

# The Impact of Specific Exceptions on Fair Use: An Update

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In 2012, I published a law review article where I argued that when a defendant engages in the type of activity permitted by a specific exception under the Copyright Act, but does not qualify for a technical reason, the court should give weight to the defendant's substantial compliance with the exception when considering the first fair use factor (the purpose and character of the use).<sup>1</sup> In adopting a specific exception, Congress recognized the strong public policy interest in permitting the use in cases meeting the exception's requirements. Significantly, the same public policy interest still exists in cases where many, but not all, of the exceptions' requirements are met. While the existence of a specific exception should not be dispositive of the fair use analysis, I argued that it should have a positive influence on the first fair use factor. Since then, both the Second Circuit and the Register of Copyrights have given substantial weight to specific exceptions in the context of consideration of the first fair use factor.

## A. Second Circuit

In support of its conclusion that providing access to the print disabled was a valid purpose under the first factor, the Second Circuit in *Authors Guild v. HathiTrust*<sup>2</sup> noted that 17 U.S.C. § 121, which permits "authorized entities" to make accessible format copies for the print disabled, "illustrates Congress's intent that copyright law make appropriate accommodations for the blind and print disabled." In other words, the Second Circuit used the rationale behind a specific exception, which may not otherwise have applied, to support a finding of a valid purpose under the first factor.<sup>3</sup>

## B. Register of Copyrights

In the rulemaking under section 1201 of the Digital Millennium Copyright Act, the Register of Copyrights is required to make recommendations to the Librarian of Congress on the grant of proposed exemptions to section 1201(a)'s prohibition on the circumvention of technological protection measures. In making her recommendation, the Register must consider whether users of a class of works are likely to be adversely affected by the circumvention prohibition "in their ability to make noninfringing uses" of the class of works. Thus, a central issue in her recommendation is the lawfulness of the proposed use. In the past

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<sup>1</sup> See generally Jonathan Band, *The Impact of Substantial Compliance with Copyright Exceptions on Fair Use*, 59 J. Copyright Soc'y 453 (2012).

<sup>2</sup> 755 F.3d 87, 102 (2d Cir. 2014).

<sup>3</sup> The Second Circuit likewise found that Congress in the Americans With Disabilities Act "reaffirmed its commitment to ameliorating the hardships faced by the blind and the print disabled." *Id.*

sixth rulemakings, the Register has issued voluminous recommendations that examine in detail the lawfulness of the proposed uses—typically the permissibility of the use under section 107. In the Register’s most recent recommendation, issued in October 2015, specific exceptions informed the Register’s first factor analysis with respect to four of the proposed uses.

### 1. Jailbreaking.

When discussing the first fair use factor in the context of the proposed “jailbreaking” exemption, the Register observed that “the goal of jailbreaking is to allow the operating system on a device to interoperate with other programs, a favored purpose under the law.”<sup>4</sup> In support of the statement that interoperability is a favored purpose under the law, the Register cited her 2010 recommendation concerning jailbreaking. In her 2010 recommendation, the Register cited the language in *Harper & Row v. The Nation* that fair use has traditionally been defined as “a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent.”<sup>5</sup> The Register then asserted that “in evaluating whether a particular use is being made in such a reasonable manner, it is helpful to look at the judgments Congress has made as to what kinds of uses of copyrighted material are reasonable and should be considered non-infringing.”<sup>6</sup> The Register observed that “in this case, one does not have to look far. In fact, Section 1201 itself offers strong evidence that the conduct at issue here is conduct that, at the time Congress enacted the prohibition on circumvention, it anticipated and considered to be reasonable and lawful.”<sup>7</sup>

That “evidence” was the interoperability exception in 17 U.S.C. § 1201(f). After describing section 1201(f)’s provisions, the Register stated:

In the legislative history associated with that provision, Congress expressed a commitment to permit and encourage interoperability between independently created computer programs and existing programs. Endorsing the holding of *Sega Enters. Ltd. v. Accolade, Inc.*, Congress stated in the legislative history that the purpose of the reverse engineering exemption, an exemption that it described as permitting “the circumvention of access control technologies for the sole purpose of achieving software interoperability,” was to “avoid hindering competition and innovation in the computer and software industry.”<sup>8</sup>

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<sup>4</sup> Recommendation of the Register of Copyrights, Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention (2015)(“2015 Recommendation”) at 188.

<sup>5</sup> Recommendation of the Register of Copyrights, Section 1201 Rulemaking: Fourth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention (2010)(“2010 Recommendation”) at 91 (citing 471 U.S. 539, 549 (1985)).

<sup>6</sup> 2010 Recommendation at 91.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 92.

On the basis of this legislative history, the Register found that “Congress has determined that reverse engineering for the purpose of making computer programs interoperable is desirable when certain conditions are met, and has crafted a specific exemption from section 1201(a)’s prohibition on circumvention in such cases.”<sup>9</sup> The Register reasoned that “while an iPhone owner who ‘jailbreaks’ does not fall within the four corners of the statutory exemption in section 1201(f), the fact that he or she is engaging in jailbreaking in order to make the iPhone’s firmware interoperable with an application specially created for the iPhone suggests that the purpose and character of the use are favored.”<sup>10</sup>

In sum, the Register viewed a specific exception—section 1201(f)—as evidence of a favored purpose under the first fair use factor analysis.<sup>11</sup>

## **2. 3D Printers**

As with jailbreaking, the Register gave weight to Congress’s enactment of section 1201(f) when considering the copying of computer programs necessary to employ alternative feedstock for 3D printers. With respect to the first factor, “the Register notes that interoperability is recognized as a favored purpose under the law.”<sup>12</sup> Specifically,

Congress recognized the importance of compatibility in the DMCA by including a statutory exemption to the prohibition on circumvention for certain reverse engineering activities. See 17 U.S.C. § 1201(f); see also 144 CONG. REC. E2138 (daily ed. Oct. 13, 1998) (statement of Rep. Bliley) (stating that “section 1201 should not inhibit interoperability of devices ‘in the consumer electronics environment’”).<sup>13</sup>

Guided by this Congressional recognition, the Register found that the first factor favored the proponents because “third-party feedstock often cannot be used without altering the printer operating system software.”<sup>14</sup>

## **3. Abandoned Video Game Software**

When discussing the copying necessary for video-gamers and libraries to use abandoned video-game software, the Register noted that the proponents had not relied on 17 U.S.C. § 117, which permits the owner of a copy of a computer program to copy or adapt that program when the copy or adaptation is created

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<sup>9</sup> *Id.* at 93.

<sup>10</sup> *Id.*

<sup>11</sup> Additionally, the Register cited the foregoing analysis when stating that the fair use analysis with respect to the “unlocking” of mobile devices is “in many respects analogous to the reasoning that has led the Register to conclude in past rulemakings that ‘jailbreaking’ of smartphones is likely to be a fair use.” 2015 Recommendation at 162.

<sup>12</sup> 2015 Recommendation at 368.

<sup>13</sup> *Id.* at 368 n.2481.

<sup>14</sup> *Id.* at 368.

as an “essential step” in the utilization of the program in conjunction with a machine. Nonetheless, she observed that section 117 “evinces Congress’s understanding that reverse engineering and the pursuit of interoperability are favored activities under the law.”<sup>15</sup> Later, in the context of applying the first fair use factor to continued play by gamers, the Register stated that “[h]ere, where gamers wish to modify a copy of video game software they have lawfully acquired simply to allow its continued personal use on their own computers—akin to the adaptation exception embodied in section 117—the first factor tends to support a finding of fair use.”<sup>16</sup> The Register thus suggested that the favored nature of reverse engineering and interoperability indicated by section 117 tilted the first factor in favor of a fair use finding.

The Register then considered the lawfulness of the copies made by librarians and archivists for purposes of preservation, research, and study. The Register stated that “[t]hough it does not address the full range of preservation-related activities advocated by proponents, section 108 of the Copyright Act, which exempts certain activities of libraries and archives, is helpful to this inquiry.”<sup>17</sup> She elaborated:

The Register finds that section 108 provides useful and important guidance as to Congress’s intent regarding the nature and scope of legitimate preservation activities, and hence the types of uses that are most likely to qualify as fair in this area. Section 108 suggests that such activities should be carried out by a preservation-oriented institution—a library or archives—and, as noted, must not be for direct or indirect commercial gain. While section 108 is limited to libraries and archives, the record here reflects that museums engage in similar efforts to preserve video games. In light of their similar preservation mission in this context, the Register sees no reason to exclude museums from the reach of the proposed exemption.<sup>18</sup>

Thus, the Register suggested not only that section 108 guide courts as they apply fair use to preservation activities of libraries and archives that might fall beyond the four corners of section 108; she also suggested that section 108 guide courts as they apply fair use to the preservation activities of museums, to which section 108 does not extend.

#### **4. MOOCs**

Finally, the TEACH Act, 17 U.S.C. § 110(2), informed the Register’s evaluation of the lawfulness of using audiovisual clips in Massive Open Online Courses (MOOCs): “While the TEACH Act may not itself provide a comprehensive basis for a finding of noninfringing use in the MOOC context, the

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<sup>15</sup> *Id.* at 336.

<sup>16</sup> *Id.* at 338.

<sup>17</sup> *Id.* at 341.

<sup>18</sup> *Id.* at 342.

Register believes that the Act, which became law in 2002, provides useful and important guidance as to Congress' intentions regarding the need for and nature of excepted uses to permit certain performances and displays of copyrighted works for distance learning."<sup>19</sup>

### **C. Conclusion**

Both the Second Circuit and the Register of Copyrights have used the policy underlying a specific copyright exception to support a finding of a valid purpose under the first fair use factor. Other courts should as well.

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<sup>19</sup> *Id.* at 74. The Register also recommended “that any exemption for uses in connection with MOOCs be tied to key aspects of section 110(2), including its emphasis on implementation of TPMs in distance learning that incorporates copyrighted works.” *Id.* “The Register is persuaded that while the strict contours of section 110(2) may be an imprecise fit for the rapid emergence of the MOOC model, section 110(2) nonetheless offers important and meaningful guidance concerning Congress’s desire to balance pedagogical needs in distance learning with copyright owners’ concerns of harmful impact.” *Id.* at 102.