

A Preservationist's Guide to the DMCA Exemption for Software Preservation



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The Library of Congress recently adopted several exemptions to the Digital Millennium Copyright Act (DMCA) provision prohibiting circumvention of technological measures that control access to copyrighted works. The exemptions went into effect on October 28, 2018 and last until October 28th, 2021. This guide is intended to help preservationists determine whether their activities fall under the new exemption.

Background

The DMCA anti-circumvention provision prohibits circumvention of technological protection measures (TPMs) that control access to copyrighted works. More commonly known as DRM (short for “digital rights management”), these TPMs control access to computer programs by requiring a user to do something before allowing the user to use the program. TPMs come in many familiar forms. For example, they may require a user to:

enter a password or a product key,

insert a CD or dongle, or

connect to an Internet server for authentication.

These requirements inhibit efforts to preserve software because preservationists may not be able to meet the requirements of outdated TPMs. Old TPMs may require using obsolete operating systems, or inserting floppy disks despite modern computers no longer supporting floppy disk drives.

Without an exemption, librarians or preservationists circumventing these TPMs may be subject to legal liability under the DMCA. Fortunately, the Software Preservation Network has obtained temporary exemptions for digital preservation. These exemptions remove this legal liability for circumventing a TPM, provided that certain conditions are met. And while the text of the exemption itself only mentions TPMs that “control access” to copyrighted works, the exemption also covers “copy controls” that prevent full copying of content stored on storage media (for example, bad sector copy protection on CDs). Note that the exemptions do not remove legal liability for copyright infringement of the underlying software itself, so as we discuss in more depth below, you’ll still want to follow the best practices for fair use or obtain permission from the copyright owner in order to avoid copyright liability.

Who can claim an exemption?

The exemption is generally directed to preservation activities by libraries, archives, and museums. But a library, archive, or museum must meet each of five criteria to be considered “eligible” to claim the exemption. The library, archive, or museum must:

1. Make its collections open to the public or routinely available to unaffiliated outside researchers.

2. Ensure that its collections are composed of lawfully acquired or licensed materials.

This requirement, like the others, is drawn from the § 108 Discussion Document produced by the Copyright Office. The purpose of this requirement is to prevent copying or distribution of unlawfully acquired materials “under the guise of a copyright law exception.”¹

As an example, the Copyright Office has said that a library that provides links to scans of newspaper articles made by others would not be eligible if it does not own physical copies of the articles and has not licensed its copies.² For purposes of this exemption, our understanding is that the institution must have purchased or licensed the contents of its collections.

3. Implement reasonable digital security measures for preservation activities.

The Copyright Office does not prescribe any particular security requirements, just that they be “reasonable” when compared to practices of similar peer institutions. Requirements may vary depending on the size and mission of the institution, and the types of materials kept in its collections.³

4. Have a public service mission.

Institutions that only serve private interests are not eligible. This does not necessarily mean that all for-profit institutions are ineligible. As long as the values and goals of the institution are directed to the public, for-profit institutions may be covered as well.⁴ But it may be more difficult for commercial entities to qualify because of other requirements discussed below.

5. Have trained staff or volunteers that provide services normally provided by libraries, archives, or museums.

Individual hobbyists or collectors, as well as institutions that do not carefully oversee their collections, generally cannot claim the exemption. Depending on the type of institution, examples of normally provided services may include “helping to manage the collections, answering questions from the public, or planning events.”⁵

What type of software is covered?

In terms of genre, the exemptions encompass all types of computer programs, including operating systems, word processors, creative design suites, video players, and video games.⁶ But there are several requirements dealing with how the computer programs were acquired and what one can do with the computer programs, once the TPMs have been circumvented to gain access to them.

The computer program must have been lawfully acquired. This means that the initial copy of the software that the institution seeks to preserve must have been legally purchased or licensed.

The software must no longer be reasonably available in the commercial marketplace.

The Copyright Office did not provide an explicit definition of reasonable availability. But this requirement is probably met for obsolete computer programs where that particular version is no longer manufactured or sold by the software developer. While there may be other situations where computer programs may be considered no longer reasonably available, the Acting Register of Copyrights has said that software that can only be purchased in second-hand stores is considered no longer reasonably available.⁷

So, for example, Word 2003, because it is no longer sold by Microsoft, would be no longer reasonably available in the commercial marketplace, even if newer versions of Word are available, or if used versions of Word 2003 may be purchased on eBay or Amazon. If a library had lawfully acquired an original version of Word 2003, it may preserve it, assuming the other requirements are met.

What can you use the preserved software for?

The sole purpose of the circumvention activity must be for lawful preservation of the computer program or digital materials dependent on a computer program. So preservationists can circumvent TPMs on software either to preserve that software itself, or to preserve user-created digital files or materials that can only be opened using that software, as long as the preservation itself would be lawful.⁸

The computer programs cannot be used for direct or indirect commercial advantage. Simply, this means that the computer programs cannot be used to help the institution make profit. This is an analogue to the “public mission” requirement already discussed. Similar to how the institution must not have a private mission, the institution’s use of the computer programs must not be for private profit-making purposes.⁹



STOP: If you want to preserve a video game and it requires a connection to an external server for gameplay, a different set of rules apply. (We know that’s confusing.) Those restrictions are outside the scope of this guide. Please review section 12 of the Final Rule or contact the Cyberlaw Clinic for more information.¹⁰

What can you use the preserved software for?

All DMCA exemptions only allow circumvention of access controls for persons who engage in non-infringing uses of the software. In other words, this exemption does not give anyone free reign to use the software for any purpose. Anyone who infringes a copyright in the computer program or dependent digital material is not only liable for that copyright infringement, but also cannot claim protection under this exemption. There are several ways for use of software to be non-infringing:

- **The software is not copyrighted.** In some limited cases, the software may be something that is not eligible for copyright protection in the first place. In other cases, the software may be in the public domain because the developer explicitly disclaimed copyright protection.
- **The software is copyrighted, but you have permission to preserve the software.**
- **The software is copyrighted and you do not have explicit permission to preserve the software, but the Section 108 exemption applies.** It is not infringement for eligible libraries and archives to make copies of materials for certain limited purposes.¹¹ For example, they can make up to three copies of a work, solely to replace a copy that is “damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete,” if certain other requirements are also met.¹² The Acting Register of Copyrights acknowledged that migrating software stored on floppy disks to modern storage media is one example that may qualify for this exception.¹³ But this exception does not allow modification of the software, and requires that devices that can read the software be obsolete.
- **The preservation is fair use.** The four factors of the fair use analysis look at: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect of the use on the potential market for the copyrighted work.¹⁴ The Acting Register of Copyrights found that copying or modifying computer programs for preservation and research purposes may qualify as fair use.¹⁵ The Association of Research Libraries, in collaboration with the Software Preservation Network has created a code of best practices to help preservationists determine if their activities may qualify as fair use.¹⁶ The Code is a helpful consensus document that addresses five common situations about which there is substantial agreement among practitioners.¹⁷

Each of these determinations are highly context-dependent. This is particularly true for fair use, where determining whether someone is engaging in fair use of the software depends on the particular circumstances of the use. So it is difficult to say categorically that all uses of software for preservation would qualify as non-infringing uses.

For specific legal advice on whether a particular use is non-infringing, please consult a local attorney.

Where can you use the software?

Copies of the computer programs cannot be distributed or made available outside of the physical premises of the library, archive, or museum.

One last thing...

The 2018 DMCA exemptions are temporary and only in effect for three years. This means that in 2021 the software preservation community must petition the Copyright Office to renew or expand the exemption for software preservation. Evidence of software preservationists' use of the exemption is crucial for maintaining it.

Please let us know if you use this guide or the exemption! You can contact Kendra Albert via email at kalbert@law.harvard.edu or fill out the Google form at <https://brk.mn/DMCAGuide>.

Acknowledgments & Endnotes

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1 U.S. Copyright Office, Section 108 of Title 17, A Discussion Document of the Register of Copyrights, 20 (2017) (“Discussion Document”).

2 Discussion Document at 20.

3 Discussion Document at 21.

4 Discussion Document at 19.

5 Discussion Document at 19-20.

6 The text of the exemption itself says “except video games,” but this is because another exemption deals with preservation and other allowed activities specifically for video games. The other exemption covers preservation of video games to the same extent as this exemption covers preservation of other computer programs, so for purposes of software preservation, the requirements described in this guide apply to all types of computer programs, including video games.

7 U.S. Copyright Office, Section 1201 Rulemaking: Seventh Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendations of the Acting Register of Copyrights, 254 (2018) (“Recommendations”).

8 Recommendations at 254.

9 Discussion Document at 21-22.

10 37 C.F.R. §201.40 (12). A copy of the exemption text is available at <https://www.copyright.gov/title37/201/37cfr201-40.html>

11 17 U.S.C. 108.

12 17 U.S.C. 108(c).

13 Recommendations at 236-37.

14 17 U.S.C. 107.

15 Recommendations at 240-41, 245.

16 Association of Research Libraries, Center for Media & Social Impact & Program on Information Justice and Intellectual Property, Code of Best Practices in Fair Use for Software Preservation (2018), https://www.arl.org/storage/documents/publications/2018.09.24_softwarepreservationcode.pdf (“Code”).

17 Code at 1, 4-7.

DMCA Exemption for Software Preservation Checklist

Can you circumvent DRM on software you are preserving? If you check all the boxes on this list, then you fall within the software preservation exemption obtained by the Software Preservation Network!



Are you eligible?

- Are you a library, archive, or museum?
- Do you meet each of the following criteria?
 - Your collections are open to the public or routinely available to outside researchers
 - Your collections are composed of lawfully acquired or licensed materials
 - You implement reasonable digital security measures for preservation activities
 - You have a public service mission
 - You have trained staff or volunteers that provide services normally provided by libraries, archives, or museums



Is the computer program eligible?

- Did you lawfully acquire your copy?
- Did you confirm that the software is no longer reasonably available in the commercial marketplace (for example, is the software no longer available from the manufacturer or developer)?
- Not for commercial advantage



How are you using it?

- For lawful preservation of the computer program, or for lawful preservation of digital files that can only be opened with the computer program
- For non-infringing uses (at least one of the following must apply to be non-infringing):
 - Is the software not copyrighted?
 - Do you have permission to preserve the software?
 - Do you qualify for a Section 108 exemption?
 - Is your use fair?
- Not distributing it or making it available outside the library, archive, or museum

If you have checked all of the boxes, congratulations! Your software preservation activities are likely covered by the DMCA exemption. If you are not completely confident that you can check off each one of these boxes, please consult your friendly neighborhood attorney.

This checklist is meant to be used with Preservationist's Guide to the DMCA Exemption for Software Preservation, which contains more detailed explanation of each of the criteria. You can find the Preservationist's Guide at:
<http://www.softwarepreservationnetwork.org/1201-exemption-guide-for-software-preservationists>.