



UNITED STATES COPYRIGHT OFFICE

## Long Comment Regarding a Proposed Exemption Under 17 U.S.C. § 1201

[ ] Check here if multimedia evidence is being provided in connection with this comment

### ITEM A. COMMENTER INFORMATION

\*Institutions are listed for identification purposes only. We submit this reply in our individual capacities. \*

Kyle K. Courtney, Copyright Advisor and Program Manager at Harvard Library.

Rachael Samberg, Scholarly Communication Officer and Program Director of UC Berkeley Library's Office of Scholarly Communication Services.

Timothy Vollmer, Scholarly Communication and Copyright Librarian at UC Berkeley Library.

### ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class Addressed: 7(b)

### ITEM C. OVERVIEW

Comment on Proposed Exemption

In the Round 2 comments, the Association of American Publishers (AAP) submitted a reply in opposition to the proposed exemption to 17 U.S.C. § 1201 submitted by Authors Alliance, The American Association of University Professors (AAUP), and The Library Copyright Alliance (LCA) for the purpose of text data mining (TDM) for motion pictures and literary works (hereafter "Authors Alliance proposed exemption"). The AAP comments are limited to Class 7(b): literary works. Their comments inaccurately characterized an article co-written by Kyle K. Courtney, copyright advisor and program manager at Harvard Library, Rachael Samberg, Scholarly Communication Officer and Program Director of UC Berkeley Library's Office of Scholarly Communication Services, and Timothy Vollmer, Scholarly Communication and Copyright Librarian at UC Berkeley Library. The article, *Big Data Gets Big Help: Law and policy literacies for text data mining*, outlines key law and policy literacies libraries can help researchers understand so they can confidently navigate text data mining.<sup>1</sup> The

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<sup>1</sup> <https://crln.acrl.org/index.php/crlnews/article/view/24383/32222>

**Privacy Act Advisory Statement:** Required by the Privacy Act of 1974 (P.L. 93-579)

The authority for requesting this information is 17 U.S.C. §§ 1201(a)(1) and 705. Furnishing the requested information is voluntary. The principal use of the requested information is publication on the Copyright Office Web site and use by Copyright Office staff for purposes of the rulemaking proceeding conducted under 17 U.S.C. § 1201(a)(1). NOTE: No other advisory statement will be given in connection with this submission. Please keep this statement and refer to it if we communicate with you regarding this submission.

literacies include copyright, contract, privacy, and ethics. We submit this reply in our individual capacities.

AAP's comment claims that petitioners have not met the test for adverse impact centered on the prohibition on circumvention since in some cases publishers use contractual terms to restrict or forbid TDM. The AAP comment says,

[I]t is worth noting that it is not uncommon for publishers to include contractual terms in licensing and browsewrap agreements for electronically distributed works that forbid the use of works that are accessed for TDM purposes. See Courtney et al.; CCC, RightFind XML for Mining, available at <http://www.copyright.com/business/xmlformining/>. Accordingly, even if circumvention were permissible, the circumventing party could be violating agreed terms of use. "Researchers and librarians ... need to understand circumstances in which contracts they have signed or to which they have assented can control—and even supersede—TDM uses ...." Courtney et al. In such a circumstance, it is the contractual term—rather than the prohibition on circumvention—that is the source of the limitation on use. Accordingly, the statutory requirement that the section 1201 prohibition be the cause of the claimed adverse effect would not be met.

Our article provides an introduction to the landscape of legal, policy, and ethical issues that researchers should understand as they engage in text data mining. It does not claim that all publishers, or even a majority of publishers, restrict or forbid TDM through contractual agreements. In fact, in many circumstances TDM researchers use corpora without any contractual or licensing agreement attached. In other cases, they are leveraging literary works through databases or collections provided via their university, which via license agreement retains fair use rights<sup>2</sup>, or even specifically enables TDM. But in these cases, users might still be prevented from conducting TDM due to technological protection measures.

To establish a case for an exemption, petitioners must show that uses affected by the prohibition on circumvention are, or are likely to be, noninfringing. The Authors Alliance proposed exemption has made a compelling case that creating collections of copyrighted works for TDM is a fair use.<sup>3</sup> In addition, petitioners must demonstrate that as a result of a technological measure controlling access to a copyrighted work, the prohibition is causing (or in the next three years is likely to cause) an adverse impact on those uses. The Authors Alliance proposed exemption has also provided ample evidence that this is the case, including via multiple letters from researchers

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<sup>2</sup> For example, via a fair use "savings clause" such as in the licensing agreement between the American Chemical Society and the University of California: "Fair Use: Nothing in this Agreement shall in any way exclude, modify or affect anything the Grantee or an Authorized User is allowed to do in respect of any of the ACS Products consistent with the Fair Use Provisions of United States Copyright Law." [https://cdlib.org/services-groups/collections/licensed\\_resources/redacted\\_licenses/STACS\\_AccessAgrnt\\_w\\_TDM\\_Rider\\_2016\\_Redacted.pdf](https://cdlib.org/services-groups/collections/licensed_resources/redacted_licenses/STACS_AccessAgrnt_w_TDM_Rider_2016_Redacted.pdf)

<sup>3</sup> See Item E.2, at p. 22.

[https://www.copyright.gov/1201/2021/comments/Class%2007a%20and%2007b\\_InitialComments\\_Authors%20Alliance,%20American%20Association%20of%20University%20Professors,%20and%20Library%20Copyright%20Alliance.pdf](https://www.copyright.gov/1201/2021/comments/Class%2007a%20and%2007b_InitialComments_Authors%20Alliance,%20American%20Association%20of%20University%20Professors,%20and%20Library%20Copyright%20Alliance.pdf)

who explain that the 1201 prohibition on circumvention is causing the adverse impacts they are experiencing in attempting to conduct TDM.<sup>4</sup>

Licensing and contractual obligations are separate legal issues from this exemption proceeding. This 1201 proceeding applies only to the underlying copyright issues that could impact uses like TDM. Contracts and licensing topics, while valid in their own right, are beyond the scope of the consideration for this proposed copyright exemption. Therefore, it is inaccurate for AAP to extrapolate from our article that since contracts may control TDM in some cases, the proposed exemption does not meet the statutory requirement that the 1201 prohibition is the cause of the adverse effect.

Kyle K. Courtney  
Rachael Samberg  
Timothy Vollmer

## **DOCUMENTARY EVIDENCE**

*Commenters are encouraged to submit documentary evidence to support their arguments or illustrate pertinent points concerning the proposed exemption. Any such documentary evidence should be attached to this form and uploaded as one document through regulations.gov.*

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<sup>4</sup> For example, Letter from The Association for Computers and the Humanities (Appendix A), Letter from Matthew Sag (Appendix J), Letter from James Clawson (Appendix C), Letter from Henry Alexander Wermer-Colan (Appendix P), and Letter from Melanie Walsh (Appendix O). These are included as part of the Authors Alliance proposed exemption, available at [https://www.copyright.gov/1201/2021/comments/Class%2007a%20and%2007b\\_InitialComments\\_Authors%20Alliance,%20American%20Association%20of%20University%20Professors,%20and%20Library%20Copyright%20Alliance.pdf](https://www.copyright.gov/1201/2021/comments/Class%2007a%20and%2007b_InitialComments_Authors%20Alliance,%20American%20Association%20of%20University%20Professors,%20and%20Library%20Copyright%20Alliance.pdf).