

**BEFORE THE UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS**

**COMMENT REGARDING SECTION 1201 STUDY
DOCKET NO. 2015-8**

COMMENT OF THE CYBERLAW CLINIC AT HARVARD LAW SCHOOL

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Addressing questions 2, 4, and 5.

I. INTRODUCTION

Pursuant to the Notice of Inquiry for Section 1201 Study,¹ the Cyberlaw Clinic at Harvard Law School (the “Cyberlaw Clinic”) submits the following comment. The Cyberlaw Clinic routinely advises clients on matters related to anticircumvention law, including clients who seek exemptions in the triennial anticircumvention rulemaking process. Most recently, the Cyberlaw Clinic represented a coalition of medical device researchers, who sought what became exemptions 7(C) and 10 in the 2015 rulemaking.²

The Cyberlaw Clinic operates like a law firm, and as such rarely participates in rulemakings or litigation in its own name. It has chosen to do so here, however, because this Office’s present understanding of the anticircumvention rulemaking puts an inappropriate burden on its clients. This burden can be profound: in the most recent rulemaking, the attorneys, students, and interns at the Cyberlaw Clinic logged approximately 575 hours of work to obtain the exemption, though several different stages of comments, hearings, and follow-up letters. This exceeds the estimated average hours spent litigating many forms of civil trials, from initial research through post-trial activity.³ And given that the exemption the Cyberlaw Clinic put forward received relatively little opposition compared to others, it is likely that others advocating for more contentious exemptions spent even more time.

This creates tremendous waste for all involved in the process — including the Copyright Office itself — and takes what was intended by Congress to be a simple and direct “fail-safe”⁴ for likely noninfringing uses into a complicated, *ad hoc*, and unduly burdensome rulemaking. The rulemaking’s focus has also shifted from inquiring about matters of copyright and piracy to general questions as to whether the planned activity should be allowed to exist at all, and under what conditions.

¹ 80 Fed. Reg. 81,369 (Dec. 29, 2015).

² See 37 C.F.R. §§ 201.40(7)(i)(C), (10).

³ See Paula Hannaford-Agor et al., *Estimating the Cost of Civil Litigation*, NATIONAL CENTER FOR STATE COURTS (Jan. 2013), http://www.courtstatistics.org/~media/microsites/files/csp/data%20pdf/csph_online2.ashx (estimating a median time for most forms of civil litigation as taking between 196 and 472 attorney hours, depending on type, including trial and post-trial disposition).

⁴ H.R. REP. 105-551, pt. 2, at 36 (1998) [hereinafter *COMMERCE REPORT*].

Congress did not intend to create a miniature version of itself in this rulemaking. As set forth further below, the proper inquiry as to whether a proponent should be granted an exemption should turn on two considerations. First, it should be based on a narrow determination as to whether a current or planned noninfringing use of a copyrighted work is being prevented because of anticircumvention law. Second, it should determine whether the use is “adversely affected,” and thus should be granted an exemption, under the factors articulated in 17 U.S.C. § 1201(a)(1)(C), with the preferences towards fair and academic uses Congress contained within. At heart, a use should be found to be “adversely affected” whenever the harm to the planned noninfringing use is not outweighed by the harm to the market for or value of a work that would occur by allowing the particular use. This showing should be made under a preponderance of the evidence standard, rooted solely in questions of copyright law. The classes granted an exemption should be articulated in a broad way, with full input from the affected classes of users.

While this Office purports to follow these general contours in some respects, the evolution of the rulemaking has introduced additional burdens that should not be present. The current rulemaking requires substantive showings that are not required under the statutory framework, and presents proponents with evidentiary requirements far beyond the scope of the statutory authority granted by Congress. This is inappropriate in light of the plain meaning of the statute, its legislative history properly understood, and the Administrative Procedure Act (“APA”). Much of this impropriety stems in particular from this Office’s reliance on what has been captioned the “House Manager’s Report,” a single Congressman’s opinion on the law that, for reasons set forth further below, should be accorded no weight whatsoever.⁵

The following sections lay out the standards employed by the rulemaking as it exists today, identify specific changes that this Office should make to the rulemaking process that do not require any additional modification to the underlying law,⁶ and explain why this reformulation is required by the statute and will help ease the administrative burden on this Office.

II. THE COPYRIGHT OFFICE SHOULD SIMPLIFY AND CLEARLY ARTICULATE WHAT A PROPONENT MUST SHOW IN THIS EXEMPTION

The question of what, specifically, a proponent must prove in order to obtain an exemption is the source of a large part of the administrative waste in this proceeding. In no single place does the Copyright Office or Library of Congress succinctly list the criteria by which they examine proposed exemptions. In the most recent rulemaking,⁷ some of the required elements were

⁵ REP. HOWARD COBLE, SECTION-BY-SECTION ANALYSIS OF H.R. 2281 AS PASSED BY THE HOUSE OF REPRESENTATIVES ON AUG. 4, 1998 (Comm. Print 1998) [hereinafter HOUSE MANAGER’S REPORT].

⁶ The Clinic seeks specifically to address modifications to the procedure based on the law as it exists today. Given how little evidence there to show that anticircumvention law is actually deterring piracy, however, and the significant costs it presents to those doing legitimate forms of research and expression, we welcome a more general reexamination of the overall propriety of anticircumvention law.

⁷ As the standards for this rulemaking have evolved over time, this comment generally addresses the standards as they were at the sixth triennial rulemaking proceeding. Earlier proceedings are addressed to the extent they give

discussed in the Notice of Inquiry, and some were included in the Notice of Proposed Rulemaking. It was only when the Recommendation of the Register of Copyrights was released (contemporaneous with the Librarian's Rule, and thus preventing any other engagement with the recommendation) that proponents were shown the relative weight of these different elements. Before articulating what the Cyberlaw Clinic believes the proper elements to an exemption should be, it is helpful to first outline what proponents are currently required to show in this rulemaking and why that showing is inappropriate.

A. The Copyright Office's current requirements are too burdensome, largely due to an improper reliance on one Congressman's statement that contradicts the enacted law and proper legislative history.

In the Notice of Inquiry and Notice of Proposed Rulemaking for the most recent rulemaking, this Office set forth the following nine elements for proponents of exemptions. These were never articulated in a single, comprehensive way, but rather emerged from a statements in the rulemaking notices. As near as the Cyberlaw Clinic can discern, a proponent seeking an exemption must show:

1. That the proponent's activity implicates works that are protected under copyright law. This requirement comes from the statute's applicability only to "a work protected under this title,"⁸ and the Notice of Inquiry cites in passing a prior rejection for an exemption that only applied to works in the public domain and an example of a proponent who did not qualify.⁹
2. That an activity that they intend to do is likely to be noninfringing under copyright law, but for copyright's anticircumvention law. The Notice of Inquiry cites 17 U.S.C. § 1201(a)(1)(B) for this requirement.¹⁰
3. That the activity is jeopardized so much that there is a "substantial diminution" of the availability of works for this purpose "actually occurring" in the marketplace, and not just "mere inconveniences," or "individual cases." The Notice of Inquiry cites the House Manager's Report for these criteria.¹¹

context and clarity to the current standards. *See generally* REGISTER OF COPYRIGHTS, SECTION 1201 RULEMAKING: SIXTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS (October 8, 2015) [hereinafter 2015 RECOMMENDATION].

⁸ 17 U.S.C. § 1201(a)(1)(A).

⁹ Notice of Inquiry and Request for Petitions, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 79 Fed. Reg. 55,687, 55,693 (Sept. 17, 2014) [hereinafter 2015 Rulemaking NOI].

¹⁰ *Id.* at 55,690.

¹¹ *Id.*

4. That, if relying on claimed future impacts to planned activity, the future adverse impacts are not only likely, citing 17 U.S.C § 1201(a)(1)(B), but should only be considered in “extraordinary circumstances” where the likelihood of the future adverse impact is “highly specific, strong, and persuasive,” citing the House Manager’s Report.¹²
5. How the technological protection measure (“TPM”) in question works, and how it is circumvented. The Notice of Proposed Rulemaking does not specify where this requirement comes from,¹³ and, curiously, it later discourages this same sort of public disclosure, noting that it may enable bad actors.¹⁴
6. That the TPM is the “clearly attributable” cause of the claimed adverse impact. The Notice of Inquiry cites the House Commerce Committee report for this element, and further uses the House Manager’s Report to stress that this should be separately demonstrated, and distinguished from “marketplace trends, other technological developments, or changes in the roles of libraries, distributors or other intermediaries.”¹⁵
7. That no potential alternatives exist which would permit users to engage in the asserted noninfringing uses without the need for circumvention. The Notice of Proposed Rulemaking introduces this without citing a particular basis for the assertion,¹⁶ but one assumes that this is meant to address the requirement of the Register and Librarian to assess the “availability for use” of the contemplated use under the statute.¹⁷
8. That the statutory factors in 17 U.S.C. § 1201(a)(1)(C)(i)–(v) favor the exemption, and that, in particular, they favor the exemption in light of the “benefits that the technological measure[s] bring[] with respect to the overall creation and dissemination of works in the marketplace.” The Notice attributes the first criteria to from the statute directly, and the consideration of the positive benefits of TPMs to the House Manager’s Report.¹⁸
9. That, in light of concerns outside of copyright law, the activity contemplated by the exemption should be allowed to occur in the first place. The Notice of Proposed rulemaking asked specific questions along these lines to each of the proposed exemptions

¹² *Id.*

¹³ Notice of Proposed Rulemaking, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 79 Fed. Reg. 73,856, 73,858 (Dec. 12, 2014) [hereinafter 2015 Rulemaking NPRM]; *see also id.* at 73,871 (inquiring in one exemption the “environment ... in which circumvention would be accomplished,” without stating a basis for this inquiry).

¹⁴ *See id.* at 73,871 (asking proponents for an exemption on medical devices to address whether granting the exemption could have “negative repercussions ... for example, by making it easier for wrongdoers to access such medical devices’ software or outputs”).

¹⁵ 2015 Rulemaking NOI, *supra* note 9, at 55,690.

¹⁶ 2015 Rulemaking NPRM, *supra* note 13 at 73,858.

¹⁷ 17 U.S.C. § 1201(a)(1)(C)(i).

¹⁸ 2015 Rulemaking NOI, *supra* note 9, at 55,690.

in the last rulemaking, and did not cite a specific authority for opening this line of inquiry.¹⁹

This is far more than what the statute requires. The statute states only that the Register and Librarian identify those “adversely affected ... in their ability to make noninfringing uses,” and provide an exemption for those uses.²⁰ The statute also provides the specific criteria by which the question of whether someone is “adversely affected” is made, namely, the factors in § 1201(a)(1)(C)(i)–(v). The statute makes no reference to elements 5, 6, 7, or 9, and posits no requirement that a proponent separately demonstrate a “substantial adverse effect” as a threshold inquiry before a consideration of the statutory factors.²¹ Treating these as distinct, heightened requirements violates the letter of the statute and creates an uncertain additional burden that muddies this already unclear proceeding.

Several of these additional burdens are directly attributable to this Office’s reliance on a specific piece of legislative history, the House Manager’s Report by Representative Howard Coble.²² This report holds no weight, and discounting it would go a long way to bringing the rulemaking into its proper scope and substance, while also easing the burdens of rulemaking administration.

The Supreme Court has made clear that reliance on any piece of legislative history, if it can be relied upon at all, must be put into its proper context.²³ Rep. Coble had no personal experience with the development of this rulemaking. His Judiciary Committee did not even consider this rulemaking; it was added by the House Commerce Committee further along the legislative process.²⁴ Beyond having no direct role in the creation of this rulemaking, Rep. Coble’s statements were likely not even seen by Congress before final enactment of the bill, and indeed were released a month *after* the House had voted on the DMCA.²⁵ The “Report” is no more than

¹⁹ See, e.g., 2015 Rulemaking NPRM, *supra* note 13, at 73,871 (articulating a variety of questions related to safety, security, industry practices, and other non-copyright related matters).

²⁰ 17 U.S.C. § 1201(a)(1)(C).

²¹ In the 2012 Recommendation, for example, the Register explicitly stated that demonstrating “substantial adverse impact” was one of “two *threshold* requirements to establish a prima facie case for a proposed class,” before examining the statutory factors. REGISTER OF COPYRIGHTS, SECTION 1201 RULEMAKING: FIFTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS, at 7 (Oct. 12, 2012) [hereinafter 2012 RECOMMENDATION] (emphasis added).

²² See HOUSE MANAGER’S REPORT, *supra* note 5.

²³ See *Nat’l Assn. of Greeting Card Publishers v. U.S. Postal Serv.*, 462 U.S. 810, 833 n.28 (1983) (noting that the House Manager’s statements in that case do “not have the status of a conference report, or even a report of a single House available to both Houses”); see also *Vaughn v. Rosen*, 523 F.2d 1136, 1142 (D.C. Cir. 1975) (noting, in discussing a statute, that “we as a court viewing the legislative history must be wary of relying upon the House Report, or even the statements of House sponsors, where their views differ from those expressed in the Senate”).

²⁴ Compare COMMERCE REPORT, *supra* note 4, at 35–36, with H.R. REP. 105-551, pt. 1, at 4 (1998); see also Bill D. Herman & Oscar H. Gandy, Jr., *Catch 1201: A Legislative History and Content Analysis of the DMCA Exemption Proceedings*, 24 CARDOZO ARTS & ENT. L.J. 121, 169–70 (2006).

²⁵ See David Nimmer, *Appreciating Legislative History: the Sweet and Sour Spots of the DMCA’s Commentary*, 23 CARDOZO L. REV. 909, 934, 935 n.152 (2002).

a committee print, designed to aid members of Congress in their internal consideration of pending matters.²⁶ And given that it was not released until nearly all of Congress's deliberations on the DMCA took place, it likely did not even do that. If the proper use of legislative history is to understand the "general objectives Congress sought to achieve,"²⁷ then this document can only answer 1/535th of that question.

Even beyond the fact that Congress almost certainly did not consider Rep. Coble's views when enacting the DMCA, reliance on the House Manager's Report is problematic for a number of other reasons. First, it directly contradicts the far more authoritative reports of the Commerce Committee and the final Conference Committee, the latter of which Rep. Coble was a member.²⁸ Rep. Coble contends that a proponent must show a "substantial diminution" of a planned use to receive an exemption,²⁹ but nowhere in the statute, the Commerce Report, or the Conference Report is the Register or Librarian instructed to find more than that a person is "affected" by anticircumvention law.³⁰ This does not appear to be an oversight: the Commerce Committee repeatedly notes that any diminution in noninfringing uses should be considered in the rulemaking.³¹ The House Manager's Report admonishes against granting exemptions for "individual cases,"³² but the Commerce Committee repeatedly refers to "individuals" as the rightful potential beneficiaries of this rulemaking.³³

²⁶ See *Library Resources for Administrative History: Congressional Hearings and Committee Prints*, NATIONAL ARCHIVES, <http://www.archives.gov/research/alic/reference/admin-history/congressional-hearings.html> (last visited Feb. 29, 2016) ("In contrast to the public reporting function of hearings, reports, and documents, committee prints historically have been publications produced primarily for the internal use of congressional committees themselves. Commonly, prints contain background studies, bill drafts, or statute compilations to aid the committee's consideration of legislation, or they present analytical information or statistical data required by the committee for the exercise or its oversight functions.").

²⁷ *Wirtz v. Bottle Blowers Ass'n*, 389 U.S. 463, 468 (1968).

²⁸ For example, Professor Nimmer cites the discussion in the House Manager's Report of whether TPMs that negatively effect "playability" could be circumvented under section 1201. The Commerce Committee said they could be as they would not be "effective" in controlling access to a work, Rep. Coble strenuously disagreed, and the Conference Committee credited the arguments of the Commerce Committee, and discredited those of Rep. Coble. See Nimmer, *supra* note 25, at 935-39.

²⁹ See HOUSE MANAGER'S REPORT, *supra* note 5, at 6.

³⁰ See 17 U.S.C. § 1201(a)(1)(C) (referring to those "adversely affected ... in their ability to make noninfringing uses"); H.R. CONF. REP. 105-796 at 64 (1998) [hereinafter CONFERENCE REPORT] (referring to "affected classes of works"); COMMERCE REPORT, *supra* note 4, at 37 ("The primary goal of the rulemaking is to assess whether the prevalence of these technological protections ... is diminishing the ability of individuals to use these works in ways that are otherwise lawful."); see also Herman & Gandy, *supra* note 24, at 168 ("[T]he burden of proof is merely one of demonstrating some measureable adverse effect; the word 'substantial' is simply not present.").

³¹ See, e.g., COMMERCE REPORT, *supra* note 4, at 36.

³² HOUSE MANAGER'S REPORT, *supra* note 5, at 6.

³³ See COMMERCE REPORT, *supra* note 4, at 35 (noting the benefits of allowing "individual members of the public" use of copyrighted works); *id.* at 36 (the rulemaking would "prevent a diminution in the ability of individual users of a particular category of copyrighted materials"); *id.* at 37 (stating "the goal of the proceeding" as determining whether "the ability of individual users to make lawful uses" is negatively affected).

The Copyright Office has previously tried to tie other legislative history to this “substantially affected” formulation by focusing on the Commerce Report’s assertion that “the rulemaking ... should not be based on *de minimis* impacts.”³⁴ Here, Congress is invoking a specific Latin maxim that courts use to reject trifling claims from being adjudicated. This is best read as a prohibition against entertaining claims of TPM interference that would not result in anticircumvention liability if brought by a party under 17 U.S.C. § 1203, because such a claim would be *de minimis*.³⁵ If the use could attract a non-frivolous lawsuit, the exemption should be examined on its merits.

Finally, the House Manager’s Report says that exemptions based on “likely” adverse impacts, as opposed to current adverse impacts, need to be subjected to heightened standards and should only be granted in “extraordinary circumstances.”³⁶ This is illogical. The basic premise of the rulemaking is that the Register and Librarian are exempting presently-prohibited activity. Either proponents are supposed to admit that they are presently engaging in this activity, and thus breaking the law,³⁷ or that they plan to do this activity in the future, and thus are under Rep. Coble’s “extraordinary circumstances” framework. This would transform the burden of proof over *all* of the exemptions in this rulemaking into something more than a preponderance of the evidence, which this Office already acknowledges is the proper standard.³⁸

Several other elements that this Office uses in this rulemaking are unnecessary because they are redundant of the statutory factors articulated in the statute. To the extent the Copyright Office needs to know how a TPM works and how it is circumvented, it is only to assess the effect that allowing the use would have on the market for or value of the underlying class of works.³⁹ This Office does not need to inquire whether a harm is “clearly attributed” to the presence of a TPM, as the use must be related in some way to the TPM in order to be “affected” under the statute. Moreover, if it is only a marginal impact on the planned use, the statutory factor addressing the “availability for use” of the work factor ably addresses this question.⁴⁰ There is also a practical element that will keep trivial uses away, namely, that no proponent would go through the hundreds of attorney hours necessary to obtain an exemption if they can achieve the use in another way.⁴¹ This is also why the Copyright Office need not inquire about reasonable

³⁴ *Id.* at 37.

³⁵ See Herman & Gandy, *supra* note 24, at 170 (noting prior incorrect use of the *de minimis* language from the Commerce Report).

³⁶ HOUSE MANAGER’S REPORT, *supra* note 5, at 6.

³⁷ The exception being exemptions that are already granted, and those where the use presents a border case as to whether it fits under one of the statutory exemptions. See, e.g., U.S. COPYRIGHT OFFICE, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS IN RM 2005-11; RULEMAKING ON EXEMPTIONS FROM PROHIBITION ON CIRCUMVENTION OF COPYRIGHT PROTECTION SYSTEMS FOR ACCESS CONTROL TECHNOLOGIES, at 57-59 (2006) [hereinafter 2006 RECOMMENDATION] (recommending an exemption when the statutory scope is unclear).

³⁸ See 2015 Rulemaking NOI, *supra* note 9, at 55,689. As noted *infra* in Section III, the Copyright Office has deviated from this standard on several occasions.

³⁹ 17 U.S.C. § 1201(a)(1)(C)(iv).

⁴⁰ 17 U.S.C. § 1201(a)(1)(C)(i); see *infra* Section II.C for a discussion of the proper use of this factor.

⁴¹ See *supra* note 3 and accompanying text.

alternatives: if the alternatives were truly adequate, no rational person would not go through this rulemaking.

B. The Copyright Office should state a simple, four-element requirement for participants in this rulemaking to substantiate.

For the reasons set forth above, all that the statute and a fair reading of the legislative history require is a simple, four-factor inquiry for this process. In the rulemaking, a proponent should be required to show that:

1. *At least some works in the the class of works the proponent seeks to access are protected under copyright.* As this Office has noted, works that are not protectable under Title 17 are not subject to anticircumvention law, though this Office should err on the side of substantive consideration of edge cases in light of the fact this matter can be subject to debate.⁴²
2. *An activity that the proponent seeks to do with regard to a class of works is likely to be noninfringing under copyright law, but for this anticircumvention provision.* This emanates directly from the statute.⁴³
3. *The presence or planned presence of a technological protection measure makes this activity unlawful under 17 U.S.C. § 1201(a)(1)(A).* This also directly emanates from the statute, as it is the presence of a technological protection measure and the rerouting around thereof that leads a person to be “affected” by the statute.⁴⁴
4. *The proponent is “adversely affected” under the factors articulated in 17 U.S.C. § 1201(a)(1)(C).* This is a considerable reworking of the present approach to “adverse effects” and the use of the statutory factors in § 1201(a)(1)(C). Currently, the Copyright Office does not consider the two notions as linked.⁴⁵ The proper reading of the statute, however, is that one is examined in reference to the other.⁴⁶

No other factors should be part of the rulemaking. This formulation deliberately omits the non-copyright elements that have been grafted on by the Copyright Office. It also omits those elements based solely on this Office’s improper reliance on the House Manager’s Report, and the matters that should be consolidated into the analysis of the statutory factors.

⁴² See 2015 Rulemaking NOI, *supra* note 9, at 55,693.

⁴³ See 17 U.S.C. § 1201(a)(1)(B) (exempting those who are hampered “in their ability to make noninfringing uses of that particular class of works”).

⁴⁴ See 17 U.S.C. § 1201(a)(1)(C) (confining the exemption to those “adversely affected by the prohibition under [§ 1201(a)(1)(A)]”).

⁴⁵ See 2012 RECOMMENDATION, *supra* note 21, at 7.

⁴⁶ See *infra* Section II.C.

Such a formulation would make the rulemaking conform with the requirements of the statute and provide greater clarity for participants in this rulemaking. It should also ease the administration of the rulemaking by narrowing the scope of issues fairly subject to debate. The Cyberlaw Clinic expects that in many cases elements 1–3 will be threshold questions, needing only simple showings though citation of basic facts and law. Question 4 will be subject to some further opposition and debate, but the inquiry can be properly confined to whether there is an “availability for use” of the activity in question (considering questions like adequate alternatives and the specific effect of the TPM in question), and whether allowing circumvention for use would negatively impact the “market for or value of” the works in question. These factors should be weighed and considered in the manner discussed below.

C. Whether a proponent is “adversely affected” should be redefined in light of the proper legislative history.

The statute makes clear that the determination of who is “adversely affected” by a TPM, and thus entitled to an exemption, is to be determined by the procedures articulated in § 1201(a)(1)(C), and in consideration of five factors:

- (i) the availability for use of copyrighted works;
- (ii) the availability for use of works for nonprofit, archival, preservation, and educational purposes;
- (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;
- (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and
- (v) such other factors as the Librarian considers appropriate.⁴⁷

The Commerce Committee made clear that “[t]he primary goal of the rulemaking proceeding” is to identify times when “the prevalence of” TPMs “is diminishing the ability of individuals to use these works” in noninfringing ways.⁴⁸ This could be read to apply anytime a person seeks to do a noninfringing activity that anticircumvention law prohibits, but the inclusion of factors to aid that determination indicate that Congress envisioned times where a person would be adversely affected (in lay terms) by the presence of legal protections for TPMs, but nevertheless would not be granted an exemption as “adversely affected” (as a term of art) under § 1201(a)(1).⁴⁹ The statute also indicates when those times would be: where the risk to the market for or value of works is too significant to allow the exemption. This is articulated in § 1201(a)(1)(C)(iv), the only

⁴⁷ 17 U.S.C. § 1201(a)(1)(B) (“The prohibition contained in subparagraph (A) shall not apply to persons who are users of a copyrighted work ... if such persons are, or are likely to be in the succeeding 3-year period, adversely affected by virtue of such prohibition ... as determined under subparagraph (C).”).

⁴⁸ COMMERCE REPORT, *supra* note 4, at 37.

⁴⁹ See *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (statutes should not be read in ways that render sections superfluous).

one of the four primary factors⁵⁰ that instructs the Register and Librarian to look beyond the particular “use” in question to the greater market effect of the circumvention.

The heart of the rulemaking can therefore be summarized as a balance between the first and fourth factors of the statute: whether works are available for the use in question⁵¹ versus whether the use would negatively affect the market for or value of the work in a way that the rulemaking should contemplate.⁵² The former dictates in favor of granting an exemption if the works are not otherwise available for the use, while the latter weighs against the exemption if the use will lead to market harm. If the record shows that the works are not otherwise available for the use, and that allowing the use would present no harm to the market for or value of a work (for example, when the use in question does not lead to a risk of piracy), the exemption should be granted — especially considering Congress’s repeated preference for protecting noninfringing uses.⁵³

When both factors are present, however, they must be balanced, and Congress has stated where to place the fulcrum. Specifically, Congress instructs the Register and Librarian to note whether the use in question aids archival, preservation, and educational purposes (Factor (ii)) or paradigmatic fair uses (Factor (iii)).⁵⁴ Congress included factors (ii) and (iii) to make clear that, if there is both evidence of a harm to access and a harm to the market for copyrighted works if the exemption is granted, then uses that are either for archival, preservation, or educational purposes, or uses that help productive fair uses of works, should nevertheless be allowed. This framework enables the desired preferences of the Commerce Committee for socially productive uses.⁵⁵

As presently construed, the Copyright Office demands far more of proponents when examining adverse effects. Specifically, it cites the House Manager’s Report to suggest that the impact to the contemplated noninfringing use should be a “substantial diminution,” or a “substantial adverse effect.”⁵⁶ It is unclear whether this requires a proponent should show that they are affected to a

⁵⁰ The proper analysis of the fifth factor, “such other factors as the Librarian considers appropriate,” is discussed in Section IV.B.

⁵¹ This construction mirrors the use of the term “availability” in the Commerce Committee Report. *See* COMMERCE REPORT, *supra* note 4, at 37 (discussing the “availability of works in the marketplace for lawful uses”).

⁵² As this Office has noted previously, not all market effects should be cognizable under the statute, just as not all negative market effects should be cognizable under fair use’s fourth factor, which matches the language of this section. *See Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 99 (2d Cir. 2014) (inquiries under fair use should focus on market substitution). The effect by the use is not always negative, either. *See* 2006 RECOMMENDATION, *supra* note 37, at 64 (noting the positive impact that security research can have to the value of copyrighted works).

⁵³ *See* 2012 RECOMMENDATION, *supra* note 21, at 77 (when there is “at best, only a tenuous relationship between [the exempted activity] and piracy,” the exemption should be granted).

⁵⁴ The direct parallel construction between this section and the preamble to 17 U.S.C. § 107 clearly indicates that Congress had fair use in mind for 17 U.S.C. § 1201(a)(1)(C)(iii).

⁵⁵ *See, e.g.*, COMMERCE REPORT, *supra* note 4, at 35–36 (emphasizing the importance of “the ability of individual members of the public to access and use copyrighted materials” for “social development”).

⁵⁶ REGISTER OF COPYRIGHTS, 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, at 231 (June 11, 2010) [hereinafter 2010 RECOMMENDATION].

heightened degree than an average user, or that the burden of production in proving an adverse effect should be higher, but either formulation would be incorrect. The suggestion that something more “substantial” needs to be present contradicts legislative history, as noted above.⁵⁷ A heightened standard of proof would violate the APA, for the reasons discussed in Section III below.

The House Manager’s Report also confuses the proper use of the factors, through its passing suggestion that the Librarian and Register should consider “the positive as well as the adverse effects” of TPMs.⁵⁸ An abstract consideration of the positive and negative attributes of technologies is just another way of asking the Copyright Office to re-legislate anticircumvention law on its own, which, of course, it cannot do.⁵⁹ The Office cannot accept an open-ended invitation to consider all possible technologies that may control reproduction and distribution over a class of works, or what hypothetical authors of hypothetical works may or may not do because of the presence or absence of certain TPMs. This would, in effect, delegate the whole anticircumvention debate back to federal agencies.

The Commerce Committee’s report was not so general. It acknowledged that Congress was setting a default that TPM-protected works should maintain their integrity, and that this should help spur the creation of works, but that “marketplace realities may someday dictate a different outcome,” and therefore in those cases “it would be appropriate to modify the flat prohibition against the circumvention . . . in order to ensure that access for lawful purposes is not justifiably diminished.”⁶⁰ This grounds the inquiry in a case-by-case determination based on the use that is contemplated by a proponent, and not an abstract assessment of values around the technologies or classes of works in question.

Therefore, in order to demonstrate whether a proponent should receive an exemption as “adversely affected,” the proponent should show that a desired use of a class of works is not otherwise available under 17 U.S.C. § 1201(a)(1)(C)(i). It must also show that the market harm for allowing the use is either negligible, offset by the socially productive use contemplated by the proponent under §§ 1201(a)(1)(C)(ii) or (iii), or that the value of the underlying work will improve because of the use. The burden of production and proof required for this analysis is discussed in the following section.

⁵⁷ See *supra* notes 28–30 and accompanying text.

⁵⁸ See 2015 RECOMMENDATION, *supra* note 7, at 16 (citing HOUSE MANAGER’S REPORT, *supra* note 5, at 6).

⁵⁹ *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989).

⁶⁰ COMMERCE REPORT, *supra* note 4, at 36. The use of the term “lawful purposes” appears to be a slight misstatement; as set forth *infra* in Section IV, the proper inquiry is solely uses that are likely noninfringing.

III. THE COPYRIGHT OFFICE MUST ALIGN ITS BURDENS OF PRODUCTION AND PERSUASION IN THIS RULEMAKING WITH SECTION 1201 AND THE ADMINISTRATIVE PROCEDURE ACT

Beyond the substance of what a proponent must show, the Copyright Office has evolved standards for production and persuasion that are advertised as equivalent to the APA,⁶¹ but are in fact more burdensome. Under the APA, proponents of rules are obligated solely to produce “reliable, probative, and substantial evidence.”⁶² The Supreme Court has stated that “substantial evidence” in this sense means no more than information of a sufficient quantity of evidence to carry the proponent’s burden.⁶³ The burden under an APA proceeding is preponderance of the evidence.⁶⁴

As noted above, the Copyright Office has mistakenly relied on the House Manager’s Report to require proponents to demonstrate a “substantial diminution” in their ability to make noninfringing uses before granting exemptions. The substantive ramifications of this have already been reviewed,⁶⁵ but it has a procedural dimension as well. The Copyright Office has used this higher standard in the past to suggest that more evidence than is needed to satisfy a preponderance standard — at times by simply stating that more could be produced by a proponent to prove a case.⁶⁶ This is improper and contrary to the appropriate understanding of legislative history.⁶⁷ The preponderance of the evidence standard calls for a weighing of the evidence presented by both sides, not an abstract piling of evidence until the arbiter is satisfied.⁶⁸

The Copyright Office also devises a higher evidentiary burden by relying on the Rep. Coble’s admonition against basing a rulemaking on “mere inconveniences” or “individual cases,” and the suggestion that in prospective cases the exemption should only be granted in “extraordinary circumstances.”⁶⁹ While the time and energy it takes to obtain an exemption under this process

⁶¹ The Section 1201 rulemaking is, of course, governed by the APA. *See* 17 U.S.C. § 701(e); COMMERCE REPORT, *supra* note 4, at 37.

⁶² 5 U.S.C. § 556(d).

⁶³ *Steadman v. SEC*, 450 U.S. 91, 99 (1981).

⁶⁴ 5 U.S.C. § 556(d).

⁶⁵ *See supra* notes 28–33 and accompanying text.

⁶⁶ This was the result in the 2010 Recommendation, when the Register recommended that an exemption not be granted to enable “read aloud” features of e-books for the visually impaired, which the Librarian of Congress overruled, noting, *inter alia*, that there were no opponents to the exemption, indicating that as long as the proponents satisfied their burden of production, they too satisfied their burden of proof. Final Rule, Exemption on Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43,825, 43,838 (July 27, 2010).

⁶⁷ COMMERCE REPORT, *supra* note 4, at 37 (requiring simply “distinct, verifiable, and measurable” evidence); *see also* Herman & Gandy, *supra* note 24, at 146 (“[N]owhere did the Committee or the statute imply that the burden for proving adverse effect was particularly high or difficult to meet.”).

⁶⁸ *Steadman*, 450 U.S. at 98–99.

⁶⁹ *See* 2015 RECOMMENDATION, *supra* note 7, at 15 (citing HOUSE MANAGER’S REPORT, *supra* note 5, at 6).

will deter those who are merely “inconvenienced” from appearing, the statutory language simply does not include any of these limitations, as already discussed.⁷⁰

Equally troubling, especially in this most recent rulemaking, is the use of these standards to make *post hoc* limitations on the scope of exemptions, on the basis that proponents did not show that they needed to make use of a particular attribute of a work, or engage in the use in a particular way.⁷¹ Like the anticircumvention rulemaking more generally, this issue also has both a substantive and procedural dimension. On the substance, the heavily qualified exemptions issued by this Office are out of step with the intent of Congress, which asked the Register and Librarian to identify “a narrow and focused subset” of works, but only compared to the very broad categories of authorship in 17 U.S.C. § 102.⁷² Procedurally, making such alterations without providing participants an opportunity to respond raises issues of whether there was fair notice of the rulemaking under the APA.⁷³ This approach also places the Copyright Office in the inappropriate position of determining what are the proper techniques for engaging in the electrical and computer engineering activities required to make the contemplated use, an issue with which this Office has no competency. It also leads the Copyright Office to carve out elements of the exemption in consideration of non-copyright factors, which is outside the proper inquiry of the rulemaking for the reasons articulated in the following section. For these reasons, such limitations to scope should only be contemplated after participants have had an opportunity to respond to those limitations.

IV. THE COPYRIGHT OFFICE LACKS AUTHORITY TO CONSIDER ISSUES IRRELEVANT TO COPYRIGHT LAW IN DETERMINING EXEMPTIONS UNDER SECTION 1201

Congress has carefully circumscribed the Copyright Office’s scope of inquiry to copyright impacts in this rulemaking. For the first several instances of this rulemaking, this Office acknowledged the limitation.⁷⁴ This most recent rulemaking, however, allowed non-copyright issues to become the main focus of several of the exemptions. This contradicts both the statute and principles of administrative law, and as a result created a tremendous burden on both the participants in the proceeding and the Copyright Office itself.

⁷⁰ See *supra* notes 28–33 and accompanying text.

⁷¹ The limitations imposed by this Office are no doubt known, but for an illustration see Katharine Trendacosta, *The New DMCA Rules Don’t Go Far Enough*, GIZMODO (Oct. 28, 2015), <http://gizmodo.com/the-new-dmca-rules-dont-go-far-enough-1739174855>.

⁷² COMMERCE REPORT, *supra* note 4, at 38.

⁷³ 5 U.S.C. § 553(b) (requiring the “terms or substance of the proposed rule” to be made known as part of a rulemaking notice); *Chocolate Mnfrs. Ass’n of U.S. v. Block*, 755 F.2d 1098, 1105 (4th Cir. 1985) (agencies must alert interested parties to any deviations to the proposed rules that do not directly flow from the character of the comments).

⁷⁴ See *infra* notes 88–92 and accompanying text.

Section 1201(a)(1)(C) makes clear that its focus is solely on copyright. The statute asks the Librarian and Register to examine the impact on “noninfringing uses,” and employs concepts and terms laden with meaning in copyright law, including archival preservation,⁷⁵ the classic productive fair uses,⁷⁶ and fair use’s consideration of the effects on the market for or value of works.⁷⁷ Subsequent consideration by this Office in earlier rulemakings has also brought in the concept of interoperability, which is reflected in copyright in several places, including its concern over protecting the functional elements of expressions, fair use, and the statutory permission for adaptation of computer programs.⁷⁸ These concerns are within the core of copyright, and fairly considered in light of Congress’s direction to consider “such other factors as the Librarian considers appropriate.”⁷⁹

The flexibility to consider other matters within the scope of copyright, however, does not equal a mandate to undertake a freewheeling analysis of matters outside the Office’s regulatory discretion and competency. The Copyright Office’s recent foray into public health, safety, and environmental analysis in the 2015 rulemaking contravenes Congress’ erected limits, the tenets of administrative law, and this Office’s own established policy.

A. The text of Section 1201 limits this rulemaking to copyright issues.

As the Supreme Court has repeatedly expounded, an agency “literally has no power to act ... unless and until Congress confers power upon it.”⁸⁰ Congress has conferred power to the Copyright Office in this rulemaking under § 1201(a)(1)(C), but it did so only in a limited way. It instructs the Office to determine “whether persons who are users of a copyrighted work are, or are likely to be ... adversely affected ... in their ability to make noninfringing uses.”⁸¹ While some of the legislative history around the statute blends the two concepts, the term “noninfringing uses” is materially different than “lawful uses.” The former speaks specifically to copyright; the latter speaks to the law more generally.

Congress chose this language carefully. It originally proposed legislation allowing the Librarian and Register to articulate exemptions for “lawful uses,” but changed it to “noninfringing uses” before enactment.⁸² This clarification demonstrates Congress’ intent to center the rulemaking on

⁷⁵ Compare 17 U.S.C. § 1201(a)(1)(C)(ii) (considering impacts on libraries and archives), *with* 17 U.S.C. § 108 (making the same considerations in copyright more generally).

⁷⁶ Compare 17 U.S.C. § 1201(a)(1)(C)(iii), *with* 17 U.S.C. § 107.

⁷⁷ Compare 17 U.S.C. § 1201(a)(1)(C)(iv), *with* 17 U.S.C. § 107(4).

⁷⁸ See 2010 RECOMMENDATION, *supra* note 56, at 106–07; 17 U.S.C. §§ 102(b), 107, 117(a). For cases discussing interoperability in a copyright context, see *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1520–28 (9th Cir. 1992); *Sony Computer Entm’t, Inc. v. Connectix Corp.*, 203 F.3d 596, 602–08 (9th Cir. 2000); *Lotus Dev. Corp. v. Borland Int’l, Inc.*, 49 F.3d 807, 818 (1st Cir. 1995).

⁷⁹ 17 U.S.C. § 1201(a)(1)(C)(v).

⁸⁰ *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986).

⁸¹ 17 U.S.C. § 1201(a)(1)(C).

⁸² Compare CONFERENCE REPORT, *supra* note 30 at 2, *with* 17 U.S.C. § 1201(a)(1)(C).

copyright, as the Copyright Office itself noted in earlier rulemakings.⁸³ Congress considered making the inquiry broader, but it opted not to in the end. The Copyright Office argued that it should make these forays because there are “serious issues,”⁸⁴ but no matter “how serious the problem an administrative agency seeks to address,” it may not act in a manner “inconsistent with the administrative structure that Congress enacted into law.”⁸⁵ The Copyright Office is thus bound to the statute’s focus on copyright matters.

B. The statute’s contemplation of “other factors” must be read to be limited to copyright-related factors, such as interoperability.

Factor (v), “such other factors as the Library considers appropriate,” functions not as unlimited discretion to the Copyright Office, but to capture other copyright issues not otherwise listed. The Supreme Court has endorsed this formulation, holding in a case concerning a judge’s power to consider “such other factors as the court deems appropriate” under a statute to be “understood in light of the specific terms that surround it.”⁸⁶ This is often referred to as the canon of statutory interpretation *ejusdem generis*, and is routinely used when interpreting “such other factors” clauses in statutes.⁸⁷

This Office had previously adopted this interpretation. Since 2003, it has characterized its mandate as “carefully balanc[ing] the availability of works for use, the effect of the prohibition on particular uses and the effect of circumvention on copyrighted works.”⁸⁸ All these factors plainly relate to copyright. This Office has likewise limited its analysis to copyright issues in executing rulemakings. It typically examines only Factors (i) to (iv) without reaching Factor (v).⁸⁹ Where it has invoked Factor (v), however, it has discussed only the copyright-related issue of interoperability.⁹⁰ Beyond this, it has previously rejected evidence by participants in the rulemaking on the ground that it that lacked a nexus to copyright. In 2010, for example, this Office refused to weigh arguments regarding the environmental effects of an exemption, acknowledging that the Office has “no responsibilities for, and no particular expertise in, such matters.”⁹¹ It noted, quite unequivocally, that concerns “unrelated to copyright interests ... are

⁸³ 2010 RECOMMENDATION, *supra* note 56, at 6 n.9 (“[T]he subsequent amendment changing ‘lawful’ to ‘noninfringing’ clarifies that the focus of the rulemaking is on whether access controls have adversely affected the ability of users to make noninfringing uses, a somewhat narrower focus than might have been the case if the original proposed statutory text – ‘lawful uses’ – had been retained.”).

⁸⁴ 2015 RECOMMENDATION, *supra* note 7, at 3.

⁸⁵ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (internal quotations omitted).

⁸⁶ *Hughey v. United States*, 495 U.S. 411, 419 (1990).

⁸⁷ *See, e.g., Cement Kiln Recycling Coalition v. EPA*, 493 F.3d 207, 222 (D.C. Cir. 2007); *In re Disconnection of Certain Territory from Highland City*, 668 P.2d 544, 548 (Idaho 1983) (citing cases and treatises).

⁸⁸ Final Rule, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 68 Fed. Reg. 62,011, 62,012 (Oct. 31, 2003).

⁸⁹ *See, e.g.,* 2006 RECOMMENDATION, *supra* note 37, at 52 (“[T]his discretionary factor has lain dormant in prior proceedings ...”); 2012 RECOMMENDATION, *supra* note 21, at 97–98, 136–37.

⁹⁰ *See, e.g.,* 2006 RECOMMENDATION, *supra* note 37, at 52.

⁹¹ 2010 RECOMMENDATION, *supra* note 56, at 147, 153.

not germane to the matters Congress was concerned with when it drafted Section 1201(a)(1),” and that “[t]he purpose of the proceeding is to address copyright law and policy concerns.”⁹²

This issue was treated quite differently in the 2015 rulemaking. In the 2015 rulemaking, the Office repeatedly considered multiple factors that are entirely outside of copyright. In evaluating an exemption for software security research, for example, the Copyright Office factored in issues of public health.⁹³ In assessing an exemption for vehicle software security research, it weighed automobile safety, emissions compliance, and environmental impact.⁹⁴

It is simply untenable to suggest Congress delegated authority over the entirely separate fields of public safety, health, and the environment using a handful of general words towards the end of a statute. As the late Justice Scalia famously noted, Congress does not “hide elephants in mouseholes.”⁹⁵ The Supreme Court does not recognize delegation of “broad and unusual authority” through “vague terms or ancillary provisions.”⁹⁶ This is especially true where delegation would result in significant economic and political change,⁹⁷ as it would here if the Copyright Office were to usurp the FDA or EPA’s authority to make particular judgments through broad prohibitions.

This Office itself has conceded that public safety and environmental concerns with “at best a very tenuous nexus” to copyright are “more properly debated by Congress or the agencies with primary jurisdiction.”⁹⁸ This is absolutely right, and until Congress gives it the power to do otherwise, this Office cannot use these sorts of considerations as a basis of granting, denying, or qualifying an exemption. Indeed, were this Office to interpret the rulemaking as granting them broad authority, such a delegation would be unconstitutional. The Supreme Court has held that statutes that direct agency action must contain an “intelligible principle,”⁹⁹ which § 1201(a)(1)(C) does not do for non-copyright issues. The Court reads provisions to comport with this rule, and disfavors constructions of statutes that present an agency with an “open-ended grant.”¹⁰⁰ To read Factor (v) without regard to its context in copyright would untether it from any legislative control; the provision must refer specifically to copyright concerns if it is to remain constitutional.

V. CONCLUSION

For the reasons above, the Cyberlaw Clinic respectfully requests that the Copyright Office confine this rulemaking to its proper legislative scope, and adopt the aforementioned changes to

⁹² *Id.* at 153.

⁹³ 2015 RECOMMENDATION, *supra* note 7, at 312–15.

⁹⁴ *Id.*

⁹⁵ *Whitman v. American Trucking Ass’n, Inc.*, 531 U.S. 457, 468 (2001).

⁹⁶ *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006).

⁹⁷ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

⁹⁸ See 2015 RECOMMENDATION, *supra* note 7, at 3, 316.

⁹⁹ See, e.g., *Whitman*, 531 U.S. at 472.

¹⁰⁰ *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980).

the Section 1201 rulemaking process, in order to sure that all participants, including this Office, are not unduly burdened by substantive limitations and considerations that are outside of this legislative scheme.

Respectfully submitted,



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