

Nimmer
on
Copyright

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GLOSSARY OF ABBREVIATIONS AND OTHER REFERENCES

Certain references in the text, not otherwise identified, are as follows:

<i>Reference</i>	<i>Identification</i>
BCIA	Berne Convention Implementation Act of 1988 (see Overview) (see also Appendix 2A <i>infra</i>)
Commerce Rep. (DMCA)	H.R. Rep. No. 105-551, Part 2, 105th Cong., 2d Sess. (1998) (see Appendix 53 <i>infra</i>)
Conf. Rep.	H.R. Rep. No. 94-1733, 94th Cong., 2d Sess. (1976) (see Appendix 5 <i>infra</i>)
Conf. Rep. (DMCA)	Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 105-796, 105th Cong., 2d Sess. (1998) (see Appendix 57 <i>infra</i>)
Current Act (1976 Act)	17 U.S.C. § 101 <i>et seq.</i> (Pub. L. 94-553, 90 Stat. 2541) (see Appendix 2 <i>infra</i>)
Decennial	January 1, 1978 — March 1, 1989 (see Overview <i>infra</i>)
DPRA	Digital Performance Rights in Sound Recordings Act of 1995 (see Appendix 2H)
Hearings on GATT Intellectual Property Provisions	<i>General Agreement on Tariffs and Trade (GATT): Intellectual Property Provisions</i> , Joint Hearings Before the Subcommittee on Intellectual Property and Judicial Administration of the House Committee on the Judiciary and the Subcommittee on Patents, Copyrights, and Trademarks of the Senate Committee on the Judiciary, 103d Cong., 2d Sess. (August 12, 1994)
H. Rep.	H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976) (see Appendix 4 <i>infra</i>)
H. Rep. (AHRA)	H.R. Rep. No. 102-873 Part 1, 102d Cong., 2d Sess. (1992). (see Appendix 37 <i>infra</i>)
H. Rep. (BCIA)	H.R. Rep. No. 100-609, 100th Cong., 2d Sess. (1988) (see Appendix 32 <i>infra</i>)

<i>Reference</i>	<i>Identification</i>
H. Rep. (DMCA)	H.R. Rep. No. 105-551. Part 1, 105th Cong., 2d Sess. (1998) (see Appendix 52 <i>infra</i>)
H. Rep. (DPRA)	H.R. Rep. No. 104-274, 104th Cong., 1st Sess. (1995) (see Appendix 45 <i>infra</i>)
H. Rep. (FECA)	H.R. Rep. No. 109-33(1), 109th Cong., 1st Sess. (2005)
H. Rep. (PRO IP)	H. R. Rep. No. 110-617, 110th Cong., 2d Sess. (2008)
H. Rep. (SCPA)	H.R. Rep. No. 98-781, 98th Cong., 2d Sess. (1984) (see Appendix 30 <i>infra</i>)
H. Rep. (SHVA)	H.R. Rep. No. 100-887(1), 100th Cong., 2d Sess. (1988), reprinted in 1988 U.S. Code Cong. & Admin. News 5611
OCILLA	Online Copyright Infringement Liability Limitation Act (see § 12B.01[C] <i>infra</i>)
Reg. Rep.	Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess., Copyright Law Revision (House Comm. Print 1961) (see Appendix 14 <i>infra</i>)
Reg. Supp. Rep.	Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess., Copyright Law Revision Part 6 (House Comm. Print 1965) (see Appendix 15 <i>infra</i>)
SAA	Statement of Administrative Action (see § 18.06 [C][2][c] <i>infra</i>)
S. Rep.	S. Rep. No. 94-473, 94th Cong., 1st Sess. (1975) (see Appendix 4A <i>infra</i>)
S. Rep. (AHRA)	S. Rep. No. 102-294, 102d Cong., 2d Sess. (1992) (see Appendix 36 <i>infra</i>)
S. Rep. (BCIA)	S. Rep. No. 100-352, 100th Cong., 2d Sess. (1988) (see Appendix 35 <i>infra</i>)
S. Rep. (DMCA)	S. Rep. No. 105-190, 105th Cong., 2d Sess. (1998) (see Appendix 54 <i>infra</i>)

<i>Reference</i>	<i>Identification</i>
S. Rep. (DPRA)	S. Rep. No. 104–128, 104th Cong., 1st Sess. (1995) (see Appendix 46 <i>infra</i>)
Trans. Supp. Prov.	Transitional and Supplementary Provisions (see Appendix 2 <i>infra</i>)
TRIPs	Trade-Related Aspects of Intellectual Property Rights (see § 18.06[A] <i>infra</i>)
U.C.C.	Universal Copyright Convention (see Appendices 24 and 25 <i>infra</i>)
U.S.P.Q.	United States Patent Quarterly
1909 Act	Act of March 4, 1909, ch. 320, 35 Stat. 1075, as thereafter codified in 17 U.S.C. § 1 <i>et seq.</i> , and as amended (see Appendix 6 <i>infra</i>)
1997 Hearings, Serial No. 33	<i>The WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act</i> , Hearing Before the Subcommittee on Courts and Intellectual Property, Serial No. 33 (Sept. 16-17, 1997)
2000 Hearings, Serial No. 145	<i>United States Copyright Office and Sound Recordings as Work Made for Hire</i> , Hearing Before the Subcommittee on Courts and Intellectual Property, Serial No. 145 (May 25, 2000)

**CONGRESSIONAL
COMMITTEE
REPORTS ON THE
DIGITAL MILLENNIUM
COPYRIGHT ACT AND
CONCURRENT
AMENDMENTS
(cont.)**

PART II

**THE DMCA
(cont.)**

SUBPART B

**Reports and Findings
from the
Library of Congress
and Copyright Office**

Statement of the Librarian of Congress Relating to Section 1201.

In accordance with section 1201(a)(1) of the copyright law, I am today issuing a final rule that sets out four classes of works that will be subject to exemptions for the next three years from the statute's prohibition against circumvention of technology that effectively controls access to a copyrighted work. This is the second time that I have issued such a rule, which the Digital Millennium Copyright Act (DMCA) requires that I do every three years. These exemptions expire after three years, unless proponents prove their case once again.

As required by the DMCA, the Register of Copyrights has conducted a rulemaking and made a recommendation to me on this matter. I have accepted the Register's recommendation and determined that for the next three years, persons who engage in noninfringing uses of copyrighted works in these four classes will not be subject to the statutory prohibition against circumvention of access controls.

It is important to understand the purposes of this rulemaking, as stated in the law, and the role I have in it. The rulemaking is not a broad evaluation of the successes or failures of the DMCA. The purpose of the proceeding is to determine whether current technologies that control access to copyrighted works are diminishing the ability of individuals to use works in lawful, noninfringing ways. The DMCA does not forbid the act of circumventing copy controls, and therefore this rulemaking proceeding is not about technologies that control copying. Some of the people who participated in the rulemaking did not understand that and made proposals based on their dissatisfaction with copy controls. Other participants sought exemptions that would permit them to circumvent access controls on all works when they are engaging in particular noninfringing uses of those works. The law does not give me that power. The focus in this rulemaking is on whether people have been adversely affected by access controls in their ability to make noninfringing uses of particular classes of copyrighted works. Congress

* The statement can be found at the U.S. Copyright Office website: http://www.copyright.gov/1201/docs/librarian_statement_01.html.

has directed me to exempt particular classes of works if the case has been made that such an adverse impact exists or will exist in the next three years. These exemption are in place for only three years, but may be renewed if a case has been made that they are needed.

As Congress intended, this rulemaking has considered a wide range of possible adverse impacts. There was broad public participation in this rulemaking. Fifty-one individuals or organizations proposed one or more classes of works for exemption, and 338 commented on those proposals. The Copyright Office conducted six days of public hearings in April and May: four in Washington and two in Los Angeles, California. Transcripts of the hearings and copies of all the comments and reply comments and other information received by the Copyright Office were posted promptly on the Office's official website to ensure that the process was as open as possible.

The Register of Copyrights and her staff have conducted a careful and extensive evaluation of the entire record in the proceeding and determined that proponents of exemptions have demonstrated that the prohibition on circumventing access controls has had a substantial adverse effect on the ability of people to make noninfringing uses of four particular classes of copyrighted works. The Register has given me her analysis and recommendation, and today I have signed a document providing that persons making noninfringing uses of these four classes of works will not be subject to the prohibition against circumventing access controls during the next three years. The four classes of works are:

1. Compilations consisting of lists of Internet locations blocked by commercially marketed filtering software applications that are intended to prevent access to domains, websites or portions of websites, but not including lists of Internet locations blocked by software applications that operate exclusively to protect against damage to a computer or computer network or lists of Internet locations blocked by software applications that operate exclusively to prevent receipt of email.
2. Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete.
3. Computer programs and video games distributed in formats that have become obsolete and which require the original media or hardware as a condition of access.
4. Literary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling of the ebook's read-aloud function and that prevent the enabling of screen readers to render the text into a specialized format.

Two of these classes of works are very similar to the two classes of works that were exempted three years ago, but they have been modified to take into account

the somewhat different cases that were presented to the Register this year. One of these two new classes of works will provide some relief to libraries and archives in their preservation activities, and the other will assist the blind and visually disabled in their ability to gain meaningful access to digital materials.

2000 Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies.

AGENCY: Copyright Office, Library of Congress.

ACTION: Final Rule.

SUMMARY: This rule designates the classes of copyrighted works that the Librarian of Congress has determined shall be subject to exemption from the prohibition against circumvention of a technological measure that effectively controls access to a work protected under title 17 of the U.S. Code. In title I of the Digital Millennium Copyright Act, Congress established that this prohibition against circumvention will become effective October 28, 2000. The same legislation directed the Register of Copyrights to conduct a rulemaking procedure and to make recommendations to the Librarian as to whether any classes of works should be subject to exemptions from the prohibition against circumvention. The exemptions set forth in this rule will be in effect until October 28, 2003.

EFFECTIVE DATE: October 28, 2000.

FOR FURTHER INFORMATION CONTACT: Charlotte Douglass or Robert Kasunic, Office of the General Counsel, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, DC 20024. Telephone (202) 707-8380; telefax (202) 707-8366.

SUPPLEMENTARY INFORMATION:

Recommendation of the Register of Copyrights

* 65 Fed. Reg. 64555 (Oct. 27, 2000).

I. Background

A. *Legislative Requirements for Rulemaking Proceeding*

The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) require that Contracting Parties provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors or other copyright owners (or, in the case of the WPPT, performers and producers of phonograms) use in connection with the exercise of their rights and that restrict acts which they have not authorized and are not permitted by law.¹

In fulfillment of these treaty obligations, on October 28, 1998, the United States enacted the Digital Millennium Copyright Act ("DMCA"), Pub. L. 105-304 (1998). Title I of the Act added a new Chapter 12 to Title 17 U.S.C., which among other things prohibits circumvention of access control technologies employed by or on behalf of copyright owners to protect their works. Specifically, new subsection 1201(a)(1)(A) provides, *inter alia*, that "No person shall circumvent a technological measure that effectively controls access to a work protected under this title." Congress found it appropriate to modify the prohibition to assure that the public will have continued ability to engage in noninfringing uses of copyrighted works, such as fair use. See the Report of the House Committee on Commerce on the Digital Millennium Copyright Act of 1998, H.R. Rep. No. 105-551, pt. 2, at 36 (1998) (hereinafter *Commerce Comm. Report*). Subparagraph (B) limits this prohibition. It provides that the prohibition against circumvention "shall not apply to persons who are users of a copyrighted work which is in a particular class of works, if such persons are, or are likely to be in the succeeding 3-year period, adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works under this title" as determined in this rulemaking. This prohibition on circumvention becomes effective on October 28, 2000, two years after the date of enactment of the DMCA.

During the 2-year period between the enactment and the effective date of the provision, the Librarian of Congress must make a determination as to classes of works exempted from the prohibition. This determination is to be made upon the recommendation of the Register of Copyrights in a rulemaking proceeding. The determination thus made will remain in effect during the succeeding three years. In making her recommendation, the Register of Copyrights is to consult with the Assistant Secretary for Communications and Information of the

¹ The treaties were adopted on December 20, 1996 at a World Intellectual Property Organization (WIPO) Diplomatic Conference on Certain Copyright and Neighboring Rights Questions. The United States ratified the treaties in September, 1999. The treaties will go into effect after 30 instruments of ratification or accession by States have been deposited with the Director General of WIPO.

Department of Commerce and report and comment on the Assistant Secretary's views. 17 U.S.C. 1201(a)(1)(C).

A more complete explanation of the development of the legislative requirements is set out in the Notice of Inquiry published on November 24, 1999, 64 FR 66139, and is also available on the Copyright Office's website at: www.loc.gov/copyright/1201/anticirc.html. See also the discussion in section III.A. below.

B. Responsibilities of Register of Copyrights and Librarian of Congress

The prohibition against circumvention is subject to delayed implementation in order to permit a determination whether users of particular classes of copyrighted works are likely to be adversely affected by the prohibition in their ability to make noninfringing uses. By October 28, 2000, upon the recommendation of the Register of Copyrights in a rulemaking proceeding, the Librarian of Congress must determine whether to exempt certain classes of works (which he must identify) from the application of the prohibition against circumvention during the next three years because of such adverse effects.

The Register was directed to conduct a rulemaking proceeding, soliciting public comment and consulting with the Assistant Secretary of Commerce for Communications and Information, and then to make a recommendation to the Librarian, who must make a determination whether any classes of copyrighted works should be exempt from the statutory prohibition against circumvention during the three years commencing on that date.

The primary responsibility of the Register and the Librarian in this respect is to assess whether the implementation of technological protection measures that effectively control access to copyrighted works (hereinafter "access control measures") is diminishing the ability of individuals to use copyrighted works in ways that are otherwise lawful. Commerce Comm. Report, at 37. As examples of technological protection measures in effect today, the Commerce Committee offered the use of "password codes" to control authorized access to computer programs and encryption or scrambling of cable programming, videocassettes, and CD-ROMs. *Id.*

The prohibition becomes effective on October 28, 2000, and any exemptions to that prohibition must be in place by that time. Although it is difficult to measure the effect of a future prohibition, Congress intended that the Register solicit input that would enable consideration of a broad range of current or likely future adverse impacts. The nature of the inquiry is delineated in the statutory areas to be examined, as set forth in section 1201(a)(1)(C):

- (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.

II. Solicitation of Public Comments and Hearings

On November 24, 1999, the Office initiated the rulemaking procedure with publication of a Notice of Inquiry. 64 FR 66139. The Notice of Inquiry requested written comments from all interested parties, including representatives of copyright owners, educational institutions, libraries and archives, scholars, researchers and members of the public. The Office devoted a great deal of attention in this Notice to setting out the legislative parameters and developing questions related to the criteria Congress had established. The Office was determined to make the comments it received available immediately in order to elicit a broad range of public comment; therefore, it stated a preference for submission of comments in certain electronic formats. *Id.* In response to some commenters' views that the formats permitted were not sufficient, the Office expanded the list of formats in which comments could be submitted. 65 FR 6573 (February 10, 2000). In the same document, the Office extended the comment period: comments would be due by February 17, 2000 and reply comments by March 20, 2000. On March 17, the Office extended the reply comment period to March 31; scheduled hearings to take place in Washington, DC on May 2-4 and in Palo Alto, California, at Stanford University on May 18-19; and set a June 23, 2000 deadline for submission of post-hearing comments. 65 FR 14505 (March 17, 2000). All of these notices were published not only in the **Federal Register**, but also on the Office's website.

In response to the Notice of Inquiry, the Office received 235 initial comments and 129 reply comments. Thirty-four witnesses representing over 50 groups testified at five days of hearings held in either Washington, DC or Palo Alto, California. The Office placed all initial comments, reply comments, optional written statements of the witnesses and the transcripts of the two hearings on its website shortly after their receipt. Following the hearings, the Office received 28 post-hearing comments, which were also posted on the website. All of these commenters and witnesses are identified in the indexes that appear on the Office's website.

The comments received represent a broad perspective of views ranging from representatives or individuals who urged there should be broad exemptions to those who opposed any exemption; they also included a number of comments about various other aspects of the Digital Millennium Copyright Act. The

Copyright Office has now exhaustively reviewed and analyzed the entire record, including all of the comments and the transcripts of the hearings in order to determine whether any class of copyrighted works should be exempt from the prohibition against circumvention during the next three years.²

III. Discussion

A. *The Purpose and Focus of the Rulemaking*

1. Purpose of the Rulemaking

As originally reported out of the Senate Judiciary Committee on May 11, 1998, S. Rep. No. 105-190 (1998), and the House Judiciary Committee on May 22, 1998, H.R. Rep. No. 105-551, pt. I (1998), section 1201(a)(1) consisted of only one sentence—what is now the first sentence of section 1201(a)(1): “No person shall circumvent a technological measure that effectively controls access to a work protected under this title.” Section 1201(a)(2), like the provision finally enacted, prohibited the manufacture, importation, offering to the public, providing or otherwise trafficking in any technology, product, service, device, or component to circumvent access control measures. Section 1201(a) thus addressed “access control” measures, prohibiting both the conduct of circumventing those measures and devices that circumvent them. Thus, section 1201(a) prohibits both the conduct of circumventing access control measures and trafficking in products, services and devices that circumvent access control measures.

In addition to section 1201(a)(1)’s prohibition on circumvention of access control measures, section 1201 also addressed circumvention of a different type of technological measure. Section 1201(b), in the versions originally reported by the House and Senate Judiciary Committees and in the statute finally enacted, prohibited the manufacture, importation, offering to the public, providing or otherwise trafficking in any technology, product, service, device, or component to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under title 17 in a copyrighted work. The type of technological measure addressed in section 1201(b) includes copy-control measures and other measures that control uses of works that would infringe the exclusive rights of the copyright owner. They will frequently be referred to herein as copy controls. But unlike section 1201(a), which prohibits both the conduct of circumvention and devices that circumvent, section 1201(b) does not prohibit

² In referring to the comments and hearing materials, the Office will use the following abbreviations: C-Comment, R-Reply Comment, PH-Post Hearing Comments, T + speaker and date—Transcript (ex. “T Laura Gasaway, 5/18/00”) and WS + speaker—Written statements (ex. “WS Vaidhyathan”). Citations to page numbers in hearing transcripts are to the hard copy transcripts at the Copyright Office. For the hearings in Washington, DC, the pagination of those transcripts differs from the pagination of the versions of the transcript available on the Copyright Office website.