

## SECTION 1201 OF TITLE 17

# The Triennial Rulemaking Process

**SECTION 1201 RULEMAKING:  
Sixth Triennial Proceeding to Determine  
Exemptions to the Prohibition on Circumvention  
of Copyright Protection Systems for Access Control**  
RECOMMENDATION OF THE REGISTER OF COPYRIGHTS

**LIBRARY OF CONGRESS**

**NTIA**  
NATIONAL TELECOMMUNICATIONS & INFORMATION ADMINISTRATION

**LIBRARY OF CONGRESS**

**The Triennial Rulemaking Process**  
for Section 1201

### Slide 1

Welcome to the United States Copyright Office's informational video on section 1201 of title 17 of the United States Code.

This video will give you an overview of the triennial rulemaking process for section 1201, including what the requirements for granting an exemption are, the different phases of the process, and the Register's Recommendation and Final Rule.

Other videos discuss the legal overview of section 1201 and renewal process in depth.

# The Triennial Rulemaking Process

## Section 1201

### The Rulemaking Process

- 1 Requirements for Granting an Exemption
- 2 Petition Phase
- 3 Public Comment Phase
- 4 Public Hearings Phase
- 5 Register's Recommendation and Final Rule



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Every three years, the Copyright Office conducts a public rulemaking, so it can advise the Librarian of Congress on any proposed exemptions to the prohibition on circumventing access controls. During this process, petitioners submit necessary evidence and arguments for the Librarian to consider when evaluating whether to grant an exception.

The rulemaking has several phases: the petition phase, the public comment phase, which has multiple rounds, and the public hearings phase. After these phases are completed, the Register consults with NTIA and presents his or her recommendation to the Librarian. The Librarian will review the recommendation before issuing any exemptions. And, starting with the Seventh Triennial Rulemaking, the Copyright Office implemented a new streamlined petition process for renewing existing exemptions.

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Requirements for granting an exemption

## The Triennial Rulemaking Process

### Requirements

for Granting an Exemption

**I**

The exemption must relate to at least some works protected by copyright

**II**

The uses of the works must be noninfringing

**III**

Users must currently or in the next three years be adversely affected in their ability to make such noninfringing uses

**IV**

The technological protection measure (“TPM”) must be the cause of such adverse effects

#### Slide 4

By the end of the rulemaking proceedings, a petitioner has to make four showings to get an exemption. First, the exemption must relate to at least some works protected by copyright. Second, the uses of the works must be noninfringing. Third, users must currently or in the next three years be adversely affected in their ability to make such noninfringing uses. And fourth, the technological protection measure or “TPM” must be the cause of such adverse effects.

## The Triennial Rulemaking Process

### Requirements

for Granting an Exemption

#### *Required Showing: Protected Works*

The proposed class must include at least some **works protected by copyright**

- The law refers to a “class of copyrighted works”
- Exemptions should not be proposed for ideas, facts, only works in the public domain, etc.



#### Slide 5

Proponents of an exemption must show that the proposed class includes at least some works protected by copyright.

This is because the law under section 1201 refers to a “class of copyrighted works” and provides that the circumvention prohibition only applies to works protected by copyright law. Thus, exemptions should not be proposed for ideas, facts, only works in the public domain, etc.

## The Triennial Rulemaking Process

### Requirements

for Granting an Exemption

#### *Required Showing: Noninfringing Use*

The uses at issue are must be **noninfringing**, based on the Copyright Act and relevant court decisions

- It is not enough that a particular use *could be* noninfringing. Rather, the Register will assess whether the use is *likely to be* noninfringing based on current law

**Noninfringing uses could include statutory exceptions for:**

- Fair use (17 U.S.C. § 107)
- Reproductions by libraries and archives (17 U.S.C. § 108)
- Certain uses of computer programs (17 U.S.C. § 117)
- Reproductions for the blind or other persons with disabilities (17 U.S.C. § 121)

#### Slide 6

Proponents of an exemption should identify the specific noninfringing uses of copyrighted works sought to be facilitated by circumvention and the legal basis the proponent is relying on. This information typically includes describing how the work will be used, and by whom, as well as identifying the section of the Copyright Act that permits the use and any court decisions.

It is not enough that a particular use could be noninfringing. Rather, the Register will assess whether the use is likely to be noninfringing based on current law. There is no “rule of doubt” favoring an exemption when it is unclear that a particular use is noninfringing.

Noninfringing uses include statutory exceptions for fair use, reproductions by libraries and archives, certain adaptation or repair involving computer programs, or reproduction of works for the blind or other people with disabilities. While these are some of the more common reasons that people claim a particular use is noninfringing, this is not an exhaustive list.

## The Triennial Rulemaking Process

### Requirements

for Granting an Exemption

*Required Showing:  
Adverse Effect*

Proponents of an exemption should explain how they are **adversely affected** in their ability to make such noninfringing uses, either currently or in the **next three years**

In addition, the TPM itself must be the **cause** of the adverse impact, not marketplace trends or other technological developments

*In assessing adverse effects, the Office must  
balance the five statutory factors in section 1201*

#### Slide 7

Proponents of an exemption should explain how they are adversely affected in their ability to make such noninfringing uses either currently or in the next three years.

This evidence should identify distinct, verifiable, and measurable impacts to the proposed noninfringing use. Examples might include TPMs that prevent an ebook from being accessed by screen reading software for persons who are blind or those that prevent automobile repair. Adverse effects do not include mere inconveniences.

In addition, the TPM itself must be the cause of the adverse impact, not marketplace trends, or other technological developments. For example, if a computer program does not run as fast with newer operating systems, this would be an adverse effect caused by technological developments, not the TPM.

In assessing adverse effects, the Office must balance the five statutory factors in section 1201.



## The Triennial Rulemaking Process

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### Requirements

for Granting an Exemption

*Required Showing:  
Adverse Effects – Statutory Factors*

#### Factor 1: the availability for **use of copyrighted works**

- This includes any positive and negative effects of the prohibition against circumvention has on the availability of copyrighted materials
- Alternatives to circumvention should be real and **not merely theoretical**

#### Slide 8

Under the first statutory factor, the Office considers evidence relating to the availability for use of copyrighted works. This type of evidence will usually relate to the positive and negative effects of the prohibition on the availability of copyrighted materials and the alternatives to circumvention, which should be real and not merely theoretical.



## The Triennial Rulemaking Process

### Requirements

for Granting an Exemption

#### *Required Showing: Adverse Effects – Statutory Factors*

These factors borrow from copyright law's infringement exceptions, including fair use and the exceptions for libraries and archives

Factor 2: the availability for use of works for nonprofit archival, preservation, and educational purposes

Factor 3: 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

Factor 4: the effect of circumvention of technological measures on the market for or value of copyrighted works

Factor 5: such other factors as the Librarian considers appropriate

#### Slide 9

With the second factor, the Office will consider the availability for use of works for nonprofit archival, preservation, and educational purposes. The third factor instructs the Office to assess 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. The fourth factor considers the effect of circumvention of technological measures on the market for or value of copyrighted works, and is trying to determine if there is a real threat of market substitution.

If factors two through four look familiar, it is because these factors borrow from copyright law's infringement exceptions, including fair use and the exceptions for libraries and archives.

The last factor asks for evidence related to such other factors as the Librarian considers appropriate. This could include issues related to any copyright concerns not yet addressed and even some non-copyright concerns.

No single factor is determinative, and in many cases some of these factors do not apply at all.

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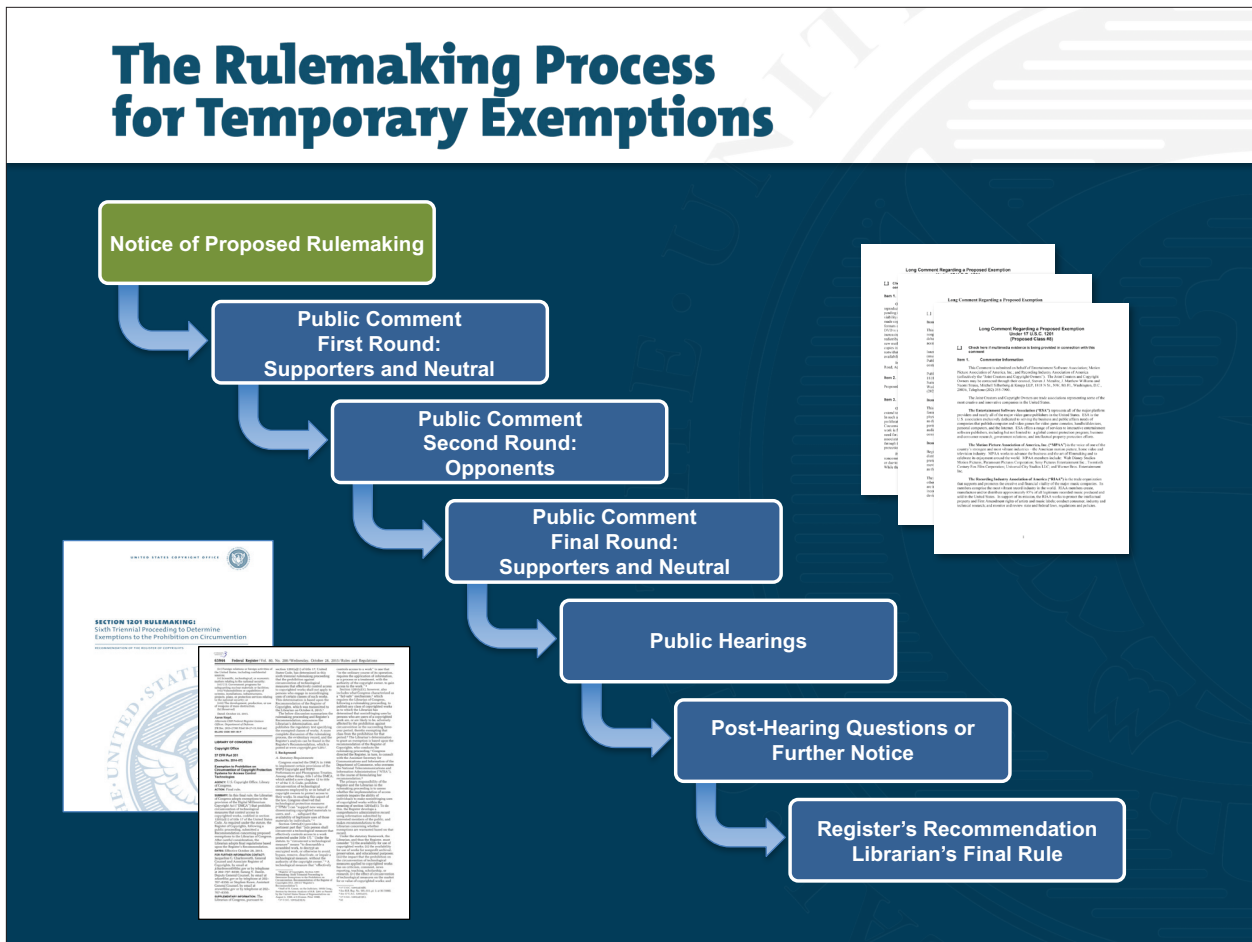
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The Petition Phase

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After the Copyright Office issues a Notice of Proposed Rulemaking, parties will have the opportunity to support or oppose the proposed exemptions during several rounds of public comment. Next, the Office will hold public hearings and follow up with post hearing questions or a further notice. Finally, the Register will make a recommendation and the Librarian will publish the new and renewed exemptions in the Federal Register.

Note that a separate video discusses the process for streamlined petitions to renew exemptions.

## The Triennial Rulemaking Process

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### Petition Phase

Submitting Comments – Submitter and Contact Information

#### *Identify the submitter*

Petitioners should, if desired, provide a means for others to contact the submitter, or an authorized representative of the submitter, by **email and/or telephone**

- Note that any information appearing in the petition will be accessible by the public
- The submitters' email address will be used to remind parties of the streamlined process for renewed exemptions

#### Slide 12

During the petition phase, a party who wants a new exemption should submit a petition that sets forth basic information regarding elements of its proposed exemption. Petitioners do not have to set forth their whole case at this time; that comes during the public comment phase.

A petitioner should, if desired, provide a means for others to contact the submitter, or an authorized representative of the submitter, by email and/or telephone. Note that any information appearing in the petition will be accessible to the public.

## The Triennial Rulemaking Process

### Petition Phase

Brief Overview of Proposed Exemption

*Include a statement describing the proposed exemption*

**For example:**

“A proposed exemption for owners of 3D printers to circumvent TPMs on firmware or software in 3D printers to run the printers’ operating systems to allow use of non-manufacturer-approved feedstock.”

**For example:**

“A proposed exemption for computer programs in tractors that use lockout codes to prevent farmers from repairing broken tractor parts.”

**Include:**

- **The type of copyrighted work needed to be accessed;**
- **The physical media or device on which the works are stored or the service through which the works are accessed;**
- **The purposes for which these works need to be accessed; and**
- **The types of users who want access**

#### Slide 13

The petition should include a statement describing the proposed exemption, including the type of copyrighted work needed to be accessed, the physical media or device on which the works are stored or the service through which the works are accessed, the purposes for which these works need to be accessed, and the types of users who want access. Some examples of proposed exemptions are displayed here.

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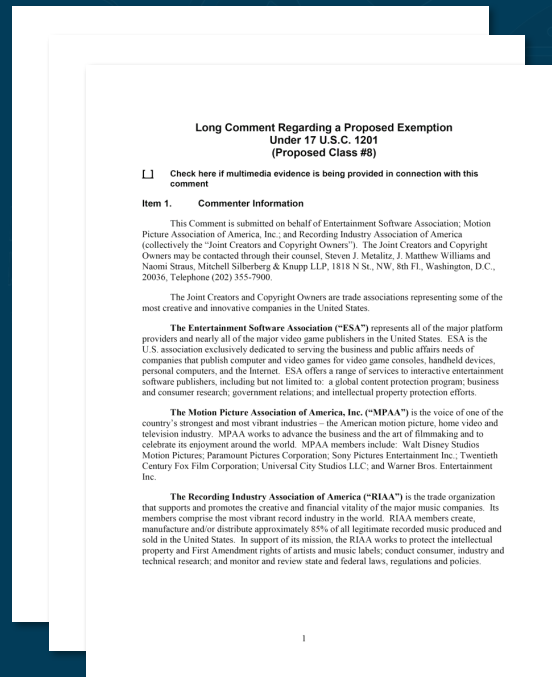
The Public Comment Phase

# The Triennial Rulemaking Process

## Public Comment Phase

During the public comment phase, the Office hears perspectives from proponents, opponents, and other parties who wish to weigh in on the proposed classes of works

There are **three rounds** of public comments, which aim to give the different interests a chance to participate and respond to others' views



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During the public comment phase, the Office hears perspectives from proponents, opponents, and other parties who wish to weigh in on the proposed classes of works.

There are three rounds of public comments, which aim to give the different interests a chance to participate and respond to others' views. It is important that in this phase proponents put forward their full case for an exemption.

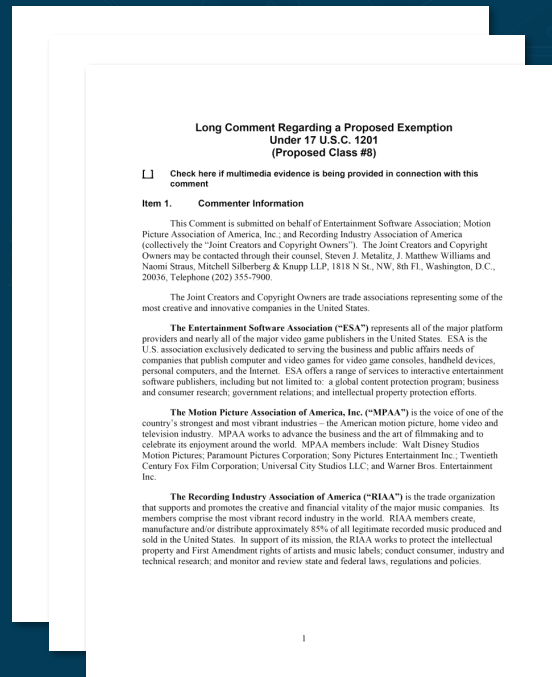


# The Triennial Rulemaking Process

## Public Comment Phase

During the public comment phase, the Office hears perspectives from proponents, opponents, and other parties who wish to weigh in on the proposed classes of works

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During the first round of comments, parties present legal and evidentiary submissions from those who support a proposed exemption as well as any neutral parties that neither support nor oppose an exemption but seek only to share pertinent information about a specific proposal. Parties may include documentary evidence and/or multimedia presentations submitted in accordance with Office guidelines. Proponents should present their entire case for the exemption during this round and bear the burden of establishing that the requirements for granting an exemption have been satisfied.

During the second round of comments, parties present legal and evidentiary submissions from those who oppose a proposed exemption. This round may also include documentary evidence and/or multimedia presentations.

The third round is limited to supporters of particular proposals, or neutral parties that neither support nor oppose a proposal, who seek to reply to points made in the earlier rounds of comments. These reply comments shall not raise new issues, but should be limited to addressing arguments and evidence presented by others.

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The Public Hearings Phase

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### Public Hearings Phase

Copyright Office holds public hearings following the last round of public comments

The hearings are usually held in Washington, D.C. and in California

The hearings are not mandatory and will be webcast for remote viewing



*Participation in the hearings is optional*

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## The Triennial Rulemaking Process

### Public Hearings Phase



The Office tries to identify **specific issues** for parties to address during the hearings and may offer particular participants the opportunity to **demonstrate technologies** that are unknown to the Office

The Office may ask for written **post-hearing questions** if it has additional questions

*Parties are discouraged from submitting additional written evidence at the hearing*

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The Copyright Office tries to identify specific issues to be addressed during the hearings, and may offer particular participants the opportunity to demonstrate technologies that are unknown to the Office.

Following the hearings, the Office may request additional information from participants through the form of post-hearing questions. Responding to a request is voluntary, but any response will be need to be supplied by a specified deadline. Parties are discouraged from submitting additional written evidence at the hearing.

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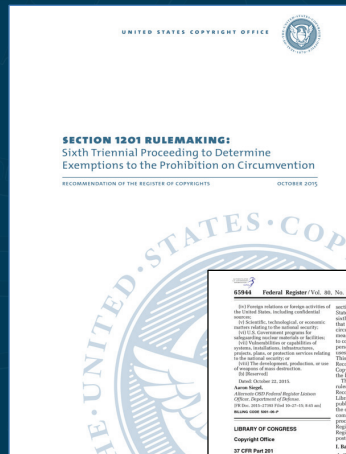
The Register's Recommendation and Final Rule

# The Triennial Rulemaking Process

## Register's Recommendation and Final Rule

After the comment and hearing phases are completed, the Register consults with NTIA and presents a recommendation to the Librarian of Congress

The Librarian will review the recommendation and issue any exemptions as a final rule in the Federal Register



### Slide 21

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### Disclaimer:

The United States Copyright Office is providing general information about section 1201 of the Copyright Act and its rulemaking proceeding.

By law, the Office cannot provide legal advice to the public.

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