2014-07_2015.pdf (last visited Oct. 2, 2016).

29. See 2015 Final Rule, *supra* note 9, at 69549.

30. See Jack I. Lerner & Michael C. Donaldson, Comment of International Documentary Association, et al., COPYRIGHT.GOV at 1 (Feb. 6, 2015), http://copyright.gov/1201/2015/comments-020615/InitialComments_LongForm_IDA_Class06.pdf.

31. *Id.*

32. Jaqueline C. Charlesworth, Re: Docket No. 2014-7, Exemptions to Prohibition Against Circumvention of Technological Measures Protecting Copyrighted Works, COPYRIGHT.GOV (June 3, 2015), <http://www.copyright.gov/1201/2015post-hearing/letter%20%20Class%206%20witness-signed.pdf>.

33. See Neill & Roane, *supra* note 28, at 1.

34. *Id.*

35. See Christopher L. Perez, *Consideration of the DMCA Exemption for Documentary Filmmakers*, 39 L.A. L., 14, 15 (2016).

36. See 2015 Final Rule, *supra* note 9, at 69549.

Sorting different genres of film into documentary and non-documentary films becomes difficult for at least two reasons. The first reason is that online video creators who do qualify under the documentary exemption might not even consider themselves “documentarians” due to the nature of their videos and where they are distributed (nor would they be likely to include themselves in the category).³⁷ The second reason is the sheer number of subgenres situated between the documentary and non-documentary film genres. Examples of these subgenres include, but are not limited to, biopics, films “inspired by” or “based on a true story,” as well as those shot in a “documentary” style.

Delineating between genres of film is no easy task and unnecessarily complicates the law. Not only would a filmmaker have to establish fair use before using copyrighted material,³⁸ but the filmmaker would also have to determine the genre of her film in order to figure out if she falls under the exemption. The anti-circumvention provisions of the DMCA complicate the question of fair use. The provisions shift the focus away from “How do I use [copyrighted works] appropriately and responsibly?” to ‘How can I [even] access this material [for fair use] at all?’³⁹

The rationale behind granting exemptions to only documentary films is as unclear as it is unfair. Back in 2012, in granting the exemption for documentary films, the Register provided the following justification: “[N]ot making any judgment as to whether any particular use offered by the proponents is in fact fair, and it is conceivable that some may not be.”⁴⁰ The Register further provided: “Nonetheless, there is ample basis to conclude that some significant number (and probably many) of the proposed uses likely would qualify as noninfringing under Section 107.”⁴¹

Then, the Librarian of Congress in his 2015 Final Rule stated, “the Register could not conclude, based on the record, that the use of motion picture clips in narrative films was, on balance, likely to be noninfringing, especially in light of the potential effects on existing licensing markets

37. See USCO, Sixth Triennial 1201 Rulemaking Hearings: Proposed Classes, 6, 19, 20, 23 at 53-54 (2015) (Statement of Art Neill, Proponent, New Media Rights).

38. See *Lenz v. Universal Music Corp.*, 801 F.3d 1126, 1132 (9th Cir. 2015).

39. Lerner & Donaldson, *supra* note 30, at 8.

40. U.S. COPYRIGHT OFFICE, SECTION 1201 RULEMAKING: FIFTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS 129 (2012).

41. *Id.* at 129-30.

for motion picture excerpts.”⁴² The Librarian of Congress’s use of a balancing test to analyze the use of clips in narrative films implies that the Copyright Office considers plenty of narrative films to be making noninfringing, fair uses, of content. Therefore, by the Copyright Office’s own logic, such narrative films are worthy of an exemption.

In fact, many narrative films make fair use. Proponents cited more than thirty non-documentary films that relied heavily on fair use, to illustrate the need for all filmmakers to have these anti-circumvention exceptions, regardless of whether they’re making a documentary or another type of film.⁴³

The root of this problem is the need to determine the likelihood an administrative body or court would find a use as noninfringing. Such an arbitrary standard erroneously forces the Librarian of Congress to foresee all the uses within a class of work and to determine its probability of being noninfringing. There is no need for the Librarian of Congress to conduct such an analysis because if a film is making fair use, it should be exempted from § 1201 of the DMCA’s provisions regardless of its genre.

Additionally, in her 2015 recommendation, the Register voiced a concern about the adverse impact that the expanded exemption might have on the licensing market for motion picture clips.⁴⁴ Such a concern is not justified. Filmmakers in both groups regularly remix content in such a manner that can properly be categorized as fair use. That said, filmmakers in both groups who want to reuse protected content in ways that are not protected by fair use regularly acquire licenses. The demand for licenses will not be impacted because an expanded exemption would only apply to films already making fair use of content. As discussed in the next part, fair use is a noninfringing use of a work.⁴⁵ An expansion of exemptions to allow for fair use will never have an effect on any legitimate licensing market because noninfringing uses do not need to be licensed in the first place.

42. 2015 Final Rule, *supra* note 9, at 69949.

43. 2015 RECOMMENDATION, *supra* note 12, at 41.

44. *See id.* at 79 (“But with narrative films there is a significant countervailing concern: that copyrighted works will be used in a manner that may supplant the existing, robust licensing market for motion picture clips.”).

45. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984).

C. Fair Use Is Noninfringing Use and Should Be Exempted from Section 1201 of the DMCA's Circumvention Provisions

Fair use is sometimes erroneously perceived as infringement that is merely excused by the law.⁴⁶ In fact, fair use is authorized by the law and is in its nature noninfringing.⁴⁷ Section 1201 of the DMCA's biggest flaw is the way it treats the doctrine of fair use. Users making fair use of content may still be held liable simply for circumventing TPMs under § 1201 of the DMCA, despite the lack of infringing behavior. Such an outcome is inconsistent with the idea that, "anyone who . . . makes a fair use of the work is not an infringer of the copyright with respect to such use."⁴⁸ It turns out that § 1201 of the DMCA gets the law wrong, and unnecessarily impinges upon speech protected by fair use. Instead, individuals seeking to make any noninfringing use of content, such as fair use, should be permitted to circumvent TPMs without violating federal law.⁴⁹

By exempting all fair use from § 1201 of the DMCA's circumvention prohibitions, the process will be simplified. The process will be able to focus solely on infringing behavior and will not have the terrible side effect of chilling otherwise legal conduct. Unfortunately, efforts to exempt all fair uses during past rulemakings were denied due to the procedural requirements for satisfying an exemption.⁵⁰ The requirement of pointing to a particular type of use was especially difficult to satisfy.⁵¹ Since fair use implicates numerous types of uses, the Library of Congress has been unable to pass such a broad exemption.⁵²

As a more complete fix, policymakers must encourage the Congress to amend § 1201 of the DMCA in order to adopt a means to allow fair uses to circumvent technological restrictions to protected content.

46. See *Lenz v. Universal Music Corp.* 801 F.3d 1126, 1133 (9th Cir. 2015).

47. *Id.* at 1132.

48. *Sony*, 464 U.S. at 433.

49. See generally, Joshua Gray & Donald Robertson III, Short Comment on a Proposal Exception Under 17 U.S.C. 1201 (Feb. 6, 2015), http://www.copyright.gov/1201/2015/comments-020615/FreeSoftwareFoundation/InitialComments_ShortForm_FreeSoftwareFoundation_Class4.pdf (advocating for any circumvention for a noninfringing purpose to be permitted under 17 U.S.C. § 1201).

50. See Bill D. Herman, et al., *Catch 1201: A Legislative History and Content Analysis of the DMCA Exemption Proceedings*, 24 CARDOZO ARTS & ENT. L.J. 121, 167 (2006) ("[T]he [Copyright Register's] final rulings were filled with jurisdictional and procedural dismissals of proposed exemptions. . . .").

51. See *id.* at 174-77.

52. See *id.* at 177.

III. LEGISLATIVE REFORM

A. *Proposal To Amend Section 1201 of the DMCA To Clarify the Role of Fair Use*

A simple solution that would negate much of the uncertainty already described, and categorically allow for circumvention of TPMs in cases where the circumvention is used for fair use, is a legislative amendment. This Article proposes to amend 17 U.S.C. § 1201(c)(1) as follows (new text appears in brackets):

Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title. [Nothing in this section shall prohibit access to copyrighted works for otherwise lawful purposes, including fair use. If a person circumvents a TPM as defined in this act and that person acted with a good faith belief that his or her acts constituted fair use as defined by 17 U.S.C. § 107, the court shall not award damages or provide for any other penalties under 17 U.S.C. § 1201.]

By explicitly exempting fair use purposes from § 1201 of the DMCA, anyone simply accessing copyrighted content for fair use purposes will no longer have to fear potential civil and criminal penalties under § 1201 of the DMCA. This provision would also make the expensive and time consuming exemption process more efficient, conserving valuable government and private resources, because fewer exemptions would be required.

Since fair use can be unpredictable and many copyright attorneys disagree about whether the use of work constitutes fair use, the statute should be rewritten to protect the creators' good faith belief that their work constituted a fair use—even if a court later finds that it is not a fair use. If a court finds that a creator's work does not constitute fair use, there are already a wide variety of civil copyright remedies available to the copyright owner.⁵³ The additional civil and criminal penalties for individuals acting with a good faith belief are simply unnecessary.

B. *An Amended Section 1201 of the DMCA's Implications on International Treaty Obligations*

The United States has entered into foreign treaties regarding intellectual property, and more specifically, the circumvention of TPMs.⁵⁴

53. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433-34 (1984).

54. See, e.g., World Intellectual Property Organization Copyright Treaty art.11, Dec. 20, 1996, 36 I.L.M. 65 [hereinafter WIPO Copyright Treaty]; World Intellectual Property Organization Performances & Phonogram Treaty art. 18, Dec. 20, 1996, 36 I.L.M. 76 [hereinafter WIPO Performances & Phonogram Treaty].

If the amendment to 17 U.S.C. § 1201(c)(1) recommended above were to be presented to Congress and subsequently enacted, the amendment would satisfy the requirements of these international treaties.

The World Intellectual Property Organization (WIPO), of which the United States is a member, administers a number of international treaties involving copyright law. The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT) address anti-circumvention.⁵⁵ Both treaties incorporate the same language regarding the circumvention of TPMs:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.⁵⁶

The WCT and WPPT do not clearly define “adequate legal protections.”⁵⁷ The treaties give its signatories the ability to interpret the language of the treaties when drafting anti-circumvention laws.⁵⁸ Currently, the DMCA already goes beyond what is mandated by these treaties with respect to prohibiting access controls.⁵⁹ Both the WCT and WPPT provide members the freedom to protect access controls at the country’s discretion.⁶⁰ Amending the DMCA provisions regarding anti-circumvention access controls to include a carve-out for fair use would still allow the United States to comply with the requirements of both WIPO treaties.

Outside the WIPO treaties, the United States may be bound by its participation in different free-trade agreements. The World Trade Organization (WTO) administers the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), which sets forth obligations in the context of multilateral trade agreements.⁶¹ Although

55. See WIPO Copyright Treaty, *supra* note 54; accord WIPO Performances & Phonogram Treaty, *supra* note 54.

56. WIPO Copyright Treaty, *supra* note 54; accord WIPO Performances & Phonogram Treaty, *supra* note 54.

57. See WIPO Copyright Treaty, *supra* note 54; accord WIPO Performances & Phonogram Treaty, *supra* note 54.

58. See WIPO Copyright Treaty, *supra* note 54, at art. 14(1); see also WIPO Performances & Phonogram Treaty, *supra* note 54, at art. 4(1).

59. See DANA BELDIMAN, FUNCTIONALITY, INFORMATION WORKS, AND COPYRIGHT 32 (2008).

60. *Id.* at 28.

61. U.S. COPYRIGHT OFFICE, CIRCULAR 38A, INTERNATIONAL COPYRIGHT RELATIONS OF THE UNITED STATES 1 (2016).

TRIPS does not address anti-circumvention provisions itself, the multilateral trade agreements may individually set the guidelines involving circumvention of TPMs.⁶² For example, in February 2016 the Trans-Pacific Partnership (TPP) was signed by all twelve of the member countries, but remains to be ratified.⁶³ The TPP provides access and trafficking control provisions similar to those of § 1201 of the DMCA.⁶⁴ The TPP also allows an avenue for member countries to grant exceptions or limitations for noninfringing uses, but is not as specific as the DMCA's triennial rulemaking process.⁶⁵ Regardless of the similarities between the anti-circumvention provisions within the TPP and § 1201 of the DMCA, an amendment to the latter would not render them incompatible.

Even after ratification, an amendment would still allow the United States to meet the requirements set out in the TPP. The TPP itself allows parties of the agreement to provide for certain limitations and exceptions to their anti-circumvention provisions "in order to enable non-infringing uses if there is an actual or likely adverse impact of those measures on those non-infringing uses, as determined through a legislative, regulatory, or administrative process in accordance with the Party's law, giving due consideration to evidence when presented in that process. . . ."⁶⁶

The amendment to § 1201 of the DMCA would simply allow individuals to circumvent TPM's in order to make fair use. As previously discussed, fair use is non-infringement.⁶⁷ Since the text of the TPP requires a legislative, regulatory, or administrative process to make such a determination,⁶⁸ Congress will need to hold a hearing in the process of amending § 1201 of the DMCA. The hearing would allow Congress to determine the actual or likely adverse impact of the anti-circumvention provision on fair use. The amendment would still treat circumvention of TPMs and copyright infringement as separate violations, but would ensure an important noninfringing use, fair use, is properly and fully exempted from § 1201 of the DMCA's circumvention provisions.⁶⁹

62. See, e.g., Agreement on Trade-Related Aspects of Intellectual Property Rights art. 5., Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1197.

63. *Trans Pacific Partnership Trade Deal Signed in Auckland*, BBC.COM (Feb. 4, 2016), <http://www.bbc.com/news/business-35480600>.

64. See Trans-Pacific Partnership art. 18.68, Feb. 4, 2016, https://www.mfat.govt.nz/assets/_securedfiles/Trans-Pacific-Partnership/Text/18.-Intellectual-Property.pdf.

65. *Id.*

66. *Id.*

67. *Lenz v. Universal Music Corp.* 801 F.3d 1126, 1132 (9th Cir. 2015).

68. Trans-Pacific Partnership, *supra* note 64, art. 18.68.

69. See *id.*

IV. REGULATORY REFORM

While we await broad legislative reform, there are also ways to improve the current rulemaking process.

A. *“Substantial Adverse Impact” Should Be Revised To Require a “Likelihood” of an Adverse Impact*

As it stands, the standard of review for even getting an exemption, as interpreted by the Copyright Office, is unnecessarily high. The language of § 1201 of the DMCA states: decisions to grant exemptions shall be based on whether users of copyrighted works are or are likely to be “adversely affected by the prohibition.”⁷⁰ With respect to demonstrating an “adverse impact,” the Copyright Office has chosen to use a higher standard than the statute suggests on its face. The Copyright Office requires that proponents of a particular class demonstrate that prohibition has a “substantial adverse impact” on the noninfringing use in question.⁷¹

Aside from the fact that § 1201 of the DMCA makes no mention of the word “substantial,” it is unclear if this approach is even an accurate representation of the legislative intent behind it. The United States House Committee on Energy and Commerce Committee (notably concerned with Congress’ commitment to fair use) described the burden in a completely different manner.⁷² The Commerce Report noted that the rulemaking should focus on “distinct, verifiable, and measurable impacts, and should not be based upon de minimus impacts.”⁷³ These two descriptions represent opposing viewpoints on what constitutes “adverse impact.” A proponent of a class of exemptions could undoubtedly demonstrate the “distinct, verifiable and measurable impact of a prohibition” of that class, while failing to demonstrate a “substantial adverse impact.” Thus, a rulemaking body could use either description of the burden.

In an effort to address this ambiguity, the Copyright Office should use a standard of review more in line with the language of § 1201 of the DMCA and the legislative intent to simply require measurable impact. While the legislative reform described in Part III represents the optimal solution for accommodating noninfringing uses of copyrighted works,

70. 17 U.S.C. § 1201(a)(1)(C) (2012).

71. 2012 Final Rule, *supra* note 26, at 65261.

72. CHRISTOPHER WOLF, DIGITAL MILLENNIUM COPYRIGHT ACT: TEXT, HISTORY AND CASELAW 440 (2003).

73. *Id.*

such an adjustment would help to balance the important need for public access to these works. Thus, the current burden of proof should require *only* a showing of the “likelihood” of an adverse impact, rather than that of a “substantial” adverse impact.

B. Renewal of Existing Exemptions Can Be Accomplished Without Requiring Proponents To Prove Them De Novo

Section 1201(a)(1)(C) of the DMCA states that the Librarian of Congress determines whether users of copyrighted works are or are likely to be adversely affected by the prohibition of noninfringing uses of a particular class in the succeeding three-year period.⁷⁴ This language essentially sets the standard that proponents of an exemption must meet in order to be granted an exemption. Accordingly, if the Librarian determines that a class of use is likely to be noninfringing, § 1201(a)(1)(D) provides that the sections’ prohibitions will not apply to that class for the ensuing three-year period.⁷⁵ Although this language clearly specifies a finite duration for the exemption, the language in § 1201 of the DMCA does not require proponents meet the same initial burden once the three-year period has expired.

The current de novo standard is not based on statutory language, but on one committee report issued by the House Committee on Energy and Commerce.⁷⁶ The operative sentence in the report states that “the assessment of adverse impacts on particular categories of works is to be determined de novo.”⁷⁷ While these reports typically carry weight, they are not legally binding on the Copyright Office.⁷⁸ As the Supreme Court has cautioned, committee reports may be unrepresentative of the views of Congress and may even be misleading.⁷⁹

Taken with the fact that the Register has conceded the need for a presumption of renewal, the Copyright Office could eliminate the requirement for re-proving exemptions and still operate within the bounds of statutory language in § 1201 of the DMCA.⁸⁰ This would then place the burden on opponents of exemptions to prove that an exemption should not be renewed, which would in turn create a much more efficient

74. See 17 U.S.C. § 1201(a)(1)(C).

75. *Id.* § 1201(a)(1)(D).

76. See Band, *supra* note 14.

77. H.R. Rep. No. 105-551, pt. 2, at 37 (1998).

78. See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

79. See *id.*

80. See *Register’s Perspective on Copyright Review: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 27 (statement of Maria A. Pallante, Register of Copyrights and Dir., USCO).

rulemaking process. Proponents would save the absurd amounts of time and money currently wasted on re-proving the need for an exemption. This presumption would not eliminate all recourses available to opponents of a class of exemptions. By bringing forth evidence that demonstrates an “effect of circumvention of technological measures on the market for or value of copyrighted works,” the Librarian could deny extension of the renewal of the exemption for that particular class.⁸¹

It is worth noting that § 1201 of the DMCA requires the Librarian of Congress, and not the Copyright Office, to determine whether or not noninfringing users are adversely affected by the prohibition.⁸² If the Committee Report were followed, it is still the Librarian that is obligated to conduct a *de novo* review of evidence.⁸³ However, unless opponents have brought forth adequate evidence to the contrary, the Librarian could base a decision for renewal off of evidence provided during the previous triennial proceeding.⁸⁴ While the automatic renewal approach discussed above is preferable, the changes outlined in this paragraph would modestly reduce the negative impact that the current *de novo* review has on proponents.

C. The Triennial Rulemaking Process Should Account for the Confidentiality Concerns of Proponents

Proponents and supporters of exemptions face an additional obstacle during the triennial rulemaking process: confidentiality. Supporters of exemptions have voiced concerns surrounding restrictions on providing confidential client information while simultaneously providing detailed evidence that supports the need for an exemption.⁸⁵ This issue presents itself in a variety of ways: clients may not want the details of their business dealings made available on the public record; attorneys may not be able to respond to questions from the Copyright Office due to their confidential nature; and even where confidentiality is waived, attorney’s acting on their client’s behalf may be reluctant to provide information that could expose them to liability.

The following example from the 2015 rulemaking hearings illustrates the difficulties supporters may have in the public hearing setting. During the hearings in Los Angeles, Jacqueline Charlesworth,

81. See 17 U.S.C. § 1201(a)(1)(C)(iv).

82. See Band, *supra* note 14.

83. See *id.*

84. See *id.*

85. See, e.g., USCO, Sixth Triennial 1201 Rulemaking Hearings: Proposed Classes, 19, 20, 23 at 260 (2015) (Statement of Kendra Albert, Student, Harvard Law School).

general counsel for the Copyright Office, attempted to gain more information on specific examples of filmmakers whose distributors rejected their work due to the low resolution of the video content used.⁸⁶ While detailed answers may have helped to further establish the affect anti-circumvention provisions covering Blu-ray discs was having on this class of filmmakers, the names of distributors, the filmmakers, and other specifics were not provided to Charlesworth.⁸⁷ The attorney who testified did not provide the information because it was privileged, the deal was ongoing, and there was a substantial amount of money was on the line for both parties involved.⁸⁸

One possible solution for this is to adopt an administrative mechanism for submitting confidential information. This would be very useful in situations where proponents and supporters are forced to withhold otherwise pertinent information due to its confidential nature. As illustrated above, it would also be useful in instances where representatives of the Copyright Office make specific informational requests at public hearings.

Currently, a number of federal agencies accommodate these types of submissions. For instance, the Food and Drug Administration allows for submission of “Drug Master Files” that are used to provide confidential detailed information about facilities, processes or articles used in the drug manufacturing process; this information is then used to bolster support for new drug applications.⁸⁹ Similarly, the Federal Communications Commission allows for certain submissions to be withheld from public inspection if, for example, the information in question is commercial, financial, contains a trade secret, or could result in substantial competitive harm.⁹⁰

The benefits of implementing a comparable administrative procedure for § 1201 of the DMCA’s triennial rulemaking process are twofold. It is highly likely that proponents and supporters would be more willing to share the detailed ways in which they are being affected by the anti-circumvention laws. A process for submitting confidential information in select circumstances would also allow the Copyright Office to root its exemption decisions in a more complete record.

86. *See id.* at 51.

87. *See id.* at 51-52 (Statement of Art Neill, Proponent, New Media Rights).

88. *See id.*

89. 21 C.F.R. § 314.420 (2015).

90. 47 C.F.R. § 0.459(b) (2015).

V. CONCLUSION

Section 1201 of the DMCA's anti-circumvention provisions are unnecessarily prohibiting circumvention for otherwise lawful uses of copyrighted content. The current rulemaking process for creating exemptions is ineffective and cumbersome. The good news is that there are many reforms at the legislative and regulatory levels that can ensure § 1201 avoids unnecessary restrictions on otherwise lawful speech.