

Before the United States Copyright Office
Library of Congress
Washington, DC

In the Matter of:

Exemptions To Permit Circumvention of
Access Controls on Copyrighted Works

Docket No. 2020–11

**RESPONSES OF AACCS LA AND DVD CCA
TO POST-HEARING LETTER FOR CLASS 7(a)
(MOTION PICTURES – TEXT AND DATA MINING)**

***REQUEST 1.** Please provide your views regarding minimum, yet sufficient, security measures with which eligible institutions should be required to comply when creating a corpus of literary works or motion pictures on which text and data mining techniques can be performed. We welcome specific examples of standards for information security management currently used by academic institutions that the Office should consider, as well as suggestions of specific security measures that could potentially be used individually or in combination with other measures. We also invite you to compare standards you suggest with the approach taken by the EU Directive on Copyright in the Digital Single Market.*

RESPONSE TO REQUEST 1:

Minimum Security Measures Should Reflect Value of Large Collections of Motion Pictures

While AACCS LA and DVD CCA remain opposed to granting the proposed exemption in the first place, if the Office is inclined to grant some form of an exemption for Class 7, reasonable limits are better than no limitations. Given the high commercial value of a large corpus of motion pictures, the security measures should reflect that high value and absolutely prevent access to and use of these works beyond what a narrowly-tailored exemption would permit, if granted.

As a large collection of circumvented motion pictures in a single repository represents a more attractive target for piracy than individual titles distributed on physical media, the security measures should reflect that increased risk and include at least the following:

- i. Strong encryption on the server storing the corpus;

- ii. Physical separation of the corpus server from other facility servers;
- iii. Limited and guarded network access with no access beyond the facility's intranet;
- iv. Stringent access mechanisms and policies limiting access to the corpus server to only those facility personnel who have a legitimate and authorized need to do so;
- v. Deletion of the corpus upon conclusion of the applicable research need.

A Corpus of Motion Pictures Should Meet the Security Standards for Highly Sensitive Information

At the hearing for Class 7, proponents outlined the approach of the University of California, which would classify such a corpus as “highly sensitive,” warranting the most stringent security measures. DVD CCA and AACCS LA appreciate that proponents recognize that a collection of “in the clear” motion pictures should be treated as “highly sensitive.” This classification, however, is merely a starting point, and does not in, itself, prescribe either the measures required to protect the “highly sensitive” information or the standards to establish those measures. As the exemption would insert the exemption beneficiaries into the present content security ecosystem - which can only be as strong as its weakest link - the standards should be applicable to all exemption beneficiaries. Proponents should be prepared to apply the same security standards to all such collections, large or small, and to not leave the standard of appropriate security measures to any form of a subjective or case-by-case (or institution-by-institution) process.

While proponents argued that smaller collections might not require the same protection as larger collections, the suggestion disregards the fact that small collections may nonetheless be comprised of high-value titles that pirates are currently seeking. Furthermore, the Copyright Office should discourage the potential for gamesmanship that the two different standards could produce. For example, a single institution might create multiple smaller collections to avoid the standards for large collections. Under such circumstances, if the institution is permitted to use

“small collection” security standards, an effective “large collection” remains vulnerable, as breaching one of the small collections could very likely result in the ability to breach all of the collections maintained by the institution, leading to exposure of every title stored in every collection held by that institution.

The EU Directive Calls for Direct Input by Content Owners

The EU Directive does not provide explicit guidance regarding the nature of appropriate technical measures to protect the works used in data mining. Rather, it recognizes the important role of rightsholders in determining the conditions under which their works are used in this context. Specifically, the EU Directive provides that rightsholders “should remain free to choose the appropriate means” by which institutions make use of their works in legitimate data mining exercises.¹ The Directive further provides that rightsholders and institutions should be encouraged to “define commonly agreed best practices” for protecting these works.² Given that there is no agreement on whether an exemption should exist and the absence of any real world efforts to engage in licensed data mining, there are no standards in place applicable to the proposed use. The nature of this proceeding, specifically its structure and deadlines, do not provide any additional room for the rightsholders and institutions to reach agreement on best practices after the Librarian has reached her determination. Nevertheless, the Office could sponsor a working group of relevant stakeholders to come together to draft an appropriate statement of best practices – which would likely, of course, take a not-insignificant investment of time and personnel resources by those stakeholders (and, arguably, the Office as well). Such a working group would likely benefit from

¹ DIRECTIVE (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, introductory paragraph (7).

² *Ibid* at Title II, Article 3.

considering the applicability of various existing security standards in place for protecting highly sensitive information, including motion pictures. Until the development of such a set of more specific best practices for these exemption beneficiaries, the default should be that those eligible institutions seeking to take advantage of the proposed exemption will (1) make good faith efforts to contact and engage with the applicable rightsholder(s) regarding reasonable security requirements; (2) comply with the reasonable security requirements of rightsholders regarding securing the circumvented works, and (3) in the absence of an agreement with the applicable rightsholder(s), whether through an inability to find the rightsholder(s) or a failure of the rightsholder(s) to engage in good faith with the institution, to apply at least the security measures described above (*i.e.*, strong encryption, physically separated corpus server, and stringent access mechanisms and policies) to the corpus of circumvented works.

REQUEST 2. *Proponents explained in the hearing that the proposed text and data mining techniques would not enable researchers to view the text of literary works or the images from motion pictures included in a corpus in whole or in part. Please provide your views on regulatory language that would specify that researchers would not be permitted to view the text or images from works included in a corpus.*

RESPONSE TO REQUEST 2:

Proponents Did Not Say Viewing Was Not Possible

Because the transcript of the hearing is not yet available, confirming exactly what was said is not possible. Counsel for AACCS LA and DVD CCA attending this hearing came away with a slightly different understanding of what proponents said than what was suggested in the post-hearing letter.³ Proponents indicated that the ultimate output of the data mining process would be

³ While proponents indicated some researchers may wish to view the works included in their datasets, possibly to confirm the validity of the algorithm's output, which could be accomplished by accessing the original DVD or Blu-ray disc and simply looking at the applicable scene. There is simply no evidence in the record to support such validation as a noninfringing use.

“a number” that represented the results of the algorithmic analysis of the data in the motion picture. An example given was examining RGB color values in a movie, where high levels of red and orange at a particular point might indicate an on-screen explosion, and in turn, the resulting output from data mining might be a number on a scale representing, among other things, how many explosions took place. From this result, researchers would be able to draw some conclusions about violence in movies. The output of the data mining process – from this example – does not produce user-accessible clips or excerpts of the motion pictures analyzed.

While the lack of user-accessible clips and excerpts at the end may be considered favorable, focusing only on the ultimate output of the data mining process fails to consider that there will still be a circumvented motion picture available in a user-accessible form at some point in the process. Even if the circumvented title is subsequently converted to some other, non-user-accessible, format in order to support the data mining process, it is still the case that a copy “in the clear” has been produced and is susceptible to further, unlawful copying and distribution.

For this reason, the fourth general requirement for minimum security measures proposed above (*i.e.*, stringent access mechanisms and policies) should include explicit limitations on subsequent use of the circumvented and stored titles, such as requiring that any access or use of the circumvented titles be only as necessary to be immediately ingested (or converted to another applicable non-user-accessible format for ingestion) into the data mining system. Confirming the validity of the data mining algorithm’s output does not clearly require the circumvented title; particularly when the original disc can just as easily be accessed to play back the appropriate scene to confirm that the algorithm has, in fact, accurately captured the content of the motion picture.

REQUEST 3. *In their reply comments, proponents amended their proposed exemptions significantly in response to points opponents raised in their comments. These amendments introduced several new issues into the proceeding to which opponents have not have the opportunity to respond in writing. Opponents may respond to any new issues raised in proponents’ reply comment.*

RESPONSE TO REQUEST 3:

Current Version of the Proposed Exemption

*Proposed Class 7(a) (revised): **Motion pictures**, where the motion picture is lawfully made and obtained on a DVD protected by the Content Scramble System, on a Blu-ray disc protected by the Advanced Access Content System, or via a digital transmission protected by a technological protection measure, where: (1) the circumvention is undertaken by a researcher affiliated with a nonprofit library, archive, museum, or institution of higher education to deploy text and data mining techniques for the purpose of scholarly research and teaching; and (2) the researcher uses reasonable security measures to limit access to the corpus of circumvented works only to other researchers affiliated with qualifying institutions for purposes of collaboration or the replication and verification of research findings.*

Issues Raised by Current Version

While AACCS LA and DVD CCA appreciate proponents’ flexibility in proposing a number of modifications to the originally proposed text, the current version does raise a number of issues:⁴

- **The need for circumvention** – It should be explicitly stated that any circumvention be only as necessary to accomplish actual current research (*i.e.*, not for potential future research), and only in the case where a market check has taken place to determine if alternatives to circumvention, including, but not limited to, licensing from the applicable rightsholder(s), are available.

⁴ DVD CCA and AACCS LA presume that “where the motion picture is lawfully made” was actually intended to address that the copy, not the motion picture itself, was lawfully made and distributed.

- **Those who conduct the circumvention** – The current draft language proposes that circumvention could be done by a “researcher affiliated with a nonprofit library, archive, museum, or institution of higher education.” Unfortunately, this description of the user results in an incredibly broad swath of potential users to engage in circumvention. At the outset, as proponents proffered no evidence of libraries, museums, or archives seeking to engage in the proposed use, the Office can dispense with these references and focus its inquiry on higher education institutions. But, even limiting the inquiry to higher education institutions, the problems with the language are immediate. A “researcher affiliated with” can cover almost anybody in almost any role in an institution. First, what *bona fides* are required to be considered a “researcher”? And what is meant by affiliation? Is an alum with no other current connection “affiliated” with the university? The proposed language does not answer these questions, and the dearth of record evidence certainly makes narrowly crafting an exemption based on record evidence a challenge. To that end, the exemption beneficiary would be better defined in accordance with the record evidence, which would mean faculty and staff of a nonprofit, accredited institution of higher education who are engaged in social sciences research authorized, or otherwise sanctioned by, the applicable academic department of the institution.
- **“Text and data mining”** – The term “text and data mining” is actually not defined in the proposed exemption, and, without a precise definition, is subject to broad interpretation. Again, the absence of examples in the record makes defining these terms a challenge.
- **“For the purpose of scholarly research and teaching”** – Circumvention under this proposed exemption (if granted) should be for no other purpose than the non-commercial

scholarly research and teaching it is purported to support, so the word “solely” should be inserted at the beginning of this phrase.

- **“Collaboration”** – While collaboration within the academic community may strengthen academic research, the use of the term here is vague, and should be made more precise, and the class of persons eligible to be included in such collaboration should likewise be limited to faculty and staff as described above. Further, the concept of “replication and verification of research findings” is broad as well. Such access by colleagues should take place no more than is reasonably necessary to satisfy the need for academic review. Replication beyond that point is unwarranted.

As stated before, AACCS LA and DVD CCA maintain their objections for the reasons set forth in their written comments and oral testimony throughout this proceeding. Without doubting the sincerity of proponents and their desire to make constructive contributions to social science research, opponents nonetheless point out that the law does not clearly support a finding that text and data mining is clearly non-infringing. Further, while recognizing that the European Union has taken steps to accommodate text and data mining, and that such approaches in other jurisdictions may be instructive, the differences between the United States and the European Union are such that suitability of the E.U. approach for the United States should not be assumed. Any approach will likely require more deliberation than what the current rulemaking permits.

Date: May 20, 2021

(Signatures Follow on Next Page)

Respectfully submitted,

/s/ Michael B. Ayers

Michael B. Ayers
Michael B. Ayers Technology Law
5256 S. Mission Rd., Suite 703-2215
Bonsall, CA 92003-3622
michael@ayerstechlaw.com
(760) 607-6434

/s/ Dean S. Marks

Dean S. Marks
13236 Weddington St.
Sherman Oaks, CA 91401-6036
deansmarks@yahoo.com
(818) 469-7185

/s/ David J. Taylor

David J. Taylor
Right Size Law PLLC
621 G ST SE
Washington, DC 20003
david.taylor@rightsizelaw.com
202-546-1536

COUNSEL TO DVD CCA AND AACSLA: