

NEW RULES FOR A NEW DECADE: IMPROVING THE COPYRIGHT OFFICE'S ANTI-CIRCUMVENTION RULEMAKINGS

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In 2013, over 100,000 Americans petitioned their government to make an important policy change. Their request was not to legalize marijuana,¹ to strengthen gun control laws,² or even to build a new Death Star.³ Instead, the petition requested reversal of an administrative decision by the U.S. Copyright Office made under an obscure provision of the Digital Millennium Copyright Act (“DMCA”).⁴ Though issues of copyright rarely garner the level of public attention that larger populist issues do, a significant number of Americans expressed concern that federal copyright law, intended to protect the creative works of artists, was being used to prevent American consumers from using legally-purchased cell phones on mobile networks of their choosing.⁵

Since the passage of the DMCA in 1998, every three years the Copyright Office has conducted a rulemaking to determine what classes of copyrighted works, if any, should be exempted from the DMCA’s prohibition on circumvention of technological protection measures.⁶ Five times the

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1. See Gil Kerlikowse, *What We Have to Say About Legalizing Marijuana*, WE THE PEOPLE, <https://petitions.whitehouse.gov/response/what-we-have-say-about-legalizing-marijuana> (last visited Mar. 28, 2014) (responding to eight petitions, including one with 74,169 signatures).

2. See Bruce Reed, *A Message from President Obama about Your Petition on Reducing Gun Violence*, WE THE PEOPLE, <http://petitions.whitehouse.gov/response/message-president-obama-about-your-petition-reducing-gun-violence> (last visited Mar. 29, 2014) (responding to thirty-three separate petitions about changing gun control laws).

3. See *Secure resources and funding, and begin construction of a Death Star by 2016*, WE THE PEOPLE (Nov. 14, 2012), <https://petitions.whitehouse.gov/petition/secure-resources-and-funding-and-begin-construction-death-star-2016/wlfKzFkN>.

4. *Make Unlocking Cell Phones Legal*, WE THE PEOPLE, <https://petitions.whitehouse.gov/petition/make-unlocking-cell-phones-legal/1g9KhZG7> (Jan. 24, 2012) (requesting reversal of the Librarian of Congress’s decision to remove cell phone unlocking from the list of DMCA anti-circumvention exemptions).

5. See *id.*

6. See 17 U.S.C. § 1201(a)(1)(B)–(C) (2012) (directing the Librarian of Congress to grant exemptions following a triennial rulemaking conducted by the Register of Copyrights).

Copyright Office has gathered input from copyright owners and other parties to determine what exemptions to recommend,⁷ but no exemption stirred a public outcry until 2012. In the most recent rulemaking, the Librarian of Congress declined to renew an exemption that permitted consumers to unlock their cell phones for use on other wireless networks.⁸ Despite the rulemaking process being intended to act as a “fail-safe” protecting the right of consumers to make legal use of copyrighted works,⁹ the rulemaking landed on an outcome that sparked concerns from both the public and the White House that a legitimate activity was being outlawed.¹⁰ Such a response raises the question as to whether the rulemaking process is fulfilling its intended role, and what, if any, lessons can be learned from over a decade of experience with this process.

This Note discusses trends in the Copyright Office’s anti-circumvention rulings and suggests changes that incorporate lessons gained from over a decade of experience with the process. Part I describes the legislative origins of the rulemaking process in the DMCA and its later implementation, with a focus on larger trends and themes of the anti-circumvention rulemakings through 2009. Part II reviews the recent 2012 rulemaking, selecting a few examples to illustrate some issues with the rulemaking process with a particular emphasis on the controversial denial of the cell phone unlocking exemption. Part III identifies three main areas of concern and suggests changes to the rulemaking process that would address those concerns while more clearly aligning the rulemaking with Congress’s intended goals. Part IV concludes.

I. BACKGROUND

When the Copyright Office has conducted rulemakings under the DMCA, it has frequently cited the intent of Congress to justify its decisions and define the scope of its authority. Understanding those arguments requires a clear idea of how the DMCA was drafted and its provisions

7. The specifics of this process are discussed *infra* Section I.A.

8. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65,260, 65,278 (Oct. 26, 2012) (to be codified at 37 C.F.R. pt. 201).

9. The House Commerce Committee, which added the rulemaking process to the DMCA, described the process as a “fail-safe” mechanism to protect against threats to lawful use of copyrighted works. H.R. REP. NO. 105-551, pt. 2, at 36 (1998) [hereinafter Commerce Comm. Report].

10. R. David Edelman, *It's Time to Legalize Cell Phone Unlocking*, WE THE PEOPLE, <https://petitions.whitehouse.gov/response/its-time-legalize-cell-phone-unlocking> (last visited Mar. 28, 2012).

finalized. As with many major laws, the DMCA was the result of numerous compromises and intense lobbying pressure, and the final text left a legacy of confusion and ambiguity for the Copyright Office to parse through.

A. THE BIRTH OF THE DMCA

In the early 1990s, the Clinton administration formed a task force to analyze the early Internet, with a focus on whether commercial interests would be willing to provide content on the Internet to consumers.¹¹ The head of the Patent and Trademark Office, Bruce Lehman, was tapped to lead a working group on the issue, and the group produced a white paper recommending, among other things, that Congress prohibit the manufacture of tools that would help individuals circumvent technological protections of copyrighted works.¹² Although the White Paper characterized its recommendations as small changes consistent with existing law,¹³ there was strong public debate and pushback against the ideas it presented.¹⁴ As Congress considered the White Paper's proposed legislative changes, the United States attended a 1996 conference for the World Intellectual Property Organization ("WIPO"), where attendees approved a treaty committing to provide legal protection against "circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention."¹⁵ To bring the country

11. JESSICA LITMAN, *DIGITAL COPYRIGHT 90* (2006). For a thorough discussion of the events leading up to the DMCA, see *id.* at 89–96. Professor Litman has described early conceptualizations of the Internet as a form of more interactive cable television programming. *Id.* at 89–90.

12. INFO. INFRASTRUCTURE TASK FORCE, *INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 230–34* (1995) [hereinafter *Lehman White Paper*].

13. See *id.* at 233–34 (suggesting its recommendations were "not unprecedented"). But see LITMAN, *supra* note 11, at 96 (characterizing the Lehman White Paper's description of copyright law as "dubious" and noting strong criticism by copyright scholars).

14. See, e.g., Denise Caruso, *The prospect of Internet censorship raises troubling issues for business*, N.Y. TIMES (Dec. 18, 1995), <http://www.nytimes.com/1995/12/18/business/technology-digital-commerce-prospect-internet-censorship-raises-troubling-issues.html> (expressing concerns the law "could create restrictions on free speech that are as sweeping as they are vague"); Pamela Samuelson, *The Copyright Grab*, WIRED, Jan. 2006, available at <http://www.wired.com/wired/archive/4.01/white.paper.html> (describing the law as an attempt by publishers to control all private uses of copyrighted works).

15. WIPO Copyright Treaty art. 11, Dec. 20, 1996, 2186 U.N.T.S. 121 available at http://www.wipo.int/export/sites/www/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf (last visited Sept. 28, 2013). Bruce Lehman, attending the conference, advocated for the language despite being warned by Senator Orrin Hatch not to push for changes when Congress was debating the ideas from the White Paper. JONATHAN BAND & MASANOBU KATOH, *INTERFACES ON TRIAL 2.0* 78 (2010).

into compliance with its treaty obligations, Senator Orrin Hatch introduced a bill the following summer.¹⁶

That bill, which would later become known as the Digital Millennium Copyright Act (“DMCA”), arguably went further than the WIPO treaty required, prohibiting circumvention of technological protections to gain access to a work, as well as prohibiting the manufacture or distribution of tools that would enable such circumvention.¹⁷ Although the Senate quickly passed the original draft bill with little debate,¹⁸ a collection of academics, consumer advocates, and members of the technology industries called the Digital Future Coalition (“DFC”) lobbied the House of Representatives to make changes to the circumvention language, concerned that the bill as drafted would inhibit fair use and cover drastically more situations than intended by its authors.¹⁹ Concerned that the House Judiciary Committee would be dismissive of their concerns, the DFC successfully convinced the leadership of the House Commerce Committee to take authority over marking up the bill.²⁰ Presumably the House Commerce Committee, which interacted with technology manufacturers and was less closely tied to the entertainment industry, would be more receptive to their concerns than the Judiciary Committee.

The Commerce Committee was concerned about whether fair use would still apply to circumvention and allow consumers to circumvent for otherwise lawful uses of copyrighted works.²¹ Although representatives of copyright industries insisted that fair use would not be undermined by the circumvention ban, they also were opposed to adding an explicit fair use privilege into the legislation, claiming such a privilege would provide a “roadmap” for circumvention services.²² Eventually, a compromise was reached where the phrase “fair use” would not appear in the section of the DMCA prohibition and the Department of Commerce would be tasked with promulgating regulations allowing exemptions for individuals.²³ Though circumvention would be generally prohibited, the Department of Commerce

16. 143 CONG. REC. 17,262 (1997).

17. See LITMAN, *supra* note 11, at 133–34.

18. See *id.* at 136–37.

19. See *id.* at 122–45 (discussing the background of the DFC and its role in the DMCA’s legislative path).

20. *Id.* at 137.

21. *Id.* at 138.

22. See *Copyright Treaties Implementation Act: Hearing on H.R. 2281 Before the Subcomm. on Telecomm., Trade and Consumer Protection of the H. Comm. on Commerce*, 105th Cong. 57 (1998) (testimony of Steven J. Metalitz, Motion Picture Association of America).

23. See LITMAN, *supra* note 11, at 140–41 (“The compromise on fair use nowhere mentioned the phrase ‘fair use.’”).

would conduct studies every two years identifying the negative impact of the ban on consumers, and the Department could identify classes of copyrighted works for which circumvention by individuals would be permitted.²⁴ Later, when the House and Senate reconciled their different versions of the bill, the process was changed to a rulemaking run every three years by the Copyright Office.²⁵ The Copyright Office would take input from the Department of Commerce and members of the public before the Register of Copyrights recommended exemptions to the Librarian of Congress, who would make the final decision about which classes of copyrighted works were exempt from the ban on individual circumvention.²⁶ With only a few weeks remaining in the congressional session, the legislators were focused on ensuring that *something* passed, making a number of last-minute deals and changes to ensure that happened.²⁷

Though much effort and time had been spent debating the impact of the circumvention ban on consumers, the statutory language in the DMCA § 1201 discussing the rulemaking process was relatively brief:

(C) During the 2-year period described in subparagraph (A), and during each succeeding 3-year period, the Librarian of Congress, upon the recommendation of the Register of Copyrights, who shall consult with the Assistant Secretary for Communications and Information of the Department of Commerce and report and comment on his or her views in making such recommendation, shall make the determination in a rulemaking proceeding for purposes of subparagraph (B) of whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition under subparagraph (A) in their ability to make noninfringing uses under this title of a particular class of copyrighted works. In conducting such rulemaking, the Librarian shall examine—

- (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;

24. *See id.* at 141.

25. *See id.* at 143–44.

26. *See id.* at 144.

27. *See id.* at 142–43.

- (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.²⁸

The statute directs the Librarian of Congress to examine the impact of the ban on “noninfringing use,” but no specific mention is made of fair use in the text.²⁹ It provides no details as to how to conduct the rulemaking, the weight to be given to the Department of Commerce’s input, or how to define a “particular class of copyrighted works” for exemption.

After fighting for over a year to limit the potential harm to consumers posed by the bill, activists like the Digital Future Coalition (“DFC”) had only been able to extract “modest concessions” rather than the sweeping changes they hoped.³⁰ The rulemaking only offered the opportunity (but not certainty) to mitigate excessive harm from the circumvention ban. One founder of the DFC privately doubted whether the large, multiyear effort had ultimately been worth the few concessions they had won.³¹

B. TRENDS IN EARLY RULEMAKINGS: FROM HARSH TO FLEXIBLE

With so little statutory direction for the rulemaking, a number of questions remained to be resolved by the Copyright Office. In early rulemakings, the Copyright Office took a conservative approach to conducting its role, but its approach grew more flexible over time. The Office had the hard task of wrestling with a complicated law full of inconsistencies.³² Particularly difficult questions were the necessary showing of harm to justify an exemption and the definition of a class of works.

1. *Standard of Harm*

One of the first difficulties the Copyright Office encountered was defining the requisite evidence of harm necessary to justify granting an

28. 17 U.S.C. § 1201(a)(1)(C) (2012).

29. *Id.*

30. See LITMAN, *supra* note 11, at 145 (arguing that the deal amounted to “sell[ing] the public short”).

31. Mark Gray, A “Causal Nexus of Harm”: DMCA Circumvention and Rulemaking 26–27 (Apr. 5, 2011) (unpublished A.B. thesis, Princeton University) (on file with Mudd Library, Princeton University).

32. For a criticism of the DMCA’s coherence, reality, and breadth, see David Nimmer, *Codifying Copyright Comprehensibly*, 51 UCLA L. REV. 1233, 1342–44, 1370–81 (2003). Professor Nimmer has criticized the DMCA rulemaking provision as leaving copyright law “in shambles” and expressed concern that § 1201’s circumvention ban, as written, allows copyright law to become “an all-encompassing monstrosity” by expanding into areas previously untouched by copyright. *Id.* at 1342, 1374.

exemption. In the first rulemaking, the Register denied recommendation of most proposed exemptions because she interpreted the statute to require a showing of “substantial adverse impact” on noninfringing use of copyrighted works.³³ The statute does not use the phrase “substantial” harm, but the Register supported her reading by citing the House Commerce Committee’s report, which stated both that the circumvention ban was presumed to apply unless the harm criteria were met and that the rulemaking should focus on “distinct, verifiable, and measurable impacts” rather than *de minimis* harm.³⁴ Reading the statute to require a showing of “substantial” harm was a controversial decision, and the Department of Commerce, in its advisory capacity, pushed back on such an interpretation as lacking any statutory basis for adding a “significant new term” to the statute.³⁵

The Register later clarified in 2003 that she had not intended to set a higher burden of proof, but given what she called the “undue alarm” expressed by members of the public and the Department of Commerce, she clarified the term to require evidence of “distinct, verifiable” harm to meet the burden of proof.³⁶ There have still been instances where parties have criticized the Register as requiring an unnecessarily high burden of proof,³⁷

33. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64,556, 64,558 (Oct. 27, 2000) (codified at 37 C.F.R. pt. 201) [hereinafter 2000 Exemption].

34. *Id.* at 64,558 (citing Commerce Comm. Report, *supra* note 9, at 37).

35. Letter from Nancy Victory, National Telecommunications and Information Administration, to Marybeth Peters, Register of Copyrights (Aug. 11, 2003), *available at* <http://www.ntia.doc.gov/other-publication/2003/ntia-letter-register-copyrights-regarding-dmca>.

36. MARYBETH PETERS, REGISTER OF COPYRIGHTS, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS IN RM 2002-3; RULEMAKING ON EXEMPTIONS FROM PROHIBITION OF CIRCUMVENTION OF COPYRIGHT PROTECTION SYSTEMS FOR ACCESS CONTROL 16–18 (2003), *available at* <http://www.copyright.gov/1201/docs/registers-recommendation.pdf> [hereinafter 2003 Recommendation] (citing Webster’s Dictionary). The Register clarified that her use of substantial was meant as the opposite of “insubstantial,” using the word because it appeared in a report from the House Manager. *Id.* at 16. However, commenters have questioned the value of the House Manager’s report because it was written after passage of the DMCA draft by the House and was heavily influenced by the Judiciary Committee, which wanted stricter standards than the Commerce Committee (likely out of irritation with their role over copyright being usurped). *See* Bill Herman & Oscar 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) (characterizing use of the House Manager’s Report as foreshadowing her “eagerness” to construct a high standard of proof).

37. *See, e.g., id.* at 172–74 (citing a proposal in 2003 rejected for lack of “substantial” harm despite making a legitimate argument about expense to consumers); FRED VON LOHMANN & GWEN HINZE, ELECTRONIC FRONTIER FOUNDATION, DMCA TRIENNIAL RULEMAKING: FAILING THE DIGITAL CONSUMER 4–6 (2005), *available at* https://www.eff.org/files/filenode/DMCA_rulemaking_broken.pdf (citing examples of the

but there is evidence that, at least for some exemptions, she has required a lower burden of harm to consumers when the harm to copyright owners is little.³⁸

2. *Defining a “Class of Works”*

Although the Copyright Act defines “categories” of copyrighted works, such as audio-visual works and literary works, Congress failed to define what a “class of works” encompassed when writing the DMCA and directing the Librarian to grant exemptions based on them. In the first rulemaking, the Register described the scope of a “class of works” as a “key issue” on which she sought public input.³⁹ A number of submissions called for the definition of “class” to be “function-based”—to incorporate the intended use of the work when deciding if an exemption was proper.⁴⁰ However, the Register did not believe the Librarian could incorporate “external criteria” such as the intended use of a work into the definition of a class, citing the Commerce Committee, which intended the term to encompass a narrow subset of the broader categories of copyrighted works.⁴¹ Under this interpretation, the Register denied recommending many submitted exemptions in 2000 because they were based on the intended use of the work.⁴² Similarly, in 2003, the Register declined to recommend a number of exemptions such as circumvention for “fair use works,”⁴³ circumvention necessary for conducting a “legitimate research project,”⁴⁴ and circumvention for reverse engineering for interoperability.⁴⁵

In 2006, the Register reevaluated her stance on use-based classes in light of a proposed exemption for film studies professors wishing to make

Register dismissing costs and impediments to consumers as “mere inconveniences” rather than sufficient harm to justify an exemption).

38. In 2009, the Register permitted an exemption allowing consumers to “jailbreak” their smartphones to run third-party software on them, despite having rejected a previous exemption allowing “jailbreaking” of video game consoles for the same purpose. Elizabeth Jackson, *The Copyright Office's Protection of Fair Uses Under the DMCA: Why the Rulemaking Proceedings Might Be Unsustainable and Solutions for Their Survival*, 58 J. COPYRIGHT SOC'Y U.S.A. 521, 540 (2011).

39. 2000 Exemption, *supra* note 33, at 64,559.

40. *Id.*

41. *Id.* at 64,559–60 (citing Commerce Comm. Report, *supra* note 9, at 38).

42. *Id.* at 64,562.

43. 2003 Recommendation, *supra* note 36, at 84.

44. *Id.* at 86–88.

45. *Id.* at 182–83. The Register based her rejection of this exemption on the belief that the DMCA allowed the reverse engineering desired by the proponents and that the Librarian was not authorized to further reshape an area where Congress had carefully constructed a solution. *Id.*

educational use of DVDs in the classroom. Three media studies professors from the University of Pennsylvania proposed an exemption for “[a]udiovisual works included in the educational library of a college or university’s film or media studies department and that are protected by technological measures that prevent their educational use.”⁴⁶ Media studies professors often use clips of multiple movies in class, which requires either manually swapping DVDs or breaking DVD encryption to create clips for convenient classroom use.⁴⁷ The professors’ submission cited examples of professors who were forced to either lose ten percent of class time for “meaningless DVD juggling” or knowingly violate Section 1201’s ban.⁴⁸ The motion picture industry vigorously objected to the proposed exemption, spending considerable time at a public hearing arguing that a propped-up camcorder pointed at a television screen was good enough for the professors and an exemption was unnecessary because the professors were not entitled to the “optimum” method of making their use.⁴⁹ Ultimately, the Register determined that the exemption should be granted, which meant changing how the Office defined a “class of works.”⁵⁰

The Register, confronted with clear evidence of a legitimate noninfringing use that would otherwise be prevented by the DMCA, was

46. Comments of Peter Decherney, Assistant Professor at the University of Pennsylvania’s Cinema Studies Program, Michael Delli Carpini, Professor & Annenberg Dean, & Katherine Sender, Assistant Professor at the University of Pennsylvania’s Annenberg School of Communication, *In re* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies at 1, No. RM 2005-11 (U.S. Copyright Office 2005), *available at* http://www.copyright.gov/1201/2006/comments/decherney_upenn.pdf [hereinafter Decherney Proposal]. Presumably, the exemption added the location of the works as a way to avoid incorporating the use, as required by the Register in previous rulemakings, while achieving a similar limiting function to maximize the chance of success. In the eyes of the professors, nobody had previously made the argument for such an exemption properly, and they could uniquely make a case because of the need for high-quality digital media in a media studies class. *See* Gray, *supra* note 31, at 76.

47. Decherney Proposal, *supra* note 46, at 1–2.

48. *Id.* at 5, 8–9.

49. *See* Transcript of Public Hearing on Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies at 56–59, No. RM 2005-11A (U.S. Copyright Office Apr. 3, 2006), *available at* <http://www.copyright.gov/1201/2006/hearings/transcript-april03.pdf>.

50. MARYBETH PETERS, REGISTER OF COPYRIGHTS, 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 15 (Nov. 17, 2006), *available at* http://www.copyright.gov/1201/docs/1201_recommendation.pdf [hereinafter 2006 Recommendation] (“Critical to the recommendation in support of an exemption, however, is a clarification of the interpretation of the proper scope of what may be a ‘class of works.’”).

willing to incorporate an intended use into the “class of works” exempted from § 1201’s circumvention ban.⁵¹ Turning to the statute, the Register noted that it directed that exemptions would prevent the circumvention ban from applying to “such users,” who were harmed in making noninfringing use, implying that the exemption could incorporate use.⁵² This new interpretation would also permit exemptions to be narrower in scope, addressing the Register’s frequent concern that exemptions would be unnecessarily broad and exceed the authority granted to the Copyright Office.⁵³ Ultimately, the Register recommended an exemption for “[a]udiovisual works included in the educational library of a college or university’s film or media studies department, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by media studies or film professors,” which incorporated both a locational restriction (the works must be owned by a film studies department) and a use-based restriction (for purposes of educational use by a specific category of professors).⁵⁴

Since 2006, the Copyright Office has relied heavily on use-based limitations to narrow exemptions. Of the six exemptions recommended in 2006, four incorporated an intended use.⁵⁵ In the 2009 rulemaking, the Register went further in relying on use to modify exemptions, particularly in her modification of a proposed DVD exemption.⁵⁶ Whereas the 2006

51. *Id.* at 16–17. The Register considered her earlier conclusion “reasonable in light of the record,” but the factual record presented by the professors was sufficient to change her mind. *Id.*

52. *Id.* at 18.

53. *See id.* at 19 (noting that in some cases “failing to specify the use or users for whom the exemption was found to be warranted would result in an unnecessarily broad exemption”). The hesitance of the Copyright Office to go beyond the scope of its authority has been a common feature of the various rulemakings. Although the Copyright Office is rightly concerned about respecting the limits of its statutory authority, it may also be concerned that overly aggressive action could result in a push by aggrieved parties to consolidate its functions into another executive agency. *Cf.* LITMAN, *supra* note 11, at 74 (mentioning the Copyright Office’s reliance on the copyright bar to protect it from legislative influence); *see also* Pamela Samuelson, *Will the Copyright Office Be Obsolete in the Twenty-First Century*, 13 CARDOZO ARTS & ENT. L.J. 55, 61–64 (1994) (discussing the possibility of the Patent and Trademark Office taking over the functions of the Copyright Office).

54. 2006 Recommendation, *supra* note 50, at 24.

55. *See id.* at 1–2 (recommending exemptions “for the purpose of” education, archival reproduction, lawfully connecting to cell phone networks, and good faith security testing).

56. *See* MARYBETH PETERS, 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

exemption was narrowed by both location and use,⁵⁷ the Register recommended a far broader exemption for audiovisual works encompassing three main uses: educational use by college professors and students, documentary filmmaking, and noncommercial videos.⁵⁸ This was a significantly more expansive exemption than that in the previous round, changing the strict limits of the older exemption and permitting three broad use types.⁵⁹ One commenter has suggested this was a natural reaction to the Copyright Office's greater focus on users.⁶⁰ Perhaps more surprisingly, users who wanted to make use of the exemption could do so as long as they "believe[d] and ha[d] reasonable grounds for believing that circumvention is necessary,"⁶¹ a major change from the narrower exemptions from earlier rulemakings. After the 2009 rulemaking, there was room for optimism within the copyright community that the rulemakings would be an effective process to address fair use concerns for consumers beyond the seemingly harsh statutory language embedded in the DMCA.

II. RECENT RULEMAKING UPDATE

In December 2010, the Register of Copyrights, Marybeth Peters, stepped down and was replaced by Maria Pallante.⁶² Register Peters served as Register for over fifteen years, stepping down shortly after the final 2010 rulemaking.⁶³ When Register Pallante stepped into her post, it remained to be seen how she would differ or align with the decisions of her predecessor when handling the numerous issues touched upon during the rulemaking process.

CONTROL TECHNOLOGIES 72 (June 11, 2010), *available at* <http://www.copyright.gov/1201/2010/initialed-registers-recommendation-june-11-2010.pdf> [hereinafter 2010 Recommendation].

57. As mentioned *supra*, the requirement that a work be both used specifically by a film studies professor *and* reside in a university's media studies library would imply that if a professor in another field (such as music) wished to circumvent a DVD, or if the DVD to be utilized was a personal copy or stored at the university's main library, that would still be illegal under DMCA § 1201(a). *See* 2006 Recommendation, *supra* note 50, at 24.

58. 2010 Recommendation, *supra* note 56, at 21–22.

59. For example, permitting circumvention for "noncommercial video" is very broad, considering that in 2006 only a professor in a specific department would be permitted to circumvent. *See supra* note 57.

60. *See* Jackson, *supra* note 38, at 539.

61. *See* 2010 Recommendation, *supra* note 56, at 21.

62. *See* Marybeth Peters, 1994–2010, U.S. COPYRIGHT OFFICE (Jan. 27, 2014), <http://www.copyright.gov/history/bios/peters/peters.html>.

63. *Id.*

A. A NEW RULEMAKING RAISES NEW PROBLEMS

In the most recent rulemaking, the new Register took a somewhat different approach. Register Pallante was more cautious than her predecessor, differing in her handling of the definition of a “class of works,” as well as the standard of harm necessary to justify an exemption. The Register’s more conservative approach to recommending exemptions differed from the increasingly liberal decisions of previous rulemakings, which may have been a factor in the later public uproar over denial of an exemption for cell phone unlocking.

Though the Copyright Office had taken major steps in defining a “class of works,” in absence of guidance from Congress, the Register chose not to build further on that interpretation, instead denying a proposed exemption out of discomfort with defining a class. As in previous rulemakings, the Register incorporated intended use into the classes of works recommended for exemption, incorporating use into every recommended exemption.⁶⁴ However, when faced with a request to expand a previously granted exemption for jailbreaking to tablet devices, the Register refused to do so, stating that the term “tablet” was too “ill defined” and could potentially cover anything from iPads to laptops.⁶⁵ Despite acknowledging the similarity between tablets and mobile phones, which were again granted an exemption for jailbreaking in 2012, the Register denied creating any exemption for tablet devices, declining to further modify the proposal to make it sufficiently narrow to comply with Congress’s intent.⁶⁶ However, when discussing a

64. See MARIA PALLANTE, REGISTER OF COPYRIGHTS, SECTION 1201 RULEMAKING: FIFTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS 2–3 (Oct. 12, 2012), available at http://www.copyright.gov/1201/2012/Section_1201_Rulemaking%202012_Recommendation.pdf [hereinafter 2012 Recommendation] (recommending exemptions to permit the blind to use screen readers, to enable smartphones to run third-party software, and to conduct research for designing systems that allow blind or deaf consumers to enjoy audiovisual works).

65. *Id.* at 78. “Jailbreaking” allows third party applications to run on a restricted device, for example, installing applications on an iPhone that are not downloaded from Apple’s App Store. See Mike Keller, *Geek 101: What Is Jailbreaking?* PC WORLD (Feb. 13, 2012), http://www.techhive.com/article/249091/geek_101_what_is_jailbreaking.html.

66. 2012 Recommendation, *supra* note 64, at 78. When faced with a similar issue in past rulemakings, Register Peters simply added modifications she thought necessary to comply with the Copyright Office’s authority, such as when she added a use-based restriction on top of a location restriction to 2006’s film studies exemption. See 2006 Recommendation, *supra* note 50, at 19–24. Register Peters was motivated in part to ensure the exemption clearly identified the intended beneficiary, and her discussion of the locational restriction implies that keeping it made the rulemaking analysis more favorable because of the additional narrowing. *Id.* at 19–20.

proposed exemption for the blind to utilize screen readers, Register Pallante was willing to narrow the class of works by adding a stipulation that publishers be compensated when appropriate for regular commercial copies of the book,⁶⁷ an initiative not taken for the tablet question. This may have been because of the additional layers of complication in defining tablets or perhaps it was simply more politically difficult to deny an exemption to the blind than tablet owners.

Additionally, Register Pallante required a different showing of harm to merit an exemption than previous rulemakings. In 2010, Register Peters renewed an exemption allowing users to unlock their cell phones for legal use on other mobile networks, satisfied that consumers were substantially harmed because they required circumvention to switch mobile providers while keeping their own phones.⁶⁸ Register Pallante, looking at the facts again in 2012, instead said that consumers were not adversely impacted because more phones were being sold already unlocked; in other words, while consumers may not be able to change networks with their chosen phone, the existence of “ample alternatives” meant that consumers were insufficiently harmed to justify an exemption.⁶⁹ Register Peters’s discussion in 2010 implied that consumers having to change their purchasing habits (such as by purchasing a new phone) was a sufficient adverse impact to justify an exemption,⁷⁰ yet in 2012 Register Pallante did not go so far.⁷¹ Instead,

67. 2012 Recommendation, *supra* note 64, at 23–24.

68. *See* 2010 Recommendation, *supra* note 56, at 116 (“The material submitted in this rulemaking shows that the locks have a substantial adverse affect on the use of the handset. Specifically, if a consumer wishes to switch wireless providers, but keep her phone, she would have to engage in a circumventing activity.”). Though the Register granted an exemption for unlocking in 2006, there was very little record and analysis because the wireless industry ignored the proceedings until after the submission deadline, resulting in the Register discarding their submitted arguments and recommending the exemption based on a rich, unopposed record for the proponents. *See* 2006 Recommendation, *supra* note 50, at 42–48 (discussing the late of submissions from the wireless industry). The Register’s harsh tone may indicate a strong displeasure with the industry’s failure to engage in the rulemaking. *See id.* at 47 (“Not only would acceptance of the late filings wreak havoc on the decisionmaking process, but it also would be fundamentally unfair to the parties who have made timely submissions, and in particular to the proponents of the exemption.”). Furthermore, the analysis of the unlocking exemption in 2010 was far richer, comprising seventy of the 262 pages in the Register’s report. *See* 2010 Recommendation, *supra* note 56, at 105–74.

69. 2012 Recommendation, *supra* note 64, at 95.

70. *See* 2010 Recommendation, *supra* note 56, at 116.

71. As mentioned before, dismissing consumer cost as “mere inconvenience” has been a criticism of the Copyright Office in the past. *See* VON LOHMANN & HINZE, *supra* note 37, at 4–7. Similarly, it echoes arguments by the motion picture industry that recording DVD content off a television screen was “good enough” for educators to obviate the need for an

Register Pallante only recommended the unlocking exemption apply to phones purchased within ninety days of the Librarian's decision going into effect so that owners of older phones, which were not available unlocked, could unlock those devices for use on other networks.⁷² The Librarian of Congress adopted the Register's recommendations without comment.⁷³

B. PUBLIC BACKLASH OVER CELL PHONE UNLOCKING

The decision to outlaw cell phone unlocking hit news outlets and generated a fair amount of public concern.⁷⁴ On the White House's page for citizen petitions, over 114,000 people signed a petition to overturn the Librarian of Congress's decision.⁷⁵ The White House Senior Advisor for Internet, Innovation, & Privacy replied on behalf of the Obama administration, saying that not only should consumers be allowed to unlock their cell phones without legal penalty, but consumers should also be able to unlock tablet devices.⁷⁶ The White House stated it planned to formally engage the Federal Communications Commission ("FCC") through the National Telecommunications and Information Administration ("NTIA") in the Department of Commerce.⁷⁷

Interestingly, the Copyright Office and Library of Congress issued a joint statement reacting to the Obama administration, reiterating the goals of the rulemaking process and the legal constraints placed on it by Congress: "As designed by Congress, the rulemaking serves a very important function, but it was not intended to be a substitute for deliberations of broader public policy."⁷⁸ The statement was panned by technology site Techdirt, which described the statement as "a bit disingenuous,"⁷⁹ given that the rulemaking

exemption. *See* 2006 Recommendation, *supra* note 50, at 14–15 (listing arguments by opponents of the media studies DVD exemption).

72. 2012 Recommendation, *supra* note 64, at 99–100.

73. *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65,260, 65,278 (Oct. 26, 2012) (to be codified at 37 C.F.R. pt. 201).

74. *See, e.g.*, Timothy B. Lee, *Jailbreaking now legal under DMCA for smartphones, but not tablets*, ARS TECHNICA (Oct. 25, 2012), <http://arstechnica.com/tech-policy/2012/10/jail-breaking-now-legal-under-dmca-for-smartphones-but-not-tablets/> (calling the ruling "arbitrary" and showing the "fundamental brokenness" of the DMCA).

75. *Make Unlocking Cell Phones Legal*, *supra* note 4.

76. Edelman, *supra* note 10.

77. *Id.*

78. *Statement from the Library of Congress Regarding White House Statement Today in Response to a Petition on Section 1201 Rulemaking*, LIBRARY OF CONGRESS (Mar. 4, 2013), <http://www.loc.gov/today/pr/2013/13-041.html>.

79. Mike Masnick, *Library of Congress Shoots Back at White House Over Phone Unlocking: We're Just Doing Our Job*, TECHDIRT (Mar. 5, 2013), <http://www.techdirt.com/>

was meant as a safety valve to problems with the DMCA and that the Librarian can consider “such other factors as the Librarian considers appropriate.”⁸⁰

Since then, a number of parties have tried to enable consumers to unlock their cell phones in a more permanent way. Multiple legislators have introduced bills in Congress to fix the issue, some completely revising the text of DMCA § 1201⁸¹ and others simply overriding the Librarian’s decision with regard to the cell phone unlocking exemption and directing a new rulemaking focused specifically on expanding an unlocking exemption to tablet devices.⁸²

On September 17, 2013, the NTIA formally petitioned the FCC to conduct a rulemaking that would add a new obligation of U.S. mobile carriers to unlock any device furnished by the carrier so that it could be used with other lawfully obtained mobile services.⁸³ Providing a summary of the DMCA rulemakings and the public response to the recent exemption, as well as offering a proposed rule for adoption, the NTIA made a strong case that such a rule would be in the public interest and would be well within the FCC’s statutory authority.⁸⁴ In December, CTIA-The Wireless Association,⁸⁵ a trade association for wireless providers, announced a voluntary set of principles for cell phone unlocking it had committed to adopt after pressure from the FCC.⁸⁶ The issue of cell phone unlocking, now removed from the

blog/wireless/articles/20130304/16271422195/librarian-congress-shoots-back-white-house-over-phone-unlocking-were-just-doing-our-job.shtml. Critics of the rulemaking process have noted that the Copyright Office has often cited its lack of power to avoid handling larger policy issues in the rulemakings, instead referring critics to Congress. *See* Herman & Gandy, *supra* note 36, at 177–81 (classifying this as the second most common argument made by the Register when denying exemptions).

80. 17 U.S.C. § 1201(a)(1)(C)(v) (2012).

81. *See* Unlocking Technology Act of 2013, H.R. 1892, 113th Cong. (2013).

82. *See* Unlocking Consumer Choice and Wireless Competition Act, S. 517, 113th Cong. (2013).

83. Petition for Rulemaking of the National Telecommunications and Information Administration, *In re* Amendment of Part 20 of the Comm’n’s Rules & Regulations to Require Certain Providers of Commercial Mobile Radio Servs. To Unlock Wireless Devices Upon Request (F.C.C. Sept. 17, 2013), *available at* http://www.ntia.doc.gov/files/ntia/publications/ntia_mobile_devices_unlocking_petition_09172013.pdf.

84. *Id.* at 13–16.

85. The organization’s name originally stood for the Cellular Telecommunications Industry Association, but CTIA has used its current name as an orphan initialism devoid since 2004. Amy Storey, “Is CTIA an Acronym?” CTIA BLOG (June 1, 2009), <http://blog.ctia.org/2009/06/01/is-ctia-an-acronym>.

86. Letter from Steve Largent, President of CTIA—The Wireless Association, to the F.C.C. (Dec. 12, 2013), *available at* <http://www.ctia.org/docs/default-source/fcc-filings/ctia-letter-on-unlocking.pdf>.

sphere of the Copyright Office, is active and progressing, despite its classification as presenting insufficient harm to consumers for purposes of the rulemaking.

C. IMPROVING THE PROCESS

Ultimately, the 2012 rulemaking has shown that the process still suffers from a lack of clarity. Ambiguity remains as to what constitutes sufficient harm to noninfringing use to justify an exemption, with the Copyright Office still requiring evidence of “substantial” harm and using the term in an unclear fashion. The way “classes of works” have been defined continues to result in confusion, with the Register declining to cover “tablet” devices out of concern the class would be defined too broadly. More generally, the public response to the cell phone unlocking decision illustrates that for a process set up specifically to safeguard noninfringing use, the rulemaking is failing to safeguard unobjectionable noninfringing uses, likely because of the growing complexity of the requirements set by the Copyright Office to successfully petition for an exemption.⁸⁷ The Copyright Office seems to add an additional layer of complication in each rulemaking, despite the fact that the rulemaking process has more value in setting norms than it does in making a concrete impact on legal liability.⁸⁸

The rulemaking could be and should be improved to better accomplish its intended function. The House Commerce Committee cannot have intended the rulemaking process to be so complex and uncertain as to negate its function—namely, protecting against unintended consequences of the DMCA’s circumvention ban. Although there have been countless calls for Congress to revise the DMCA,⁸⁹ it is unrealistic to expect Congress will

87. As the EFF has noted, the Copyright Office makes six requirements on proponents of exemptions that make participation difficult for members of the public without access to specialized copyright lawyers. See VON LOHMANN & HINZE, *supra* note 37, at 3. Even specialist organizations with that expertise regularly fail to gain exemptions because the harms to consumers are dismissed as “de minimis.” See *id.* at 3–4.

88. The rulemaking only affects the ban on individual circumvention, and the statute bars use of the rulemaking analysis as defense in any other legal action. 17 U.S.C. § 1201(a)(1)(E) (2012). Someone circumventing to jailbreak a smartphone could still be sued for direct infringement and would have to mount a robust fair use defense without citing the rulemaking materials. Furthermore, unless an individual has great experience with digital protection, they would need to rely on tools created by others, which are illegal to create or distribute under § 1201(a)(2) in all circumstances. A user could have the right to circumvent but be functionally prohibited by lack of tools, giving her an empty right.

89. See, e.g., Chris Moseng, Note, *The Failures and Possible Redemption of the DMCA Anticircumvention Rulemaking Provision*, 12 J. TECH L. & POL’Y 333, 361 (2007) (dismissing the rulemaking process as a “failed” safety valve requiring intervention from Congress); Arielle Singh, Note, *Agency Regulation in Copyright Law: Rulemaking Under the DMCA and Its Broader*

revise this section of copyright law when Congress is preoccupied with economic issues and debates over government spending.⁹⁰ Until Congress takes up the call to write the next great Copyright Act,⁹¹ there will be little statutory change.

Though Congress may be unable to help, the Copyright Office is perfectly capable of modifying its approach to the rulemakings to incorporate over a decade of experience with the statute and underlying issues. The Copyright Office has grown more comfortable in its role, taking steps to clarify the necessary proof to show harm to noninfringing use⁹² and changing its position on incorporating an intended use in a “class of works” as a means to further tailor exemptions to the specific harm they are intended to address.⁹³ The public reaction to the recent rulemaking illustrated a disconnect between consumer expectations and administrative actions, but the Copyright Office is perfectly poised to learn from the experience and chart its course as a proactive, flexible agency that adapts to new information to protect both creators and consumers. This process starts with rethinking the anti-circumvention rulemaking.

III. OPPORTUNITIES FOR CHANGE

There are three main changes that would streamline the rulemakings. First, given how many proposed exemptions are renewals of currently existing exemptions, the Copyright Office should clarify the necessary burden of proof to account for available factual evidence when an exemption is considered for renewal. Second, the Copyright Office should more strongly consider fair use when conducting its analysis. The purpose of the rulemaking process was to protect noninfringing uses, of which fair use is a subset, and the four fair use factors offer a helpful, though not dispositive,

Implications, 26 BERKELEY TECH. L.J. 527, 568–70 (2011) (suggesting Congress give the Copyright Office more regulatory authority); Jackson, *supra* note 38, at 544–45 (briefly discussing potential reforms by Congress that could better protect fair use).

90. *Cf.* Todd S. Purdum, *The year the government broke*, POLITICO (Oct. 11, 2013, 5:02 AM), <http://www.politico.com/story/2013/10/the-year-the-government-broke-government-shutdown-debt-ceiling-congress-98165.html> (describing congressional deadlock and disfunction). Congress has difficulty focusing on copyright when larger policy problems are in its sights. *See, e.g.*, LITMAN, *supra* note 11, at 45 (describing how efforts to reform copyright stopped as Congress focused on World War II).

91. Register Pallante has begun calling for wide action by Congress to drastically revise the aging statute. *See* Maria Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315 (2013).

92. *See supra* Section I.B.1.

93. *See supra* Section I.B.2.

analytical lens. Finally, the Copyright Office should use reasonable belief as a way of narrowing exemptions and avoiding excessive complexity when devising classes of works. All three changes would drastically improve the efficiency of the Copyright Office's anti-circumvention rulemakings, as well as provide a model for future copyright reform. Each is discussed below.

A. SHIFTING THE BURDEN FOR RENEWALS

Generally each rulemaking has taken about a year, with the exception of 2009, when it stretched for twenty months.⁹⁴ In each round, many of the proposed exemptions are identical or similar to ones from past rulemakings.⁹⁵ Despite the frequency of recurring proposals, the Copyright Office considers them *de novo*, requiring new factual evidence of harm in the record despite how difficult that proof might be to obtain.⁹⁶ This means that there must be a new factual analysis, and often a legal one, for an exemption to be recommended once more.⁹⁷

Some commenters have suggested that the Copyright Office move from a *de novo* approach to one that gives deference to previously granted exemptions.⁹⁸ Although the Copyright Office cannot ignore the *de novo* requirement, which was specifically described by the House Commerce

94. The 2009 rulemaking took an especially long time, with the Copyright Office needing to extend the previous round of exemptions as an interim rule as it finished the process. *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Interim Rule, 74 Fed. Reg. 55,138 (Oct. 27, 2009) (to be codified at 37 C.F.R. pt. 201).

95. In 2012, the Office identified ten proposed classes of exemptions, with twenty-two total variations. Of the ten classes of exemptions, four had previously been considered in the 2009 rulemaking. Despite being forty percent of the classes, these repeated categories attracted more input and debate, and thirteen of the twenty-two variations came from those 4 repeated classes. *See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, U.S. COPYRIGHT OFFICE (2011), <http://www.copyright.gov/1201/2011/initial/>.

96. *See* 2012 Recommendation, *supra* note 64, at 6–7 (requiring submission of “persuasive *current* evidence”).

97. *See id.* at 70–71 (stating that there must be a *de novo* review of evidence presented for an exemption, but that a previously developed legal analysis by the Register can be relied on if there has been no change in case law). Even here, Register Pallante noted that relying on the legal analysis would only be appropriate if the “evidence in the present record” supported it. *Id.*

98. *See* Singh, *supra* note 89, at 568; *see also* Jackson, *supra* note 38, at 546 (suggesting shifting the presumption to exemptions granted twice in a row); Aaron Perzanowski, *Evolving Standards & the Future of the DMCA Anticircumvention Rulemaking*, 10 J. INTERNET L. 1, 21 (2007) (arguing that the current insistence on proof of ongoing harm “fails to recognize” the impact of existing exemptions).

Committee as part of the rulemakings,⁹⁹ the statute does not discuss how evidence and submissions from previous rulemakings should be treated.¹⁰⁰ Therefore, the Copyright Office has additional flexibility to determine the burden, much as it did during the confusion over how to define “substantial” adverse effects.¹⁰¹ Under its current statutory authority, the Copyright Office can use a less strict requirement of current factual evidence for exemptions that have already been in place.

1. *The Current Approach to De Novo Rulemaking Does Not Account for Requests to Renew*

Currently, the Copyright Office considers all exemptions de novo, requiring that the proponents of a given exemption, including previously granted exemptions, point to “persuasive, current evidence” that the proposed behavior is likely to be noninfringing, as well as whether the circumvention ban has a current or likely future adverse impact on that behavior.¹⁰² The combination of these two requirements is more difficult to meet for proponents of previously granted exemptions than new exemptions because there is no evidence of present harm to locate, and the process is biased against exemptions targeting future harms.

Proponents of renewing an exemption have less factual evidence available to them than those advancing new exemptions. If an exemption is in effect, users can freely circumvent to avoid harm to their noninfringing use, meaning there will be no evidence of present harm. Furthermore, the Register has previously dismissed proposals guarding against future harm as “speculative.”¹⁰³ Proposals for new exemptions can often point to harms created from their absence,¹⁰⁴ but much as someone under an umbrella

99. See 2012 Recommendation, *supra* note 64, at 5 (citing Commerce Comm. Report, *supra* note 9, at 37).

100. 17 U.S.C. § 1201(a)(C) (2012) (explaining only who should be involved in the rulemaking and what factors should be considered).

101. See *supra* Section I.B.1.

102. See 2012 Recommendation, *supra* note 64, at 5–8.

103. See, e.g., *id.* at 5 (“On this record, the repair concern appears to be purely speculative. Indeed, when questioned at one of the rulemaking hearings about the need for an exemption to repair broken consoles, counsel for lead proponent EFF candidly acknowledged that she didn’t ‘know the details.’”). The EFF was advancing an exemption that would have allowed users to jailbreak their own video game consoles, but the exemption was ultimately denied. Register Peters did the same thing, such as when she dismissed a 2010 exemption because the evidence of future adverse harm failed to be “highly specific, strong, and persuasive.” 2010 Recommendation, *supra* note 56, at 231.

104. See 2006 Recommendation, *supra* note 50, at 20–21 (citing as sufficient evidence that an educational device, the Pioneer DVD player, was slow and a “significant delay” in light of its intended classroom use).

cannot prove that they are currently wet in the rain for lack of umbrella, proponents of recurring exemptions cannot show evidence of a current harm that does not exist.¹⁰⁵ This difficulty of proving a negative is complicated by the definition of “substantial” harm advanced by the Register in 2003, requiring “distinct, verifiable, and measurable impacts.”¹⁰⁶ This language suggests an emphasis on actual harm that is “measurable” and could bias the Office against renewing exemptions already in effect that have prevented the existence of ongoing harm.¹⁰⁷

Because proponents of recurring exemptions have no present harm to point to and because the Copyright Office often dismisses future harms as “speculative,”¹⁰⁸ proponents of recurring exemptions are placed in a uniquely difficult position when convincing the Copyright Office to renew an exemption. Indeed, a major reason for Register Pallante denying an exemption for cell phone unlocking was because proponents “improperly” relied on the 2010 Rulemaking for many of their factual assertions rather than present new, current evidence.¹⁰⁹ If proponents of an exemption that

105. Register Pallante has implied that the failure to gain an exemption is simply the failure of proponents to build an adequate record. *See* Pallante, *supra* note 91, at 331 n. 83 (quoting a House Judiciary Member as saying that “[t]he quality of the DMCA process depends upon the quality of the record. Future participants in the process should build an adequate record upon which an exemption may be based.”). It is difficult to build an adequate record when the burden is relatively higher than that for proponents of exemptions that have not been in effect.

106. *See supra* Section I.B.1.

107. *See* Jackson, *supra* note 38, at 532 (“Future harm cannot be verified or measured because it is harm that, by definition, does not exist yet.”).

108. *See, e.g.*, 2012 Recommendation, *supra* note 64, at 47 (describing concerns about inability to repair video game consoles as “speculative” because they could be repaired by the manufacturer under for free warranty or for a reasonable fee); 2010 Recommendation, *supra* note 56, at 234 (describing arguments an online service using DRM servers would fail as falling “into the hypothetical zone”). The 2010 proposal cited several online music and movie services that had shut down their servers, but the Register denied the exemption because the services had offered refunds, and consumers may still have access to purchased content as long as they did not change computers or operating systems or hard drives or take other similar action. *Id.* at 232–34.

109. In the 2012 Recommendation, Register Pallante wrote:

The Register is compelled to note that the record developed by the proponents is lacking and they improperly rely on the Copyright Office’s 2010 Recommendation as evidence for many of their factual assertions. Merely citing to conclusions drawn by the Register in past rulemakings does not itself create a factual record for purposes of a current rulemaking. As the Register has noted many times in the past, the record must be developed and reviewed *de novo* in each proceeding; a proponent is required to present a *prima facie* case, based on current evidence, that it is entitled to the proposed exemption.

has already proved itself once must point to nonexistent or difficult-to-gather evidence of a harm that was mitigated by a previously granted exemption, the rulemaking risks eliminating noninfringing uses of copyrighted works despite Congress's intent to preserve them. Without addressing this discrepancy, the Copyright Office cannot effectively fulfill its statutory role under the DMCA.

2. *Requests to Renew Exemptions Should Only Require Factual Continuity and Proof of Reliance*

The best solution is to modify the necessary factual showing for exemptions that have been granted previously. The Copyright Office should instead give deference to the factual record from when the exemption was granted, requiring only that proponents prove ongoing reliance on the exemption and that there has not been radical change in the factual background since the previous rulemaking. Detractors of the exemption should bear the burden of presenting evidence either that sufficient factual change justifies a new analysis of adverse impact or that new harm to copyright owners' interests outweighs the public benefit of keeping the exemption as it was. For modifications of an exemption beyond its previous incarnation, a party that wanted to expand the scope of an exemption would bear the burden of proving that the additional modification both meets the statutory requirements and is not covered by the current exemption.

Such a process would preserve the *de novo* nature of the rulemaking by not permitting exemptions to persist without additional evidence presented at each round. To maintain an exemption, a party would be required to step forward and submit evidence that noninfringing users of copyrighted works were using or relying upon the exemption. A reliance requirement would ensure that (1) exemptions that fail to have value for users of copyrighted works would not remain in effect and (2) the Copyright Office would have additional evidence with which it could evaluate whether the exemptions it grants are making a tangible impact on noninfringing use.

Shifting the burden of proof for previously granted exemptions solves the stated problem regarding proponents' difficulty proving a negative to renew an exemption. The current system places a difficulty on proponents of exemptions of proven value that is not placed on proponents of new exemptions. Placing such an evidentiary burden on proponents of renewing exemptions risks the expiration of socially valuable exemptions despite their continued need. Such a situation almost happened in 2009, when the Register declined to renew an exemption permitting circumvention of ebooks so that

print-disabled readers could enable text-to-speech functionality and enjoy the literature.¹¹⁰ In her recommendation, the Register pointed to the sparse factual record submitted by the American Federation for the Blind, saying they had submitted no evidence showing that the circumvention ban “actually has had an adverse effect” on the ability of print-disabled readers to engage in noninfringing uses of ebooks.¹¹¹ Admittedly the offered evidence was very thin,¹¹² but the Librarian overruled the Register’s recommendations and granted the exemption, citing “statements on the likelihood of access not being available to blind individuals,” among other factors.¹¹³ Both the Register and Librarian felt strongly that an exemption would be socially beneficial,¹¹⁴ but the Register was uncomfortable recommending an exemption in light of previously established rules about the factual requirements for proposed exemptions examined *de novo*. By modifying the approach to recurring exemptions as suggested, situations like this could be avoided without the Librarian needing to exercise his discretion.

Altering the Copyright Office’s approach to these exemptions would have the added benefit of making modifications better considered with a more diverse factual record. By forcing all proponents of modification to offer strong evidence of the benefits over the existing exemption, detractors of an exemption (copyright owners interested in removing the exemption entirely) as well as consumer advocates (trying to expand the scope of an exemption to be broader than initially envisioned) will have equal evidentiary burdens in persuading the Register to modify the exemption. The current rulemaking process favors the interests of copyright holders, as they have only to insist that the fairly weighty burden of the statute has not been met,

110. See 2010 Recommendation, *supra* note 56, at 261–62.

111. *Id.* at 250. The American Federation for the Blind had only submitted a sample of five ebooks, four of which would not be read by screen readers because of digital protection. *Id.* at 248–50. It should be noted that the Register was requesting evidence of harm from the ban after the circumvention ban had been exempted for seven years.

112. The American Federation for the Blind did a survey of five ebooks, four of which it found inaccessible. *Id.* at 248–50. Two of the books were no longer protected by copyright, meaning they were not covered by the circumvention ban. *Id.* at 255–56.

113. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43,825, 43,838–39 (July 27, 2010) (to be codified at 37 C.F.R. pt. 201) [hereinafter 2010 Exemption]. The Librarian also cited the lack of opposition to the exemption and the “broad benefits in society” in renewing the exemption. *Id.*

114. See *id.* (“[T]here are broad benefits to society in making works accessible to the visually impaired.”); 2010 Recommendation, *supra* note 56, at 261 (“The Register fully supports universal accessibility to ebooks for the blind and visually impaired.”).

regardless of clear consumer harm.¹¹⁵ Setting up a tug of war between two parties, with the status quo in the middle, would create an adversarial system wherein both sides have to present convincing evidence to the Copyright Office that their suggested outcome is best. In such a situation, the truth is more likely to come out through parties arguing both sides, giving the Copyright Office better information about the advantages and disadvantages of a given change than if the process favored one party over another.

This change is consistent with the intent of Congress and the Copyright Office's statutory authority. The statute itself provides little guidance as to how the Copyright Office should handle its role in the rulemaking process, stating simply that the Copyright Office should consider whether persons using certain classes of works would likely be harmed in the succeeding three years in making noninfringing use of a work.¹¹⁶ The House Commerce Committee sheds somewhat more light on Congress's intent. The Commerce Committee Report explains the rationale for adding the rulemaking process, specifically calling it a "fail-safe" mechanism,¹¹⁷ to prevent, among other things, "the adoption of business models that depend upon restricting distribution and availability, rather than upon maximizing it."¹¹⁸ The Committee was also concerned that the circumvention ban would "undermine Congress' longstanding commitment to the principle of fair use," thus it set up the rulemaking provision to "respond[] to this concern."¹¹⁹

The Commerce Committee Report requires that rulemaking be conducted *de novo* but says little else. In describing the *de novo* approach to rulemaking, the Register has cited the page of the House Report stating "the assessment of adverse impacts on particular categories of works is to be determined *de novo*."¹²⁰ Although the Commerce Committee Report is helpful to understand the purpose of and intent behind the rulemaking process, delving too deeply into the factual specifics in the report would be

115. For example, in 2006, opponents of the DVD media studies exemption argued that because a class could not incorporate use, any exemption for audiovisual works would inherently be too broad to justify under the statute. *See* 2006 Recommendation, *supra* note 50, at 14–15. The wireless industry was similarly able to convince the Register that an exemption for phone unlocking was unwarranted because more phones being sold unlocked, which meant circumvention was not necessary for consumers to obtain an unlocked phone. 2012 Recommendation, *supra* note 64, at 87.

116. *See* 17 U.S.C. § 1201(a)(B) (2012).

117. Commerce Comm. Report, *supra* note 9, at 36.

118. *Id.*

119. *Id.* at 35.

120. *See, e.g.*, 2012 Recommendation, *supra* note 64, at 5 (quoting Commerce Comm. Report, *supra* note 9, at 37).

misleading. A number of modifications were made to the rulemaking section when the House and Senate reconciled their different versions,¹²¹ and the draft of the bill discussed in the Commerce Report differs from the final version.¹²² At the time the report was written, the Commerce Committee may not have considered how recurring exemptions would be handled, as even the Copyright Office needed to figure those details out during early rulemakings.

The Commerce Committee Report's statement that the rulemaking should be conducted *de novo* does not bar the Copyright Office from changing the evidentiary burden for recurring exemptions. As stated earlier, the current rulemaking process in practice has a heightened burden for proponents of a recurring exemption.¹²³ The report is clear that the rulemaking process was set up to protect noninfringing uses of copyrighted works, ensuring that the public would have access to those works "that are important to education, scholarship, and other socially vital endeavors."¹²⁴ Exemptions that have passed statutory muster once are likely to fall within these categories. Making the suggested change prevents underprotecting these uses by placing excessive factual burdens on their renewal.

The *de novo* requirement is still met by the requirement that an exemption have proven public usage or reliance to gain the presumption of validity. For the rulemaking to be *de novo*, exemptions cannot be renewed as a matter of course, without a single interested party proposing the exemption. Exemptions must be proposed every three years anew, and the requirement of having proof of use would necessarily require a party to organize and propose the exemption, using that factual evidence as proof of the need for the exemption. However, given that granted exemptions cannot have current proof of harm in their absence, the Register certainly has the flexibility to require a different kind of proof for those special cases. The lack of statutory guidance on how to handle these situations, coupled with the stated intention of the Commerce Committee to protect fair use,¹²⁵ gives the Copyright Office the ability to treat recurring exemptions differently by

121. *See supra* Section I.A.

122. For example, the Report states that the process is to be conducted every two years, despite the final law conducting it every three years. *See* Commerce Comm. Report, *supra* note 9, at 37.

123. *See supra* Section III.A.2

124. Commerce Comm. Report, *supra* note 9, at 36.

125. *Id.* at 35–36. Again, remember that the House Commerce Committee was the originator of the rulemaking proceedings in the DMCA. LITMAN, *supra* note 11, at 140–41 (describing a legislative compromise that directed the Commerce Department to promulgate exemptions to § 1201).

expecting factual evidence more in line with the evidence that would be reasonably available to a proponent.

A potential reason for the current difficulty with proving future adverse impacts is the Copyright Office's reliance on the House Manager's Report, which states that exemptions for future harms should be granted only in "extraordinary circumstances."¹²⁶ As other commenters have noted, the House Manager's Report is not a reliable indicator of Congress's intent for the rulemaking process.¹²⁷ Not only was the report written after the full House passed the bill,¹²⁸ but the authors on the House Judiciary Committee were very much embroiled in a turf war with the Commerce Committee, upset that their historical authority over copyright issues had been usurped.¹²⁹ Given that the chief counsel for the House Judiciary Committee Subcommittee on Intellectual Property, Mitch Glazier, was heavily involved in drafting the original, more restrictive bill,¹³⁰ it should come as no surprise that the committee he worked with released a report that characterized the rulemaking process as more limited than its drafters intended. The intent of the rulemaking process should be read from the reports of its drafters, not outside lawmakers with separate, political interests.

Furthermore, the rulemaking process has seen burden shifting in a handful of cases, though it was not explicitly called out as such. In the 2009 rulemaking, the Register made it very clear that the evidence advanced by the American Federation for the Blind ("AFB") was insufficient to show a need for an exemption on ebooks to help blind consumers.¹³¹ No other evidence was offered in support of the exemption other than the AFB's initial submission,¹³² yet the Librarian said he was convinced by "statements [on the

126. STAFF OF H. COMM. ON THE JUDICIARY, 105TH CONG., SECTION-BY-SECTION ANALYSIS OF H.R. 2281 AS PASSED BY THE UNITED STATES HOUSE OF REPRESENTATIVES ON AUG. 4, 1998 6 (Comm. Print 1998) [hereinafter House Manager's Report].

127. See, e.g., Herman & Gandy, *supra* note 36, at 169 (describing the Judiciary Committee, writing after passage of the bill, as wanting stricter standards than the Commerce Committee); Perzanowski, *supra* note 98, at 14 (describing the House Manager's Report as offering a "slightly different interpretation" than the Commerce Committee Report).

128. See Herman & Gandy, *supra* note 36, at 169.

129. See LITMAN, *supra* note 11, at 137–38.

130. See *id.* at 137. Glazier is now the Senior Executive President at the Recording Industry of America Association ("RIAA"). See *Executive Bios*, RECORDING INDUSTRY ASSOCIATION OF AMERICA, http://www.riaa.com/aboutus.php?content_selector=about_us_exec_bios (last visited Feb. 8, 2014).

131. See 2010 Recommendation, *supra* note 56, at 253 (admonishing proponents of the exemption for not listening to her previous warning to provide a richer evidentiary record).

132. See *id.* at 247–50 (describing the AFB's submission as the only evidence offered in support of the exemption).

record] on the likelihood of access not being available” to the blind.¹³³ AFB’s only offered statements were in their initial submission, noting among other things that the situation around ebook restrictions “ha[d] not changed appreciably” since 2002.¹³⁴ In light of the scant evidence offered in support of the exemption, the Librarian seems to have done something very similar to the approach suggested above, giving deference to a previously granted exemption for lack of opposition and the evidence that advocates still cared enough about it to propose it anew. However, as the stated reason for granting the exemption was the *likelihood* of harm (not evidence of harm, simply statements about it), the justification seems weak in light of the usual requirement of proving “substantial” adverse effects. For the sake of transparency, it would have been better policy for the Librarian to state his reasons directly.

The new Register did something similar in the 2012 rulemaking, where in the introduction of her recommendation she made a distinction between factual showings and legal analyses.¹³⁵ Previously, the Register had simply stated that determinations were made de novo and that facts must be proven anew in each rulemaking. However, this distinction was the basis for the Register’s decision to renew the exemption permitting jailbreaking of cell phones to run third party applications.¹³⁶ While reusing the previous legal analysis, the Register did not entirely throw out the factual analysis. Instead, she found factual evidence of adverse impact on noninfringing use in little over a page, swayed by the fact that the smartphone had been widely adopted and unauthorized (jailbroken) apps were enjoying sales success.¹³⁷ This is very

133. 2010 Exemption, *supra* note 113, at 43,838.

134. Comments of the American Foundation for the Blind, *In Re Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies* at 3, No. RM 2008-8, available at <http://www.copyright.gov/1201/2008/comments/american-foundation-blind.pdf>.

135. 2012 Recommendation, *supra* note 64, at 6.

136. *See id.* at 71 (citing 2006 Recommendation, *supra* note 50, at 40 (finding that the previous legal analysis and factual posture was the same as the prior rulemaking and thus should be renewed)):

Nonetheless, where, as here, the Register of Copyrights has previously developed a legal analysis, and there has been no pertinent change in statutory or case law – and no new persuasive arguments have been offered in the current proceeding – it is appropriate to rely upon the earlier legal analysis, provided that the evidence in the present record supports it.

2012 Recommendation, *supra* note 64, at 71. Note that the cited language was for the exemption permitting blind users to circumvent ebooks, the same exemption that would vex the Register three years later.

137. *See* 2012 Recommendation, *supra* note 64, at 74–76.

similar to the suggested approach, using evidence of exploitation and reliance on a previous exemption as factual evidence that it is still needed.

In both of these cases, the outcome of the Librarian's and Register's decisions map well with this Note's proposed solution. There is evidence that perhaps the impetus for these decisions was very close to the stated rule. However, in both cases, the reasoning for each outcome was neither explicit nor based in a clear, identifiable process. For purposes of transparency, the rulemaking process should make explicit what has been developing implicitly for several years: exemptions that have been previously granted have special considerations that should be accounted for in the ground rules of the rulemaking proceedings. Because the Copyright Office has already been doing something similar under its current authority, the Office should adopt this clear, coherent approach to renewed exemptions for better transparency and consistency in outcome.

B. INCORPORATING FAIR USE

1. *The Copyright Office Has Failed to Sufficiently Safeguard Fair Use*

Another common criticism of the rulemaking process is the way it has failed to account for fair use. The Electronic Frontier Foundation ("EFF") in 2005 described the rulemaking process as putting fair use in a "deep freeze" because before a user can have digital fair use questions adjudicated in court, they need access to the underlying work, which is illegal unless the work employs no technical protections—such as digital rights management ("DRM")—or the Copyright Office explicitly grants an exemption for that "class of works."¹³⁸ Since the EFF's criticism in 2005, the Register has occasionally incorporated a fair use analysis when discussing exemptions,¹³⁹ but the EFF's point remains now that DRM is common and digital copies of works are becoming the prevalent, often only, format of some creative content. Without the ability to access unprotected works, consumers of copyrighted content will be unable to make fair use of those works because consumers would have liability under § 1201 regardless.

The Copyright Office recognizes that concerns about the DMCA's effect on fair use were the motivating factors in the establishment of the

138. See VON LOHMANN & HINZE, *supra* note 37, at 6–8.

139. See 2010 Recommendation, *supra* note 56, at 49–53, 94–100, 183–90 (conducting a fair use analysis for three proposed exemptions, all of which were granted). *But see* 2006 Recommendation, *supra* note 50, at 29 (rejecting as "improper" generalizing about fair use to analyze an exemption because there was too much potential for facts to vary within the exemption).

rulemaking process.¹⁴⁰ The House Commerce Committee intended the rulemaking process as a “fail-safe” to guard against a society where hard copies of works were eliminated and permanent encryption and protection of copyrighted works became the norm, preventing consumers from accessing works without violating the DMCA.¹⁴¹ This is the case in many industries, where it is increasingly difficult to rent movies¹⁴² or purchase releases from artists¹⁴³ outside of a digital context. The scenario that Congress worried about is on the doorsteps of the American public, and that change in circumstance merits a change in the assumptions made by the Copyright Office.

Part of the issue is that the statute directs the Copyright Office to grant exemptions that enable “noninfringing uses,” a term encompassing, but different from, fair use.¹⁴⁴ This statutory mandate forces the Copyright Office into making what one commenter has called a “binary determination” that a use is or is not noninfringing,¹⁴⁵ because an exemption must be “narrowly tailored” to a very specific harm to users of a particular class of works.¹⁴⁶ Because fair use is intensely fact-specific,¹⁴⁷ the Copyright Office has had difficulty recommending exemptions that would be fair use in some but not

140. 2003 Recommendation, *supra* note 36, at 7–8.

141. Commerce Comm. Report, *supra* note 9, at 36.

142. See Andrea Peterson, *Netflix has won: Blockbuster is closing its last retail stores*, THE WASHINGTON POST (Nov. 6, 2013), available at <http://www.washingtonpost.com/blogs/the-switch/wp/2013/11/06/netflix-has-won-blockbuster-is-closing-their-last-retail-stores>. With the fall of Blockbuster, Redbox remains one of the few players with name recognition willing to serve a market for physical rentals. See Gina Hall, *Blockbuster loss may be Redbox gain*, L.A. BIZ (Nov. 8, 2013), <http://www.bizjournals.com/losangeles/news/2013/11/07/blockbuster-loss-may-be-redbox-gain.html>.

143. Increasingly music albums are being released in digital form only, on online storefronts like iTunes. See, e.g., Steve Marinucci, *New Beatles digital only album out on iTunes today*, EXAMINER.COM (July 24, 2012), www.examiner.com/article/new-beatles-digital-only-album-out-on-itunes-today (describing the release of a digital exclusive Beatles album on iTunes); *Bio: Album*, JAYPARK.COM, <http://www.jaypark.com/en/bio/album.asp> (last visited Nov. 11, 2013) (showing multiple albums that were released only as digital singles).

144. 17 U.S.C. § 1201(a)(1)(c) (2012). Fair uses are noninfringing, but so are other actions such as creating archival copies under § 108’s exception for archives and libraries or exercising consumer rights under the first sale doctrine.

145. Perzanowski, *supra* note 98, at 21.

146. See 2003 Recommendation, *supra* note 36, at 84. The Copyright Office has generally viewed its authority narrowly, and the Register has looked favorably upon proposed exemptions that are “narrowly tailored.” See, e.g., 2006 Recommendation, *supra* note 50, at 62 (noting proponents for a security exemption “acknowledged” that an exemption should be “narrowly tailored” to address very specific form of harm); 2010 Recommendation, *supra* note 56, at 253–54 (discussing the inadequacy of a proposed exemption by contrasting it with a previously granted exemption that was more “narrowly tailored” to the harm).

147. See *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577–78 (1994).

all factual situations.¹⁴⁸ It has also rarely conducted its own fair use analysis when analyzing the merits of a proposed exemption, but that has changed in recent years.¹⁴⁹

In recent rulemakings, the Copyright Office has grown more flexible in incorporating fair use. In 2010, the Register recommended an expanded exemption for circumvention of protection on DVDs to make documentaries and noncommercial videos.¹⁵⁰ In her analysis, the Register conducted a broad fair use analysis for the proposed exemption for creating noncommercial videos, ultimately finding that despite many examples provided by the proponents not qualifying as fair use, many examples could be considered fair use.¹⁵¹ In the same rulemaking, the Register also used fair use as justification to recommend an exemption that allowed users to “jailbreak” their smartphones, holding that such behavior “fits comfortably within the four corners of fair use.”¹⁵² The Register’s successor, Maria Pallante cited and reiterated this fair use analysis.¹⁵³ Despite previously opposing reliance on fair use as a criterion for analysis, the Copyright Office has in recent years begun giving fair use a larger role in its rulemaking calculations.

However, this is only done for occasional exemptions, leaving proponents responsible for arguing fair use and hoping the Copyright Office takes that argument up in its final recommendations. There is no guarantee that the Copyright Office will consider fair use unless it considers it applicable to a specific instance.

2. *The Register Should Explicitly Bring in Fair Use as Part of Exemption Analysis to Better Achieve the Intent of Congress*

The simplest solution to the occasional inclusion of fair use is the most direct: the Copyright Office should explicitly conduct a fair use analysis as part of the statutory analysis of the § 1201 factors. The analysis from the fair use determination would not be dispositive, but it would contextualize analysis of the statutory factors and give the Register a better perspective on whether to approve, deny, or modify a proposed exemption.

148. See 2003 Recommendation, *supra* note 36, at 84–85 (“Defining a class in such a manner would make it applicable to all works and would not provide any distinctions between varying types of works or the measures protecting them.”).

149. See, e.g., 2010 Recommendation, *supra* note 56, at 72 (conducting a fair use analysis for noncommercial video); *id.* at 91 (doing the same for “jailbreaking” of mobile phones).

150. *Id.* at 72.

151. *Id.* at 52.

152. *Id.* at 91.

153. 2012 Recommendation, *supra* note 64, at 77.

The DMCA directs the Librarian to consider the following 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.¹⁵⁴

Several of these factors mirror text from other sections of the Copyright Act, fair use in particular.¹⁵⁵ Fair use itself is not listed as one of the factors, but shades of it pervade these factors for consideration. In light of a developed record from over twelve years of rulemaking, it is clear that more room can and should be made for fair use within the general analysis done by the Copyright Office.

Because the Librarian is allowed to consider other factors he “considers appropriate,” the Copyright Office should exercise its authority and conduct a fair use analysis for each proposed exemption. It is entirely “appropriate” to consider the doctrine underlying the rulemaking process, set up by the House Commerce Committee as a “fail-safe” out of concern that the circumvention ban would “undermine” Congress’s historic commitment to fair use.¹⁵⁶

When analyzing a rulemaking, the Register should first do a fair use analysis of the proposed exemption, using facts provided by proponents and opponents of an exemption. The fair use analysis would be used to better understand and contextualize the other statutory factors. For example, a proposed use that is favorable under a fair use analysis would strongly suggest that the prohibition would have a strong impact on criticism, comment, news reporting, etc. (when those factors are implicated). It would not have as strong of an impact on the availability of copyrighted works, which would be analyzed as the Register has traditionally done. Because the fair use analysis explores the market impact of the desired use, the analysis would be informative to that statutory factor. Additionally, because fair use

154. 17 U.S.C. § 1201(a)(1)(C) (2012).

155. *See* 17 U.S.C. § 107 (2012), which lists in the preamble “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research” as activities fair use is meant to protect. The fourth factor also places emphasis on the market effect of a claimed fair use. *Id.* § 107(4).

156. Commerce Comm. Report, *supra* note 9, at 35–36.

examines market harm differently depending on whether a use is “transformative,” this analysis might better isolate the relevant markets for the work.¹⁵⁷

By starting off with a fair use analysis, the Register will be better able to focus on the thrust of the rulemaking process: does the prohibition on circumventing DRM prevent users from making lawful (noninfringing) use of copyrighted works? Fair use often serves as a proxy for whether an activity is socially beneficial,¹⁵⁸ and bringing in the fair use analysis to better contextualize the factors that the Librarian must consider will appropriately map the outcomes of rulemaking decisions with the public interest the process is intended to safeguard.

Additionally, a fair use analysis will better capture exemptions before the Register, which do not always implicate archives, education, or research. In multiple rulemakings, the Register has not used the second and third factors for analysis when they are not implicated, such as the proposed exemption for jailbreaking smartphones¹⁵⁹ and the exemption for cell phone unlocking for use on other networks, where the Register found that none of the four factors applied.¹⁶⁰ When multiple or none of the factors are relevant to an exemption, the Register has no guidepost for analyzing an exemption other than looking at factual evidence of harm on the record.¹⁶¹ To avoid decisions straying too far from the intent of the statute, fair use should be the guidepost that helps evaluate exemptions and their alignment with the intent of the Commerce Committee. Because fair use is broader than the

157. See 2010 Recommendation, *supra* note 56, at 102 (conducting a brief analysis of the market harm factor for exemption purposes). The Register’s discussion of the market harm factor within a fair use analysis was considerably longer. Compare *id.* at 97–100 with *id.* at 102. The fair use analysis was likely helpful to determining market impact under the statutory factor.

158. See, e.g., *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 478–79 (1984) (Blackmun, J., dissenting) (describing fair use as providing external benefits “from which everyone profits”); *Princeton Univ. Press v. Michigan Document*, 99 F.3d 1381, 1400 (6th Cir. 1996) (“[T]he ultimate inquiry under the first fair use factor is whether the type of use being challenged is, by its nature, likely to benefit society without excessively diminishing the incentives to create new works.”). The first fair use factor is meant to analyze social benefit, so it can be a helpful guidepost in determining the value of exemptions.

159. See 2010 Recommendation, *supra* note 56, at 101–02 (“Like the previous factor, the recommendation is unlikely to affect the interests in this factor. This factor also appears to be neutral.”).

160. See *id.* at 150 (finding that all four factors were “neutral” because unlocking phones for use on other mobile networks would not impact archival, news reporting, scholarship, etc.).

161. See *id.* at 150–54 (criticizing opponents of the exemption for using the forum to protect a business model, but otherwise offering little evidence the Register deemed valid).

rulemaking factors, fair use can provide applicable guidance for situations where the narrower statutory factors in Section 1201(a)(1)(C) fall short.

A potential concern with this approach is that if Congress wanted fair use to be considered in the DMCA, it easily could have included such language. Indeed, the only mention of fair use in the DMCA is a short note in § 1201 that the law is not meant to affect rights or defenses to copyright infringement, including fair use.¹⁶² However, fair use was clearly important to the Commerce Committee, which mentioned multiple times in its report how the doctrine benefited both consumers and many industries.¹⁶³ An additional statement in the House report by two Representatives, Scott Klug and Rick Boucher, adds more context. Klug, who introduced an amendment that added the rulemaking process to the bill, still “remain[ed] troubled” by the potential implications of the DMCA on fair use.¹⁶⁴

Though § 1201 is not subject to the fair use defense, fair use is not entirely barred. Representative Klug and his colleague had originally introduced language extending fair use to the circumvention ban in § 1201 but were stonewalled by colleagues whose motivations were never made clear.¹⁶⁵ Despite inability to get an explicit fair use protection in the anti-circumvention provisions, the Congressmen intended the rulemaking to “focus on the extent to which exceptions and limitations to this prohibition are appropriate and necessary to maintain balance in our copyright laws.”¹⁶⁶

The failure of the Representatives to explicitly bring fair use into the statute should not be considered evidence that Congress intended the rulemakings to avoid discussing fair use. First, a later account of the negotiations notes that objections to an explicit fair use privilege were rooted

162. 17 U.S.C. § 1201(c).

163. See Commerce Comm. Report, *supra* note 9, at 25 (“[Fair use] is critical to advancing the personal interests of consumers. Moreover, as many testified before the Committee, it is no less vital to American industries.”).

164. *Id.* at 85. Klug’s amendment originally gave the power to grant exemptions to the Secretary of Commerce. See *id.* at 85–86. The rulemaking was altered at the last minute to be based in the Copyright Office with input from the Department of Commerce because of Senate political concerns over retaining Judiciary Committee authority (and thus lobbying attention). See LITMAN, *supra* note 11, at 142–44.

165. See Commerce Comm. Report, *supra* note 9, at 86 (quoting WIPO Copyright Treaty, *supra* note 15, at 2) (“For reasons not clear to us, and despite the WIPO Treaty language ‘recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information * * *,’ our proposal was met with strenuous objection.”). Likely the other Committee members were being heavily lobbied by industries that desire strong copyright protection, such as the motion picture and recording industries. See *supra* Section I.A.

166. Commerce Comm. Report, *supra* note 9, at 86.

in concerns by the content industry that it would “provide a roadmap” to companies distributing circumvention tools and would weaken legal safeguards for protection technologies, rendering them ineffective.¹⁶⁷ Fair use as an informative tool would avoid weakening protection technologies because exemptions would still need additional evidence and recurring action by proponents. Second, it is difficult to argue that the DMCA had any singular “intent” behind it, given the sharply divisive interests exerting their influence and compromising in the end product.¹⁶⁸ Rather than attempt to divine what particular factions wanted from the bill, it instead makes sense to look at the larger themes and claims by the Commerce Committee about its goal to protect fair uses through the rulemaking process.

Indeed, the Register has gained new insights on appropriate exemptions through a decade of rulemakings. From an initial approach that rebuffed calls to allow broad fair use,¹⁶⁹ the Register has brought fair use in as a growing part of analyzing many exemptions.¹⁷⁰ Because of the experience the Copyright Office has gained from multiple rounds of rulemaking, as well as a growing understanding of the underlying policy issues implicated in the rulemaking process, the Office has a strong justification to more fully incorporate fair use. This analysis would not be a binding factor but instead would better inform and contextualize the statutory factors, in line with the expectations of the Congressional members who drafted the rulemaking provision.¹⁷¹ As Representative Scott Klug and his colleague Representative Rick Boucher noted, “Whatever protections Congress grants should not be wielded as a club to thwart consumer demand for innovative products, consumer demand for access to information, consumer demand for tools to

167. LITMAN, *supra* note 11, at 138.

168. *See* Herman & Gandy, *supra* note 36, at 189 (“More realistically, there is no primary intent behind § 1201, but rather a clash of hopes and wishes that tumbled out in the form of an awkwardly worded statute.”); *see also* LITMAN, *supra* note 11, at 133–145 (discussing the bargaining process leading to the final text of § 1201).

169. *See* 2003 Recommendation, *supra* note 36, at 54–55. Though the Register could have recommended a broad exemption permitting archival of computer software and video games, she stated it was “improper” to “generalize” the parameters of fair use because it was too fact-based to be generally embodied in an exemption. *Id.*

170. *See, e.g.*, 2010 Recommendation, *supra* note 56, at 49–53 (conducting a fair use analysis on an exemption allowing for circumventing of DVD protection for educational, documentary, and noncommercial videos); *id.* at 92–100 (conducting a fair use analysis on jailbreaking smartphones to permit running third-party applications); *id.* at 183–86 (conducting a fair use analysis to determine the noninfringing nature of circumventing technological protection measures in order to investigate and fix security vulnerabilities).

171. *See* Commerce Comm. Report, *supra* note 9, at 86. The Congressmen clearly saw the rulemakings as an imperfect but viable avenue to protect the public interest in using copyrighted works without permission for socially beneficial activities.

exercise their lawful rights, and consumer expectations that the people and expertise will exist to service these products.”¹⁷²

C. REVISITING “CLASSES OF WORKS”

1. *The Current Approach to Narrowing Exemptions by Use and User Are Too Technical*

Although it has become more flexible in defining “classes of works” for purposes of the rulemaking, the Copyright Office uses an approach that is still overly technical. Much as the Copyright Office has grown more comfortable using fair use to analyze exemptions, it has grown more flexible in how it defines “classes of works” for purposes of granting exemptions, defining classes based on specific uses or users.¹⁷³ Although this has enabled a number of socially beneficial exemptions,¹⁷⁴ it has also introduced complexity into the system that could impact the ability of ordinary citizens to participate in the rulemaking process and understand the extent of their rights. Although narrowing exemptions by incorporating the use has given the Copyright Office sufficient granularity to feel comfortable under its statutory authority, the Office’s method of narrowing has also resulted in increasingly messy and complicated exemptions.

The most recent rulemaking exemplifies this problem of increasing complexity. A particularly contentious exemption, the exemption permitting users to break protection on DVDs, was recommended by the Register as a dense, four-paragraph block of single-spaced text that took over two pages to spell out.¹⁷⁵ One of the four variations is reproduced here for illustration:

172. *Id.* at 87.

173. *See* 2000 Exemption, *supra* note 33, at 64,559. The Register refused to incorporate what she called “external criteria” such as a specific uses or users within a “class of works.” *Id.* However, this logic changed in 2006, when she granted an exemption for DVDs that were held in a university’s film studies library, when circumvention was for educational use in the classroom. *See* 2006 Recommendation, *supra* note 50, at 24. This was done by a bit of statutory interpretation that had apparently been overlooked for the previous six years because of inadequate facts from prior rulemakings. *See id.* at 18 (placing emphasis on the phrase “such users” in the statute and drawing the implication that a “class of works” can include users). A more likely explanation is that the previous stance towards incorporating a use or user would have led to an inequitable outcome for educators that the Register could not justify.

174. Every one of the five recommended exemptions in 2012 was qualified by the purpose of circumvention. *See* 2012 Recommendation, *supra* note 64, at 2–3. Of the five main classes of works recommended for exemption by the Register in 2010, four included language specifying the purpose of the circumvention and use to which the work was being put. *See* 2010 Recommendation, *supra* note 56, at 1–2.

175. *See* 2012 Recommendation, *supra* note 64, at 140–42.

Motion pictures, as defined in 17 U.S.C. § 101, that are lawfully made and acquired via online distribution services and that are protected by various technological protection measures, where the person engaging in circumvention believes and has reasonable grounds for believing that circumvention is necessary because reasonably available alternatives, such as noncircumventing methods or using screen capture software as provided for in alternative exemptions, are not able to produce the level of high-quality content required to achieve the desired criticism or comment on such motion pictures, and where circumvention is undertaken solely in order to make use of short portions of the motion pictures for the purpose of criticism or comment in the following instances: (i) in noncommercial videos; (ii) in documentary films; (iii) in nonfiction multimedia ebooks offering film analysis; and (iv) for educational purposes in film studies or other courses requiring close analysis of film and media excerpts, by college and university faculty, college and university students, and kindergarten through twelfth grade educators. For purposes of this exemption, “noncommercial videos” includes videos created pursuant to a paid commission, provided that the commissioning entity’s use is noncommercial.¹⁷⁶

Calling this text “complicated” would be an understatement.

Other exemptions from the most recent rulemaking exhibit similar added complexity. The recurring exemption for the blind to use ebooks was further modified, narrowed down from its previous incarnations to require that the “the rights owner is remunerated, as appropriate, for the price of the mainstream copy of the work as made available to the general public through customary channels,”¹⁷⁷ something the Register had not required in the previous three exemptions. While the Copyright Office is understandably concerned about making exemptions that stretch too broadly, narrowing to such a level of granularity makes exemptions increasingly complex and inaccessible, particularly to the general public, which is meant to benefit from the exemptions.

As a result of the increasingly complicated requirements that the Copyright Office sets in rulemakings, individual participation in the rulemaking process has decreased considerably since the first rulemaking. In 2000, the Copyright Office received 235 comments, many from individuals

176. *Id.* at 141.

177. *Id.*

representing themselves.¹⁷⁸ This number fell drastically in the subsequent round,¹⁷⁹ after the Register clarified that proponents needed to show evidence of “substantial” adverse impact and could not define a class of works with a function-based limitation.¹⁸⁰ In the most recent rulemaking, only five comments were submitted by individuals not represented by attorneys,¹⁸¹ and their submissions were generally short¹⁸² and quickly dismissed for “insufficient factual or legal analysis.”¹⁸³

The process, as noted by the EFF, does not facilitate public involvement.¹⁸⁴ Meeting the requirements set by the Copyright Office, which have changed in significant ways over the course of previous rulemakings,¹⁸⁵ requires assistance from copyright attorneys and technical experts.¹⁸⁶ This increasing complexity has arisen out of the rulemaking process, including how exemptions have been increasingly narrowed by the Copyright Office. It is a small wonder that there was so much public outcry over the 2012 jailbreaking decision when the process leading to that decision was not easily understood by non-lawyers.

Despite the considerable policy implications of rulemaking outcomes, the shifting requirements for exemptions combined with often densely worded final exemptions leave little room for regular, non-legal members of the public to influence rulemakings or understand their rights after exemptions have been granted. Furthermore, as discussed in Section III.B.1, the prevalence of digital-only content means that the complicated language of exemptions may be the only avenue to enable fair use, despite fair use being the realm of the courts rather than an administrative agency. There must be a better way to make the rulemaking process and decisions accessible to ordinary consumers while enabling more input from the courts on how fair

178. See *Post-Hearing Comments: Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 2000*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/1201/comments> (last visited Feb. 1, 2014).

179. See *Post-Hearing Comments: Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 2003*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/1201/2003/comments/index.html> (last visited Feb. 1, 2014) (displaying a total of fifty submissions, many by organizations).

180. See *supra* Section I.B.1.

181. See *Proposed Classes: Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 2011*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/1201/2011/initial/> (last visited Feb. 1, 2014).

182. See, e.g., *Submission by Kellie Heistand, 2011*, U.S. COPYRIGHT OFFICE, http://www.copyright.gov/1201/2011/initial/kellie_heistand.pdf.

183. 2012 Recommendation, *supra* note 64, at 160.

184. VON LOHMANN & HINZE, *supra* note 37, at 2–4.

185. See *supra* Section I.B.

186. VON LOHMANN & HINZE, *supra* note 37, at 3.

use should function in a digital era where technological protection measures are common.

2. *The Register Should Incorporate Reasonable Belief in Classes of Works*

A good way to solve this problem would be to include a narrowing provision that focuses on whether a user reasonably believes they are making noninfringing use. Register Peters, after gaining ten years of experience with the rulemaking process, did this in 2010 when she incorporated a user's state of mind as part of an exemption. Incorporating a reasonable belief test, with both objective and subjective components, would simplify the text of exemptions and make them more accessible to ordinary consumers, while allowing space for courts to handle difficult edge cases with which the Copyright Office has traditionally struggled.

In 2010, the Register took this approach by adding a reasonable belief element to the exemption for DVD circumvention.¹⁸⁷ The exemption allowed for circumvention of DVD protection when a user “believes and has reasonable grounds for believing” that circumvention is necessary for one of several uses.¹⁸⁸ In her explanation, the Register noted that she included the provision to have “some degree of assurance” that a user was not circumventing for infringement.¹⁸⁹ A user needed to both subjectively believe the circumvention was necessary for the noninfringing use and be objectively reasonable in that belief. This dual requirement is a sensible approach to circumvention and provide better clarity and narrowing for exemptions.

By using reasonable belief of noninfringement, the Copyright Office can narrow exemptions in a clearer way than it did in the last rulemaking, avoiding complicated language that makes exemptions harder for consumers to understand and rely on. For example, the 2012 exemption for ebook circumvention added the provision about copyright owners being remunerated to balance concerns by publishers, who expressed concern that the original proposal would allow circumvention even when there were available formats on the market that served the needs of the blind.¹⁹⁰ Put more simply, the objection was that users would circumvent when it was unnecessary. Instead of narrowing the exemption by specifics about the work being used, the Register could accomplish the same function by narrowing the scope of an exemption based on the user's assessment of their need, as

187. 2010 Recommendation, *supra* note 56, at 72.

188. *Id.*

189. *Id.* at 75.

190. 2012 Recommendation, *supra* note 64, at 19.

well as a test for the reasonableness of that assessment that could be adjudicated by a court.

Limiting exemptions by reasonable belief of noninfringement would help bring a judicial role to copyright law, avoiding difficult factual determinations that are not easily handled by the Copyright Office. As noted by commentators, the mandate to look at “noninfringing uses” forces the Copyright Office to make a binary determination involving a doctrine that is heavily fact-dependent.¹⁹¹ Instead of forcing the Copyright Office to make absolute decisions about situations that may but will not always implicate fair use, an objective standard allows the Office to craft exemptions that are limited to necessary uses, while shifting some of the analysis of necessity to the judicial branch, which is far better equipped to handle fact-specific questions of copyright law, particularly when fair use is involved. Fair use is a creation of the judiciary, and using reasonable belief of noninfringement allows the judiciary to continue to shape fair use in a digital, post-DMCA world. This approach would offer a pathway to make reasonable, considered fair uses of digital works while allowing both the Copyright Office and judiciary to shape the bounds of such uses.

The Copyright Office has often struggled with crafting an exemption that covers only the desirable noninfringing behavior. For example, in 2012 when the Register declined to extend the jailbreaking exemption to tablets, her main concern was that the term was difficult to define and could cover a wide range of devices with different uses and situations.¹⁹² The Register agreed with critics who claimed that the different devices that could possibly fall within that term would require their own analysis and exemption proceeding.¹⁹³ Another proposed exemption in that rulemaking, which would have allowed circumvention to enable closed captions for hearing-disabled individuals, was denied because it was too broadly defined and there was not enough evidence for the Register to analyze any “particularized” uses.¹⁹⁴ The proponents of the exemption had made broad suggestions of what the exemption would enable,¹⁹⁵ but the Register was unwilling to even reform the exemption to be narrower without a more specific description of the exact uses the exemption would enable.¹⁹⁶ In both cases, the Register was unwilling to recommend or even reshape exemptions because there was too much

191. Perzanowski, *supra* note 98, at 21.

192. 2012 Recommendation, *supra* note 64, at 78.

193. *Id.*

194. *Id.* at 149.

195. *Id.* at 148–49.

196. *Id.* at 149.

ambiguity about the particular types of uses that would require their own analyses. If that analysis could be done closer to the time of use by a court, rather than up to three years in advance, the exemptions could be recommended with confidence that only noninfringing uses would be protected under the statute.

Edge cases where noninfringement is uncertain can sink entire exemptions or require that they be modified to the point of inscrutability. If the Copyright Office instead uses a reasonable belief standard, the Office can shift that uncertainty to a forum better situated to fact-specific determinations than a Washington D.C. conference room trying to predict the future years in advance. Bringing reasonable belief into exemptions gives both the flexibility and simplicity to exemptions that would otherwise lack those qualities.

IV. CONCLUSION

When the DMCA was first passed into law, many questions remained about how the law would work in practice. In many ways, giving administrative responsibility to an office based in the legislative branch¹⁹⁷ was a regulatory experiment at the time it was proposed. Since that time, digital technology has rapidly evolved from what it was in the 1990s. With over fifteen years and four rounds of rulemaking experience to draw upon, the Copyright Office can adjust how the rulemaking process is run with confidence.

The suggested proposals significantly address criticisms of the rulemaking process while staying within the intent of Congress. Clarifying the burden of proof expected to renew an exemption will light a clear path for consumer advocates who want to preserve a recommendation but have difficulties in marshaling evidence. Proactively thinking about fair use will more directly account for the intent of the House Commerce Committee when drawing the line between noninfringing uses that merit an exemption and those that do not. Incorporating reasonable belief into exemptions will allow exemptions to be narrow without being unnecessarily complex while leaving room for the courts to shape fair use jurisprudence. Taken together, these changes would bring more clarity and efficiency into rulemaking

197. In his signing statement, President Clinton dismissed constitutionality concerns by claiming that the Copyright Office was an executive agency for constitutional purposes (despite being part of the Library of Congress). William J. Clinton, Statement on Signing the Digital Millennium Copyright Act, 2 PUB. PAPERS 345 (Oct. 28, 1998), *available at* <http://www.presidency.ucsb.edu/ws/?pid=55169>.

proceedings while respecting the scope of the authority that Congress granted to the Copyright Office.

Register Pallante has suggested a larger regulatory role for the Copyright Office, allowing it to take on more administrative responsibility within the copyright system.¹⁹⁸ By actively improving one of its major administrative roles, the Copyright Office will have powerful proof for Congress that the Office can handle increased responsibilities. All that remains is to act.

198. See Pallante, *supra* note 91, at 341–43.