

Is Further Erosion of Intellectual Property on the Horizon? A Proposed Expansion of the Exemption Rule under the Digital Millennium Copyright Act Suggests There Is

Article

Amundsen Davis Intellectual Property Alert

March 18, 2024

A proposed rule at the Copyright Office seeks to expand the exemptions available under Section 1201 of the Digital Millennium Copyright Act (DMCA) to give those conducting research into the operation of AI systems an unprecedented level of access to copyrighted materials.

In general, the DMCA seeks to address copyright concerns in light of new technology. Section 1201 in particular prohibits the circumvention of technological measures intended to control access to copyrighted works. There are multiple exemptions from this general rule that are intended to permit noninfringing uses by persons who are, or would likely be, adversely affected by the confines of the general rule.

In addition to a few other proposals, including exemptions for online learning courses and video game players playing old games on new computers, the proposed rule at issue would allow researchers of AI systems to bypass technological measures controlling access to copyrighted materials in order to freely copy and share collections of works with researchers from other institutions.

Many in the publishing and entertainment industries are concerned that such an exemption would open a can of worms, compromising the security of copyrighted works and facilitating infringement.

Below are some of the key concerns expressed in the second round of public comments to the proposed rule:

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Facilitating Infringement

The Motion Picture Association (MPA), News/Media Alliance (N/MA) and Recording Industry Association of America (RIAA) expressed concerns that the language of the proposed rule, which would allow researchers to copy and redistribute copies of copyrighted works for purposes of researching and "teaching", is too broad. The failure to limit the scope of the word "teaching" could potentially excuse infringing uses.

Security Risks

Commenters also expressed concerns relating to the security of copyrighted materials. In particular, the MPA, N/MA and RIAA believe that security will be compromised as copyrighted works move along a distribution chain after being obtained by an initial AI researcher. New parties accessing the material thereafter become removed from requirements to comply with security standards, presenting greater security risks.

Fair Use Inquiry

The MPA, N/MA and RIAA also noted that the fair use inquiry as it relates to AI and copyright is far from decided. The Association of American Publishers (AAP) noted that "[t]he legality of exploiting copyrighted materials without permission to develop and populate AI systems is currently the subject of numerous lawsuits and is far from established as fair use." Until a fair use determination has been appropriately made, commenters expressed a belief that it is inappropriate for a new exemption to be adopted.

Next Steps

The Copyright Office is soliciting another round of comments, due March 19, and will hold public hearings beginning on April 15. Should this particular proposed rule pass, researchers will benefit from the ability to more easily collaborate while copyright owners will remain concerned about their ability to police their copyrighted works.

You can view all comments to the Section 1201 exemptions on the U.S. Copyright Office Website.

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