



AUTHORS
ALLIANCE

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Regan A. Smith
Associate General Counsel
U.S. Copyright Office
101 Independence Ave. S.E.
Washington, D.C. 20559-6000
(202) 707-1027

Re: Docket No. 2015-8, Section 1201 Study

Dear Ms. Smith,

Authors Alliance is a nonprofit organization that works to empower and advocate for authors who, like our approximately 700 members, “write to be read.”¹ These are creators who are motivated in their creative work primarily by the prospect of advancing knowledge, discourse, and culture, and who want to see their work widely disseminated.

Authors Alliance participated in the last rulemaking cycle—the first since our launch—seeking a renewed and expanded exemption for the authors of multimedia ebooks. We anticipate returning in future years to advocate for similar exemptions.

As a participant in the exemption process and as a community of rightsholders ourselves, we are pleased to see the Copyright Office’s interest in considering some reforms of the Section 1201 rulemaking process. We believe that § 1201 is, at present, overly burdensome on noninfringing activities and the rule-making exemption procedures are a perennial drain on the resources of both proponents and opponents. We believe strongly that the law can be much improved. Our responses to several of the Office’s specific inquiries follow below:

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

Individual authors generally have a very different relationship to § 1201 than to copyright law. Our community and other similarly situated authors create copyrighted works on a regular basis. We are among the constituencies served by the Copyright Act generally. However, technological protection measures (TPMs) are rarely used by individual authors.

¹ More about our organization, our mission, and our projects is available on our website. See Authors Alliance, *About Us*, <http://authorsalliance.org/about>.

If TPMs are placed on our members' works, they are typically developed, controlled, and implemented by marketplace intermediaries and non-author copyright owners.

Both as exemption seekers and as rightsholders, authors can find § 1201(a)(1)(A) has been an obstacle to making the fair uses essential to their creative work.

Section 1201(a)(1)(A) is at its most problematic where it inhibits actions that, in its absence, would be lawful, noninfringing uses. Indeed, this difficulty is precisely why Congress created the exemption process in the first place.² It is important to stress that the label “noninfringing uses” obscures the importance many such uses have for our creative economy and our democracy. Fair use, the paradigmatic “noninfringing use,” is a “traditional First Amendment safeguard.”³ As creative expression becomes increasingly digital and subject to TPMs, the pressure § 1201 places on fair use and its value to free expression will only increase.

Unfortunately, the “balance” introduced by the exemption process is slow, cumbersome, and, almost by necessity, underinclusive of the many noninfringing uses that might be made of technically protected works. Furthermore, the breadth of the prohibition, insofar as it has been interpreted to be applicable even absent a nexus to copyright infringement,⁴ has converted it into a weapon wielded to serve purposes remote from traditional copyright concerns.⁵

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

Yes. We believe that there should be presumptive renewal of *all* previously granted exemptions. Such a presumption would not hinder the ability of opponents to request a reversal of outdated or problematic exemptions, but it would take considerable stress off the

² See H.R. Rep. No. 105-551, at 26 (1998) (“The Committee on Commerce felt compelled to address these risks [that § 1201 would undermine Congress' long-standing commitment to the concept of fair use] The Committee has struck a balance that is now embodied in Section 102(a)(1) of the bill, as reported by the Committee on Commerce. The Committee has endeavored to specify, with as much clarity as possible, how the right against anti-circumvention would be qualified to maintain balance between the interests of content creators and information users. The Committee considers it particularly important to ensure that the concept of fair use remains firmly established in the law.”).

³ *Eldred v. Ashcroft*, 537 US 186, 220 (2003).

⁴ See, e.g., *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, 629 F. 3d 928, 950 (9th Cir. 2010).

⁵ See generally Electronic Frontier Foundation, *Unintended Consequences: Fifteen Years under the DMCA* (2013) available at <https://www.eff.org/pages/unintended-consequences-fifteen-years-under-dmca>.

many public interest organizations that presently expend significant resources to document the need for exemptions that have proven benign and now meet only token opposition.

Indeed, present procedures require a large commitment from proponents in order to secure temporally limited exemptions. Many proponents, Authors Alliance included, are small, public-interest organizations with limited resources. Without the benefit of a presumption, the process of seeking a renewal is a labor-intensive effort, and requires a significant commitment of attention and legal expertise. The long-term sustainability of the present methods for securing the public's fair use rights seems very much in doubt.

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

The statutory purpose of the exemption process is plain: to protect the noninfringing uses of copyrighted works adversely affected by the prohibition on circumvention. However, the extra-statutory burdens placed on proponents under current procedures frustrate this objective. For instance, the Office's past use of a "substantial adverse affect" standard contravenes the statutory text, and downplays the very real harm caused by restricting fair use that Congress sought to mitigate via the rulemaking process.

Current requirements that proponents provide a renewed evidentiary record for each rulemaking are particularly burdensome and do not appear to be statutorily mandated. Absent reason to believe that evidence from past rulemakings is no longer apposite, proponents should be able to continue to rely on evidence from past rulemakings when seeking to renew their exemptions.

7. Should section 1201 be amended to allow the adoption of exemptions to the prohibition on circumvention that can extend to exemptions to the anti-trafficking prohibitions, and if so, in what way? For example, should the Register be able to recommend, and the Librarian able to adopt, exemptions that permit third-party assistance when justified by the record?

Yes. Many of the constituencies that most rely on § 1201 exemptions, including our own, simply lack the resources to develop the technologies necessary for exercising their exemptions. By permitting behavior but outlawing the tools that make the behavior possible, § 1201 as currently drafted undermines itself and disserves the public that relies on the exemption process.

Generally, we believe that third parties should be free to provide tools designed to enable privileged conduct, and assistance to any person looking to make good faith use of an applicable exemption. In order to avoid the paradoxical result noted above, the Librarian should, at a minimum, be empowered to grant exemptions to the anti-trafficking rule in the

same way it is empowered to grant exemptions to § 1201(a)(1)(A). In particular, we would appreciate special emphasis on allowing third party tools and assistance vis-à-vis exemptions geared primarily to individuals and consumers, that is, those actors least likely to be able to make use of applicable exemptions without assistance.

9. Please assess whether there are other permanent exemption categories that Congress should consider establishing—for example, to facilitate access to literary works by print- disabled persons?

The most effective and straightforward exemption would be for circumventions to enable noninfringing use of a technically protected copyrighted work. Such a permanent exemption would remedy the persistent under-inclusiveness of the existing statute's exemption process, giving it the balance its drafters intended it to have from the beginning while also drastically reducing the resources expended on all sides in the triennial rulemaking.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael Wolfe", with a stylized flourish at the end.

Michael Wolfe
Executive Director
Authors Alliance