

## Librarian's order advances fair use in higher education

by Carrie Russell, director, Program on Public Access to Information for ALA's Office for Information Technology Policy

Finally, some good news about fair use in higher education that is actually related to that copyright amendment we love to hate—the Digital Millennium Copyright Act (DMCA).

The DMCA was the first copyright amendment that established that user rights to digital information would be limited compared to rights to analog information. In the digital environment, where licensing can usurp user exceptions, “guilty until proven innocent” is the new norm—essentially one must have prior permission to access and use digital works, or abide by some pre-requisites before exercising a user right (consider the TEACH Act's numerous prerequisites).

Fortunately, Congress recognized that digital controls that protect access to digital works may be overkill, negatively affecting one's ability to exercise fair use. It did this by legislating that every three years, the U.S. Copyright Office in consultation with the National Telecommunications and Information Administration, must conduct a “rulemaking” to check if noninfringing uses of protected works were barred by technological protection measures employed by rights holders. If so, the Copyright Office recommends to the Librarian of Congress (who makes the final determination), classes of works that should be exempt from the anti-circumvention provision for a three-year period. In plain language, users can break encryption or other technologies for these particular classes of works without running afoul of the law.


This year, seven classes of works are exempt, including the right to circumvent e-book protection schemes that prevent the text-to-speech functionality, of great importance to people

with print disabilities. The exemption of most importance to higher education involves DVDs (including both film and television content) protected by Content Scrambling System (CSS). For the next three years, higher educational faculty in all disciplines can break the CSS in order to create film clip compilations for criticism or comment, including performance for teaching purposes. Previously, only faculty teaching film or media studies could exercise this exemption.

In its filing with the Copyright Office, the Library Copyright Alliance (LCA), of which ACRL is a member, provided evidence that faculty in all disciplines use film clips for commentary and criticism. LCA collected hundreds of examples of this by asking media and other librarians to gather actual occasions when faculty did or wanted to use compilation clips. The Copyright Office said that these uses were fair uses, blocked by technological protection measures.

In addition, the Librarian of Congress extended this exemption to film and media studies students, to documentary filmmakers, and to “vidders” who create noncommercial, transformative videos for platforms like YouTube. The exemption does not specifically apply to teachers or students in the K–12 environment, because according to the Librarian's rule, not enough evidence was presented to justify the need for high-quality clips in elementary and secondary education. On a bright note, the rule concludes that screen capture software can be used by anyone to create clips, signaling that the Copyright Office does not deem screen capture software a circumvention tool, a clarification of importance since screen capture is so widely used.

Another surprise exemption proposed by the Electronic Frontier Foundation that drew great media attention was “jailbreaking” smartphones (such as the iPhone) allowing owners of cell phones to circumvent software that prevents them from using third-party smartphone applications.

To read the full report from the Librarian of Congress and LCA testimony and filings, see [www.copyright.gov/1201/](http://www.copyright.gov/1201/). 

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Jenni Terry is press officer at ALA's Washington Office, e-mail: [jterry@alawash.org](mailto:jterry@alawash.org)