
RECENT REGULATION

COPYRIGHT LAW — DIGITAL MILLENNIUM COPYRIGHT ACT — LIBRARIAN OF CONGRESS EXEMPTS UNIVERSITY PROFESSORS AND FILM STUDENTS FROM DMCA ANTICIRCUMVENTION PROVISIONS. — Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43,825 (July 27, 2010) (to be codified at 37 C.F.R. pt. 201).

Since the emergence of the digital era, the use of technology in the classroom has become increasingly pervasive,¹ and the virtues of such uses have been quite widely felt.² Section 1201 of the Digital Millennium Copyright Act³ (DMCA) generally prohibits the circumvention of technological access controls, which have the effect of limiting the degree to which educators and students may make fair uses of copyrighted works. That same section includes a provision granting the Librarian of Congress the authority to exempt users who “are, or are likely to be in the succeeding three-year period, adversely affected . . . in their ability to make noninfringing uses . . . of a particular class of copyrighted works.”⁴ Recently, the Librarian of Congress accepted the recommendation of the Register of Copyrights to issue a rule that exempts university professors and film students from the DMCA’s anticircumvention provisions when they override access controls⁵ on DVDs with the reasonable belief that such actions are necessary to further pedagogical goals.⁶ The new rule succeeds in expanding the limited educational privileges announced in a prior rulemaking

¹ See generally U.S. DEP’T OF EDUC., TOWARD A NEW GOLDEN AGE IN AMERICAN EDUCATION (2004), available at <http://www2.ed.gov/about/offices/list/os/technology/plan/2004/plan.pdf> (discussing the implementation of a national education technology plan that acknowledges the significant role technology plays in American education).

² See, e.g., William Fisher & Jacqueline Harlow, *Film and Media Studies and the Law of the DVD*, CINEMA J., Spring 2006, at 118, 118–20 (describing the myriad uses of DVDs in university settings); Ethan Todras-Whitehill, *New Tools: Blogs, Podcasts and Virtual Classrooms*, N.Y. TIMES, Aug. 3, 2005, at G8 (detailing the uses of blogs and podcasts in elementary and secondary schools).

³ Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.); see 17 U.S.C. § 1201 (2006).

⁴ 17 U.S.C. § 1201(a)(1)(C) (2006).

⁵ The rule explicitly refers to the Content Scramble System (CSS), an encryption-based access control system that “requires the use of appropriately configured hardware such as a DVD player or a computer DVD drive to decrypt, unscramble and play back, but not copy, motion pictures on DVDs.” *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 308 (S.D.N.Y. 2000). However, because this comment focuses on access controls generally, the term “access controls” will be used in place of CSS wherever applicable.

⁶ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43,825, 43,827 (July 27, 2010) (to be codified at 37 C.F.R. pt. 201) [hereinafter 2010 Final Rule].

proceeding. However, the Register of Copyrights ignored evidence of the benefits of extending the exemption to other university students, to K-12 teachers and students, and to other media beyond motion pictures on DVDs. By adopting the Register's recommendation, the Librarian crafted a rule that leaves many of the very users whom Congress intended to protect without the ability to exercise their fair use rights.

Following the technological "arms race" of the 1980s and the rapid development of the internet in the 1990s, media companies petitioned the government for augmented legal protection against enterprising individuals who circumvented access controls on DVDs and engaged in the widespread copying and dissemination of these companies' prized works.⁷ In response, Congress amended the Copyright Act of 1976⁸ by enacting the DMCA in 1998. The DMCA carries a series of anticircumvention measures, the most relevant of which is § 1201(a)(1). This provision explicitly prohibits the circumvention of any "technological measure that effectively controls access" to a protected work.⁹ In order to preserve the public's ability to engage in fair uses of copyrighted materials,¹⁰ Congress initially identified seven classes of uses that would be free from DMCA liability.¹¹ However, acknowledging the limitations of its forecasting ability, Congress incorporated within § 1201 a "fail-safe mechanism."¹² This mechanism prescribes triennial rulemaking proceedings whereby the Librarian of Congress — upon the recommendations of the Register of Copyrights and the National Telecommunications and Information Administration (NTIA) of the Department of Commerce¹³ — balances the benefits and

⁷ See JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 607–08 (2d ed. 2006).

⁸ Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–810 (2006)).

⁹ 17 U.S.C. § 1201(a)(1)(A).

¹⁰ See 2010 Final Rule, *supra* note 6, at 43,826.

¹¹ These uses included intelligence gathering, reverse engineering, encryption research, security testing, and — for nonprofit libraries, archives, and educational institutions — gaining access to a copyrighted work to determine whether to acquire it. See 17 U.S.C. § 1201(d)–(j). Many commentators viewed the initial congressional exemptions as unnecessarily restrictive. See, e.g., Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 1, 19–20 (1999) (asserting that the "seven very specific exceptions [of § 1201]" are "too narrowly crafted").

¹² H.R. REP. NO. 105-551, pt. 2, at 36 (1998).

¹³ See 2010 Final Rule, *supra* note 6, at 43,827. In all four of the § 1201 rulemakings, the Librarian has adopted in their entirety the Register's rationales for and designations of new exempted classes. See *id.* at 43,828; Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68,472, 68,473 (Nov. 26, 2006) (codified at 37 C.F.R. § 201.40 (2010)); Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 68 Fed. Reg. 62,011, 62,011 (Oct. 31, 2003); Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64,556, 64,556 (Oct. 27, 2000). Because the Librarian plays an ancil-

harms of granting exemptions to other proposed classes.¹⁴ Subsection 1201(a)(1)(C) of the DMCA directs the Librarian to examine four primary factors in the course of a rulemaking:

- (i) the availability for use of copyrighted works; (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes; (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research; [and] (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works.¹⁵

The § 1201 rulemaking in 2006 was the first to establish an educational exception to the DMCA's anticircumvention provisions.¹⁶ A group of film professors initially proposed an exemption for professors of film and media studies.¹⁷ Proponents of the proposed class argued that possible alternatives to circumvention, such as using VHS cassettes, recording with a digital video recorder, or playing individual DVDs in succession to showcase clips, were inadequate to satisfy the particular pedagogical purposes of film professors.¹⁸ They further contended that the proposed exemption would have little to no effect on the market for copyrighted audiovisual works and would therefore be properly tailored to minimize adverse consequences to copyright holders.¹⁹ Finding these reasons persuasive, the Register concluded that all of the § 1201(a)(1)(C) factors weighed in favor of exempting "[a]udiovisual works included in the educational library of a college or university's film or media studies department . . . use[d] in the classroom by media studies or film professors."²⁰

The 2010 rulemaking was designed to respond to eight new proposals that the Copyright Office received in 2009.²¹ Some proponents

lary role in the rulemaking process, much of the discussion concerning the reasoning behind the 2010 rulemaking draws on the recommendations of the Register and NTIA alone.

¹⁴ See 2010 Final Rule, *supra* note 6, at 43,826.

¹⁵ 17 U.S.C. § 1201(a)(1)(C)(i)-(iv); see also 2010 Final Rule, *supra* note 6, at 43,826. For a more in-depth explanation of § 1201 and the triennial rulemaking process, see generally Bill D. Herman & Oscar H. Gandy, Jr., *Catch 1201: A Legislative History and Content Analysis of the DMCA Exemption Proceedings*, 24 CARDOZO ARTS & ENT. L.J. 121 (2006).

¹⁶ See U.S. COPYRIGHT OFFICE, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS IN RM 2005-11; RULEMAKING ON EXEMPTIONS FROM PROHIBITION ON CIRCUMVENTION OF COPYRIGHT PROTECTION SYSTEMS FOR ACCESS CONTROL TECHNOLOGIES 13 (2006), available at http://www.copyright.gov/1201/docs/1201_recommendation.pdf.

¹⁷ *Id.*

¹⁸ See *id.* at 20. These purposes included illustrating nuances in color balance and aspect ratio, minimizing waste of class time, and presenting additional DVD-only features (such as alternative camera angles and behind-the-scenes interviews). *Id.* at 20-24.

¹⁹ See *id.* at 24.

²⁰ *Id.*

²¹ See U.S. COPYRIGHT OFFICE, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS IN RM 2008-8; RULEMAKING ON EXEMPTIONS FROM PROHIBITION ON CIRCUM-

argued that the exempted class should include audiovisual works in any college or university library because the 2006 rule “unduly restrict[ed] the range of titles available for pedagogical use” and presupposed that most schools had “dedicated and separate film and/or media studies libraries.”²² Others sought to eliminate the exclusive privilege given to film professors, as instructors’ needs for applications of technology in foreign language, criminal justice, law, and medical courses reflected “the pervasiveness and importance of audiovisual material in contemporary education.”²³ Still others believed that college students and K–12 teachers and students should be able to circumvent access control technologies.²⁴ Beneficiaries of the 2006 rule sought its renewal, including its exemption for audiovisual content other than motion pictures on DVDs.²⁵ NTIA contended that the source of copyrighted works circumvented for educational use should be limited to college and university libraries, and it determined that evidence supported an exemption for college professors and students more generally.²⁶

The Register agreed with NTIA that all university professors should be exempt from DMCA liability, but she further extended the exemption only to film students rather than to all university students.²⁷ The Register stated that access controls adversely affect a variety of educational purposes and that using other forms of media or acquiring licenses from relevant rights holders are impractical alternatives to circumvention.²⁸ Because the exempted parties would be allowed to copy only short portions of copyrighted works for educational uses, the Register reasoned that the exemption would not harm the market for or value of copyrighted works.²⁹ In addition, given that “[n]o evidence was introduced to suggest that harm to copyright owners’ interests would result from . . . noninfringing uses of lawfully acquired DVDs,” the Register declared that there should be no limitations on the source of the copyrighted works.³⁰ However, she determined that non-film students and K–12 teachers and students should not be covered under the rule because proponents of that position failed to show that access

VENTION OF COPYRIGHT PROTECTION SYSTEMS FOR ACCESS CONTROL TECHNOLOGIES 22, 26 (2010) [hereinafter 2010 RECOMMENDATION OF THE REGISTER], available at <http://www.copyright.gov/1201/2010/initial-ed-registers-recommendation-june-11-2010.pdf>.

²² *Id.* at 26.

²³ *Id.* at 30–31; *see id.* at 31 & n.95, 33, 63.

²⁴ *See id.* at 32–35.

²⁵ *See id.* at 29.

²⁶ *See* Letter from Lawrence E. Strickling, Assistant Sec’y for Commc’ns & Info., NTIA, to Marybeth Peters, Register of Copyrights 4–6 (Nov. 4, 2009) [hereinafter 2009 NTIA Letter], available at <http://www.copyright.gov/1201/2010/NTIA.pdf>.

²⁷ *See* 2010 RECOMMENDATION OF THE REGISTER, *supra* note 21, at 72.

²⁸ *Id.* at 55–70 (citing 17 U.S.C. § 1201(a)(1)(C)(i)–(iii) (2006)).

²⁹ *See id.* at 70–71 (addressing concerns raised by 17 U.S.C. § 1201(a)(1)(C)(iv)).

³⁰ *Id.* at 65.

to high-quality images was absolutely necessary for these individuals.³¹ She further noted that, while many proponents defined their proposed classes in terms of audiovisual works, “[n]o evidence was introduced in relation to audiovisual works outside of the subset of motion pictures”; thus, the exemption should be restricted to motion pictures alone.³² Finally, the Register insisted that all university professors and film students “must believe and have reasonable grounds for believing that circumvention is necessary in order to . . . provide some degree of assurance that the designation of this class may not be used as a pretext for [excessive] circumvention.”³³ Ultimately, the Librarian followed the Register’s recommendation in its totality.³⁴

The 2010 rule succeeded in broadening the scope of the 2006 rule. Yet the Register neither accounted for nor properly weighed all of the evidence presented, which led her to inappropriately constrain the degree of coverage for excepted uses. Moreover, the exception’s limitation to motion pictures on DVDs excluded a large swath of other media that could be employed in the classroom. As a result, the Register squandered an excellent opportunity to bring copyright law in this area into alignment with existing fair use doctrine and, at least for the next three years, eliminated the possibility that adversely affected users seeking to take advantage of emerging technologies in educational contexts will be accorded appropriate accommodation.

The § 1201 rulemaking process was expressly implemented to “ensure that the public [would] have continued ability to engage in noninfringing uses of copyrighted works.”³⁵ This language reflects Congress’s commitment to the widely accepted doctrine of fair use³⁶ and affirms its constitutional duty “[t]o promote the Progress of Science and useful Arts.”³⁷ Indeed, the social benefits of fair use are numerous: it strikes a balance between proprietary interests and fundamental free speech rights, facilitates productive uses of works when the value of those uses far outweighs the transaction costs that would result from the license and sale of intellectual property, and contributes to the development of an informed citizenry that is better positioned to en-

³¹ *See id.* at 62–65.

³² *Id.* at 75–76. Television productions, interviews, commercials, and trailers, in addition to feature films, fall within the definition of “motion pictures” under the Copyright Act of 1976. *See id.*

³³ *Id.*

³⁴ 2010 Final Rule, *supra* note 6, at 43,828.

³⁵ *Id.* at 43,826. This explanation comports with one of the DMCA’s key objectives, “to facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age.” S. REP. NO. 105-190, at 1–2 (1998).

³⁶ *See* 2010 RECOMMENDATION OF THE REGISTER, *supra* note 21, at 8–9. Congress formally codified fair use in the Copyright Act of 1976. *See* 17 U.S.C. § 107 (2006).

³⁷ U.S. CONST. art. I, § 8, cl. 8.

gage in democratic and cultural institution-making.³⁸ Moreover, § 107 of the Copyright Act — which articulates the factors to be considered in fair use determinations — explicitly protects the fair use of a copyrighted work for the purposes of “criticism, comment, . . . [and] teaching.”³⁹ Most educational uses would correspond with at least one, if not all, of these three purposes. The 2010 rule undermines the purposes of the § 1201 rulemaking process by slowing the advancement of education, a significant social good.

In addition to being out of step with fair use principles, the Register’s decision rested on a number of faulty evidentiary premises. In doing away with the requirement that borrowed media come from university libraries, the Register’s recommendation stands at odds with NTIA’s determination that limiting the source of copyrighted works to an institution’s libraries and academic departments would curb misuse.⁴⁰ Moreover, with respect to non-film students, NTIA found that “[t]he record show[ed] that [classroom use of clips] is important for both students and instructors at the university level.”⁴¹ Thus, although there was strong record evidence that would have supported the Register in eliminating departmental distinctions and maintaining the library source requirement, the Register’s recommendation omits any reference to this evidence, for reasons unknown and unjustified.

The Register further stated that the evidence presented by K-12 proponents was lacking because it involved only “assorted hypothetical situations.”⁴² To the contrary, proponents cited numerous actual situations in which the DMCA stymied pedagogical goals: they expressed frustration over, among other things, teachers’ inability to have students compare particular film scenes or evaluate how portrayals of romance in the media shaped societal expectations.⁴³ Although these

³⁸ See Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J.L. & TECH. 41, 43–45 (2001).

³⁹ 17 U.S.C. § 107. Admittedly, courts weighing the appropriateness of fair use defenses have increasingly tied their judgment to whether the use is “transformative” (which generally means that the user animates the original work with new meaning or purpose). See William W. Fisher & William McGeeveran, *The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age* 55 (Berkman Ctr. for Internet & Soc’y, Research Publ’n No. 2006-09, 2006), available at http://cyber.law.harvard.edu/publications/2006/The_Digital_Learning_Challenge. However, the Ninth Circuit has held that “a use could be transformative if it served a different informative purpose than the original content.” *Id.* at 55–56 (citing *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003)). As a result, “[e]ducational uses might fare better under these broader articulations of the transformativeness standard.” *Id.* at 56.

⁴⁰ See 2009 NTIA Letter, *supra* note 26, at 6.

⁴¹ *Id.* at 4. NTIA also recognized the beneficial use of video clips for high school chemistry students and students with special needs. *Id.* at 4 n.18.

⁴² 2010 RECOMMENDATION OF THE REGISTER, *supra* note 21, at 64.

⁴³ See *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies: Rulemaking Hearing on Proposed Exemptions to Section 1201 Before the Register of Copyrights* 131–35 (2009) [hereinafter *Section 1201 Hearing*] (statement of Renee

proponents did include some fictionalized scenarios to support their case,⁴⁴ the Register failed to mention that most proponents offered a mixture of hypothetical and factual illustrations.⁴⁵ These evidentiary missteps undermined the logic of the Register's reasoning and negatively influenced her recommendation to the Librarian as a result.

Not only was the Register's recommendation plagued by evidentiary omissions, but it also relied on false assumptions. For example, her assertion that non-film students and K-12 teachers and students may use alternatives to circumvention, such as video capture software,⁴⁶ is of no help to individuals lacking the means to use such alternatives. One proponent of expanding the exemptions noted that, due to operating system restrictions, "screen capture technologies do not provide a long-term solution" to the problems associated with the DMCA's anticircumvention provisions.⁴⁷ Furthermore, access to free video sharing websites is often restricted in primary and secondary schools.⁴⁸ It is possible that non-film students and K-12 teachers and students may still be able to avoid DMCA liability in certain cases by claiming coverage under the documentary filmmaking or noncommercial video prongs of the 2010 rule.⁴⁹ Nevertheless, distinguishing between film students and non-film students and between university teachers and other teachers ignores the highly integrated and cross-disciplinary nature of technology usage in the classroom today and serves to make the pure educational exemption underinclusive. Consequently, there seems to be little reason why the Register drew the lines where she did.

The imposition of a reasonableness standard as a way to distinguish lawful from unlawful circumvention makes these distinctions all the more untenable. Even if one were to assume that the standard is

Hobbs, Professor of Broadcasting, Telecommunications & Mass Media, Temple University), available at <http://www.copyright.gov/1201/hearings/2009/transcripts/1201-5-6-09.txt>.

⁴⁴ See Post-Hearing Response from Peter Jaszi, Professor of Law, Am. Univ. Washington Coll. of Law, on behalf of Renee Hobbs, to Robert Kasunic, Principal Legal Advisor, Office of the Gen. Counsel, U.S. Copyright Office (July 10, 2009), available at http://www.copyright.gov/1201/2008/answers/7_10_responses/problems-with-screen-capture-jaszi.pdf.

⁴⁵ See, e.g., *Section 1201 Hearing*, *supra* note 43, at 150-70 (statement of Roger Skalbeck, Associate Law Librarian for Electronic Resources & Services, Georgetown University Law Center) (advocating for an exemption for law school and medical school uses); *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies: Rulemaking Hearing on Proposed Exemptions to Section 1201 Before the Copyright Office Panel 21-25* (2009) (statement of Steve Metalitz), available at <http://www.copyright.gov/1201/hearings/2009/transcripts/1201-5-1-09.txt> (petitioning for an exemption for foreign language uses).

⁴⁶ See 2010 RECOMMENDATION OF THE REGISTER, *supra* note 21, at 63-64.

⁴⁷ *Section 1201 Hearing*, *supra* note 43, at 124-25 (statement of Jonathan Band, Attorney, Jonathan Band PLLC).

⁴⁸ See *id.* at 132 (statement of Renee Hobbs).

⁴⁹ See 2010 Final Rule, *supra* note 6, at 43,827-28.

effective in decreasing the frequency of illegal circumvention, the rule would still apply only to college professors and film students. This classification presumes that these individuals are unique in their ability to exercise discretion carefully and determine when circumvention of access controls is actually necessary. However, there is little evidence that non-film students or K-12 teachers would be less able to make such determinations. In light of these realities, the newly created standard seems arbitrary at best.

The exclusion of media other than motion pictures on DVD is flawed as well, but for different reasons. Admittedly, none of the evidence presented by any of the proponents referred to audiovisual works beyond motion pictures and DVDs.⁵⁰ Yet in the 2006 rulemaking, the Register found the exemption for audiovisual works generally to be “narrowly tailored,”⁵¹ even though the evidence offered by proponents pertained only to motion pictures on DVDs.⁵² Similarly, no evidence of significant economic harm to copyright holders as a result of the 2006 rulemaking or the proposed 2010 classes was presented before or during the 2010 rulemaking.⁵³ Lastly, the days of the DVD as the predominant storage media format may be numbered. Internet companies have increasingly gained market share in the film and television industry since the introduction several years ago of cheap and easily accessible digital downloads.⁵⁴ It would seem, then, that the 2010 rule could have addressed these emergent new media while still satisfying the DMCA’s benefit-harm balancing requirement.

While the 2010 rule will likely be a boon for university faculty and film students, the same cannot be said for non-film students and K-12 teachers and students. The limited application of the exemption to motion pictures and certain educational actors goes against the spirit of the § 1201 rulemaking process, which is to protect and preserve fair use in the digital age. The 2010 rule will block avenues for innovative learning and undermine the progressive constitutional rationale for copyright. A more expansive rule would have served to bring the legal system into alignment with existing social norms and to provide users with a clearly articulated fair use framework within which they may more easily operate.

⁵⁰ See 2010 RECOMMENDATION OF THE REGISTER, *supra* note 21, at 75-76.

⁵¹ See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68,472, 68,473-74 (Nov. 26, 2006) (codified at 37 C.F.R. § 201.40 (2010)); 2010 RECOMMENDATION OF THE REGISTER, *supra* note 21, at 25.

⁵² See, e.g., Comments of Peter Decherney et al. at 17-39, Exemption to Prohibition on Circumvention of Copyright Prot. Sys. for Access Control Techs. (Copyright Office 2006) (No. RM 2005-11), available at http://www.copyright.gov/1201/2006/comments/decherney_upenn.pdf.

⁵³ See 2010 RECOMMENDATION OF THE REGISTER, *supra* note 21, at 52.

⁵⁴ See Brooks Barnes & Matt Richtel, *Studios Are Trying to Stop DVDs from Fading to Black*, N.Y. TIMES, Feb. 25, 2008, at C1.