

**ACTION:** Advance notice of proposed rulemaking; request for comment.

**SUMMARY:** The Forest Service is preparing to promulgate regulations to provide clarity and direction on the management of National Forest System surface resources when the mineral estate is privately held.

**DATES:** Comments must be received in writing by February 27, 2009.

**ADDRESSES:** Written comments concerning this advance notice of proposed rulemaking notice should be addressed to Forest Service, USDA, attn: Director, Minerals and Geology Management, at Mail Stop 1126, Washington, DC 20250-1126; by electronic mail to [36cfr251@fs.fed.us](mailto:36cfr251@fs.fed.us); or by fax to (703) 605-1575; or by the electronic process available at Federal e-Rulemaking portal at <http://www.regulations.gov>. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at 1601 N. Kent Street, Suite 500, Arlington, Virginia 22209 during regular business hours (8:30 a.m. to 4 p.m.), Monday through Friday, except holidays. Visitors are encouraged to call ahead to (703) 605-4792 to facilitate entry to the building.

**FOR FURTHER INFORMATION CONTACT:** Ivette E. Torres, Liaison Specialist, Minerals & Geology Management. Phone Number: (703) 605-4792, or (703) 615-7813. E-mail: [ietorres@fs.fed.us](mailto:ietorres@fs.fed.us).

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:** The Forest Service intends to engage in rulemaking to provide clarity and direction on the management of the National Forest System surface resources when the mineral estate is privately held and fulfill the statutory mandate on the Allegheny National Forest in Pennsylvania. To that end, it hereby seeks public comment on the scope and direction of the intended rulemaking, including, but not limited to, the identification of the issues and concerns related to private oil and gas development on the Allegheny National Forest which would be appropriately considered in this rulemaking effort.

The proposed regulation will clarify and expand policy at 36 CFR 251.15—Conditions, rules and regulations to govern exercise of mineral rights reserved in conveyances to the United States, and be consistent with 36 CFR

part 251 subpart D—Access to Non-Federal Lands. The proposed rulemaking is also intended to fulfill the mandate set forth by section 2508 of the Energy Policy Act of 1992, Public Law 102-486, 106 Stat. 3108-3109, which has been codified at 30 U.S.C. 226(o), concerning private oil and gas development on the Allegheny National Forest. Section 2508 requires 60-day prior notification and clarifies content requirements of the notification. The Forest Service invites public comment as it prepares for this rulemaking.

#### Regulatory Findings

This advance notice of proposed rulemaking is being issued to obtain public comment and provide clarity and direction on the management of National Forest System surface resources when the mineral estate is privately held, and to fulfill the statutory mandate in 30 U.S.C. 226(o), regarding the Allegheny National Forest in Pennsylvania. The Department is not proposing any specific approaches for managing non-Federal lands; there are no regulatory findings associated with this notice. Comments received will help the Department determine the extent and scope of any future rulemaking.

#### Conclusion

The Department of Agriculture is considering how best to proceed with engaging the public in identifying with issues and concerns related to private oil and gas developments on the Allegheny National Forest. Through this advance notice of proposed rulemaking, the Department is seeking public input as responses to concerns about the management of National Forest System surface resources when the mineral estate is privately held. Public input and comment will help inform the Department's consideration of how best to proceed with long-term uses and management of these areas. How the Department ultimately addresses the final rule will depend on a number of factors. These include court decisions, public comments, and practical options for amending the current rule, an EIS or both, using other administrative tools to implement land uses and access to non-Federal lands.

Dated: December 17, 2008.

**Sally D. Collins,**

*Associate Chief.*

[FR Doc. E8-30742 Filed 12-24-08; 8:45 am]

**BILLING CODE 3410-11-P**

## LIBRARY OF CONGRESS

### Copyright Office

#### 37 CFR Part 201

[Docket No. RM 2008-8]

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

**AGENCY:** Copyright Office, Library of Congress.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Copyright Office of the Library of Congress is conducting its triennial rulemaking proceeding in accordance with a provision of the Copyright Act which was added by the Digital Millennium Copyright Act and which provides that the Librarian of Congress may exempt certain classes of works from the prohibition against circumvention of technological measures that control access to copyrighted works. The purpose of this rulemaking proceeding is to determine whether there are particular classes of works as to which users are, or are likely to be, adversely affected in their ability to make noninfringing uses due to the prohibition on circumvention. This notice publishes the classes of works that the Office will consider for exemption, which were proposed in the comment period that ended on December 2, 2008. This Notice further reiterates the previously published request for responsive written comments from all interested parties, including representatives of copyright owners, educational institutions, libraries and archives, scholars, researchers and members of the public, in order to elicit additional evidence either supporting or opposing the classes of works proposed for exemption.

**DATES:** Comments addressing the proposed classes of works are due by 5:00 P.M. E.S.T., February 2, 2009.

**ADDRESSES:** All of the comments proposing classes of works for exemption are available on the Copyright Office website at: <http://www.copyright.gov/1201/2008/index.html> and at the U.S. Copyright Office, James Madison Memorial Building, Room LM-401, 101 Independence Avenue, SE., Washington, DC. Electronic submissions must be made through the Copyright Office website: [http://www.copyright.gov/1201/comment\\_forms](http://www.copyright.gov/1201/comment_forms); see 73 FR 58073, 58078 (October 6, 2008) (available at:

<http://www.copyright.gov/fedreg/2008/73fr58073.pdf>) for file formats and other information about electronic and non-electronic filing requirements. If hand-delivered by a private party, an original and five copies of any comment to Room LM-401 of the James Madison Memorial Building between 8:30 a.m. and 5 p.m. and the envelope should be addressed as follows: Office of the General Counsel, U.S. Copyright Office, James Madison Memorial Building, Room LM-401, 101 Independence Avenue, SE., Washington, DC 20559-6000. If hand delivered by a commercial courier, an original and five copies of any comment must be delivered to the Congressional Courier Acceptance Site located at Second and D Streets, NE., Washington, DC, between 8:30 a.m. and 4 p.m. The envelope should be addressed as follows: Copyright Office General Counsel, Room LM-403, James Madison Memorial Building, 101 Independence Avenue, SE., Washington DC. If delivered by means of the United States Postal Service (*see* 73 FR 58073, 58078 (October 6, 2008), available at: <http://www.copyright.gov/fedreg/2008/73fr58073.pdf>, about continuing delays), comments should be addressed to Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024-0400. Comments may not be delivered by means of overnight delivery services such as Federal Express, United Parcel Service, etc., due to delays in processing receipt of such deliveries.

**FOR FURTHER INFORMATION CONTACT:** Rob Kasunic, Principal Legal Advisor, Office of the General Counsel, Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024-0400. Telephone (202) 707-8380; telefax (202) 707-8366.

**SUPPLEMENTARY INFORMATION:** On October 6, 2008, the Copyright Office published a Notice of Inquiry in the Federal Register to initiate the fourth triennial rulemaking proceeding required by § 1201(a)(1)(C) of the Copyright Act. That notice requested comments from interested parties proposing classes of works that should be considered for exemption for the next three-year period, from October 28, 2009, until October 27, 2012. The Copyright Office received 19 comments, containing 25 classes of works proposed for exemption.<sup>1</sup> On December 3, 2008,

the Copyright Office posted all of the comments received on its website, including the description of the proposed classes and summaries of the arguments supporting these proposed classes as provided by the commenters. *See* <http://www.copyright.gov/1201/2008/index.html>. In order to provide additional notice to interested parties, the Copyright Office is herein listing the proposed classes and the person and/or entity that proposed the class. Where the summary of the argument and/or the argument in the comment suggests additional refinement to an otherwise broad designation of a class or category of works, additional bracketed information has been added by the Copyright Office. The Copyright Office is adding this information, in part, to make it clear that the proposal, even if stated in broad terms, is limited generally by the context in which it was raised. A responsive comment that seeks to leverage an untailored, overly broad designation of a class into a wholly new class of works will not have properly raised a new class in this proceeding and such a new class will not be considered. After the close of the comment period that ended on December 2, 2008, a new class can be raised in this proceeding only through the process established by the Office for untimely submissions of proposed classes based on exceptional or unforeseen circumstances, *see* 73 FR 58073, 58079 (October 6, 2008) (available at: <http://www.copyright.gov/fedreg/2008/73fr58073.pdf>). The forthcoming comment period allows the introduction of additional factual information that would assist the Office in assessing whether a proposed class is warranted for exemption and, if it is, how such a class *already proposed* should be properly tailored.

The comments received by the Copyright Office propose the following classes:

1. "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]. Proponent: The American Foundation for the Blind.

2. "Subscription based services that offer DRM-protected streaming video where the provider has only made available players for a limited number of platforms, effectively creating an access control that requires a specific operating

this Notice in order to help focus the issues raised by the commenters.

system version and/or set of hardware to view purchased material." Proponent: Megan Carney.

3. "Motion pictures protected by anti-access measures, such that access to the motion picture content requires use of a certain platform." Proponent: Mark Rizik.

4A. "Commercially produced DVDs used in face-to-face classroom teaching by college and university faculty, regardless of discipline or subject taught, as well as by teachers in K-12 classrooms." Proponent: Gary Handman, Media Resources Center, UC Berkeley.

4B. "Audiovisual works used by instructors at accredited colleges or universities to create compilations of short portions of motion pictures for use in the course of face-to-face teaching activities." Proponent: Kevin L. Smith, Duke University.

4C. "Audiovisual works that illustrate and/or relate to contemporary social issues used for the purpose of teaching the process of accessing, analyzing, evaluating, and communicating messages in different forms of media." Proponent: Renee Hobbs.

4D. "Audiovisual works that illustrate and/or relate to contemporary social issues used for the purpose of studying the process of accessing, analyzing, evaluating and communicating messages in different forms of media, and that are of particular relevance to a specific educational assignment, when such uses are made with the prior approval of the instructor." Proponent: Renee Hobbs.

4E. "Audiovisual works contained in a college or university library, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by media studies or film professors." Proponent: Peter DeCherney, University of Pennsylvania.

4F. "Audiovisual works contained in a college or university library, when circumvention is accomplished for the purpose of making compilations of portions of those works for coursework by media studies or film students." Proponent: Peter DeCherney, University of Pennsylvania.

4G. "Audiovisual works included in a library of a college or university, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by professors." Proponents: Library Copyright Alliance and the Music Library Association.

4H. "All audiovisual works and sound recordings 'used in face-to-face classroom teaching by college and university faculty, regardless of

<sup>1</sup> This is an approximation based on the manner in which the proposed classes were articulated. In some cases, the proposed class involved multiple categories of works within the class that could have been articulated as multiple classes. In other cases, there were multiple proposals that were variations on the same theme that could have been expressed as one class. In addition, a number of the proposals by different commenters proposed similar classes. The Office has chosen to group related classes in

discipline or subject taught' and regardless of the source of the legally acquired item." Proponent: Gail Fedak.

5A. "Computer programs that enable wireless telephone handsets to execute lawfully obtained software applications, where circumvention is accomplished for the sole purpose of enabling interoperability of such applications with computer programs on the telephone handset." Proponents: Fred von Lohmann and Jennifer S. Granick, Electronic Frontier Foundation.

5B. "Computer programs that operate wireless telecommunications handsets when circumvention is accomplished for the sole purpose of enabling wireless telephones to connect to a wireless telephone communication network." Proponent: MetroPCS Communications, Inc.

5C. "Computer programs in the form of firmware or software that enable mobile communication handsets to connect to a wireless communication network, when circumvention is accomplished for the sole purpose of lawfully connecting to a wireless communication network." Proponent: Paul Posner, Youghiogeny Communications, Inc. D B A Pocket Communications, Inc.

5D. "Computer programs in the form of firmware that enable wireless telephone handsets to connect to a wireless telephone communication network, when circumvention is accomplished for the sole purpose of lawfully connecting to a wireless telephone communication network, regardless of commercial motive." Proponent: Jonathan Newman, Wireless Alliance, LLC.

6. "Computer programs protected by dongles that prevent access due to malfunction or damage or hardware or software incompatibilities or require obsolete systems or obsolete hardware as a condition of access." Proponent: Joseph V. Montoro, Jr.

7. "Computer programs" [for forensic analysis]. Proponent: Gary Handman, Media Resources Center, UC Berkeley.

8A. "Literary works, sound recordings, and audiovisual works accessible on personal computers and protected by technological protection measures that control access to lawfully obtained works and create or exploit security flaws or vulnerabilities that compromise the security of personal computers, when circumvention is accomplished solely for the purpose of good faith testing, investigating, or correcting such security flaws or vulnerabilities." Proponent: Alex Halderman, University of Michigan.

8B. "Video games accessible on personal computers and protected by

technological protection measures that control access to lawfully obtained works and create or exploit security flaws or vulnerabilities that compromise the security of personal computers, when circumvention is accomplished solely for the purpose of good faith testing, investigating, or correcting such security flaws or vulnerabilities." Proponent: Alex Halderman, University of Michigan.

9A. "Audiovisual works delivered by digital television ("DTV") transmission intended for free, over-the-air reception by anyone, which are marked with a "broadcast flag" indicator that prevents, restricts, or inhibits the ability of recipients to access the work at a time of the recipient's choosing and subsequent to the time of transmission, or using a machine owned by the recipient but which is not the same machine that originally acquired the transmission." Proponent: Matt Perkins.

9B. "Audiovisual works embedded in a physical medium (such as Blu-Ray discs) which are marked for 'down-conversion' or 'down-resolutioning' (such as by the presence of an Image Constraint Token "ICT") when the work is to be conveyed through any of a playback machine's existing audio or visual output connectors, and therefore restricts the literal quantity of the embedded work available to the user (measured by visual resolution, temporal resolution, and color fidelity)." Proponent: Matt Perkins.

10A. "Lawfully purchased sound recordings, audiovisual works, and software programs distributed commercially in digital format by online music and media stores and protected by technological measures that depend on the continued availability of authenticating servers, when such authenticating servers cease functioning because the store fails or for other reasons." Proponent: Christopher Soghoian, Berkman Center for Internet & Society.

10B. "Lawfully purchased sound recordings, audiovisual works, and software programs distributed commercially in digital format by online music and media stores and protected by technological measures that depend on the continued availability of authenticating servers prior to the failure of [authenticating] servers for technologists and researchers studying and documenting how the authenticating servers that effectuate the technological measures function." Proponent: Christopher Soghoian, Berkman Center for Internet & Society.

11A. "Audiovisual works released on DVD, where circumvention is undertaken solely for the purpose of

extracting clips for inclusion in noncommercial videos that do not infringe copyright." Proponents: Fred von Lohmann and Jennifer S. Granick, Electronic Frontier Foundation.

11B. "Motion pictures and other audiovisual works in the form of Digital Versatile Discs (DVDs) that are not generally available commercially to the public in a DVD form not protected by Content Scramble System technology when a documentary filmmaker, who is a member of an organization of filmmakers, or is enrolled in a film program or film production course at a post-secondary educational institution, is accessing material for use in a specific documentary film for which substantial production has commenced, where the material is in the public domain or will be used in compliance with the doctrine of fair use as defined by federal case law and 17 U.S.C. § 107." Proponents: Kartemquin Educational Films, Inc. and the International Documentary Association.

These proposed classes represent a starting point for further consideration in this rulemaking proceeding. This Notice does not represent that any particular class proposed for exemption will ultimately be recommended for exemption by the Register of Copyrights to the Librarian of Congress. Moreover, the delineation of any class as proposed by a commenter will be considered in relation to the facts presented in the entire rulemaking process. To the extent that an exemption is deemed warranted by the evidence, a proposed class listed herein may be developed and/or refined by the Register in her final recommendation to the Librarian.

As stated in the Copyright Office's Notice of Inquiry published in the Federal Register on October 6, 2008, comments in support or in opposition to the classes proposed may be submitted during the 30-day period proceeding February 2, 2009. A comment form will be posted on the Copyright Office's website on January 2, 2009, to facilitate the submission of electronic comments responsive to class or classes of works proposed for exemption. **SEE** 73 FR 58073, 58078 (October 6, 2008) (available at: <http://www.copyright.gov/fedreg/2008/73fr58073.pdf>) for additional information about electronic and non-electronic filing requirements.

Persons submitting comments should thoroughly review the October 6 Notice of Inquiry to familiarize themselves with the substantive and formal requirements for comments. To be persuasive, a comment should comply

with the guidelines set forth in Section 3 of the Notice of Inquiry.

**Tanya Sandros,**  
General Counsel.

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## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 17

RIN 2900-AN20

#### Elimination of Requirements for Prior Signature Consent and Pre- and Post-Test Counseling for HIV Testing

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Proposed rule.

**SUMMARY:** This document proposes to amend the Department of Veterans Affairs (VA) Informed Consent regulations to update requirements concerning testing for Human Immunodeficiency Virus (HIV) so that they are consistent with the Veterans' Mental Health and Other Care Improvements Act of 2008, which repealed provisions that had been enacted in 2003.

**DATES:** *Comments:* Comments must be received on or before January 28, 2009.

**ADDRESSES:** Written comments may be submitted through <http://www.Regulations.gov>; by mail or hand-delivery to Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to "RIN 2900-AN20." Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments are available online through the Federal Docket Management System (FDMS) at <http://www.Regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Ronald O. Valdiserri, MD, MPH, Chief Consultant, Public Health SHG, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420; (202) 461-7240. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** This proposed rule would amend VA's Informed Consent regulation for HIV testing in the medical regulations in 38

CFR part 17 to remove §§ 17.32(d)(1)(vi) and 17.32(g)(4). Section 124 of Public Law 100-322 (1988) ("section 124") prohibited any VA program from widespread testing to identify HIV infections unless Congress specifically appropriated funds for such a program. The statute further required VA to "provide for a program" under which VA offered HIV testing to: (1) Any patient receiving care or services for intravenous drug abuse, diseases associated with HIV, and any patient otherwise at high risk for HIV infection; and (2) any patient requesting the test, unless medically contraindicated. No testing of any patient was permissible under section 124 without the prior written informed consent of the patient and the provision of pre-and-post-test counseling.

VA originally implemented the section 124 mandates in its informed consent policy, VHA Manual M-2, part I, chapter 23 (Feb. 15, 1990). (VA's informed consent policy is currently contained in VHA Handbook 1004.1, dated Jan. 29, 2003.) A few years after the enactment of section 124, VA established its current policy, which is codified in current 38 CFR 17.32(d)(1)(vi) and (g)(4), requiring signature consent and counseling for all HIV testing conducted by VA.

In 2008, the Administration proposed to Congress the repeal of section 124 for compelling clinical and public health reasons. VA's HIV testing procedures differ from other routine clinical testing that VA conducts, most of which only requires the patient's oral informed consent. The requirements for pre-test counseling and signed consent have been widely reported to delay testing for HIV infection, which, in turn, impairs VA's ability to identify infected patients who would benefit from earlier medical intervention. Because of the delay in testing, infected patients may unknowingly spread the virus to their partners and do not present themselves for treatment until complications of the disease become clinically evident and, often, acute. Infected patients who are, or become, pregnant can unknowingly spread the virus to their fetus. This is medically unacceptable when we now have continually improving therapies with which to clinically manage the disease effectively; in many cases, their efficacy is increased if provided during the early stages of infection.

In submitting the proposal for repeal of section 124 to Congress, the Administration was aware that the scientific literature indicated that the requirements of section 124 were outdated. For example, in one peer-reviewed published study, VA's data

indicate that 50 percent of HIV-positive veterans had already suffered significant damage to their immune system by the time they were diagnosed as HIV positive. *See* Gandhi NR, Skanderson M, Gordon KS, Concato J, Justice AC. Delayed Presentation for Human Immunodeficiency Virus (HIV) Care Among Veterans, A Problem of Access or Screening? *Medical Care*. 2007; 45 (11): 1105-1109. These patients had, on average, 3.7 years of VA care before diagnosis, indicating that there were significant missed opportunities to make a diagnosis at a stage when HIV treatment could have prevented many of the complications experienced by these patients. *Id.*

As reported by the American Journal of Public Health, another group of VA researchers recently conducted a blinded seroprevalence survey of nearly 9,000 veteran inpatients and outpatients from 6 large VA sites. They found that the rates of previously undiagnosed HIV infection varied from 0.1 percent-2.8 percent among outpatients and from 0.0 percent-1.7 percent among inpatients. While these percentages may seem small, the CDC, based upon cost-effectiveness studies, identifies 0.1% as the threshold above which HIV testing should routinely take place in health care settings. *See* Owens DK, Sundaram V, Lazzeroni LC, Douglass LR, Sanders GD, *et al.* Prevalence of HIV Infection Among Inpatients and Outpatients in Department of Veterans Affairs Health Care Systems: Implications for Screening Programs for HIV. *Am J Public Health*. 2007; 97 (12): 2173-2178.

Historically, HIV testing was driven based on an assessment of risk, i.e., if the patient reported a behavior associated with HIV transmission, the test was strongly encouraged. This was a major reason for extensive pre-test counseling. However, over time, risk-based strategies for HIV testing in clinical settings proved to be inefficient, for a variety of reasons. Some patients are unwilling to share personal information about sexual and drug use behaviors with providers; some patients are unaware of their risks (e.g., someone who has a sex partner who doesn't disclose the fact that he/she is an injection drug user); risk-based testing fails to identify many HIV-infected persons until late in the course of their disease; and some patients may continue to misperceive HIV infection as a disease limited only to homosexuals, injection drug users, and persons with multiple, anonymous sexual partners.

In 2006, the Centers for Disease Control and Prevention (CDC) recommended routine HIV screening in