

# **Marrakesh Note 4: The 2012 U.S. Copyright Office decision regarding Technological Protection Measures, including discussion of Commercial Availability of accessible works**

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**June 7, 2013**

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## **Introduction**

The Digital Millennium Copyright Act (DMCA) in the United States provides for a number of protections for rightholders in the digital area. One controversial area has been the manner in which the United States has implemented its regime of technological protection measures (TPMs) and the limitations and exceptions to the prohibition against circumvention of these measures. The abuses of the DMCA, in particular with respect to TPMs, have been well documented. *See* Electronic Frontier Foundation (EFF), *Unintended Consequences: Fifteen Years Under the DMCA* (March 2013), available at <https://www.eff.org/pages/unintended-consequences-fifteen-years-under-dmca>.

The DMCA provides for certain limitations and exceptions to the anti-circumvention provisions, but these are confined to a very narrowly defined set. For any limitations and exceptions falling outside the closed list, proponents of the limitations and exceptions must engage in a burdensome “rulemaking” procedure every three years. The most recent rulemaking by the Copyright Office took place in 2012. During the rulemaking the Copyright Office considered arguments for and against the granting of the exemption, proposals to limit the exemption in cases where there were accessible formats available from commercial sources, and other issues, such as the standards of evidence of harm required to obtain the exemptions. Several of these issues have been raised in the context of the WIPO negotiations on a treaty on copyright exceptions for disabilities. This analysis reviews the 2012 rulemaking and reflects on the relevance of the case to the WIPO negotiations.

## **The 2012 proceeding**

Even where the Copyright Act provides for specific limitations and exceptions, it is currently unclear under

U.S. law whether, where a TPM exists, the beneficiary of the specified limitation and exception also needs to have a separate exemption to circumvent the TPM. There is currently a circuit split around this issue with the Ninth Circuit finding that violation of a TPM is a separate and independent cause of action while the Federal Circuit has held that an underlying violation of copyright must exist in order for a defendant to also be found guilty of circumventing the TPM. Notably, the United States is currently engaged in negotiations for a large regional trade agreement, known as the Trans-Pacific Partnership Agreement (TPP) and its proposed text for the intellectual property would explicitly make the circumvention of a TPM a separate and independent cause of action, separate from any underlying copyright infringement. If the United States proposal is accepted, all parties to the TPP—effectively there are now twelve negotiating parties with Japan expected to join the round of negotiations in July—would require a specific limitation and exception for any beneficiary to enjoy the limitation where a TPM is placed on the work.

Given the current circuit split, and the looming conclusion of the TPP agreement, beneficiaries of limitations and exceptions are wise to seek out exemptions under the DMCA's rulemaking process. In the United States, we have had several rounds of this three-year rulemaking procedure and the rulings by the Copyright Office as well as the positions of both proponents and opponents of the exemptions provide guidance as to the future of TPMs and their relationship with limitations and exceptions.

### **2009 Exemption**

The 2009 exemption granted as a result of the DMCA rulemaking procedure under 17 U.S.C. §1201 applied only where there were no existing ebook editions of a work available in an accessible format. The restrictive language resulted in the exemption being inapplicable a great number of cases, regardless of whether that particular accessible format was interoperable or could be used on the reader owned by the person with a visual impairment. The 2009 rule provided the following exemption:

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*Literary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling either of the book's read-aloud function or of screen readers that render the text into a specialized format.*

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The provision regarding commercial availability granted in the 2009 exemption (this language was also used in the 2003 and 2006 exemptions) was heavily criticized due to the fact that not all accessible formats available were interoperable with other platforms or devices and, therefore, effectively useless to persons with visual impairments. As a result of this problematic language, in the 2012 rulemaking procedure, proponents of the rule sought to eliminate the commercial availability provision.

### **2012 Exemption Proposed by ACB/AFB:**

During last year's DMCA rulemaking, the American Council for the Blind and the American Foundation for the Blind proposed an exemption that was broader than those previously granted. In their proposal they noted that the previous exemption granted "perpetuated a fundamental inequity, namely that users who circumvented protection controls to access a given book would nevertheless be liable for copyright infringement if another edition of the e-book could be accessed by the user. This approach enshrined a kind of 'separate but equal' policy permitting publishers to potentially charge users with disabilities more

than readers without disabilities to read the same content or to force users with disabilities to make do with potentially inferior editions of a given book.” American Council of the Blind & American Foundation for the Blind, *Joint Comments on an Exemption to the Prohibition of Circumvention of Copyright Protection Systems for Access Control Technologies* (2011), available at [http://www.copyright.gov/1201/2011/initial/american\\_foundation\\_blind.pdf](http://www.copyright.gov/1201/2011/initial/american_foundation_blind.pdf).

### **Opposition by Publishers**

While the submission by the Joint Creators and Copyright Owners claimed that they did not disagree in principle with the ACB/AFB proposal, it did note specific opposition to the expanded exemption proposed. The Joint Creators and Copyright Owners specifically asserted that “There is no need for an exemption where a work is available in accessible formats. Thus, the American Council of the Blind (“ACB”) and American Foundation for the Blind (“AFB”) have failed to meet their burden to explain why such an expansion of the existing exemption is justified.” Joint Creators and Copyright Owners, *Joint Comments of the Association of American Publishers, American Society of Media Photographers, Business Software Alliance, Entertainment Software Association, Motion Picture Association of America, Picture Archive Council of America, and Recording Industry Association of America*, available at [http://www.copyright.gov/1201/2012/comments/Steven\\_J.\\_Metalitz.pdf](http://www.copyright.gov/1201/2012/comments/Steven_J._Metalitz.pdf). The submission also claimed, “Given the large-scale availability of accessible editions, the Joint Creators and Copyright Owners see no reason why the existing exemption should be expanded to cover works that can be lawfully obtained in the desired formats without engaging in circumvention.” *Id.* Essentially, the Joint Creators and Copyright Owners asserted that so long as an accessible format was available in some format, persons who are visually impaired or have other disabilities should not benefit from a limitation or exception permitting circumvention of the TPM. This position ignores the fact that most persons own a single device and some commercially available formats are not interoperable on different devices. Furthermore, the Joint Creators and Copyright Owners assertion that commercial availability is all that is needed does not address the pricing differential issues. The fact that an accessible format work is on the market, regardless of its price, suffices according to the publishers.

### **Position of the NTIA**

The National Telecommunications and Information Administration (NTIA), an agency of the United States Department of Commerce, supported the ACB/AFB proposal and rejected the position of the Joint Creators and Copyright Owners. NTIA letter to Maria Pallante, Register of Copyrights (Sept. 21, 2012), available at [http://www.copyright.gov/1201/2012/2012\\_NTIA\\_Letter.pdf](http://www.copyright.gov/1201/2012/2012_NTIA_Letter.pdf). In its response to the Register of Copyrights, the NTIA pointed out the absurdity of the position of the publishers that commercial availability should prohibit application of a limitation against circumvention of a TPM. The NTIA stated:

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*The new language further assists visually impaired Americans by including all literary works where circumvention is required for accessibility purposes, as opposed to the current, narrower exemption that compels users to obtain another edition of the work if an accessible version exists, even if accessing this alternative edition would require purchasing another device.*

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*Due to a lack of widespread device compatibility with the plethora of different electronic formats for literary works, an accessible version of a work in a different format is often not a viable alternative to circumvention. Proponents note for example, that while “Apple’s iBooks application is the only mainstream e-book reader that is accessible to individuals who are blind or visually impaired,” books purchased from Apple are readable only on the company’s iPad, iPhone, and iPod Touch devices. Visually impaired Americans who own e-readers or tablets produced by other companies are limited to the often insufficient accessibility features currently available for literary works that are compatible with their devices. In many cases, there is no accessible alternative version of a work available on a particular device that a particular visually impaired person happens to own.*

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*Requiring visually impaired Americans to invest hundreds of dollars in an additional device (or even multiple additional devices), particularly when an already-owned device is technically capable of rendering literary works accessible, is not a reasonable alternative to circumvention and demonstrates an adverse effect of the various access controls used. Therefore, NTIA supports adoption of the expanded exemption for the next three years, and strongly encourages the market to obviate any future need for this exemption by making literary works more accessible to users with disabilities, ideally in an interoperable manner.*

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Citations Omitted.

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## **Final Rule**

Ultimately, the Register of Copyrights recommended and the final rule promulgated included some modification of the ACB/AFB proposal. The final rule provided an exemption for:

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*Literary works, distributed electronically, that are protected by technological measures which either prevent the enabling of read-aloud functionality or interfere with screen readers or other applications or assistive technologies, (i) when a copy of such a work is*

*lawfully obtained by a blind or other person with a disability, as such a person is defined in 17 U.S.C. § 121; provided, however, the rights owner is remunerated, as appropriate, for the price of the mainstream copy of the work as made available to the general public through customary channels; or (ii) when such work is a nondramatic literary work, lawfully obtained and used by an authorized entity pursuant to 17 U.S.C. § 121.*

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In setting forth the rule above, while the Register of Copyrights did modify the ACB/AFB proposed rule, it did eliminate the commercial availability requirement that existed in the previous three rules in 2003, 2006 and 2009.

In approving the exemption for the benefit of persons who are blind or have visual impairments, the Register of Copyrights concluded that it was doing so in order to ensure “meaningful access” to copyrighted works.

The Register notes that the proposed class is not merely a matter of convenience, but is instead intended to enable individuals who are blind or visually impaired to have meaningful access to the same content that individuals without such impairments are able to perceive. As proponents have explained, their desire is simply to have effective access to content that individuals who are blind or visually impaired acquire lawfully, just as individuals without such impairments can buy on the mainstream market. In short, the proposed class ensures effective access to a rapidly growing array of ebook content by a population that would otherwise go without. Library of Congress, *Section 1201 Rulemaking: Recommendation of the Register of Copyrights* (2012) at 22, available at [http://www.copyright.gov/1201/2012/Section\\_1201\\_Rulemaking%20\\_2012\\_Recommendation.pdf](http://www.copyright.gov/1201/2012/Section_1201_Rulemaking%20_2012_Recommendation.pdf) (footnotes omitted).

Furthermore, the Register of Copyrights asserted that the exemption was warranted on the grounds of public policy:

Generally, public policy favors removing impediments to access for individuals with disabilities, and the notion that an individual ought to be required to invest in three (or more) competing electronic book platforms would appear to be contrary to that policy. Further, the record supports a finding that a significant number of ebooks are inaccessible on any platform, and even those that are accessible may not satisfy the needs of every individual with an impairment, further illustrating the need for such an exemption. *Id.* at 21

## **Relevance to treaty negotiations**

The recent Section 1201 case is relevant to two issues in the current WIPO negotiations on a treaty for copyright exceptions for persons with disabilities. These include (1) proposals to narrow exceptions in cases where an accessible format is commercially available, and (2) the efforts by the United States to introduce a requirement that beneficiaries must establish the “actual or likely adverse impact” of technological measures “by credible evidence in a transparent legislative or administrative proceeding.”

## Commercial Availability and Interoperability

As noted above, in the recent Section 1201 proceedings, publishers have repeatedly sought to limit exemptions to TPM to cases where an accessible format of the work was not made available commercially, and indeed, such restrictions did exist as a result of the 2003, 2006 and 2009 Section 1201 rulemaking process. This restriction was finally rejected in 2012, though, partly because of the position of the National Telecommunications and Information Administration (NTIA), an agency of the United States Department of Commerce, opposing the commercial availability standard. The NTIA noted there was insufficient interoperability among reader/players of such works, thereby placing significant economic burdens on persons with disabilities regarding obligations to have multiple devices, and also forgoing the functionality of their preferred devices.

The current version of the treaty text is likely to provide for the possibility of a restriction on exceptions themselves<sup>1</sup> (not just the legal ability to overcome technical protection measures) where “the particular accessible format [can] be obtained commercially under reasonable terms.” For example, in April, the negotiating text for Article C(4) read as follows:

4. A Member State/Contracting Party may confine limitations or exceptions under this Article to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons in that market. Any Contracting Party availing itself of this possibility shall so declare in a notification deposited with the Director General of WIPO at the time of ratification of, acceptance or accession to this Treaty or at any time thereafter. 8

8 [Agreed Statement on Article C(4): It is understood that this is without prejudice to the operation of Article D [and E].]

Agreed Statement on Article C(4): It is understood that a commercial availability requirement does not prejudice whether an exception or limitation under this Article is consistent with the three-step test.

The issue of the interoperability of the “particular accessible format” with different reader/players is important, and will have practical consequences regarding any efforts to narrow exceptions to copyright or exemptions to legal protection for TPMs. This issue could be addressed in a soft manner by adding language to C(4), along the lines of

“Such notification shall include an explanation as regards the requirements that the accessible format be interoperable with different devices in order to avoid the costs of owning multiple devices and in order to ensure the full and preferred functionality of reader/players.”

Or, in a hard manner, by a requirement such as:

“Any restriction on the use of the exceptions, conditioned on the lack of commercial availability, shall be limited to cases where the the accessible format is interoperable with different devices in order to avoid the costs of owning multiple devices and in order to ensure the full and preferred functionality of reader/players.”

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<sup>1</sup> Notably, the United States Chafee Amendment does not place any such burden on the creation or distribution of an accessible format work.

## **Evidence to support the exception**

A second issue regarding TPMs concerns the issue of the evidence required to grant exemptions to permit circumvention of TPMs.

With respect to the granting of an exemption to permit circumvention of a TPM, the United States' current three-year rulemaking process is a cumbersome and time-consuming process. More than one year passed between the notice seeking written comments on proposed classes of works and the final determinations and rules. Within the thirteen month process, proponents of the rule were required to propose the rule, and both proponents and opponents of the rule were then invited to submit written comments, reply comments, testify at hearings, and submit responses to post-hearing questions.

Throughout the course of the 2012 and 2009 rulemaking procedures, allegations were made that proponents had not satisfied their burden or presented sufficient evidence to support its proposed rules. Whether the burden has been satisfied is repeatedly an issue in the 1201 proceedings, with opponents to the rule urging the Library of Congress to reject proposed rules on this ground. Essentially, opponents of these exemptions have tried to make it more difficult for proponents, urging the Library of Congress to require voluminous amounts of evidence, ignoring the fact that for many of the proponents, the rulemaking process is already costly and consumes precious resources of these organizations.

In the 2012 rulemaking process, the ACB and AFB included a proposal extending the exemption to authorized entities. The recommendation of the Register of copyrights noted that in their proposal, written comments and testimony ACB and AFB had not provided "extensive analysis" to support the exemption for authorized entities, but nonetheless the Register would grant the proposal because it found it was supported by "relevant evidence":

The second prong of the proposal (the part that would extend the exemption to authorized entities) is a new consideration; it has not been the subject of a prior Section 1201 rulemaking and proponents did not provide extensive analysis of this aspect of their proposal. Nonetheless, the Register finds that the proposal is supported by relevant evidence and that authorized entities should enjoy an exemption to the extent required for them to carry out their work under Section 121. However, the proposal as written requires some modifications to ensure that it is consistent with, but not an enlargement of, Section 121. In relevant part, Section 121 permits qualified "authorized entities" to reproduce and distribute nondramatic literary works provided the resulting copies are in "specialized formats exclusively for use by blind or other persons with disabilities." Library of Congress, *Section 1201 Rulemaking: Recommendation of the Register of Copyrights* (2012) at 24, available at [http://www.copyright.gov/1201/2012/Section\\_1201\\_Rulemaking%20\\_2012\\_Recommendation.pdf](http://www.copyright.gov/1201/2012/Section_1201_Rulemaking%20_2012_Recommendation.pdf) (footnotes omitted).

Although the Register granted this portion of the proposed exemption, the proponents of the exemption face the risk that it will not be renewed unless sufficient evidence is provided.

In the WIPO negotiations for a treaty for persons with disabilities, the United States has made a proposal to require that exemptions be justified by "credible evidence" in "transparent legislative or administrative proceeding."

Note on Article F: Proposed addition from US: It is understood that a Contracting Party may adopt such effective and necessary measures [only where] [provided that] [on the condition that] the

actual or likely adverse impact of the Contracting Party's law protecting technological measures on the beneficiary person's lawful use of the work **is established by credible evidence** in a transparent legislative or administrative proceeding. (emphasis added)

The proposal by the United States would make it much more difficult to provide exemptions to legal protections for TPMs, and create an additional barrier for a person with disabilities to overcome in order to access a digital work.

By placing a "credible evidence" burden on a beneficiary person, the very limitations and exceptions they should be allowed to enjoy are threatened. In the United States where it is clear that persons who are visually impaired should benefit from an exemption allowing them to override TPMs, this exemption remains under attack and even the Register conceded that, with regard to a specific portion of their proposed exemption, the ACB and AFB had not provided extensive analysis. Whether the adverse impact is obvious or not, may not change the fact that the "credible evidence" standard may be a difficult one to meet, particularly when one considers the treaty will be implemented around the world, and that 90 percent of persons who are visually impaired live in developing countries. If the ability to meet the evidentiary and procedural standards are difficult for U.S. blind organizations, one can imagine that the burden will lead to far greater barriers in developing countries where the local NGOs lack the capacity to litigate such issues against publishers.

It is also notable that if the U.S. proposal is accepted, and this language finds its way into trade agreements, either as standalone language or a reference to the treaty, it will create a private right of action by right holders under the investor state dispute resolution mechanisms that the United States and Europe are seeking in various trade agreements. These agreements would allow publishers multiple opportunities to challenge exceptions -- once in the national courts and a second time before trade agreement arbitrators.