

# ISSUE BRIEF: EXEMPTIONS FOR SCHOOLS AND LIBRARIES IN THE ANTI-CIRCUMVENTION PROVISIONS OF THE DIGITAL MILLENNIUM COPYRIGHT ACT

MAY 2020

## INTRODUCTION

The Digital Millennium Copyright Act (DMCA) of 1998<sup>1</sup> was enacted to address the increasingly digital nature of copyrighted works. A complex piece of legislation, it is divided into five titles and covers topics such as the creation of safe harbors for internet service providers and the copying of software necessary for maintenance and repair of computers. Title I of the DMCA implements two World Intellectual Property Organization treaties: the Copyright Treaty and the Performances and Phonograms Treaty. Article 11 of the Copyright Treaty contains a provision that requires Contracting Parties to provide “adequate legal protection and effective legal remedies against the circumvention of effective technological measures” that are used by authors to protect their rights in their copyrighted works.<sup>2</sup> This prohibition against circumvention has been codified at 17 U.S.C. § 1201(a)(1)(A).<sup>3</sup> The DMCA goes further and prohibits not only the circumvention of technological protection measures, but also the manufacturing or trafficking in technology that is designed to circumvent measures that control access to protected works.<sup>4</sup>

The anti-circumvention provision is not absolute, with exemptions listed in both the statute and related regulations.<sup>5</sup> These exemptions describe the types of works whose technical protection measures may be circumvented and the purposes for which the works may be used. This issue brief will summarize exemptions in 17 U.S.C. § 1201 and 37 C.F.R. § 201.40 that apply to educational institutions and libraries.

## STATUTORY EXEMPTIONS

Section 1201 contains one exemption, subsection (d), which explicitly applies to educational institutions and libraries, and another exemption, subsection (g), which could be applicable to educational institutions.

---

<sup>1</sup> P.L. 105-304, 112 Stat. 2860 (1998).

<sup>2</sup> WIPO Copyright Treaty, Dec. 20, 1996, art. 11.

<sup>3</sup> 17 U.S.C. § 1201(a)(1)(A) reads in part: “No person shall circumvent a technological measure that effectively controls access to a work protected under this title.”

<sup>4</sup> 17 U.S.C. § 1201(a)(2).

<sup>5</sup> Exemptions are listed in 17 U.S.C. § 1201(d)-(j) and § 1201(a)(1)(B)-(D) provide for the creation of additional exemptions that are codified at 37 C.F.R. § 201.40.

Subsection (d) allows nonprofit libraries, archives, and educational institutions to circumvent a protection measure on a commercially exploited copyrighted work to determine whether to acquire a copy of the work. The work may not be retained longer than necessary to make a purchase decision and it may not be used for any other purpose.

Subsection (g) allows the circumvention of a technological measure applied to a copy, phonorecord, performance, or display of a published work for the purposes of encryption research, defined as “activities necessary to identify and analyze flaws and vulnerabilities of encryption technologies applied to copyrighted works.”<sup>6</sup>

Factors to be considered in determining whether a person qualifies for this exemption include whether the information derived from the encryption research was disseminated in a manner reasonably calculated to advance the state of knowledge or development of encryption technology and whether the owner of the underlying copyrighted work was informed of the research results.<sup>7</sup>

This exemption is open to all who conduct good faith research into encryption technology and disseminate that research. Researchers at both nonprofit and for-profit universities, colleges and technical schools may be able to employ this exemption to advance the field of encryption technology.

## **REGULATORY EXEMPTIONS**

Section 1201(a)(1)(B) provides that the anti-circumvention prohibition “shall not apply to persons who are users of a copyrighted work which is in a particular class of works, if such persons are ... adversely affected by virtue of such prohibition in their ability to make non-infringing uses of that particular class of works ...” Section 1201(a)(1)(C) explains the procedures and guidelines for selecting the classes of copyrighted works which may have their technological protection measures circumvented. The Librarian of Congress, upon the recommendation of the Register of Copyrights, makes a determination in a rulemaking proceeding as to which classes of copyrighted works may have their technical protection measures circumvented. The rulemaking proceedings occur every three years and the exemptions are not cumulative.

The list of regulatory exemptions is published at 37 C.F.R. § 201.40. The current list became effective in October 2018 and consists of fourteen classes of copyrighted works whose protection measures may be circumvented for a variety of purposes. Of these, four specifically apply to educational settings such as schools, libraries, or museums and three others may be applicable in educational settings.

---

<sup>6</sup> 17 U.S.C. § 1201(g)(1)(A).

<sup>7</sup> 17 U.S.C. § 1201(g)(3).

## EXEMPTIONS THAT APPLY TO EDUCATIONAL INSTITUTIONS

First, college and university faculty and students and K-12 educators and students may circumvent protection measures to access portions of motion pictures for the purpose of criticism, comment, teaching, or scholarship.<sup>8</sup> This exemption also applies to faculty of massive open online courses (MOOCs) offered by accredited nonprofit educational institutions in film studies or other courses requiring close analysis of film and media excerpts, for the purpose of criticism or comment.<sup>9</sup>

A second educational exemption applies to motion pictures (including television shows and videos) where circumvention is undertaken by the disability services office of a K-12 school, college, or university for the purpose of adding captions or an audio description to the motion picture to make it accessible for students with disabilities. This exemption is only available if an accessible version cannot be obtained at a fair price or in a timely manner.<sup>10</sup>

The third and fourth exemptions apply to libraries, archives, and museums that seek to preserve lawfully acquired video game programs<sup>11</sup> and computer programs.<sup>12</sup> To be eligible for the exemptions, a library, archive, or museum must be open to the public or routinely made available to researchers who are not affiliated with the organization.

## EXEMPTIONS THAT MAY BE APPLIED IN EDUCATIONAL SETTINGS

There are three regulatory exemptions to the anti-circumvention provision that do not specifically apply to educational institutions but may have some application in such settings.

First, circumvention may be undertaken to make use of short portions of motion pictures (including television shows and videos) from DVDs and other digital media for the purpose of criticism or comment for use in documentary filmmaking or in other films where the motion picture excerpt is used in parody or for its biographical or historically significant nature.<sup>13</sup> Short portions of motion pictures may also be used in non-commercial videos<sup>14</sup> and in nonfiction multimedia ebooks.<sup>15</sup>

The second exemption is similar to the statutory exemption in 17 U.S.C. § 1201(g) discussed above. A protection measure of a computer program may be circumvented for purposes of good-

---

<sup>8</sup> 37 C.F.R. § 201.40 (b)(1)(ii)(A).

<sup>9</sup> 37 C.F.R. § 201.40 (b)(1)(ii)(B).

<sup>10</sup> 37 C.F.R. § 201.40 (b)(2)(i).

<sup>11</sup> 37 C.F.R. § 201.40 (b)(12).

<sup>12</sup> 37 C.F.R. § 201.40 (b)(13).

<sup>13</sup> 37 C.F.R. § 201.40 (b)(1)(A).

<sup>14</sup> 37 C.F.R. § 201.40 (b)(1)(B).

<sup>15</sup> 37 C.F.R. § 201.40 (b)(1)(C).

faith testing, investigation, or correction of a security flaw or vulnerability.<sup>16</sup> The information derived from the activity must be used primarily to promote the security or safety of the class of devices or machines on which the computer program operates. But, while 17 U.S.C. § 1201(g) requires consideration of whether the knowledge gained from encryption research has been disseminated in determining whether to apply the exemption, there is no dissemination requirement in the regulation.

The third exemption that may apply to educational institutions and libraries involves the use of feedstock for 3D printers. Computer programs that limit the use of feedstock to a certain type may be circumvented for the sole purpose of using alternative feedstock.<sup>17</sup> The use of replacement ink cartridges for standard computer printers was addressed in 2004 by the Sixth Circuit. In that case, the court ruled that the DMCA did not prohibit the manufacture and sale of replacement ink cartridges for computer printers by a competitor of the original manufacturer, even though the original manufacturer of the printer and ink attempted by means of computer code to prevent the use of replacement cartridges.<sup>18</sup>

## **CONCLUSION**

The current exemptions are in force through 2021, at which point another set of exemptions is expected to be announced. In the meantime, the Senate Judiciary Committee's Subcommittee on Intellectual Property has been holding a set of hearings to examine DMCA, including Section 1201.<sup>19</sup> The AALL Copyright Committee will continue to track these issues and provide updates to members.

*Written by the AALL Copyright Committee*

---

<sup>16</sup> 37 C.F.R. § 201.40 (b)(11).

<sup>17</sup> 37 C.F.R. § 201.40 (b)(14).

<sup>18</sup> *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522 (6th Cir. 2004).

<sup>19</sup> Thom Tillis, *Getting Back to Basics on the Digital Millennium Copyright Act*, The Hill (Dec. 17, 2019), <https://thehill.com/blogs/congress-blog/technology/474918-getting-back-to-basics-on-the-digital-millennium-copyright-act>.