

AGENCY REGULATION IN COPYRIGHT LAW: RULEMAKING UNDER THE DMCA AND ITS BROADER IMPLICATIONS

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On July 27, 2010, the Library of Congress and the U.S. Copyright Office issued the final rule¹ for the fourth round of the triennial rulemaking process under the Digital Millennium Copyright Act (“DMCA”).² The final rule creates new exemptions, which indicate that agency regulation could re-
inflexibility in both the DMCA specifically and copyright legislation generally. Although some scholars have criticized the triennial rulemaking process as too narrow,³ the latest round was broader than the first three rounds—particularly in the number, scope, and importance of the exemptions. If this expansion continues, together with modifications to the rulemaking process and with more authority vested in the Register of Copyrights and the Copyright Office,⁴ the DMCA triennial rulemaking

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1. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 75 Fed. Reg. 43,825 (July 27, 2010) (codified at 37 C.F.R. § 201.40).

2. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

3. See, e.g., Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999) (addressing First Amendment concerns with an overbroad anticircumvention law and the need for a heightened standard in agency rulemaking); Woodrow Neal Hartzog, *Falling on Deaf Ears: Is the “Fail-Safe” Triennial Exemption Provision in the Digital Millennium Copyright Act Effective in Protecting Fair Use?*, 12 J. INTEL. PROP. L. 309, 314 (2005) (claiming the rulemaking proceeding “is barely more than a placebo mechanism that does very little to effectuate fair use in our digital society”); Bill D. Herman & Oscar H. Gandy, *Catch 1201: A Legislative History and Content Analysis of the DMCA Exemption Proceedings*, 24 CARDOZO ARTS & ENT. L.J. 121, 188 (2006) (stating that the rulemaking process shifted “the responsibility for ensuring fair use away from the courts and [gave] it to an obscure, relatively toothless rulemaking process”); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anticircumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519, 559–62 (1999) (emphasizing that the exemptions cannot extend to circumvention tools and are therefore too limited in scope).

4. Congress established the Copyright Office to perform “all administrative functions and duties” required under the Copyright Act. The Office is a part of the Library of Congress, and the Register of Copyrights, who heads the Copyright Office, and her

process could set a precedent for implementing greater agency involvement in an increasingly regulatory form of copyright law.

The rulemaking process is just one example of the regulatory approach to copyright law. The regulatory approach began with the Copyright Act of 1976,⁵ followed by a multitude of amendments and additions, thus evolving copyright from a simple “common law statute”⁶ to regulation-type legislation.⁷ Instead of granting authors general exclusive rights to their works and leaving the courts to interpret these rights, Congress enacted laws that are detailed, complex, and industry-specific. Because these copyright laws are specific, attempt to create immediate solutions for particular interest groups, and leave little room for judicial interpretation, they resemble regulatory laws.⁸ Furthermore, rapid technological advances often lead to more amendments, which induce greater legislative complexity.

The DMCA is a prime example of “regulatory copyright.”⁹ As David Nimmer wrote, the DMCA is “massive in scope and even more gargantuan in procedural complexity,” making it the “granddaddy of all distensions of copyright doctrine.”¹⁰ Unlike a “common law statute” approach—which for copyright is a property-based model—the DMCA controls *access* to the author’s property and prohibits trafficking in the circumvention tools used to access and copy copyrighted works. Additionally, the limitations and exemptions are specific about the type of work, users, and uses rather than allowing for a general prohibition of access for infringing uses of the work. Finally, the rulemaking process, by providing exemptions to the circumvention restrictions, infuses the DMCA with some agency oversight.

subordinates are under the “direction and supervisions” of the Librarian of Congress. 17 U.S.C. § 701 (2006).

5. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (current version at 17 U.S.C. §§ 101–1332 (2006)).

6. Richard Posner, *The Decline of Law as an Autonomous Discipline: 1962–1987*, 100 HARV. L. REV. 761, 774–77 (1987) (using the term “common law statute” to apply to generally phrased statutes that leave more room for judicial interpretation).

7. See generally Joseph Liu, *Regulatory Copyright*, 83 N.C. L. REV. 84 (2004); Peter S. Menell, *Envisioning Copyright Law’s Digital Future*, 46 N.Y.L. SCH. L. REV. 63 (2002); David Nimmer, *Codifying Copyright Comprehensibly*, 51 UCLA L. REV. 1233 (2004). These three articles form the core of this Note’s analysis of copyright law as regulatory-type legislation.

8. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 5 (1999).

9. Liu coined the term “regulatory copyright” to refer to copyright laws that are more reminiscent of laws in regulated industries, meaning they are “complex,” “context-specific,” dictate rights within a market, and reduce the power and influence of the courts. Liu, *supra* note 7, at 102–04. This term will be used throughout this Note.

10. Nimmer, *supra* note 7, at 1342.

Because the DMCA addresses an industry that is quickly evolving, and one of the flaws of regulatory-style legislation is its rigidity, the DMCA is in danger of being too inflexible. Lack of flexibility is harmful to the delicate balance between protection and access in copyright law. When Congress drafted the DMCA, it recognized that it could not predict the future technology landscape, and therefore, included the rulemaking process in the statutory scheme to create flexibility.¹¹ Some critics claim that the scope of the rulemaking process is too narrow to achieve this goal.¹² Yet, by acknowledging the positive gains in the most recent round of exemptions and by broadening the scope of the process and the Copyright Office's power, the rulemaking process could be the "fail-safe mechanism"¹³ Congress originally intended. This process, in turn, shows that agency involvement could be more beneficial in the broader context of copyright law.

In Part I, this Note outlines copyright's transition to a regulatory model, the reasons for this change, its benefits and harms, and the DMCA's fit within the regulatory scheme. Part II illustrates the mechanics of § 1201 and focuses on the rulemaking provision's notice-and-comment process. Part III analyzes the positive trend in each round's exemptions, criticisms of the DMCA rulemaking process, and proposals for addressing these criticisms in order to bolster expansion in round five. Part III also illustrates a potentially more effective version of the rulemaking process, which enables one to see how agency involvement in copyright law may be beneficial generally, especially if "regulatory copyright" is here to stay. Part IV then suggests expanding the Copyright Office's role in copyright law, due to the tension between regulatory copyright legislation and rapid technological advances as well as the Register's performance in the DMCA rulemaking process.

I. REGULATORY COPYRIGHT AND THE DMCA

Although it is just one in a string of amendments creating a regulatory structure for copyright law, the DMCA serves as the epitome of this legislative direction. This Part discusses the origins of regulatory copyright

11. H.R. REP. NO. 105-551, pt. 2, at 36 (1998).

12. *See, e.g.*, PAN LEE, DANIEL PARK, ALLEN WANG & JENNIFER URBAN, PUBLIC KNOWLEDGE REPORT 2: UPDATING 17 U.S.C. § 1201 FOR INNOVATORS, CREATORS, AND CONSUMERS IN THE DIGITAL AGE (Public Knowledge ed., 2010), *available at* <http://www.publicknowledge.org/cra/>; Fred Von Lohmann & Gwen Hinze, *DMCA Triennial Rulemaking: Failing the Digital Consumer*, ELEC. FRONTIER FOUND., 2 (Dec. 1, 2005), http://www EFF.org/IP/DMCA/copyrightoffice/DMCA_rulemaking_broken.pdf.

13. H.R. REP. NO. 105-551, at 36.

and its attributes in order to illuminate the DMCA's regulatory aspects and to place it in the context of this trend. The history of the shift in general copyright law and its positive and negative effects mirror the history and effects of the DMCA. In turn, using the DMCA and the rulemaking process as an example of regulatory copyright legislation provides advice and illustrates pitfalls in this general trend in copyright law.

A. COPYRIGHT'S EVOLUTION FROM A PROPERTY-BASED REGIME TO A REGULATORY REGIME

In its former iterations, from the British Statute of Anne in 1710,¹⁴ to the Copyright Act of 1790,¹⁵ to the 1909 Copyright Act,¹⁶ copyright followed a relatively simple property-based model. Creators of protected works had the right to exclude others from certain uses of their works. This fits the property theory, in which the right to exclude is just one stick in the “bundle of sticks.”¹⁷ While the scope of copyright protection broadened over the years—in part due to the expansion of the types of works protected¹⁸ and the duration of protection,¹⁹—the reduction in requirements such as notice²⁰ and registration²¹ made it simpler to obtain the right to exclude. The earlier copyright acts set the scope of the copyright entitlement but were “agnostic

14. Act for the Encouragement of Learning (Statue of Anne), 8 Ann., c. 19, § 1 (1710).

15. Copyright Act of May 31, 1790, ch. 15, 1 Stat. 124.

16. Copyright Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075.

17. See generally Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1996) (explaining “bundle of rights” property theories and what the Supreme Court has considered the most important stick: the right to exclude); see also 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *2 (1766) (defining property as the “sole and despotic dominion which one man claims . . . in total exclusion of the right of any other individual of the universe”). Although many have rejected the “bundle of rights” theory, it is often used as the basis for analysis. Merrill, *supra*, at 738; see also Frank H. Easterbrook, *Intellectual Property is Still Property*, 13 HARV. J. L. & PUB. POL'Y 108, 113 (1990) (stating that, except in the rarest of cases, property rights should apply to intellectual property in the same way they apply to tangible property).

18. See 17 U.S.C. § 102(a) (2006) (listing eight categories of protectable works). This number has expanded since the 1790 act, which simply protected maps, charts, and books. See Copyright Act of May 31, 1790, § 1.

19. Duration has been extended several times from the initial fourteen-year term, plus fourteen-year extension, to the current life of the author, plus seventy years. See Copyright Act of May 31, 1790, § 1; 17 U.S.C. § 302.

20. See §§ 401–406 (making the notice requirement optional).

21. See § 408 (outlining the requirements for registration, but noting that “registration is not a condition to copyright protection”). Although registration was never a requirement for initial protection, it was required for renewal, pre-1964. See Copyright Act of Mar. 4, 1909, § 23.

about the details and the structure of the resulting market.”²² Courts developed limitations on an author’s property rights, which remained a part of common law until the latter part of the twentieth century.²³

Congress first codified most of these judge-made limitations in the Copyright Act of 1976. In an attempt to codify common law and address the needs of interest groups, Congress produced a dense document that was riddled with complexities.²⁴ Although the new Act’s intricacies resembled a regulatory model, copyright as a property-based regime still persisted within the Act.²⁵ Congress then created a true regulatory regime through a series of post-1976 amendments—particularly with the flurry of amendments between 1992 and 2002—that left the Copyright Act “bloated” in all major areas.²⁶ Amendments such as the Audio Home Recording Act of 1992,²⁷ the Digital Performance Rights in Sound Recording Act of 1995,²⁸ and the DMCA in 1998, as well as the institution of a Copyright Royalty Board,²⁹ the expansion

22. Liu, *supra* note 7, at 101.

23. Restrictions on copyright owners, such as the fair use and first sale doctrines, remained solely in the common law until codification in 1976. *See, e.g.*, *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908) (creating the first-sale doctrine); *Gyles v. Wilcox*, (1740) 26 Eng. Rep. 489 (Ch.) (establishing the “fair abridgment” doctrine which later evolved into the modern fair use doctrine).

24. *See generally* Jessica Litman, *Copyright, Compromise and Legislative History*, 72 CORNELL L. REV. 857, 861 (1987) (providing an overview of the process for creating the 1976 Act, including that “the language evolved through a process of negotiation among authors, publishers, and other parties with economic interests”).

25. Liu, *supra* note 7, at 98–102, 105; *see also* John Tehranian, *Fixing Copyright: Introduction: Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 548 (“With the passage of the 1976 Copyright Act . . . we radically altered our default regime from one of nonprotection to one of protection. . . . [V]irtually the entire universe of creative works created after 1978 is now subject to copyright protection. Any use of a creative work is now, as a default matter, viewed as an infringement.”); *cf.* Nimmer, *supra* note 7, at 1282 (stating that the 1976 Act was a “departure from the flexibility and pristine simplicity of a corpus of judge-made copyright law,” though it was the subsequent amendments that truly expanded the Act’s complexity).

26. Nimmer, *supra* note 7, at 1315; Pamela Samuelson, *Fixing Copyright: Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 557 (“[T]he current statutory framework is akin to an obese Frankensteinian monster.”); *see also* WILLIAM M. LANDES & RICHARD A. POSNER, *THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY LAW* 2–3 (2004) (stating that copyright law has more amendments and is lengthier than other areas of intellectual property law).

27. 17 U.S.C. §§ 1001–1010 (2006).

28. § 114.

29. The Board determines rates and terms for statutory licenses as well as distribution of the royalties. *See* Copyright Royalty and Distribution Reform Act of 2004, 17 U.S.C. § 801.

of rulemaking by the Copyright Office,³⁰ and the detailed and numerous exemptions within the new provisions, changed the laws surrounding the creation and protection of creative works to look more like a regulated industry than property law for intellectual goods. In fact, post-1976, Congress has addressed most new subject matters with statutory amendments, instead of leaving the courts to interpret the Copyright Act.³¹

These developments ushered in the regulatory model of modern copyright law. Gone is the “industry- and technology-neutral” code.³² Instead, the rules are “context-specific” with a “precise structure and allocation of rights” governing various individual markets.³³ And tailoring rights to specific markets means more complexity. Courts are no longer able to articulate a basic property entitlement—not only was case law codified, but Congress also attempted to pre-empt many potential copyright issues that would arise with fast-evolving technology by outlining specific, detailed rights and exceptions to those rights.³⁴

The DMCA is a prime example of regulatory legislation in copyright law because it deviates from a property-based model, is industry specific, and is complex in its allocation of rights. First, the Act does not create a property right in a particular work. Instead, it regulates access to a copyrighted work as well as the tools by which to obtain that access and to make copies. Second, Congress geared the Act’s provisions toward two particular industries—traditional content creators in the entertainment and record industries, and creators of technology—by providing protection for the former through restriction of the latter. Third, the Act is detailed in its limitations and exemptions. For example, there are seven exemptions, and most specify a

30. Beyond the DMCA rulemaking process, the Copyright Office conducted notice-and-comment processes: (1) for the “operation and revision” of § 111, § 112 statutory licenses, and § 119; (2) for a proposal to extend the scope of the § 115 compulsory license; and (3) to study the “phantom signal phenomenon” under § 111. *See* Rulemaking Proceedings, COPYRIGHT OFFICE, <http://copyright.gov/laws/rulemaking.html> (last visited on Feb. 7, 2011).

31. Samuelson, *supra* note 26, at 551–52. (“The only new subject matters added to the copyright realm since 1976 have arrived through statutory amendment, not through common law interpretation of the 1976 Act’s broad subject matter provision.”).

32. Liu, *supra* note 7, at 100.

33. *Id.* at 103–04. *See generally* Michael W. Carroll, *One Size Does Not Fit All: A Framework for Tailoring Intellectual Property Rights*, 70 OHIO ST. L.J. 1361 (2009) (advocating that specific copyright and patent rights are more economically beneficial).

34. Not only did the 1976 Act create “limitations,” but it made specific exemptions to those limitations. *See* Liu, *supra* note 7, at 105. For example, § 108 outlines what libraries and archives can and cannot copy instead of leaving this copyright exception to the fair use doctrine.

class of users, limit the uses, and provide stipulations for those uses.³⁵ Last, the DMCA's triennial rulemaking process, conducted by the Copyright Office and overseen by the Librarian of Congress, establishes some supervision of the Act.³⁶

1. *Reasons for the Shift to Regulatory Copyright Law*

Several factors have driven copyright's shift to this more complex model. The first was rapidly evolving technology, which both increased and diversified options for disseminating and copying copyrighted works.³⁷ Between 1976 and 1989, Congress considered over 400 bills to amend copyright laws, most of them related to new technologies.³⁸ In 1989, the Office of Technological Assessment concluded, "all copyright law, including the Copyright Act of 1976, proceeds on the assumption that effective and efficient copying is a large-scale, publicly visible, commercial activity."³⁹ Thus, with the technology revolution that followed the 1976 Act, not only were there new modes of expression and dissemination, but the trend also created the ability to "flawlessly, inexpensively, and instantaneously reproduce and distribute works of authorship."⁴⁰ Traditional content creators wanted additional protection and boldly lobbied for it.⁴¹

Beyond the need for protective measures, the technology revolution created new, extremely valuable markets, thus adding to the incentive to

35. See, e.g., § 1201(d) (exempting "Non-profit Libraries, Archives, and Educational Institutions," by allowing access to protected works, but only to determine whether to purchase a copy, and imposing such limitations as retention "no longer than necessary" and qualification requirements for the libraries and archives).

36. § 1201(a)(1)(C). Although the DMCA vests the Librarian of Congress with the power to make exemptions under the rulemaking process, he is to do so at the recommendation of the Register of Copyrights, who is responsible for conducting the rulemaking proceedings. *Id.*

37. For a detailed explanation of the evolution in technology, which spurred the 1976 Act and subsequent amendments through 2002, see Menell, *supra* note 7, at 103–29.

38. OFFICE OF TECH. ASSESSMENT, U.S. CONG., COPYRIGHT AND HOME COPYING: TECHNOLOGY CHALLENGES THE LAW 3 (1989), available at http://govinfo.library.unt.edu/ota/Ota_2/DATA/1989/8910.PDF (finding rampant copying of music at home). Beyond copying, illegal dissemination has increased as well with websites such as YouTube and the prevalence of peer-to-peer file-sharing. See *Pornography, Technology and Process: Problems and Solutions on Peer-to-Peer Networks: Hearing Before the Comm. on the Judiciary*, 108th Cong. (2003) (statement of Marybeth Peters, Register of Copyrights, Copyright Office); Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 2 (2004).

39. OFFICE OF TECH. ASSESSMENT, *supra* note 38, at 7.

40. Menell, *supra* note 7, at 64.

41. See, e.g., *Hollywood Has a Setback in Controls for Digital Copyright*, N.Y. TIMES, June 5, 2002, at C4, available at <http://www.nytimes.com/2002/06/05/technology/05DIGI.html>.

adapt copyright laws. The entertainment industry wanted legislation that was beneficial for its bottom line.⁴² The internet explosion prompted content creators' interest in a "pay-per-use universe." Since this model is dependent on limiting user access, these creators wanted legal protection.⁴³

The economic incentive for protection resulted in "rent-seeking," political pressure, and eventually compromise in the form of lengthy legislation. Rent-seeking statutes often result from concentrated benefits and distributed costs,⁴⁴ which is applicable in this scenario; Hollywood benefits and users (i.e. the public) bear the costs. Entertainment groups can "cloak[] their rent-seeking objectives in public-regarding terms" to decrease opposition.⁴⁵ Copyright is amenable to this "cloaking" since the accepted goal of copyright is to promote creation for public benefit,⁴⁶ which can mask economic incentives.⁴⁷ But users have not been without allies. While the traditional content industry has been fighting for greater copyright protection, technologists and users have been advocating for limits to broad grants of protection.⁴⁸ The resulting compromise has created complex congressional amendments. Due to the complexity of the 1976 Act, copyright protection is prone to "rent-seeking" as interests of parties can be "hidden" within the twists and turns of the Act.⁴⁹ With an Act that can hide

42. See Jane C. Ginsburg, *Copyright Legislation for the "Digital Millennium,"* 23 COLUM.-VLA J.L. & ARTS 137, 142 (1999) (citing the "changing economies of exploitation of copyrighted works in the digital environment" as a reason for an expansive DMCA).

43. Jessica Litman, *Reforming Information Law in Copyright's Image,* 22 U. DAYTON L. REV. 587, 601 (1997) (noting the market change in the digital universe as opposed to a book, which could not "sprout wings and fly back" after one reading). The Register has noted a "pay-per-use universe" would be a positive effect of the DMCA, since it would allow users to access works cheaply. See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 65 Fed. Reg. 64,556, 64,563 (Oct. 27, 2000).

44. William N. Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation,* 74 VA. L. REV. 275, 292 (1988).

45. See *id.*

46. See Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law,* 75 TEX. L. REV. 989, 993 (1997) ("Intellectual property rights are fundamentally about incentives to invent and create.").

47. Tim Wu, *Copyright's Communications Policy,* 103 MICH. L. REV. 278, 283–84 (2004) (claiming that "author centric theories of copyright" paint an incomplete picture and that copyrighting legislation has "much more to do with managing competition between industry rivals").

48. *Id.* at 343–44 (2004) (describing copyright's regulatory-type legislation to historically be a product of a battle between disseminators, but in the digital age, it became a battle between the disseminator and the user).

49. Liu, *supra* note 7, at 138.

“rent-seeking” amendments and a battle between two industries to create these amendments, the direct result is an increase in the complexity and regulatory nature of copyright law.

2. *The History of the DMCA*

The impetus behind the DMCA’s creation and its structure mirrors the reasoning for the overall shift in copyright law. This is evident in the DMCA’s legislative history. At the Diplomatic Conference held by the World Intellectual Property Association (“WIPO”) in 1996, 150 countries, including the United States, adopted the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.⁵⁰ Countries enacted these treaties to ensure the protection of copyrighted material in the quickly evolving “digital environment . . . at a time when borderless digital means of dissemination were becoming increasingly popular.”⁵¹ The United States then implemented domestic legislation to bring U.S. copyright law into compliance with these treaties,⁵² resulting in the DMCA.⁵³

The DMCA departed from “regulating the use of information” to regulating “the devices or means by which the information [is] delivered or used by information consumers.”⁵⁴ Many opposed the bill due to this distinction: under the DMCA, liability arises “separate and independent from any act of copyright infringement” and without “any intent to promote infringement.”⁵⁵ Although members of the Commerce Committee agreed that such legislation must be approached with caution, they also felt the digital revolution had created a “unique threat” to copyright owners that required strong protection from the easier copying and dissemination that resulted from new devices.⁵⁶ Congress did not seem to consider whether any

50. These require parties to the treaties to afford “adequate legal protection and effective legal remedies against the circumvention of technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention.” World Intellectual Property Organization: Copyright Treaty art. 11, Dec. 20, 1996, 36 I.L.M. 65; World Intellectual Property Organization: Performances and Phonograms Treaty art. 18, Dec. 20, 1996, 36 I.L.M. 76.

51. H.R. REP. NO. 105-551, pt. 1, at 9 (1998).

52. *Id.* (requiring “two technological adjuncts” to the copyright law).

53. *Id.*

54. H.R. REP. NO. 105-551, pt. 2, at 24.

55. *Id.*

56. *Id.* at 24–25.

action needed to be taken, and instead, started with the assumption that copyright law had to be adapted for this digital revolution.⁵⁷

Despite the Commerce Committee referencing the need for the United States to comply with the WIPO treaties, the treaties were only one motivating factor for the DMCA.⁵⁸ In fact, the Act went far beyond the compliance requirements.⁵⁹ Instead, the DMCA's language closely resembled a suggested provision from the Clinton Administration's *Framework for Global Electronic Commerce*.⁶⁰ Backed by the entertainment industry, the initial DMCA provisions created a broad ban on technologies.⁶¹ Silicon Valley then entered the arena and limited this broad ban with exemptions such as interoperability and the elimination of requirements for designing technology to meet technological protection needs.⁶² Consequently, with Hollywood and Silicon Valley battling each other, simple provisions turned complex as Congress added limitations to please both sides.⁶³

B. THE BENEFITS AND CRITICISMS OF A REGULATORY STRUCTURE FOR COPYRIGHT LAW

A “regulatory” copyright model contains both positive and negative attributes. One benefit is regulatory copyright can tailor itself to the requirements of individual industries as different industries have varying

57. Nimmer, *supra* note 7, at 1375. Nimmer compares the legislators' assumption in enacting the DMCA to their earlier approach for addressing copyright protection for software. Congress formed the National Commission on New Technology Uses of Copyrighted Works (“CONTU”), in which the need for copyright to protect software was studied *before* Congress decided to amend the Copyright Act. CONTU advised Congress on the steps for adapting copyright law and advocated for fitting software into the existing framework. *See id.* at 1378–81.

58. For additional information on the legislative path to the DMCA, see Herman & Gandy, *supra* note 3, at 129–41.

59. *See* Samuelson, *supra* note 3, at 553 (claiming that a simple statute making it illegal to circumvent technological protection systems for purposes of engaging in or enabling copyright infringement would have been enough).

60. William J. Clinton & Albert Gore, A Framework for Global Electronic Commerce, July 1, 1997, <http://www.w3.org/TR/NOTE-framework-970706>; *see also* Samuelson, *supra* note 3 (providing an analysis of the similarities between the Framework and resulting legislation).

61. Samuelson, *supra* note 3, at 538.

62. *Id.* *But see* Wu, *supra* note 46, at 359–60 (stating that the anticircumvention provisions were the result of a battle between the concentrated content industry and the “scattered” consumers).

63. *See* Menell, *supra* note 7, at 162–91 (noting that both sides supported the DMCA, but its ineffectiveness “forced a wedge between the content and technology sectors”); Samuelson, *supra* note 3 (providing a detailed description of the battle between Hollywood and Silicon Valley in the creation of the DMCA).

needs.⁶⁴ This avoids incurring “uniformity costs.” Detailed exemptions, licenses, and set royalty rates can also provide “greater clarity to the regulated parties” and may cure market failures in some industries.⁶⁵ Clearly defined laws also reduce legal uncertainty because creators and users of content do not have to predict how a court will rule *ex post*, which is critical with constantly evolving technologies.⁶⁶ Though one might assume that the courts can react more quickly than Congress in adapting to new technologies, the legislature has proven to be equally fast or faster in determining a new technology’s copyright status in some cases.⁶⁷

Post-1976 amendments have also instituted broader agency involvement. Agencies can be more effective at rulemaking than legislators, due to fewer constraints by the political process and their use of “open, reasoned, and incremental”⁶⁸ procedures. And though agencies can be particularly susceptible to private interests,⁶⁹ they are arguably less so because bureaucrats are appointed, not elected. Their decisions do not reflect concerns about answering to constituents or garnering reelection funds. The Copyright Office appears to have successfully avoided susceptibility to private interests. Because it has remained industry-neutral, the Copyright Office’s increased involvement in copyright lawmaking is another positive aspect of regulatory copyright legislation.⁷⁰

Despite these benefits, some scholars regret the shift—or at least the way the laws have been drafted and enacted. David Nimmer has argued that legislation should embody four characteristics: (1) coherency, (2) transparency, (3) a basis in reality, and (4) breadth, and that the Copyright Act of 1976 and subsequent legislation do not reflect these traits.⁷¹ For

64. Carroll, *supra* note 33, at 1366 (believing it is better to tailor laws than to create open legislation with “flexible” standards).

65. Liu, *supra* note 7, at 133. For clear exemptions, see 17 U.S.C. §§ 108–122 (2006), as a comparison to fair use under § 107.

66. Ben Depoorter, *Technology and Uncertainty: The Shaping Effect on Copyright Law*, 157 U. PA. L. REV. 1830, 1846 (2009).

67. *Id.* at 1842–43 tbl.1 (showing, for example, that it took the court four years to enjoin Grokster and eight years to rule on the VCR, while it took Congress six years to legislate for DAT tapes and eight years for the audio cassette); Nimmer, *supra* note 7, at 1377 n.792 (noting the *Red Baron* and *Napster* decisions).

68. Eskridge, *supra* note 44, at 308.

69. Under public choice theory, asymmetrical laws that are subject to agency control lead to “agency capture,” in which one interest group comes to control the agency. *Id.* at 289.

70. *See infra* Section IV.C.

71. Nimmer, *supra* note 7, at 1270–83; *see also id.* at 1282 (“I for one regret this departure from the flexibility and pristine simplicity of a corpus of judge-made copyright law

example, many recent acts have provisions that may conflict with one another,⁷² but the complexity of the industry-specific legislation makes it difficult to identify these specific conflicts. Complexity also makes copyright laws hard to understand, resulting in poor guidance, particularly for private citizens.⁷³ This leads to uncertainty for the courts, for authors, and for users, and results in economic inefficiency due to a decrease in market transactions and the creation of derivative works.⁷⁴ This complexity also contributes to a lack of transparency, because hidden agendas can be interwoven into the Act, along with provisions that do not contribute to copyright's policy goals.⁷⁵ In addition, Congress may not have the detailed knowledge about market structures necessary to make intricate rules for individual industries,⁷⁶ and Congress may not be the best predictor of trends in technology.⁷⁷

One of the greatest disadvantages of detailed provisions is the lack of breadth and the resulting lack of flexibility. With detailed provisions, not only are the rules set, but they usurp the role of the courts. In certain instances, Congress may be able to react more quickly than the courts. Yet, a simpler property rights structure could be more responsive to the market, particularly

implanted on a statutory base consisting of general principles. This has now been replaced with a body of detailed rules reminiscent of the Internal Revenue Service.”)

72. For instance, the DMCA provides exceptions to the prohibition against circumvention, but not all of these exceptions include exemptions for the tools with which to circumvent. *See, e.g.*, 17 U.S.C. § 1201(d)(4) (2006).

73. That laymen understand copyright laws has become even more crucial in the digital age due to the ease of infringement, the ease of detecting infringement, and the proliferation of user-generated content. *See* Tehranian, *supra* note 25, at 539–40 (stating that copyright law has become relevant to everyone because “we are all regular consumers and producers of copyrighted content”); *see also* Rebecca Tushnet, *I Put You There: User-Generated Content and Anticircumvention*, 12 VAND. J. ENT. & TECH. L. 889, 914–15 (2010) (illustrating the explosion of user-generated content and the need for such users to be involved in the modification of copyright law).

74. ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 125 (2d ed. 1997). This complexity also negates the benefit of notice and the avoidance of ex post court decisions that well-written regulatory-type laws can provide.

75. Liu, *supra* note 7, at 135–36.

76. *Id.* at 136–37 (stating that this lack of prescience is seen in the number of amendments and in the cases that arise in the courts).

77. The Congressional Office of Technology Assessment, which provided a basis for many technological debates in Congress, closed in 1995 and its services have not been replaced. *See* Warren E. Leary, *Congress's Science Agency Prepares to Close its Doors*, N.Y. TIMES (Sept. 24, 1995), available at <http://www.nytimes.com/1995/09/24/us/congress-s-science-agency-prepares-to-close-its-doors.html?>; OTA LEGACY, <http://www.princeton.edu/~ota/> (last visited on Dec. 20, 2010). The Copyright Office sometimes conducts research for the Librarian, but its resources are limited.

with the rapidity and unpredictability of new technology.⁷⁸ For laws that are codified in detail, the court does not have much room for interpretation when faced with new issues, and especially when these laws become obsolete.⁷⁹ Rent-seeking legislation is also more likely to become obsolete because legislators are less likely to update them.⁸⁰ And though not all problems are foreseeable, a lack of flexibility in copyright markets can be particularly dangerous since technology evolves rapidly. Even the most prescient lawmaker cannot predict the influence of future, unknown technologies.

1. *Criticisms of the DMCA's Structure*

Many scholars have criticized the DMCA, though these criticisms generally focus on the poor drafting of the DMCA's provisions rather than its regulatory structure. Nimmer's four principles of "good" legislation⁸¹ are not present in the DMCA. With regard to breadth, the DMCA has "no pretense of serving the commonweal generally."⁸² Lack of breadth, however, can be a criticism of regulatory legislation generally since regulations are usually both industry- and rule-specific. Second, the DMCA is not based in reality.⁸³ It did not regulate activities that existed in 1998, nor do those activities exist today.⁸⁴ Congress should have realized that intricate legislation to guide future, unknown events would be problematic,⁸⁵ and therefore, should have provided more breadth to the Act.⁸⁶

Critics also claim that the DMCA lacks coherence and transparency. The Act is not coherent because it is "subject to endless contradictions and

78. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986) (preferring the efficiency of common law over legislation).

79. CALABRESI, *supra* note 8, at 5–7 ("Increasingly detailed codifications have left judges scrambling to make specific but obsolete laws functional.")

80. Eskridge, *supra* note 44, at 294.

81. See *supra* Section I.B.

82. Nimmer, *supra* note 7, at 1343. This lack of breadth refers to the interests it caters to, not to the subject, which is an expansive ban on access.

83. *Id.*; David Nimmer, *Back from the Future: A Proleptic Review of the Digital Millennium Copyright Act*, 16 BERKELEY TECH. L.J. 855, 858–59 (2001).

84. *Id.*

85. Samuelson argues that the Act should have been left open to review after its enactment because Congress was aware of potentially negative impacts of the legislation resulting from the debate between Hollywood and Silicon Valley, in addition to vocal criticisms from the academic community. Samuelson, *supra* note 3, at 522–25. While there *was* one study provision and a moratorium on the "act of circumvention provision," Samuelson stated that this was not enough. *Id.* at 557.

86. This supports Joseph Liu's assessment that the DMCA was not a good candidate for regulatory-type legislation. See Liu, *supra* note 7, at 142.

interpretive dead ends.”⁸⁷ For example, the DMCA allows the circumvention of protection measures for certain users and uses but does not always allow the requisite circumvention tools.⁸⁸ The lack of exemptions for tools also extends to the rulemaking process because the Library of Congress does not have the authority to exempt tools. Rulemaking is thus limited, unless the affected users know how to circumvent technological measures without legally marketed devices.⁸⁹ Some commentators claim these limitations render a number of the DMCA’s provisions “meaningless,”⁹⁰ thus causing incoherence and indefiniteness. These characteristics of the DMCA have led to attempts to protect non-creative works, such as garage door openers and ink cartridges,⁹¹ which is contrary to copyright’s policy goals. Because the DMCA directly affects the public, the consequences of the resulting legal uncertainty are magnified.

2. *The DMCA as a Poor Candidate for Regulatory Legislation*

While a regulatory model may be beneficial in some settings, it can be harmful in others; Joseph Liu identified characteristics of areas where regulatory legislation is most appropriate and concluded that digital copyright does not qualify.⁹² For example, a regulatory approach can be beneficial when there is “good data for a particular industry,” the main participants are “identifiable and well-represented,” and potential market failure can be clearly perceived.⁹³ Conversely, a regulatory approach may be too restrictive when there is “significant doubt over both technology and/or the future structure of the market”—when there are constant new developments and entrants.⁹⁴ Also, if there is not a strong potential for market failure, over-

87. Nimmer, *supra* note 7, at 1343.

88. For instance, the exemption for libraries, archives, and educational institutions does include an exemption for tools. *See* 17 U.S.C. § 1201(d) (2006). Meanwhile, other exemptions such as those for interoperability and encryption research do allow for the use of circumvention tools. *See* § 1201(f), (g)(4). While this may sometimes require exempted users to be technologically proficient to circumvent without legally available circumvention tools, many circumvention tools are easily available (for example, just conduct an internet search for “jailbreaking an iPhone”).

89. Samuelson, *supra* note 3, at 560–62.

90. *Id.* at 547.

91. *See* Chamberlain Group, Inc. v. Skylink Techs., Inc. 381 F.3d 1178 (Fed. Cir. 2004); Lexmark Int’l v. Static Control Components, 387 F.3d 522 (6th Cir. 2004).

92. Liu, *supra* note 7.

93. *Id.* at 140.

94. *Id.* at 140–42.

regulation can be harmful by interfering with the economic efficiency of a competitive market.⁹⁵

Digital copyright laws, such as the DMCA, fall into the latter category,⁹⁶ because the technology and the players are in constant flux and potential market failure has not been identified. Content creators, however, appear to be satisfied with protections afforded by the DMCA. In their push to quash triennial rulemaking exemptions, content industry members stated that the DMCA has “made a critical positive contribution” to protecting against a “digital cornucopia” in which there is an “unprecedented range of copyrighted materials” available to the public in digital formats.⁹⁷ But it is not clear that this legislative attempt to combat the proliferation of copyrighted digital content preempted any potential market failure. Without a definite need to correct market failure and with unforeseeable technological advances, it is hard to justify a regulatory approach. Nevertheless, the triennial rulemaking process aids in saving the DMCA from common pitfalls of a regulatory model by providing the DMCA with the flexibility to adapt to unforeseeable technologies.⁹⁸

C. POLICY BEHIND THE DMCA RULEMAKING PROCESS

The Commerce Committee proposed the rulemaking process to create flexibility within the DMCA⁹⁹ and to retain statutory fair use.¹⁰⁰ The Committee intended for this process to be the Act’s “fail-safe mechanism,” which was particularly important for regulatory-type legislation addressing a constantly evolving market and new technologies.¹⁰¹ The legislators chose a

95. *Id.*

96. *See id.* at 143–45.

97. Joint Reply Comments of the Ass’n of Am. Publishers et. al. at 4, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Docket No. RM 2005-11 (Feb. 2, 2006), *available at* http://www.copyright.gov/1201/2006/reply/11metalitz_AAP.pdf [hereinafter 2006 Joint Reply Comments].

98. For example, Congress may not have envisioned a “smartphone” in 1998, but the most recent round of rulemaking has ensured that users are not constrained by the DMCA’s prohibition against circumvention.

99. The proposal from the Judiciary Committee did not contain the rulemaking process. *See* H.R. REP. NO. 105-551, pt. 1 (1998).

100. *Id.* at pt. 2, at 37 (1998) (stating the goal of the process was the ensure that technological protection measures are not “adversely affecting the ability of individual users to make lawful uses of copyrighted works,” and “[t]he primary goal of the rulemaking proceeding is to assess whether the prevalence of these technological protections . . . is diminishing the ability of individuals to use these works in ways that are otherwise lawful”).

101. *Id.* at 36.

regulatory scheme for the exemption process, instead of a statutory scheme, so as to provide for “greater flexibility in enforcement.”¹⁰² The desire for flexibility defined the process: recurrence every three years, focus on “distinct, verifiable and measurable impacts,” consideration of “past or likely adverse impacts,” and the requirement of de novo review.¹⁰³

Beyond Congress’s stated intent, legislators often delegate authority to agencies, particularly when there are vocal, conflicting interests. This allows legislators to “claim to have done something constructive . . . by shifting political decisions to another branch.”¹⁰⁴ Since the DMCA has been the subject of pressure from both content creators and hardware/software manufacturers, Congress might wish to move the battleground for updating a controversial part of the statute into another forum. Furthermore, the “notice-and-comment” method seems appropriate. The Administrative Procedure Act establishes two types of rulemaking: “formal” and “notice-and-comment.”¹⁰⁵ Most agencies choose the latter because it is less cumbersome.¹⁰⁶ Given this general preference as well as rapid technological advances and the goal of flexibility, this notice-and-comment approach would appear to be the obvious form for the DMCA’s rulemaking process.

II. THE DMCA AND THE RULEMAKING PROCESS

Understanding the DMCA’s provisions, and particularly the rulemaking process, helps to illuminate the Act’s place within the regulatory copyright model. The DMCA triennial rulemaking process merits attention because it

102. *Id.*

103. *Id.* The original proposal in H.R. 2281, 105th Cong. (1998), was for the rulemaking to occur every two years.

104. Eskridge, *supra* note 44, at 312.

105. The Administrative Procedure Act (“APA”) establishes the guidelines for notice-and-comment rulemaking. 5 U.S.C. § 553 (2006). When Congress grants authority to an agency, Congress can supplement or override the APA’s procedural requirements, but the Commerce Committee chose not to when creating the DMCA rulemaking process. *See* H.R. REP. NO. 105-551, at 37.

106. *See* Anthony Gass, *Considering Copyright Rulemaking* (Working Paper, 2008) (on file with author). Gass notes, however, that the “notice-and-comment” process is far from streamlined. *Id.*; *see also* Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. U. L. REV. 533, 533 (2000) (stating that when Congress adopted the APA, “the notice and comment requirement . . . was viewed as a variant on the legislative process that would allow agencies to adopt and amend rules quickly in response to changing circumstances,” but the process has since become more complex with the introduction of “statutorily mandated review of agency action,” the requirement of “extensive documentation of information” the agency relies on, “detailed explanation[s] of choices” the agency makes, and other considerations).

incorporates agency involvement into the DMCA, even if that involvement falls short of true oversight. More generally, in an area of law that is increasingly regulatory, the rulemaking process is still one of the few places that incorporates agency input. By outlining relevant sections of the DMCA, with a focus on the notice-and-comment procedure, this Part depicts how the Librarian of Congress and the Register of Copyrights implement agency regulation. This Part then shows the exemptions created by this process.

A. A BRIEF OVERVIEW OF SECTION 1201

Section 1201 of the DMCA contains three basic prohibitions. The main provision prevents access to a copyrighted work by prohibiting the circumvention of a technological protection measure (“TPM”) that “effectively controls access” to that work.¹⁰⁷ Circumvention means “to descramble a scrambled work, to decrypt an encrypted work or . . . to avoid, bypass, remove, deactivate, or impair a technological measure.”¹⁰⁸ A TPM “effectively controls access” if it “requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to a work.”¹⁰⁹ This provision essentially forbids the “electronic equivalent of breaking into a locked room in order to obtain a copy of a book.”¹¹⁰ Access control is akin to a copyright owner’s exclusive distribution right under the Copyright Act.¹¹¹

The next two provisions prohibit the manufacture, sale, and trafficking of devices or services used for circumventing a TPM.¹¹² The device or service must meet three requirements to qualify for prohibition: (1) it must have been “designed or produced” primarily to circumvent TPMs; (2) if it has a purpose other than to circumvent, that purpose must be limited; and (3) it must have been marketed with the circumvention purpose in mind.¹¹³ The first trafficking provision prohibits devices or services used to *access* a

107. 17 U.S.C. § 1201(a)(1)(A) (2006).

108. § 1201(a)(3)(A).

109. § 1201(a)(3)(B).

110. *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294, 316 (S.D.N.Y. 2000). For example, if a copyright owner required a password to access a digital copy of his book, the password would be an access control measure. A person who does not know the password and uses software to discover it would be violating this provision of the DMCA.

111. Ginsburg, *supra* note 42, at 140; *see also* § 106(3).

112. § 1201(a)(2), (b)(1) (stating specifically that “[n]o person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof”).

113. § 1201(a)(2)(A)–(C), (b)(1)(A)–(C).

copyrighted work.¹¹⁴ The second trafficking ban refers to devices or services that aid in violating a copyright owner's exclusive right, such as copying a work, once access has already been achieved.¹¹⁵

In an attempt to maintain the constitutionally mandated balance in copyright law,¹¹⁶ the DMCA contains a "savings clause," several enumerated exemptions, and the triennial rulemaking process. Thus, a copyright owner does not receive universal protection against circumvention or against the creation and dissemination of tools that allow such circumvention. First, the savings clause mandates that "nothing . . . shall affect rights, remedies, limitations or defenses to copyright infringement, including fair use, under this title."¹¹⁷ Congress thus intended to import all of the limitations and defenses that protect users under the Copyright Act.¹¹⁸ The savings clause's effectiveness is questionable, however, because courts have not seemed to interpret the clause as providing significant limitations to copyright protection.¹¹⁹ In addition to this intended catch-all, the DMCA includes seven explicit exemptions: (1) a "shopping privilege" for libraries and schools, (2) certain law enforcement and government activities, (3) reverse engineering to determine and/or enable interoperability, (4) research to detect vulnerabilities in encryption technologies, (5) TPMs that prevent access by minors, (6) protection of personally identifying information, and (7) security testing.¹²⁰ Some of these exemptions only apply to accessing a work,¹²¹ while others include exemptions for circumvention tools.¹²² For

114. § 1201(a)(2). Continuing with the prior example, if the three requirements were met, the person who makes or sells the password-cracking software used to access the digital book would be in violation of this Section.

115. § 1201(b)(1). If a person has access to the author's digital book, but the author has applied a TPM that prevents the copying of that book, anyone who makes or sells a device to circumvent that TPM is in violation of the second trafficking ban. However, the person who has copied the digital book is not in violation of the DMCA because he has committed standard copyright infringement.

116. U.S. CONST. art. I, § 8, cl. 8 ("To promote the Progress of Science and the useful Arts . . .").

117. § 1201(c)(1).

118. H.R. REP. NO. 105-551, pt. 2 (1998).

119. *See, e.g.,* Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001) (holding that a fair use of a work does not require the law to allow circumvention to gain access to the "perfect form" of that work); *United States v. Elcom, Ltd.*, 203 F. Supp. 2d 1111 (N.D. Cal. 2002) (upholding fair use does not extend to circumvention tools).

120. § 1201(d)-(j).

121. *See* § 1201(d), (e), (i).

122. *See* § 1201(f), (g), (j).

other possible noninfringing uses not listed in § 1201, the triennial rulemaking process can create additional exemptions.

B. THE DMCA RULEMAKING PROCESS

Section 1201(a)(1)(C) of the DMCA creates the rulemaking process and establishes minimal guidelines for the Librarian of Congress and the Register of Copyrights.¹²³ The process, to be completed every three years, gives the Librarian the power to determine which classes of copyrighted works can or are likely within the next three years to have “noninfringing uses” that are prohibited under the broad access ban of § 1201(a)(1)(A).¹²⁴ The Librarian of Congress receives recommendations from the Register of Copyrights, and the Register in turn “consults with” the Assistant Secretary for Communications and Information,¹²⁵ overseer of the National Telecommunications and Information Administration (“NTIA”). Though the Copyright Office and the NTIA aid in the Librarian’s final decision, power ultimately vests in the Librarian, an executive appointee.¹²⁶

The rulemaking provision lists five factors for the Librarian to consider when creating exemptions. These first four factors are: (1) “availability for use of the copyrighted works,” (2) “availability . . . for nonprofit archival, preservation, and education purposes,” (3) impact of prohibiting circumvention on “criticism, comment, news reporting, teaching, scholarship, or research” of a copyrighted work, and (4) effect of prohibiting circumvention “on the market for or value of copyrighted works.”¹²⁷ The fifth factor is a catch-all, directing the Librarian to consider any other

123. The Register looks to the legislative history to further define the process. For example, she often cites to the Commerce Committee and House Manager Reports for clarification on the burden of proof and other issues. *See, e.g.*, Memorandum from Marybeth Peters, Register of Copyrights, to James H. Billington, Librarian of Cong., Recommendation of the Register of Copyrights in RM 2008-8; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, at 9–12 (June 11, 2010), *available at* <http://www.copyright.gov/1201/> [hereinafter 2010 Memorandum].

124. § 1201(a)(1)(C).

125. *Id.* The NTIA is an agency in the U.S. Department of Commerce.

126. While the power is formally vested in the Librarian of Congress, the Librarian has authorized all of the exemptions proposed by the Register of Copyrights and has only included one additional exemption. *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 75 Fed. Reg. 43,825, 43,838–39 (July 27, 2010) (codified at 37 C.F.R. § 201.40).

127. § 1201(a)(1)(C)(i)–(iv).

“appropriate” factors.¹²⁸ These factors resemble those in the copyright fair use doctrine.¹²⁹

The Copyright Office oversees the rulemaking process, which has taken between one and three years to complete.¹³⁰ First, the Register of Copyrights solicits public written comments via a Notice of Inquiry, to which all parties interested in exempting a class of works must respond.¹³¹ The Register then arranges the classes into groups and posts them on the Copyright Office’s website as a Notice of Proposed Rulemaking.¹³² Any interested parties can submit reply comments on the initial proposals.¹³³ The Copyright Office posts these replies on its website, and the Register conducts public hearings so participants can testify for or against the proposed classes of works.¹³⁴ Following the hearings, the Register can supplement the testimonies with written questions for the witnesses.¹³⁵ The Assistant Secretary for the NTIA proposes suggestions in meetings and memorializes his views in written letters.¹³⁶ The Register then reports her final decisions to the Librarian of Congress.¹³⁷ Finally, the Librarian approves or denies each exemption and publishes the final rule.¹³⁸ The Librarian has the option to publish an Interim Rule to extend the current exemptions if there is a delay in the rulemaking process.¹³⁹

128. § 1201(a)(1)(C)(v).

129. *See* § 107. The Librarian’s third factor: to consider the impact of “criticism, comment, news reporting,” is lifted word for word from § 107. The fourth factor for the Librarian’s consideration mirrors the fourth factor for statutory fair use.

130. The Copyright Office completed the first round in thirteen months compared to the most recent round which took two years and eight months. The process has become longer with each new round.

131. Prohibition on Circumvention, 2010 Final Rule, 75 Fed. Reg. at 43,827.

132. *Id.* The Copyright Office first introduced this publication in the fourth round.

133. *Id.*

134. *Id.*

135. *Id.* The Copyright Office first followed up with written questions in the fourth round.

136. *Id.*

137. *Id.*

138. *Id.* In the most recent round of exemptions, the Register posted the “Notice of Inquiry” on October 6, 2008, and accepted comments until December 2, 2008. The Register received nineteen comments proposing twenty-five classes of works (which was consolidated into eleven classes, due to overlapping proposals). Parties could then comment on the posted comments between December 29, 2008 and February 2, 2009. The Librarian published the final rule on July 27, 2010, thus completing the process.

139. *See, e.g.*, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Interim Rule, 74 Fed. Reg. 55,138 (Oct. 27, 2009).

Several aspects of the rulemaking process limit its scope. The first limitation is that the “proponents of a class of works” for an exemption hold the burden of proof and must set forth a *prima facie* case. This *prima facie* case consists of three elements: (1) that there “has been or is likely to be a substantial adverse effect on noninfringing uses”; (2) that the alleged harm is “more likely than not”; and (3) that the prohibition on circumvention has or will likely cause the alleged harm within the next three years.¹⁴⁰ Because the harm must be “substantial,” the proponent must prove that his request is not a “*de minimis*” harm, meaning it cannot be “isolated” or a “mere inconvenience.”¹⁴¹ Moreover, proponents must submit *prima facie* evidence for each round of rulemaking since requests are considered *de novo*.¹⁴²

Another limitation is the scope of the exemptions, which must be for a “particular class” of works and must be decided on a case-by-case basis.¹⁴³ A class should neither be “too broad nor too narrow.”¹⁴⁴ While the starting point for defining a “class of works” is the list of categories in § 102 of the Copyright Act, the Register has determined that a category can be further refined by characteristics of the work, types of users, and types of uses.¹⁴⁵ The Register thus has several tools to ensure classes are narrow in scope.

140. Prohibition on Circumvention, 2010 Final Rule, 75 Fed. Reg. at 43,826. The Register pulled this information from the Commerce Committee report. H.R. REP. NO. 105-551, pt. 2, at 36 (1998) (“The Committee also intends that the rulemaking proceeding should focus on distinct, verifiable, and measurable impacts; should not be based on *de minimis* impacts; and will solicit input to consider a broad range of evidence of past or likely adverse impacts.”).

141. Prohibition on Circumvention, 2010 Final Rule, 75 Fed. Reg. at 43,826.

142. *Id.*

143. *Id.*

144. Memorandum from Marybeth Peters, Register of Copyrights, to James H. Billington, Librarian of Cong., Recommendation of the Register of Copyrights in RM 2005-11; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, at 17 (Nov. 17, 2006) [hereinafter 2006 Memorandum].

145. Prohibition on Circumvention, 2010 Final Rule, 75 Fed. Reg. at 43,827; 2006 Memorandum, *supra* note 144, at 17 (stating that a class must be *defined* by the characteristics of the work but can be “*refined* by reference to a particular type of user or use”). For example, in the first exemption for the most recent round, the class is defined and refined by all three characteristics. Prohibition on Circumvention, 2010 Final Rule, 75 Fed. Reg. at 43,827–28. First, the exemption applies only to the § 102 category audiovisual works. *Id.* The class is further limited by a characteristic of the work: the DVD format. *Id.* From there, it is defined by types of users, such as “college and university professors,” as well as by types of uses: “noninfringing,” for “noncommercial videos,” and so on. *See infra* Section II.C. The Register’s willingness to further refine a work by use and user was developed in the third round. *See infra* Section III.A.3.

C. THE FOUR ROUNDS OF EXEMPTIONS

There have been four rulemaking proceedings.¹⁴⁶ Exemptions for each round have evolved by expanding and/or narrowing previously exempted classes, creating new ones, and eliminating others. Overall, the scope and number of exemptions have expanded, though to limited degree. The first round enacted two exemptions. One exemption allowed access to “compilations consisting of lists of websites blocked by filtering software applications.”¹⁴⁷ Software products that block certain websites create lists of those sites, which can be viewed as copyrightable compilations,¹⁴⁸ but this exemption allowed a person to decrypt TPMs protecting access to these lists for “comment or critici[sm].”¹⁴⁹ The Copyright Office deemed this a fair use.¹⁵⁰ The second exemption addressed the circumvention of access control mechanisms for “literary works, including computer programs and databases” that do not permit access because of “malfunction, damage, or obsolescence.”¹⁵¹ The “dongle,” a hardware lock that prevents access to software programs, served as the main evidence submitted for this exemption.¹⁵² The intent behind this exemption was to ensure that authorized users could access a work to which they are entitled and to make noninfringing uses of that work.¹⁵³

Published in 2003, the second round of exemptions expanded to include four classes of works, two of which were modified versions of the previous exemptions in 2000. The first class of exemptions altered the previous exemption for compilations of websites.¹⁵⁴ It expanded the term “lists of websites” to include “domains, websites, or portions of websites.” Overall, however, the class narrowed, since the new exemption only applied to

146. There was a two-year moratorium on circumventing access controls, as provided by 17 U.S.C. § 1201(a)(1)(A) (2006), which, in turn, delayed the first round of exemptions.

147. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 65 Fed. Reg. 64,556, 65,564 (Oct. 27, 2000).

148. *Id.*

149. *Id.*

150. *Id.* These lists were often criticized due to their high error rate. The Copyright Office also noted that because of the high error rate, website owners needed access to these lists to see if their sites were included. *Id.*

151. *Id.*

152. *Id.* at 64,565.

153. *Id.* The Register reasoned that this did not disrupt the copyright balance since the copyright owner would have already been compensated for the initial access to his work. *Id.* at 64,566.

154. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 68 Fed. Reg. 62,011, 62,013 (Oct. 31, 2003).

“commercially marketed” software and excluded lists of internet locations that “operate[d] exclusively to protect against damage to a computer” or that “operate[d] exclusively to prevent receipt of e-mail.”¹⁵⁵ The modifications essentially limited the compilations to “censorware.”¹⁵⁶ The second exemption in the 2000 round was also renewed, but “access control mechanism” was replaced with “dongle.”¹⁵⁷ This change narrowed the exemption’s application to a hardware lock protecting access to a computer program, as compared to the previous exemption for an obsolete TPM preventing access to *any* literary work.¹⁵⁸ The Register narrowed this exemption because of opponents’ criticisms that the category was over-broad¹⁵⁹ and due to a lack of evidence for harm to the broader category of literary works.¹⁶⁰

The other two exemptions in the second round of rulemaking were new. The first new exemption provided for video games and computer programs that were distributed in now obsolete formats.¹⁶¹ The Internet Archive proposed this exemption because they wished to store old video games and computer programs on modern storage systems.¹⁶² Their request to circumvent access on not-yet-obsolete formats was denied.¹⁶³ The second new exemption, proposed by the American Foundation for the Blind and supported by five major library associations, allowed the circumvention of measures that prevented the read-aloud function on eBooks and the ability of screen readers to convert text into a specialized format.¹⁶⁴ The Register

155. *Id.*

156. Censorware, also known as content-control software, prohibits a reader from accessing certain content on the Internet.

157. Prohibition on Circumvention, 2003 Final Rule, 68 Fed. Reg. at 62,013.

158. *Id.* In round one, the Register stated that this exemption “probably reach[ed] the outer limits of a permissible definition of ‘class.’” Prohibition on Circumvention, 2000 Final Rule, 65 Fed. Reg. at 64,565.

159. Joint Reply Comments of Am. Film Mktg Ass’n et. al. at 17–18, Exemption to Prohibition on Circumvention of Copyright Protection Systems from Access Control Technologies, Docket No. RM 2002-4 (Feb. 20, 2003), *available at* <http://www.copyright.gov/1201/2003/reply/023.pdf> [hereinafter 2003 Joint Reply Comments].

160. Prohibition on Circumvention, 2003 Final Rule, 68 Fed. Reg. at 62,013. This evidence that could have defeated the opponents’ claim. *Id.*

161. *Id.*

162. *Id.* at 62,014. The exemption for obsolete formats is covered under 17 U.S.C. § 108(c).

163. Prohibition on Circumvention, 2003 Final Rule, 68 Fed. Reg. at 62,014. The Register limited the exemption to computer programs and video games because evidence of other harm for other “classes of works” was not presented. *Id.*

164. *Id.*

reasoned that private performance and personal use by the disabled was a noninfringing use.¹⁶⁵ The exemption only applied when “all existing editions” prevented access.¹⁶⁶

The Librarian increased the number of exemptions from four to six in the 2006 round of rulemaking. The exemption for compilations of websites disappeared because the proponents chose to rest on their 2003 record, only adding that the exemption had not adversely affected the availability of blocking software and should therefore be maintained.¹⁶⁷ The Register felt this did not meet the proponents’ evidentiary burden of showing that the exemption was “necessary,” and therefore, the *de novo* requirement was not satisfied.¹⁶⁸ The Register advocated for renewal of the other three previous exemptions.¹⁶⁹ She expanded the eBook read-aloud exemption slightly to allow circumvention if the read-aloud function *or* the screen reader function was disabled, instead of requiring both functions to be disabled in order to trigger the exemption.¹⁷⁰ The dongle exemption incorporated a definition of “obsolete”: when hardware locks were “no longer manufactured or . . . a replacement or repair is no longer reasonably available.”¹⁷¹ The Register narrowed the exemption for obsolete video games and computer programs by both use and user, with circumvention only allowed for “the purpose of preservation or archival reproduction” and only by a “library or archive.”¹⁷²

The first new category in the third round allowed “media studies or film professors” to circumvent the Content Scramble System (“CSS”) on motion picture DVDs in order to extract short portions of films for classroom purposes.¹⁷³ This exemption is notable as it was one of the first times a “particular class of works” was defined by user and use, instead of solely by the attributes of work itself.¹⁷⁴ The second new category was also narrowed

165. *Id.*

166. *Id.* The Register believed this did not place too high a burden on eBook producers since they only needed to provide one edition of the book in which the read-aloud function was not disabled in order to avoid this exemption.

167. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 71 Fed. Reg. 68,472, 68,477 (Nov. 27, 2006).

168. *Id.*

169. *See id.* at 68,474–79.

170. *Id.* at 68,475.

171. *Id.* Adding the definition of “obsolete” did not narrow or broaden the category, but rather, imported the definition from 17 U.S.C. § 108(c), which had been referenced in the 2003 final rule.

172. *Id.* at 68,474. This change was in response to the Register’s new willingness to “refine” a class according to users and uses. *Id.*

173. *Id.*

174. *See infra* Section III.A.3 (analyzing the new approach to “class of works”).

by use; it allowed the owner of a “wireless handset” to circumvent software locks to connect the phone to a wireless telecommunications network other than that of the phone’s original carrier.¹⁷⁵ This exemption allowed people to switch carriers without having to purchase a new phone, but only if they were “lawfully connecting to a wireless telephone communication network,” i.e., their contract with the original carrier had expired.¹⁷⁶ The last new category involved sound recordings in CD format, for which the TPMs “creat[ed] or exploit[ed] a security flaw” on personal computers; circumvention was allowed in order to engage in “good faith testing, investigating or correcting” of these security flaws.¹⁷⁷ This exemption resulted from an incident in which Sony BMG Music Entertainment distributed CDs with TPMs that installed “rootkits” on personal computers, which created security vulnerabilities.¹⁷⁸

There are also six classes of works in the most recent round of exemptions. While the dongle and eBook exemptions remained exactly the same, the Register expanded two prior exemptions.¹⁷⁹ First, for the circumvention of the CSS on motion picture DVDs, the new version of the exemption focuses on purpose, rather than user, to define the “particular class of works.”¹⁸⁰ Circumvention of the CSS is now allowed in order to incorporate “short portions of motion pictures into new works for the purpose of criticism or comment” and must fall into one of three categories: (1) “educational uses” by college professors and media students, (2) “documentary filmmaking,” or (3) “noncommercial videos.”¹⁸¹ The Register

175. Prohibition on Circumvention, 2006 Final Rule, 71 Fed. Reg. at 68,476.

176. *Id.* The Register was able to refine the “class” to this particular use due to the new approach to refining a “class,” thus addressing an opponent’s concern about access to creative content created for phones.

177. *Id.* at 68,477.

178. *Id.* The language for this exemption came from 17 U.S.C. § 1201(j). Opponents claimed that this exemption already existed under § 1201(j), but the Register stated the scope was not clear and “in light of [the] uncertainty and the seriousness of the problem,” the exemption should be granted. *Id.*

179. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 75 Fed. Reg. 43,825, 43,833, 43,838 (July 27, 2010) (codified at 37 C.F.R. § 201.40).

180. *See id.* at 43,825.

181. *Id.* at 43,827. Because circumventing the CSS can lead to infringing uses as well, the Register was careful to limit the class, making it narrower than the proponents’ proposals. Hence, only people who needed high quality clips qualified (elementary school teachers, therefore, did not). Further, the use was limited to a “short portion,” it had to be used for comment or criticism, it applied only to motion pictures, it had to be incorporated into a derivative work or a compilation, and the person circumventing must have had a “reasonable belief” that he had met all of these requirements. *Id.* at 43,827–28.

also expanded the wireless network exemption to include “software” in addition to “firmware,” while adding the caveat that access must be “authorized by the operator of the network.”¹⁸²

The most recent round retired two former exemptions¹⁸³ and added two new ones, including jailbreaking, which has increased awareness of the rulemaking process. The jailbreaking exemption allows the circumvention of TPMs on smartphones in order to allow third-party applications.¹⁸⁴ Apple argued that its validation system was necessary in order to protect consumers and to protect against damage to the phone,¹⁸⁵ but the Register found jailbreaking to be a fair use.¹⁸⁶ The Register also looked to the purpose of copyright, which was not forwarded by preventing circumvention; instead, this prohibition served only to protect Apple’s business model.¹⁸⁷ The second new exemption allows circumvention of TPMs on a video game for personal computers if the circumvention is “for the purpose of good faith testing for, investigating, or correcting security flaws, or vulnerabilities.”¹⁸⁸ The proposal for this exemption was a response to newly released access control software that supposedly created security vulnerabilities. This exemption built upon the DMCA’s existing “security testing” exemption by expanding access from a “computer, computer system, or computer network,” to include “video games accessible on personal computers.”¹⁸⁹

III. THE RULEMAKING PROCESS PROVIDES FLEXIBILITY

The DMCA is a pivotal building block in the movement toward a regulatory form of copyright, and establishing agency regulation through the rulemaking process is the most important DMCA regulatory trait. Agencies are usually heavily involved in the oversight of regulated industries, but agency involvement has been minimal for many regulatory-type copyright

182. *Id.*

183. The video game and audio CD exemptions disappeared.

184. Circumvention on Prohibition, 2010 Final Rule, 75 Fed. Reg. at 43,837–38.

185. *Id.* at 43,829.

186. *Id.* at 43,828–29. The Register analyzed the four fair use factors and determined the use was noninfringing largely because it promoted interoperability, it was a private, noncommercial use, and it might actually increase Apple’s market. *Id.*

187. *Id.*

188. Technically, this exemption is an update of the security exemption in the previous round. The shift to solely video games (instead of sound recordings on CDs) was the result of the evidence submitted by the exemption’s proponent. *See id.* at 43,832–33.

189. *Id.*

provisions.¹⁹⁰ Thus, the Copyright Office's involvement in the rulemaking process can serve as an example of how such agency involvement should be utilized more in copyright law. The rulemaking process demonstrates how governance can provide flexibility and how to achieve that flexibility. Because the regulatory version of copyright has been criticized as too narrow, too inflexible, and too opaque, perhaps infusing more agency regulation would be an alternative solution to returning to a simpler, more property-based model.

Before applying agency regulation more broadly, it is necessary to analyze the success of the current process. Ultimately, this process infuses flexibility, but could be even more adept at doing so. Section III.A identifies changes and trends in the notice-and-comment procedures, the participants, and the Register's analysis that appear to be the natural product of "trial-and-error." The overall trend is an expansion of the process. While this is truly perceived in the most recent round, the prior rounds have laid the foundation. The increased breadth in the most recent round of exemptions provides hope that this trend toward greater utility will continue in the fifth round. Section III.B demonstrates that while the rulemaking process has infused flexibility, it is not a complete "fail-safe mechanism." Nevertheless, with some modifications, the triennial rulemaking process could more adeptly achieve the goals that Congress originally intended. Section III.C highlights some of the modifications that would bolster the existing positive trend in the exemptions.

A. THE TREND IN RULEMAKING FROM THE FIRST ROUND TO THE MOST RECENT

There has been a discernible evolution in the rulemaking process and the resulting exemptions, from procedural changes, to the transformation in participants and their comments, to the scope of the exempted classes. These changes have resulted in a subtle but definite expansion in the process. The most obvious trend is the increase in the number of exemptions from two, to four, to six, as well as a decrease in the ratio of accepted to rejected classes. However, evidence of growth extends beyond the numbers.

190. The Copyright Office has been involved in rulemaking in four basic areas: (1) making regulations governing the Office's affairs; (2) setting royalty rates and distribution of royalties under such acts as the Audio Home Recording Act of 1992 and statutory compulsory licenses; (3) notice-and-comment rulemaking in the Digital Performance Right in Sound Recordings Act of 1995, retransmission of digital broadcast signals and licensing under § 111, and the DMCA exemption process; and (4) influencing legislation. *See, e.g.*, Rulemaking Proceedings, *supra* note 30.

In the first rulemaking, the Register noted that because § 1201(a)(1) had just been implemented in 2000 (after a two-year statutorily mandated delay), it was hard for proponents to provide proof of current or likely adverse effects.¹⁹¹ The Register lamented the lack of judicial precedent to rely upon, and that overall, it was still unclear how § 1201(a)(1) would affect users.¹⁹² The Register thus concluded, “it is more likely that the next rulemaking will result in more substantial exemptions.”¹⁹³

The second round did see a gradual expansion, at least in the number of exemptions.¹⁹⁴ The two exemptions from the first round remained, but they were both narrowed to accord with the hard evidence submitted. And while there was an eighty-two percent decrease in the number of proponents who initially submitted comments in round one, the Register noted that a “sizeable number of comments were again based on theoretical arguments, *de minimis*, or completely absent of proof of present or likely harm, and mere inconveniences.”¹⁹⁵ Thus, even though the process became more efficient in round two, the Register still struggled due to the quality of the proposals and the evidence from which she was required to make a determination.¹⁹⁶

The third round saw the greatest progress in terms of the process’s scope because the Register adopted a new approach to defining a “class of works” and expanded upon current statutory exemptions.¹⁹⁷ While the Register remarked that many proponents still did not to adhere to the Notice of Inquiry requirements, she rejected fewer classes for their failure to define a

191. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 65 Fed. Reg. 64,556, 65,563 (Oct. 27, 2000).

192. *Id.* at 65,564.

193. *Id.*

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

195. Memorandum from Marybeth Peters, Register of Copyrights, to James H. Billington, Librarian of Cong., Recommendation of the Register of Copyrights in RM 2002-4; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, at 18 (Oct. 27, 2003), *available at* <http://www.copyright.gov/1201/2003/> [hereinafter 2003 Memorandum]. Peters noted, however, that these comments were still considered and addressed in the letter. *Id.*

196. *See* Herman & Gandy, *supra* note 3, at 165–74 (analyzing the contents of the comments and the Register’s main reasons for rejecting them).

197. *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 71 Fed. Reg. 68,472 (Nov. 27, 2006); *see also* Aaron Perzanowski, *Evolving Standards & the Future of DMCA Anticircumvention Rulemaking*, 10 J. INTERNET L., no. 10, Apr. 2007 at 1, 19–20 (discussing the Register’s new approach to “class of works”).

particular class of works, and rejected more due to a lack of evidence for “substantial adverse effect.”¹⁹⁸ Nevertheless, the comments were an improvement, and with the new scope, exemptions increased.

Finally, the most recent rulemaking round truly capitalized off of the expanded scope from round three, and the process became more efficient. The Register received fewer comments, the majority were from non-profit associations, and they met the Register’s requirements.¹⁹⁹ The Register also seemed bolder in her analysis and moved away from a general balancing approach seen in the earlier rounds. She weighed fair use factors for a few of the proposals,²⁰⁰ and for some, conducted a systematic analysis of the statutory factors the Librarian of Congress is supposed to consider.²⁰¹ The following Sections characterize areas of transformation that aided in this overall evolution.

1. *Procedural Changes to the Rulemaking Process*

This extensive process was the first of its kind in copyright law, and thus, it is not surprising that modifications arose from round to round. These changes may appear insignificant at first glance, but they ultimately aided in spawning the current exemptions. First, in round one, the Notice of Inquiry provided a list of twenty-nine questions; the Register urged the proponents to answer each question in their initial comments.²⁰² Mostly unfocused comments resulted, many of which did not answer a single question.²⁰³ It was hard to decipher the proposed “class of works” and the nature of the problem. In round two, the questions disappeared; instead, the Notice of Inquiry asked for a clear statement of the proposed “class of works,” outlined the format for the comments, and urged proponents to review the first rulemaking round for guidance.²⁰⁴ The new format allowed the

198. *See generally* Prohibition on Circumvention, 2006 Final Rule, 71 Fed. Reg. 68,472.

199. *See* Comments, COPYRIGHT OFFICE, <http://www.copyright.gov/1201/comments/> (last visited on Feb. 3, 2011) [hereinafter 2000 Comments].

200. *See* 2010 Memorandum, *supra* note 123 (showing the Register’s fair use factor analysis for the motion picture DVD exemption and the jailbreaking exemption).

201. *Id.* at 55–72, 101–02; (explaining the recommendation for the DVD exemption and the jailbreaking exemption by a factor-by-factor analysis from § 1201(a)(1)(C)(i)–(v)).

202. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Notice of Inquiry, 64 Fed. Reg. 66,139, 66,142–43 (Nov. 24, 1999).

203. For initial comments from the first triennial rulemaking, see 2000 Comments, *supra* note 199.

204. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Notice of Inquiry, 67 Fed. Reg. 63,578 (Oct. 15, 2002).

comments to be identified by class on the website, and thus, reply comments targeted specific proposals.²⁰⁵ While the Register was still unhappy with the attempts to define a class and the provided evidence for adverse effect, the new approach did improve the comments submitted by organizations, even if individual proponents appeared to be a lost cause.

The round four changes lengthened the entire process. While the final rule was published slightly late in the third round, the most recent round was delayed eight months.²⁰⁶ For the first time, the Register published a Notice of Proposed Rulemaking, in which she placed the proposals into categories, prior to the submission of reply comments.²⁰⁷ One of the reply comments, from the consortium of content creators, criticized the new notice for appearing as if the Copyright Office was endorsing all of the proposals.²⁰⁸ Despite this criticism, since multiple comments proposed similar classes of works, this new step provided clarity and organization for the “classes of works” proposed. Furthermore, the Register conducted hearings in panel format, instead of individual-by-individual, and followed up with post-hearing questions.²⁰⁹ These post-hearing questions were more focused, compared to the first round’s general post-hearing reply comments and displayed the Register’s in-depth analysis for each proposed class.

Overall, the changes to the technical aspects of the rulemaking process, while appearing small, aided in focusing the initial comments, the reply comments, and the Register’s analysis. Focusing the comments and hearings

205. For a look at the organization of the comments, see Comments on Rulemaking on Exemptions on Anticircumvention, COPYRIGHT OFFICE, <http://www.copyright.gov/1201/2003/comments/index.html> (last visited on Feb. 3, 2011).

206. The third round exemptions were to expire on October 27, 2009, but the Register published an Interim Rule, which extended these exemptions. *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Interim Rule, 74 Fed. Reg. 55,138 (Oct. 27, 2009). The Final Rule for the fourth round was not released until July 27, 2010.

207. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Notice of Proposed Rulemaking, 73 Fed. Reg. 79,425 (Dec. 29, 2008).

208. Joint Reply Comments of the Ass’n of Am. Publishers et. al. at 13, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Docket No. RM 2008-8 (Feb. 2, 2009), *available at* <http://www.copyright.gov/1201/2008/responses/association-american-publishers-47.pdf> [hereinafter 2009 Joint Reply Comments].

209. § 1201 Rulemaking Hearing Agenda, COPYRIGHT OFFICE, <http://www.copyright.gov/1201/hearings/2009/> (last visited on Feb. 3, 2011). The post-hearing questions were posted online. *See* Post-hearing Questions and Responses, COPYRIGHT OFFICE, <http://www.copyright.gov/1201/2008/questions/index.html> (last visited on Feb. 3, 2011).

is crucial to the Register's recommendations since she relies solely on the evidence presented in order to make her conclusions. If a proponent does not show a "particular class of works," "likelihood of harm," or "substantial adverse effect," and a "causal connection," then the proposal is dismissed.²¹⁰ Likewise, if opponents do not object in a detailed manner, their case is not considered and the Register may use a general balancing test that takes the opponents unstated interests into consideration.²¹¹

2. *Evolution of the Participants*

From round one to round four, the number of participants has changed drastically. The 235 comments in round one dropped to fifty comments in round two.²¹² The majority of the initial round one proponents were individuals, while the number of organizations submitting comments has never risen above twenty per round. In fact, it was not until the most recent round that the number of organizations exceeded the number of individuals, who all but disappeared from the process.²¹³ Perhaps this is due to the high burden of proof, including the need for factual support of a "substantial adverse effect." Legal knowledge about fair use and other noninfringing uses is also helpful²¹⁴—knowledge that individual proponents, many of them software engineers, programmers, and researchers, do not have. This is problematic because a limited number of organizations participating in the process can only propose a small number of exemptions. And with the recent victories, they will have to expend time and resources restating their cases for current exemptions due to the *de novo* requirement. This is no small feat.²¹⁵

210. See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Notice of Inquiry, 73 Fed. Reg. 58,073, 58,074–75 (Oct. 6, 2008).

211. See, e.g., Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 71 Fed. Reg. 68,472, 68,476 (Nov. 27, 2006) (noting the numerous reply comments in support of the wireless handset exemption and the overall lack of opposition).

212. See 2000 Comments, *supra* note 199; Comments, COPYRIGHT OFFICE, <http://www.copyright.gov/1201/2003/comments/index.html> (last visited on Mar. 6, 2011).

213. Of the nineteen comments, twelve were from organizations and seven were from individuals. See Comments, COPYRIGHT OFFICE, <http://www.copyright.gov/1201/2008/index.html> (last visited on Feb. 3, 2011).

214. 2010 Memorandum, *supra* note 123, at 10 ("Proponents of designating a particular class of works must also provide sufficient facts and legal analysis to demonstrate that the underlying use affected by the prohibition is a noninfringing use.").

215. Some of these proposals are quite lengthy and do not include involvement in reply comments, participation in hearings, and post-hearing questions.

Still, the disorderly process in the first round, particularly with initial comments,²¹⁶ evolved into a focused process by the fourth round. Like the Register, these participants have become more comfortable with the process and more efficient with their comments by knowing the level of factual support required, the policy arguments that resound with the Register, and how to tailor an acceptable “class of works.” This efficiency has arguably led to more satisfactory evidentiary and legal arguments, which has, in turn, led to more exemptions. And because comments proposed by organizations are usually the only ones that succeed, the loss of individuals may not be detrimental to the number of created exemptions.²¹⁷

Reply comments have come from both proponents and opponents of exemptions. The number of reply comments dropped from 129 in round one, to thirty-five in round three, but then increased to fifty-six in round four.²¹⁸ The content industry opponents who first appeared in round one have continued to participate in each subsequent round,²¹⁹ and the opposition did not increase until round four, when Apple and other cellular phone companies added to the opposition by fighting the jailbreaking and wireless handset exemptions.²²⁰ Nonetheless, the amount of industry participation has remained relatively stable, with a consortium of creative

216. Most of the initial comments from round one were one to two page documents that did not state a “class of works,” an adequate description of the nature of the problem, or factual support. A majority of the 235 comments supported one exemption: the circumvention of the CSS on DVDs for compatibility with Linux operating systems. The initial comments also included preemptive oppositions by companies such as Sony Computer Entertainment (for the Playstation) and Time Warner, who claimed that no class of works could qualify for an exemption. *See* 2000 Comments, *supra* note 199.

217. *But see* Tushnet, *supra* note 73 (proposing that rulemaking could be a way for laymen to be involved in amending copyright restrictions).

218. The increase in round four seems to be a result of several individuals supporting the jailbreaking exemption. *See* Responses to Comments, COPYRIGHT OFFICE, <http://www.copyright.gov/1201/2008/responses/index.html> (last visited on Feb. 3, 2011).

219. These repeat participants include Time Warner, the Motion Picture Association of America, DVD Copy Control Association, and Sony Computer Entertainment. Rounds two through four have also seen dominant opposition from joint commentators in the entertainment industry. These participants have included the Association of American Publishers, the American Society of Media Photographers, the Alliance of Visual Artists, the Business Software Alliance, the Directors Guild of America, the Entertainment Software Association, the Motion Picture Association of America, the Picture Archive Council of America, the Screen Actors Guild, and the Recording Industry Association of America. The composition has varied slightly from round to round.

220. *See* Reply Comments on Anticircumvention Rulemaking, COPYRIGHT OFFICE, <http://www.copyright.gov/1201/comments/reply/> (last visited on Feb. 3, 2011).

content industry representatives replying to every proposed exemption, and testifying at every hearing, in opposition to every proposal.²²¹

3. *The Expansion in Scope*

While the Register has been careful to remain within the statutory language and the legislative intent of the Commerce Committee, she has chosen to expand the scope of the process in two major areas: her approach to defining a “class of works” and her willingness to expand current statutory exemptions in § 1201. Both of these changes have enabled several of the current rulemaking exemptions. First, the Register broadened the definition of “particular class of works” in the third round of rulemaking.²²² In the first round, the Assistant Secretary of the NTIA suggested that “class of works” provided little guidance and that § 1201(a)(1)(C) should not be bound by the § 102(a) categories.²²³ Instead, “non-infringing *uses*” of the work should be taken into account.²²⁴ The Register disagreed at that time because she thought that a class must revolve around the “attributes” of the copyrighted work, not “external factors” such as the users or uses.²²⁵ In both the first and second rounds of exemptions, the Register rejected the majority of proposals because they failed to specify a “particular class of works” defined by the attributes of the copyrighted works.²²⁶

In the third round, however, the Register allowed a class to be refined by the users and uses.²²⁷ The proposal to circumvent the CSS on DVDs for educational purposes spurred this change. The Register justified the new approach in that “[t]he ability to carefully craft a ‘class’ that is neither too broad nor too narrow requires the availability of all of the necessary tools to achieve this goal.”²²⁸ The Register believed the statutory language supported this approach by asking for “noninfringing uses by persons who are users of a copyrighted work [who are] likely to be, adversely effected” and stating that if an exemption was granted, § 1201(a)(1)(A) “shall not apply to such users

221. See 2003 Joint Reply Comments, *supra* note 159.

222. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 71 Fed. Reg. 68,472, 68,473 (Nov. 27, 2006).

223. Letter from Gregory L. Rohde, Assistant Sec’y for Commc’ns and Info., to Marybeth Peters, Register of Copyrights (Sept. 29, 2000), *available at* <http://www.copyright.gov/1201/commerce.pdf>.

224. *Id.*

225. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 65 Fed. Reg. 64,555, 65,562 (Oct. 27, 2000).

226. *Id.* (citing this as the main flaw of the proposals).

227. Exemption to Prohibition, 2006 Final Rule, 71 Fed. Reg. at 68,473.

228. 2006 Memorandum, *supra* note 144, at 17.

with respect to such class of works.”²²⁹ Since the impetus for most proposals has been a “particular noninfringing use,” tailoring a class by use/users allows the creation of a warranted exemption and will “clearly identify the intended recipients of the remedial exemption,” as required in § 1201(a)(1)(D).²³⁰

Several of the exemptions have since utilized this new definition. The content industry consortium saw how this approach expanded the possible exemptions in round three, observing that the change “[had] positioned this proceeding at the edge of a foreseeable slippery slope” and would lead to “an accumulation of exemptions on behalf of particular groups of users or intended uses.”²³¹ Moreover, the commenters pled that “[s]uch a proliferation of exemptions could confuse consumers; prove difficult to administer; improperly spawn an underground marketplace for circumvention services; and disrupt the legitimate market for copyrighted works, by eroding confidence in the integrity and applicability of technological measures to control access to such works.”²³² The opponents saw this change as broadening the rulemaking process.

The second change was the Register’s willingness to “expand” statutory exemptions already present in § 1201. In round one, the Register rejected two proposals that expanded statutory exemptions: computer programs and other digital works for the purposes of reverse engineering, and a proposal to expand the statutory exemption for encryption research.²³³ The Register believed that since Congress had “specifically addressed the issue . . . in the same legislation that established [the] rulemaking process, the Librarian should proceed cautiously, before in effect, expanding” a statutory exemption.²³⁴

Yet, in round three, the Register approved an exemption for circumventing TPMs on CDs to discover security vulnerabilities, thus

229. 17 U.S.C. § 1201(a)(1)(D) (2006). Further, the Register believed the only legislative guidance for a “class of works” was that a class should neither be “too broad nor too narrow.” 2010 Memorandum, *supra* note 123, at 17.

230. 2006 Memorandum, *supra* note 144, at 18–19.

231. 2009 Joint Reply Comments, *supra* note 208, at 9.

232. *Id.*

233. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 65 Fed. Reg. 64,556, 64,564, 64,570–71 (Oct. 27, 2000).

234. *Id.* at 64,571. While the Register did not rule out the possibility of expanding a statutory exemption, proponents did not present enough evidence to expand either § 1201(f) or § 1302(g) in this round. *See id.*

expanding § 1201(j).²³⁵ And an exemption for video game TPMs that created security vulnerabilities once again expanded § 1201(j) in the most recent round.²³⁶ In both cases, the Register cited the seriousness of the problem as the justification for expanding upon the exemptions Congress had considered in drafting the DMCA.²³⁷ Once again, the content industry consortium opposed this change and claimed that the Register was acting outside the parameters of congressional intent.²³⁸ They argued that Congress had thought about these exemptions upon enactment, it had already considered the limitations that should be imposed, and that changing a limitation's scope should be left to the courts.²³⁹ The Register disagreed.

The two new approaches show the Register's willingness to expand the process when dictated by the needs of the evidence submitted. This is crucial in analyzing the potential flexibility the triennial rulemaking process can infuse since the Register's actions show that the process can adapt to current needs. If the Register is willing to continue modifying the process, then the goal of a "fail-safe mechanism" can be achieved.

4. *The Register's Approach and Analysis*

Likely due to a combination of the above factors, the Register's reasoning for accepting or rejecting a proposed class seems to have evolved as well. In round one, the Register rejected most proposals because they did not define an adequate "class of works."²⁴⁰ The Register also rejected many proposals because of a general balance rationale—that prohibiting access allowed greater dissemination of content, which outweighed the need to circumvent for nonfringing uses (and thus infringing uses as well).²⁴¹ Analysis stopped at these two rationales.

235. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 71 Fed. Reg. 68,472, 68,477 (Nov. 27, 2006) (codified at 37 C.F.R. § 201.40). The language for this exemption mirrored that of the statutory exemption for security testing. *See* 17 U.S.C. § 1201(j) (2006).

236. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 75 Fed. Reg. 43,825, 43,832 (July 27, 2010) (codified at 37 C.F.R. § 201.40).

237. *See* Prohibition on Circumvention, 2006 Final Rule, 71 Fed. Reg. at 68,477; Prohibition on Circumvention, 2010 Final Rule, 75 Fed. Reg. at 43,832.

238. 2009 Joint Reply Comments, *supra* note 208, at 12.

239. *Id.* at 9.

240. Six out of ten rejected exemptions failed to state a "class of works." Prohibition on Circumvention, 2000 Final Rule, 65 Fed. Reg. at 64,556.

241. This mirrored the "digital cornucopia" argument the content industry made in their reply comment in the latter three rounds. The content industry argued that because of the proliferation in creative content available digitally, the DMCA—with no rulemaking

The prominence of the Register's initial reasoning lessened in round three with the new ability to tailor a class by users and uses. An exemption could now be confined to a noninfringing use and/or user, which limited the infringing uses that could result.²⁴² This then shifted the balance in the general balancing test more toward granting an exemption. The focus was now more on determining if a use was noninfringing, rather than if the use had a substantial enough adverse effect that it would outweigh all the infringing uses that might result from the exemption, and thus, the incentive for content creators to continue digital dissemination.²⁴³ The fourth round exemplified this change with motion pictures on DVDs for professors, documentary filmmakers, and noncommercial videos.²⁴⁴ The Register claimed that she placed several limitations on the class because of the many infringing uses that could result from circumventing the CSS on DVDs.²⁴⁵ If she had not been able to refine the class as such, the benefit to content distribution created by the DMCA's protection of motion picture DVDs would have outweighed any circumvention proposal.²⁴⁶

Hence, in the fourth round, there seemed to be more in-depth analysis of whether or not a use was infringing. The Register was reluctant to base an exemption upon an area of law that was currently in flux,²⁴⁷ but she was

exemptions—was achieving its goal of promoting access to creativity in the digital space. *See, e.g.*, 2006 Joint Reply Comments, *supra* note 97, at 9 (providing statistical evidence for the growth of online content and claiming “it would be no exaggeration to say that the digital marketplace has exploded since 2003” which “should weigh heavily against the recognition of any exemption in this proceeding”).

242. *See* Prohibition on Circumvention, 2006 Final Rule, 71 Fed. Reg. at 68,473.

243. That is not to say that evidence of “substantial adverse effect” was not required, as it became a primary reason the Register rejected classes in the fourth round. However, the level of substantiality required did not appear as high with the classes now refined by use/user.

244. *See supra* Section II.C.

245. *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 75 Fed. Reg. 43,825, 43,828 (July 27, 2010) (codified at 37 C.F.R. § 201.40).

246. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 68 Fed. Reg. 62,011, 62,016 (Oct. 31, 2003) (“On balance, an exemption, which would permit circumvention of CSS, could have an adverse effect on the availability of such works on DVDs to the public, since the motion picture industry’s willingness to make audiovisual works available in digital form on DVDs is based in part on the confidence it has that CSS will protect it against massive infringement.”).

247. This was seen in round four regarding whether the purchaser of a computer program is an owner or a licensee. The argument was crucial to the Electronic Frontier Foundation’s § 117 argument, which would only apply if the jailbreaker was an owner of the software on the iPhone. 2010 Memorandum, *supra* note 123, at 86–91. However, Apple contended that such a person was a licensee, in which case § 117 would not apply. *See id.*

willing to perform a fair use analysis based on the four statutory factors.²⁴⁸ Indeed, the jailbreaking exemption arose from a four factor analysis in which the Register weighed the fair use arguments made by the Electronic Frontier Foundation and those made by Apple, to determine that the use was noninfringing.²⁴⁹ The Register showed that she did not have to rely on judicial precedent or direct statutory language to determine if a use was noninfringing.²⁵⁰

B. THE RULEMAKING PROCESS PROVIDES FLEXIBILITY

While the evolution of the rulemaking process has increased its breadth and efficiency, many have criticized the process since its inception. The main critique of the process is that it fails the congressional goal of creating a “fail-safe mechanism” because it does not provide the flexibility that the Commerce Committee envisioned.²⁵¹ But as the breadth, the number, and the impact of the exemptions increases, achieving flexibility is more tangible.

1. *Critiques of the Process and Its Ability to Provide Flexibility*

One often-cited cause of the rulemaking process’s inability to provide flexibility is the restrictive boundaries within which the Librarian of Congress and the Register of Copyrights must fit exemptions.²⁵² The Register’s approach is more limiting than copyright’s fair use doctrine. For example, in the third round of exemptions, only media and film professors could circumvent DVD encryption to use clips of motion pictures in the classroom.²⁵³ While the most recent round of exemptions has expanded circumvention allowances, it still does not include all educational uses, since the Register believed grade school teachers did not need to use high-quality

248. *See id.* at 91–100.

249. *See id.* For a more in-depth discussion of the comments for this exemption, Tushnet, *supra* note 73, at 912–18.

250. *See id.*

251. For literature criticizing the DMCA, *see generally* LEE, PARK, WANG & URBAN, *supra* note 12; Von Lohmann & Hinze, *supra* note 12.

252. While this analysis of restrictive boundaries focuses on its relation to fair use, the restrictiveness of “particular class of works” also prevents the application of an exemption to other noninfringing uses. For an example of narrow limits on types of uses, see David Kravets, *Prosecutors Seek to Block Xbox Hacking Pioneer from Mod-Chip Trial*, ARS TECHNICA (Oct. 22, 2010), <http://arstechnica.com/gaming/news/2010/10/prosecutors-seek-to-block-xbox-hacking-pioneer-from-mod-chip-trial.ars> (showing that the jailbreaking exemption for the iPhone does not extend to jailbreaking of gaming consoles, and that it is hard to predict all types of uses or users for which an exemption should apply).

253. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 71 Fed. Reg. 68,472, 68,473–74 (Nov. 27, 2006).

film clips.²⁵⁴ Hence, even though all teachers can use copyrighted material for educational purposes under the fair use doctrine, a large portion of academics are still prohibited from circumventing the CSS under the DMCA in order to obtain these film clips.²⁵⁵ As stated by the Second Circuit in *Universal City Studios v. Corley*, the DMCA does not reject fair use but “[f]air use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user’s preferred technique or in the format of the original.”²⁵⁶ However, while the court can reject access for fair use purposes on a case-by-case basis, it does not logically follow that the Register should forbid non-college professors from accessing motion picture clips.²⁵⁷

In the NTIA’s letter to the Register in 2000, the Assistant Secretary urged the Register to make the exemption process “analogous to fair use.”²⁵⁸ The letter cited the House Report’s concern that the DMCA would undermine fair use.²⁵⁹ In addition, the factors the Librarian of Congress is statutorily mandated to consider enumerate a number of fair use factors,²⁶⁰ and § 1201(c) “indicates congressional intent to preserve fair use and the other statutory limitations on the exclusive rights of copyright owners.”²⁶¹ While the Register acknowledged the NTIA letter in the Final Rule and claimed to agree with this view,²⁶² this acknowledgement has not matched in application.²⁶³

254. See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 75 Fed. Reg. 43,825, 43,827 (July 27, 2010) (codified at 37 C.F.R. § 201.40). In opposition to the motion picture DVD proposal, the joint commenters stated that academics could use VHS or could video tape a screen playing the movie. The Register noted such “lower-quality” alternatives should be sufficient for grade-school level teachers and thus excluded them from the class of users. See 2009 Joint Reply Comments, *supra* note 208, at 33–34. The Register borrowed from this reasoning.

255. Prohibition on Circumvention, 2010 Final Rule, 75 Fed. Reg. at 43,827.

256. 273 F.3d 429, 459 (2d Cir. 2001).

257. See Prohibition on Circumvention, 2006 Final Rule, 71 Fed. Reg. at 68,474.

258. Letter from Gregory L. Rohde, Assistant Sec’y for Commc’ns and Info., to Marybeth Peters, Register of Copyrights (Sept. 29, 2000), available at <http://www.copyright.gov/1201/commerce.pdf> [hereinafter 2000 NTIA Letter].

259. See *id.* (citing H.R. REP. NO. 105-551, pt. 2, at 26 (1998)).

260. See 17 U.S.C. § 1201(a)(1)(C) (2006).

261. 2000 NTIA Letter, *supra* note 258.

262. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 65 Fed. Reg. 64,556, 64,561–62 (Oct. 27, 2000) (stating “there is no disagreement with the Assistant Secretary or the Commerce Committee on the need to preserve the principles of fair use”).

263. The Register also rejected the Electronic Frontier Foundation’s suggestion of erring on the side of providing an exemption if a use could be noninfringing and to let the courts determine this on a case-by-case basis. The Register rejected this approach, stating that the

A second restriction is the “substantial adverse effect” requirement. Under the *de minimis* provision, the Librarian is unlikely to grant an exemption if there is a lawful alternative to gaining access or there is some unprotected format for the copyrighted work—no matter how costly or inconvenient gaining access might be—since this would reduce the adverse effect.²⁶⁴ For example, an exemption for region-coded DVDs has been proposed in all four rounds. A DVD player has region-coding systems enforced by Digital Rights Management (“DRM”) technologies, so even if a consumer has lawfully purchased a foreign manufactured DVD, he must use a special DVD player to play the DVD in the United States. While special DVD players are more costly and can still be region specific, the Register denied a circumvention exception because there were lawful alternatives, making the DMCA’s restrictions an “inconvenience rather than [an] actual or likely harm.”²⁶⁵ Thus, the “inconvenience” to a lawful owner of a region-coded DVD did not outweigh the need to protect DVD content distribution more generally.²⁶⁶

The NTIA raised a third harmful restriction with the Register: the high burden of proof for “likely” adverse effects.²⁶⁷ The Assistant Secretary claimed that the Register equates “the required proof for both present and future harms,” and while the bar for proof should not be as low as “mere speculation,” demonstrating a harm is “likely to occur” should be sufficient.²⁶⁸ The Register responded by citing the previous Notice of Inquiry, which stated that the proponent “must prove by a preponderance of

statutory bar is higher than “plausibly noninfringing.” *See* Comment of Fred von Lohmann & Jennifer Granick at 2–3, Electronic Frontier Foundation, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Docket No. RM 2008-8 (Dec. 2, 2008), *available at* <http://www.copyright.gov/1201/2008/comments/lohmann-fred.pdf>; 2010 Memorandum, *supra* note 123, at 11.

264. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Notice of Inquiry, 64 Fed. Reg. 66,139, 66,141 (Nov. 24, 1999) (“The availability without restriction in the latter format may alleviate any adverse effect that would otherwise result from the technological controls utilized in the electronic format.”).

265. Prohibition on Circumvention, 2000 Final Rule, 65 Fed. Reg. at 64,569.

266. *Id.* The Register claimed that because film release dates vary by country, access prohibition was needed to protect content distribution. *See id.*

267. Letter from Lawrence E. Strickling, Assistant Sec’y for Commc’ns and Info., to Marybeth Peters, Register of Copyrights, at 2–3 (Nov. 4, 2009), *available at* <http://www.copyright.gov/1201/2010/NTIA.pdf>.

268. *Id.*

evidence that the harm is more likely than not.”²⁶⁹ This still requires prima facie evidence—that the harm is not de minimis, it is “distinct,” and there is a causal connection.²⁷⁰ This is a high burden for alleging future harms.²⁷¹

A fourth restriction affects the utility of exemptions once they are created because the rulemaking’s scope does not extend to circumvention tools. The rulemaking process only applies to § 1201(a)(1)(A), which prevents access to copyrighted works, not the circumvention devices.²⁷² Thus, DMCA skeptics claim that the “meaningless provisions” problem, due to the device restriction, also extends to the exemption process.²⁷³ Though circumvention tools may not realistically be hard to obtain, this contradiction in the lawmaking process provides a formal prohibition to flexibility. For example, the jailbreaking exemption prohibits Apple from suing the circumventers, but not those who manufacture and distribute the jailbreaking programs.²⁷⁴ Apple has yet to pursue these programmers or the owners of websites with “how-to guides” to jailbreaking, but Apple might have a successful claim under the DMCA.²⁷⁵ Potential legal repercussions for those who create the tools may also limit the availability of such tools.

Beyond restrictions on the exemptions themselves, the length and complications of the rulemaking process cause the exemptions to lag behind the rapidity of technological advances and inhibit flexibility. First, the process length has increased, from one year to complete in round one to

269. 2010 Memorandum, *supra* note 123, at 10 (citing Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Notice of Inquiry, 70 Fed. Reg. 57,526, 57,528 (Oct. 3, 2005)).

270. *Id.*

271. Additionally, proving harm for an exemption that already exists is difficult since the current exemption “could prevent the appearance of future harm.” *See* Perzanowski, *supra* note 197, at 21–22.

272. 17 U.S.C. § 1201(a)(1) (2006).

273. Samuelson, *supra* note 3, at 547; *see also* Perzanowski, *supra* note 197, at 20.

274. *See* Jonathan Zittrain, Transcript of “Jailbreak?,” ON THE MEDIA FROM NPR (July 30, 2010), available at <http://www.onthemediamedia.org/transcripts/2010/07/30/03> (“I see this decision symbolically as helping to refine a conversation about how much the long arm of the vendor can keep operating after a purchase has been made. And even if, say, an Apple or a Kindle or a Facebook would be entirely within its rights to try to go after you for changing the applications that you can run on their product, it may mean that they’ll be more reluctant to do it because it’s seen not as a terrible activity but actually as a salutary one.”).

275. The Register stated that § 1201(f) may be a defense to the manufacture and distribution of jailbreaking tools, but it remains untested whether this argument would succeed in a court. *See* 2010 Memorandum, *supra* note 123, at 84–85.

approximately two years and eight months in the most recent round.²⁷⁶ Moreover, some believe the burden on the exemption proponent is too high. Not only is the process lengthy, but it is also perpetual since an exemption proponent must apply *de novo*.²⁷⁷ The proponent also bears a heavy burden of proof.²⁷⁸ The Register took language from the congressional record to define substantial as “distinct, verifiable, and measurable impacts,”²⁷⁹ and she has rejected many proposals because of the amount of factual evidence required to prove “substantial adverse effect.”²⁸⁰

With this high burden of proof, the length and complication of the process, and the narrowness of the results, some are skeptical about the effectiveness of the process.²⁸¹ The notable decline in the number of rulemaking participants may serve as evidence of this skepticism.²⁸² Ultimately, those who wish to propose exemptions must have a legal background (or legal support) and the resources to gather factual data beyond personal experiences, as personal experiences are *de minimis*.²⁸³ Unfortunately, there are a limited number of organizations that have repeatedly participated in these proceedings.

276. This resulted in an Interim Rule, which extended the 2006 exemptions. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Interim Rule, 74 Fed. Reg. 55,138 (Oct. 27, 2009).

277. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 75 Fed. Reg. 43,825, 43,826 (July 27, 2010) (codified at 37 C.F.R. § 201.40).

278. Marybeth Peters, Recommendation of the Register of Copyrights in RM 2002-4, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (Oct. 27, 2003).

279. 2010 Memorandum, *supra* note 123, at 16 (citing H.R. REP. NO.105-551, pt. 2, at 37 (1998)).

280. *See generally* Prohibition on Circumvention, 2010 Final Rule, 75 Fed. Reg. at 43,834–38 (showing that lack of proof of a “substantial adverse effect” was a factor for denying each class that was considered but denied).

281. For the first time, the content consortium criticized the direction of the process in their reply, instead of praising its “narrow focus” and the overall benefits of the DMCA. *See* 2009 Joint Reply Comments, *supra* note 208. *But cf.* 2003 Joint Reply Comments, *supra* note 159, at 17–18.

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

283. Von Lohmann & Hinze, *supra* note 12, at 4 (“[E]ven with the assistance of sophisticated attorneys and technical experts [Electronic Frontier Foundation] nevertheless faced difficulties in shouldering the evidentiary burdens imposed by the Copyright Office.”).

C. THE POSITIVE TREND AND SUGGESTIONS FOR FURTHER IMPROVEMENT

While the round four exemptions may still seem minimal amidst all potential noninfringing uses of digitally accessible copyrighted works, the positive trend in scope, efficiency, and importance of the exemptions provides hope that this direction will continue—and gain momentum—into the fifth round. With the “jailbreaking” exemption, which has created mainstream awareness of the rulemaking process, there may be more advocates of exemptions in the future.²⁸⁴ In addition, the greater likelihood of a positive outcome for a proponent may make the burden of proof and de novo requirement feel less restrictive. A positive trend is recognizable, but this progress could be bolstered by modifications to some of the current restrictions on the exemptions and the procedures. Broadening the Librarian and the Register’s powers could make the rulemaking process a more definitive solution to the DMCA’s broad ban on access.

Nevertheless, the Register and Librarian have broadened the scope of the rulemaking process while remaining within the parameters defined in the legislative history and in the statutory language. Those parameters, however, may be too limiting. Consequently, one way to bring the process in line with the Commerce Committee’s goal would be to reduce the number of restrictions on the Librarian. For instance, § 1201(a)(2) and § 1201(b)(1) could be included within the rulemaking scope, which would provide users who are exempted from circumvention provisions the tools with which to circumvent. This inclusion would also mean that the Register would not have to worry about exceeding her authority in granting an exemption that affects access controls that are copy controls as well.²⁸⁵

Second, the de novo requirement could be removed. The Register can review exemptions every three years to determine whether they are obsolete or require modifications. Under this model, comments on the last round of exemptions would be accepted and analyzed, but would not have to be fully re-proposed.

Third, the bar for making a prima facie case could be lowered. If a proponent can prove that there have been or are likely to be noninfringing uses for a protected work, a “substantial adverse effect” should not be

284. Though greater attention could also mean more opponents as well.

285. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 65 Fed. Reg. 64,556 (Oct. 27, 2000) (stating that since the CSS was both an access and a copy control, it was unclear if this was under the Librarian’s authority, and that this issue should be addressed by Congress).

required. As long as a class can be tailored to only noninfringing users and uses, the proposed class should withstand the general balancing test, as the exemption would purely be a fair use.

Furthermore, the Register should not be limited to recommendations made by proponents. The CSS exemption, for example, encompassed only motion pictures because there was no other evidence, and thus “no basis for including the somewhat broader class of audiovisual works (which includes not only motion pictures, but also works such as video games and slide presentations).”²⁸⁶ The Register had considered the inclusion of other audiovisual works, yet her determination was limited to the evidence presented.²⁸⁷ Lastly, some exemptions, particularly those that expand current statutory exemptions, should be considered for codification.

Some of the process’s narrowness is self-imposed by the Register. For example, while the exemptions for “classes of works” should remain narrower than the § 102 categories, the uses and users could be broader than their current iterations. In the CSS example, the Register could have recommended that all teachers be able to access motion pictures on DVDs, as was encouraged by the exemption’s proponents and by the NTIA.²⁸⁸ To limit users based on an assumption of their needs, rather than allowing all academics to use motion pictures, does not comport with copyright’s fair use doctrine.

The Register also has leeway in the level of factual support needed to justify an exemption. In the most recent round, the Register rejected the eBook exemption present in the two previous rounds, due to the proponent’s insufficient evidence.²⁸⁹ Despite the Register’s independent research in the area and the favorable policy arguments, she chose not to recommend the exemption to the Librarian.²⁹⁰ The Register also has room to define a “mere inconvenience,” *de minimis*, and how heavily the balance tilts in favor of denying an exemption in order to promote digital content distribution.

286. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 75 Fed. Reg. 43,825, 43,828 (July 27, 2010) (codified at 37 C.F.R. § 201.40).

287. *Id.*

288. *Id.*

289. *Id.* at 43,837–38 (rejecting the eBook exemption because it only showed that one in five books downloaded had disabled the read-aloud function).

290. *Id.* at 43,837. The Librarian overrode the Register’s rejection of this class. *See id.* at 43,838.

In addition to increasing the breadth of the current process, expanding the Copyright Office, to bring it more in line with agencies in other regulated industries, may also be beneficial. For example, if the Copyright Office was given more resources to conduct research, gather empirical data, and increase its technological expertise,²⁹¹ the lengthy, de novo process may not be necessary. Instead, the Register could propose classes of works or supplement factual evidence herself and would not have to rely solely on others' proposals in making a final rule. Overall, if Congress increased the power and resources of the Copyright Office and expanded the rulemaking process, then greater flexibility could be achieved.

IV. EXPANDING THE AUTHORITY OF THE COPYRIGHT OFFICE IN THE REGULATORY COPYRIGHT REGIME

Due to the growing success of the DMCA rulemaking process, the suggestions to expand the Copyright Office's power and resources for conducting the process should extend to copyright more generally. The rulemaking process is on its way to fulfilling the congressional goal of flexibility in the DMCA and granting the Copyright Office more rulemaking and adjudicatory powers in copyright law may also infuse flexibility into its regulatory structure. As of now, "copyright law is caught awkwardly halfway between a judicially administered property rights regime and an agency administered regulatory regime."²⁹² Since the trend toward a more regulatory form of copyright appears likely to continue, Congress should embrace it and more fully institute agency governance in copyright law.²⁹³

A. THE NECESSITY OF APPLYING AGENCY REGULATION IN COPYRIGHT LAW

Because the trend toward a more regulatory form of copyright is unlikely to be reversed and because lawmaking and judiciary solutions have proven slow, copyright law needs agency regulation. While some advocate for a

291. See Liu, *supra* note 7, at 153–58; Pamela Samuelson et. al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1205–06 (2010) (proposing "additional policy expertise and research capability" as one of several ways the Copyright Office's role should be expanded).

292. Liu, *supra* note 7, at 149.

293. Recognizing agency expansion as a viable option is particularly crucial given proposals to eliminate the Copyright Office completely. See Pamela Samuelson, *Will the Copyright Office Be Obsolete in the 21st Century?*, 13 CARDOZO ARTS & ENT. L.J. 55 (1995) (citing several reasons why the Copyright Office could become obsolete and showing that a merger with the Patent & Trademark Office would be a very likely scenario).

return to the simpler property-based regime,²⁹⁴ a reversal of the past thirty-five years seems improbable because the industry pressures that ushered in regulatory copyright are more present than ever. Rent-seeking legislation is prone to lengthy, complex statutes,²⁹⁵ and with copyright being an interest-laden area, this is unlikely to change. The more regulatory sections of the Copyright Act were the result of competing economic interests, interests that are unlikely to disappear.²⁹⁶ Recently, the Obama Administration issued the *Joint Strategic Plan*, a paper similar to Clinton's *Framework*.²⁹⁷ This report reflects content owners advocating for stronger intellectual property enforcement.²⁹⁸ It serves as just one example of how both the executive and legislative branches remain swayed by the content creators' interests in increasing copyright enforcement.

Leaving the legislature and the courts to adapt copyright to technological innovation also results in "legal delay and legal uncertainty."²⁹⁹ The judiciary has been reluctant to adapt copyright rules to new technology because of the difficult "fit" and because of fear that a ruling could adversely affect a technology whose social and economic implications are not fully known.³⁰⁰ Thus, courts often defer to the legislature. In the hands of the legislature, copyright laws are further delayed due to the Article I lawmaking process, Congress's lack of issue-specific expertise, and significant interest group

294. Samuelson, *supra* note 26, at 557 ("It can be made simple again; maybe not as simple as the Statute of Anne, but definitely simpler."). A group of professors, led by Pamela Samuelson, have released an extensive document outlining proposed reforms to the Copyright Act, including Copyright Office proposals listed below. Samuelson et. al., *supra* note 291.

295. See Liu, *supra* note 7, at 130–31 (applying this standard to copyright legislation).

296. See Wu, *supra* note 47 (explaining that regulatory sections of copyright law are the result of economic competitors such as the recording industry versus the online music distributors and the cable companies versus the broadcasters, and now, with the DMCA, between traditional content creators and users).

297. Victoria A. Espinel, 2010 Joint Strategic Plan on Intellectual Property Enforcement (June 2010), available at <http://www.whitehouse.gov/omb/intellectualproperty/>.

298. See generally *id.* The plan claims that the main policy rationale for stronger enforcement is to bolster U.S. economic welfare. See also *supra* Section I.A.2 (regarding "cloaking" interests).

299. Depoorter, *supra* note 66, at 1836.

300. See, e.g., *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*, 545 U.S. 913, 965 (2005) (Bryer, J., concurring) ("As Sony recognized, the legislative option remains available. Courts are less well suited than Congress to the task of 'accommodating fully the varied permutations of competing interests that are inevitably implicated by such new technology.'" (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984)); Depoorter, *supra* note 66, at 1842–43 tbl. I (showing the length of time it has taken Congress and the courts to rule on the legal status of new technologies).

pressure by both traditional content creators and the technology sector.³⁰¹ An agency provides the advantage of escaping some of the interest group pressure that sways Congress.³⁰² And with a specialized focus and resources to conduct studies, an agency could be more adept at diagnosing legal issues raised by new technologies as well as foresee those technologies and their social and economic implications.

Agency involvement in the DMCA rulemaking process exemplifies these advantages. The DMCA resulted from interest group pressure, particularly from the entertainment industry.³⁰³ The result was a broad ban that heavily favored copyright protection, and thus, content creators. Nevertheless, Congress created the rulemaking process to counteract any ill effects of such a broad ban.³⁰⁴ The Register has succeeded in recommending exemptions that have kept pace with technological advances better than legislation or court decisions.

B. RESHAPING THE COPYRIGHT OFFICE

Expanding the Copyright Office to provide flexibility in regulatory copyright law would require Congress to create a new entity. First, the Copyright Office is currently a subsidiary of the Library of Congress, and therefore, is an Article I agency.³⁰⁵ In granting the Librarian of Congress and the Register rulemaking authority under the DMCA, Congress violated both the separation-of-powers doctrine and the aggrandizement principle. While Congress has lawmaking power under Article I, the notice-and-comment process does not follow the Article I requirements for lawmaking.³⁰⁶ President Clinton recognized this problem when he signed the DMCA into law; he created a “legal fiction” when he stated that “the Copyright Office is, for constitutional purposes, an executive branch entity.”³⁰⁷ While the duties of the Copyright Office are more executive or administrative, the Copyright

301. *See* Depoorter, *supra* note 66, at 1857–58.

302. *See* Eskridge, *supra* note 44, at 308.

303. *Supra* Section I.A.2.

304. *Supra* Section I.A.2.

305. *See* 17 U.S.C. § 701 (2006) (granting powers to the Copyright Office and the Register, under the authority of Librarian of Congress, who appoints the Register and her subordinates).

306. *See* Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 277 (1991) (holding that for a legislative official to pass a law, it must pass both houses and must be subject to the presidential veto).

307. Gass, *supra* note 106, at 11 (quoting President Clinton in the Presidential Statement on Signing the Digital Millennium Copyright Act, 34 WEEKLY COMP. PRES. DOC. 2168, 2169 (Oct. 28, 1998)).

Office still makes legislative rules through the triennial rulemaking process without the checks-and-balances imposed on Congress or the separation of power between the legislative and executive branches.³⁰⁸

The triennial rulemaking process has not led to a challenge of the Register of Copyrights and Librarian's constitutional authority in the courts. Yet, this separation-of-powers violation should be addressed due to the expansion and increased public awareness of the DMCA rulemaking process. Arguably, the appointment of a new Register will be more high profile than it was fourteen years ago.³⁰⁹ If the Copyright Office's role is expanded significantly throughout copyright law, the problem must be addressed. One option is to make the Copyright Office an executive branch agency under the direct control of the President. The second option would be to create an independent agency. The danger of either of these scenarios is "agency capture," particularly since copyright legislation often results from asymmetrical interest group pressure.³¹⁰ While the Copyright Office has not been subject to capture in its current iteration, the likelihood of such capture could increase if the scope and structure of the Office is modified.

C. POTENTIAL BENEFITS AND CONSEQUENCES OF A MORE POWERFUL COPYRIGHT OFFICE

Delegating significant authority to an agency can be considered beneficial or counterproductive, depending on which theory of regulation is espoused.³¹¹ On the most negative end of the spectrum are the public choice theorists who believe that agencies deliver benefits to private interest groups at the expense of public interests; therefore, this camp advocates for deregulation.³¹² Next are the neopluralism theorists who also recognize the

308. That the President hires and can fire the Librarian of Congress is not enough of a check. *See Buckley v. Valeo*, 424 U.S. 1 (1976) (concluding that the President must appoint agency heads with the advice and consent of Congress. Congress can only appoint officials to help exercise legislative powers, such as gathering research for legislators).

309. Marybeth Peters, the Register of Copyrights for fourteen years, has overseen the DMCA rulemaking process since its inception. She stepped down on December 31, 2010. The Librarian of Congress named an acting Register for the interim until an appointment is made. *See* Maria Pallante Appointed Acting Register of Copyrights, LIBRARY OF CONGRESS (Dec. 17, 2010), <http://www.loc.gov/today/pr/2010/10-272.html>.

310. *See* Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1682–88 (1975) (claiming the agencies are often susceptible to private interests).

311. Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1 (1998) (analyzing the four theories of regulation and how they should "engage" one another in order to build a more applicable theory for administrative processes).

312. *Id.* at 34–50.

effect of interest group competition on agencies but believe this competition is less asymmetrical and therefore more efficient.³¹³ Third are the public interest theorists who are agnostic about regulatory outcomes, and instead, focus on the public's ability to monitor agencies.³¹⁴ Finally, civic republicanism holds agencies in high regard, finding that they are particularly adept at providing compromise amongst parties.³¹⁵

Given the Copyright Office's performance in the notice-and-comment process, and despite strong competing interests, it seems like a more favorable theory of regulation should apply in the copyright scenario. For example, while the Librarian and the Register have been cautious in granting exemptions, they most recently ruled against Apple, amidst strong opposition from cellular phone companies and content creators. And although the content industry criticized the expansion of the rulemaking process in the third round, the Register forged ahead in the fourth round under the broadened scope. Thus, the Copyright Office has taken into account the interests of individual users as well as the interests of larger, organized parties and has been a good adjudicator of competing interests. Maintaining balance is particularly important in the copyright context since the policy goals of copyright require a balance between protection and access.

In addition to the Copyright Office's balanced approach to creating exemptions, it has maintained transparency, which is crucial to creating and enforcing positive regulations. Not only has the notice-and-comment process been documented in the Code of Federal Regulations, but the Copyright Office has posted all information on its website, including comments, audio recordings of each hearing, and letters between the Librarian and the Register.³¹⁶ The intent and goals of the Register are clear throughout the process. Ultimately, the combination of balance and transparency exhibited in the rulemaking process displays the aptitude of the Copyright Office to take on more responsibility in overseeing and evolving copyright laws generally.

V. CONCLUSION

The most recent round of the DMCA triennial rulemaking process warrants attention because this often-criticized process has displayed

313. *Id.* at 56–65.

314. *Id.* at 65–76.

315. *Id.* at 76–86.

316. *See generally* Rulemaking on Anticircumvention, COPYRIGHT OFFICE, <http://www.copyright.gov/1201/> (last visited on Nov. 23, 2010).

remarkable growth in both scope and efficiency. Although the process has evolved in each of the four rounds of exemptions, this “fail-safe mechanism” can be further improved. With an even greater expansion in both the process and the Copyright Office’s power and resources, the rulemaking procedure could better reflect legislative intent: to be a true provider of flexibility by counterbalancing the DMCA’s broad ban on circumvention.

In turn, the rulemaking process serves as an example of how to infuse flexibility throughout copyright law. While several aspects of copyright have become increasingly regulatory in nature, the role of the Copyright Office has not expanded at the same pace. The result is industry-specific legislation that is complex due to both the lawmaking process and the constant amendments arising from new technologies. Including more agency oversight could reduce Congress’s constant and lengthy legislation as well as reliance on the courts, which have been reticent to determine the legal status of new technologies. Therefore, because of the Copyright Office’s aptitude in the DMCA rulemaking process and its ability, through this process, to respond to technological advances faster than Congress or the courts, expansion of this agency’s power may be one answer to the problems that exist within “regulatory copyright.”

