



## The DMCA Revisited: What's Fair?

### Fair Use Must Be Retained for Digital Material

The higher education community reaffirms that fair use is essential for collaboration, innovation, and scholarship. Because digital material comprises an increasing portion of our body of knowledge, fair use must apply to digital material as well. Despite assurances to the contrary, Section 1201 of the DMCA, as currently written, impedes the ability of educators, researchers and students from lawfully accessing and utilizing copyrighted material essential to scholarship as allowed under fair use. In particular, Section 1201:

- Encourages a “pay-per-use” society. Libraries, colleges, researchers, and students, no longer acquire the traditional rights of first sale when access to digital materials is obtained via a license. Also typically eliminated are other long-accepted rights to the personal, private, non-commercial use of lawfully purchased content. Instead, each access to a digital work is subject to fees and restrictions that do not honor fair use. Educational institutions have no alternative but to accede to licensing terms rather than foregoing access to works required to fulfill their academic mission. The U.S. Copyright Office proceedings designed to determine “what’s fair” have placed an undue burden on educators and consumers to describe the negative effects of Section 1201, and have therefore not recognized the cost to individuals and to society of the loss of these rights.
- Adversely impacts consumers’ ability to use lawfully acquired material in the way most convenient for them. The technological protection measures whose circumvention is proscribed under section 1201 hinder the user’s ability to install the material on other personally owned digital devices for their private, noncommercial use. Concerns raised that relate directly to higher education include the inability of blind students to use speech synthesis systems to “read” an electronic textbook assigned in a course, and the inability of students to “play” a digital work on their own computer rather than using a computer in a campus computer laboratory. In these cases and many others, fair use rights are abridged by Section 1201.
- Contradicts the spirit of Congress as exemplified under the current U.S. Copyright law on fair use (17 U.S.C.) and the recently passed TEACH Act. Both laws contain restrictions on how copyrighted material may be accessed and used - the key word being *accessed*. In essence, Section 1201 subverts laws which seek to strike an appropriate balance between the rights of creators to be compensated for their labor with the rights of educational institutions and the American public to access copyrighted material for nonprofit, educational purposes.

### Congress Should Support a More Balanced Approach

The “Digital Media Consumers Rights Act” (H.R.107) reaffirms the value of fair use and alleviates the shortfalls of Section 1201 by decriminalizing the circumvention of technological protection measures for traditionally non-infringing uses. The higher education community strongly urges congressional passage of this legislation, which helps restore a balanced approach to applying copyright law in the digital age. H.R. 107 will allow colleges and universities to facilitate an environment of learning, collaboration and research which is essential for the economic and cultural growth of this country.

### EDUCAUSE

EDUCAUSE is a nonprofit association whose mission is to advance higher education by promoting the intelligent use of information technology. For more information, contact Garret Sern at 202-872-4200 or [gsern@educause.edu](mailto:gsern@educause.edu).



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