

GOVERNMENT RELATIONS OFFICE & COPYRIGHT COMMITTEE  
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**Exemptions to DMCA § 1201 Circumvention of Copyright Protection Systems**

This issue brief describes the two types of exemptions available for the circumvention of copyright protection systems under the Digital Millennium Copyright Act. On July 27, 2010, the United States Copyright Office and the Librarian of Congress published a set of six exempt classes for the period running until 2012. The full list of the exempted classes appears below, together with brief explanation of how these might impact law libraries.

As shown below, there is an expanded exemption for the use of motion pictures on DVDs when used for educational purposes, as well as for documentary filmmaking and noncommercial videos.

***DMCA Background***

The Digital Millennium Copyright Act ('DMCA') was enacted in 1998 to amend United States copyright statutes to address technology issues with protection of copyrighted works in the United States.<sup>1</sup> This law came about through United States treaty obligations that arose out of the WIPO Performances and Phonograms Treaty<sup>2</sup> and the WIPO Copyright Treaty.<sup>3</sup>

One specific section of the DMCA, § 1201 - Circumvention of Copyright Protection Systems, involves the status of technological tools used to control access to works that are at least partially protected by copyright.<sup>4</sup> The first part of this section states that "No person shall circumvent a technological measure that effectively controls access to a work protected under this title."<sup>5</sup> This effectively prevents individuals from copying items such as DVDs, even if the copying would fall under fair use.

The American Association of Law Libraries (AALL) opposed the DMCA back when it was passed in 1998. AALL had specific objections to section 1201 because of the potential that it could be used to prevent fair use and legitimate access to copyrighted works. AALL continues to advocate for user rights, especially where technology may place burdens on legitimate and allowable user needs.

In the latest rulemaking session to set regulatory exemptions to § 1201, AALL, along with the Medical Library Association and the Special Libraries Association, requested an exemption for educational use of DVD clips. On May 9, 2009, AALL Copyright Committee vice chair Roger Skalbeck testified before the Library of Congress to argue for this specific exemption. The hearings in May were followed by two rounds of written questions from the Copyright Office exploring questions of screen capture software, duration of clips and related matters.

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<sup>1</sup> Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998)(codified in scattered sections of 17 U.S.C. and 28 U.S.C. § 4001).

<sup>2</sup> World Intellectual Property Organization Performances and Phonograms Treaty, Dec. 20, 1996, S. Treaty Doc No. 105-17, 2186 UNTS 203, available at [http://www.wipo.int/clea/docs\\_new/pdf/en/wo/wo034en.pdf](http://www.wipo.int/clea/docs_new/pdf/en/wo/wo034en.pdf).

<sup>3</sup> World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, S. Treaty Doc No. 105-17, 2186 UNTS 121, available at [http://www.wipo.int/treaties/en/ip/wct/pdf/trtdocs\\_wo033.pdf](http://www.wipo.int/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf).

<sup>4</sup> 17 U.S.C. § 1201 (2006).

<sup>5</sup> 17 U.S.C. § 1201 (a)(1)(A).

## ***Exemptions Explained***

The DMCA, in an attempt to balance the needs of legitimate users and to provide limited access to copyright protected works provides for specific exemptions to works. There are two locations for these exemptions. The first is in § 1201 itself and the second is in Title 37 of the Code of Federal Regulations.

### **Statutory Exemptions**

The permanent exemptions found in § 1201 are rather limited. The first two exemptions deal with specific groups of people or entities. Section 1201(d) deals with an exemption for nonprofit libraries, archives and educational institutions. This exemption allows a named institution to circumvent technological measures on commercial products "solely in order to make a good faith determination of whether to acquire a copy of that work"<sup>6</sup> and only if "an identical copy of that work is not reasonably available in another form."<sup>7</sup> The second exemption, § 1201(e), is for federal law enforcement and intelligence officers working on authorized, official government business.

The rest of the exemptions built into § 1201 deal with actions rather than specific groups of people. Section 1201(f) allows a person or business to reverse engineer a computer program and bypass technological protections for the purposes of creating other applications that will work with that program. Another exemption, § 1201(g), authorizes encryption research, with § 1201(j) similarly supporting circumvention for security testing purposes. Finally, § 1201(i) permits circumvention for the purposes of preventing a program from collecting and disseminating personal information about the user who is accessing that product.

### **Regulatory Exemptions**

The second type of exemptions are regulatory and may vary from period to period. Section 1201(a)(1) grants the Librarian of Congress rulemaking authority to create exemptions for specific users of particular classes of works who would be "adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works under this title."<sup>8</sup> The Librarian of Congress, based upon recommendations by the United States Copyright Office, is supposed to re-examine and re-issue exemptions every three years. The latest group of exemptions were supposed to be released in October 2009, but the actual release date was July 27, 2010. These new exemptions will be discussed below.

### ***History of Prior Regulatory Exemptions: 2000, 2003, 2006***

The United States Copyright Office has held four rulemaking proceedings to identify specific classes of works to be exempt. For each three-year period of exemptions, the Copyright Office has accepted public comments and suggestions and reviewed these proposals with a critical eye, passing on its recommendations to the Librarian of Congress for the final decision.

The exemptions expire at the end of each three-year term. The Copyright Office and Librarian of Congress have not seen the need to renew verbatim the exemptions from one triennial term to the next. Instead, some exemptions expand, while others fade away.

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<sup>6</sup> 17 U.S.C. § 1201 (d)(1).

<sup>7</sup> 17 U.S.C. § 1201 (d)(2).

<sup>8</sup> 17 U.S.C. § 1201 (a)(1)(B).

**In 2000, the Copyright Office and the Librarian of Congress created two exemptions:**

1. Compilations consisting of lists of websites blocked by filtering software applications; and
2. Literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence.<sup>9</sup>

**In 2003, the list of exemptions expanded to four, adding language to one prior exemption and dropping the second:**

1. Compilations consisting of lists of Internet locations blocked by commercially marketed filtering software applications that are intended to prevent access to domains, websites or portions of websites, but not including lists of Internet locations blocked by software applications that operate exclusively to protect against damage to a computer or computer network or lists of Internet locations blocked by software applications that operate exclusively to prevent receipt of e-mail.
2. Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete.
3. Computer programs and video games distributed in formats that have become obsolete and which require the original media or hardware as a condition of access. A format shall be considered obsolete if the machine or system necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.
4. 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 of the ebook's read-aloud function and that prevent the enabling of screen readers to render the text into a specialized format.<sup>10</sup>

**In 2006, the list expanded once more to six exemptions, again removing some prior exemptions and rewording others:**

1. Audiovisual works included in the educational library of a college or university's film or media studies department, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by media studies or film professors.
2. Computer programs and video games distributed in formats that have become obsolete and which require the original media or hardware as a condition of access, when circumvention is accomplished for the purpose of preservation or archival reproduction of published digital works by a library or archive. A format shall be considered obsolete if the machine or system necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.
3. Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete. A dongle shall be considered obsolete if it is no longer

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<sup>9</sup> 37 C.F.R. §201.40 (2001).

<sup>10</sup> 37 C.F.R. §201.40 (2004).

manufactured or if a replacement or repair is no longer reasonably available in the commercial marketplace.

4. 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.
5. 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.
6. Sound recordings, and audiovisual works associated with those sound recordings, distributed in compact disc format and protected by technological protection measures that control access to lawfully purchased 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.<sup>11</sup>

On October 27, 2009, the Librarian of Congress instituted an interim rule removing the exemptions' expiration date, and thus extending the 2006 exemptions until the new exemptions were finalized.<sup>12</sup>

### ***Current Exemptions for 2009-2012***

In the current rulemaking session, the Copyright Office once more issued six exemptions.<sup>13</sup> Holding true to its past habits, the exemptions list changed. Two exemptions were dropped and replaced by two new exemptions, one was expanded, two reworded and the final one was kept the same:

1. Motion pictures on DVDs that are lawfully made and acquired and that are protected by the Content Scrambling System when circumvention is accomplished solely in order to accomplish the incorporation of short portions of motion pictures into new works for the purpose of criticism or comment, and where the person engaging in circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use in the following instances:
  - i. Educational uses by college and university professors and by college and university film and media studies students;
  - ii. Documentary filmmaking;
  - iii. Noncommercial videos.

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<sup>11</sup> 37 C.F.R. §201.40 (2007).

<sup>12</sup> Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 74 Fed. Reg. 55,138 (Oct. 27, 2009)(the Supplementary Information stated "It is anticipated that this extension will be in effect for no more than a few weeks," but the extension actually lasted nine months beyond the original expiration date of October 27, 2009).

<sup>13</sup> It may be of some interest to readers to know that the Register of Copyrights only recommended only first five exemptions, and specifically stated that she did not recommend the sixth. The Librarian of Congress disagreed on the sixth exemption and included it. For more information, see the commentary provided at the beginning of the regulation in the Federal Register. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43825, 43837-43838 (July 27, 2010)(to be codified at 37 C.F.R. §201.40).

2. Computer programs that enable wireless telephone handsets to execute software applications, where circumvention is accomplished for the sole purpose of enabling interoperability of such applications, when they have been lawfully obtained, with computer programs on the telephone handset.
3. Computer programs, in the form of firmware or software, that enable used wireless telephone handsets to connect to a wireless telecommunications network, when circumvention is initiated by the owner of the copy of the computer program solely in order to connect to a wireless telecommunications network and access to the network is authorized by the operator of the network.
4. Video games accessible on personal computers and protected by technological protection measures that control access to lawfully obtained works, when circumvention is accomplished solely for the purpose of good faith testing for, investigating, or correcting security flaws or vulnerabilities, if:
  - i. The information derived from the security testing is used primarily to promote the security of the owner or operator of a computer, computer system, or computer network; and
  - ii. The information derived from the security testing is used or maintained in a manner that does not facilitate copyright infringement or a violation of applicable law.
5. Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete. A dongle shall be considered obsolete if it is no longer manufactured or if a replacement or repair is no longer reasonably available in the commercial marketplace.
6. 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.

By far the biggest change which will affect libraries, particularly academic libraries, is the first exemption, which expands the ability to circumvent the CSS encryption system that protects DVDs for certain purposes. The original exemption, which was introduced in the last rulemaking session in 2006, restricted the ability to create DVD clips to film studies professors and students at universities. The new version opens this exemption up to more users and uses, including college and university professors for educational uses, documentary filmmakers, and those creating non-commercial videos.

There are, however, new restrictions on this exemption as well. First, the film clips must be used to create a new work for criticism or comment, both of which are part of the fair use factors. You cannot rip short clips just to have them or for any other purpose. Next, the clips must be kept “short”, which is not defined by the regulation, although the commentary included with this regulation states “the Register [of Copyrights] is persuaded that it would be difficult and imprudent to quantify the precise contours of what constitutes a ‘short portion’ . . . .”<sup>15</sup> The final restriction is that the user must reasonably believe that

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<sup>14</sup> *Id.* at 43839.

<sup>15</sup> *Id.* at 43828.

the circumvention is necessary for the use. The commentary once again sheds light on this issue, stating that if there is another lawful way, such as screen capture programs, to get the quality of film necessary for the use, then the alternative method should be used.<sup>16</sup>

Only two of the other exemptions directly impact libraries, and they are the two that have existed in some form since 2003. Thus, the impact of these exemptions, which cover obsolete dongles (#5) and converting ebooks to audio for the blind (#6), is not new and most libraries should not feel a major impact. One other exemption, that of being allowed to “jailbreak”<sup>17</sup> your own cell phone in order to use third-party software (#2), may indirectly affect libraries by expanding the types of mobile software programs that patrons may want to use to access library services. The actual circumvention activities and possible consequences would not fall upon the library, however, but rather the patrons.

### ***Conclusion***

The new exemptions provide a significant expansion of the ability for libraries and their patrons to use DVD clips for educational uses, documentaries and other non-commercial films, at least for the next three years when the next set of exemptions is released. AALL and other library associations will need to continue to advocate for these exemptions to be renewed and possibly expanded, as they are reviewed *de novo* each time the regulations are issued.

All official materials relating to the section 1201 rulemaking proceeding are found on the United States Copyright Office website: [www.copyright.gov/1201/](http://www.copyright.gov/1201/) This includes copies of the Federal Register notices and proposed as well as granted classes. In addition, there are transcripts and recordings of the May 2009 hearings as well as copies of questions from the Copyright Office that followed the hearings, together with responses from hearing participants.

Roger V. Skalbeck, Chair, AALL Copyright Committee  
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<sup>16</sup> *Id.*

<sup>17</sup> Defined as circumventing “technological measures contained on certain wireless phone handsets (known as “smartphones”) that prevent third-party software applications from being installed and run on such phones.” *Id.* at 43828.