

Do The Digital Millennium Copyright Act Exemptions Help The Fair Use Balancing Act?

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The Digital Millennium Copyright Act (DMCA) is probably best known for providing the means for taking down unauthorized postings of copyrighted materials on the Internet. However, the DMCA also attempts to balance the legitimate fair use of copyrighted works with copyright holders' use of copy protection and security technologies.

This balancing act takes the technical form of limited exemptions to the anticircumvention provisions provided by Section 1201 of the DMCA. Since the technology of both the copy protection and the circumvention of copy protection continues to evolve, the DMCA provides that the U.S. Copyright Office will reconsider the exemptions every three years. The scope of the exemptions has also evolved, now encompassing both fair use of copy-protected expressive works, such as motion pictures and e-books, and copyright protected software in consumer products, such as automobile diagnostic software. The most recent triennial cycle yielded twenty-two exemptions, which were published by the U.S. Copyright Office on October 28, 2015.

The balancing act seems not to benefit legitimate fair use of copyrighted works, and critics are numerous. Calls for reform of the triennial exemption review procedures have come from varied constituencies including the Assistant Secretary of the U.S. Department of Commerce. The Association of American Universities, the American Council on Education the Association of Public and Land-Grant Universities, and EDUCAUSE (the "Associations") submitted their concerns directly to the U.S. Copyright Office. Although the Associations "represent a significant number of copyright creators and consumers," they continue to be concerned that section 1201 is adversely affecting access to copyrighted works for lawful, noninfringing uses of those works and integrated uncopyrighted materials. The Associations have proposed changes to the statute that would require enactment by Congress and changes to the rules of U.S. Copyright Office to implement. However, it is unlikely that Congress will take any productive action during an election year.

Client Tip: *Review the twenty-two current exemptions in light of the Associations' comments to determine if these exemptions would have a practical effect on your fair use considerations.*

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