

To the U.S. Copyright Office

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Class of works to be exempt: copyrighted content that the copyright holder consents to publish or distribute without payment. A slightly broader way to describe this class: copyrighted content for which the copyright holder consents to provide *open access*, when "open access" is defined as access permitting the unrestricted reading, downloading, copying, sharing, storing, printing, searching, linking, and crawling of some body of work.

The most important works in this class are scientific and scholarly journal articles, at least when the copyright is retained by the author or transferred to an open-access journal. (When the author's copyright is transferred to a traditional journal, the new copyright holder will virtually never consent to open access, so we're not talking about that case.)

Scientific and scholarly journal articles are in this class because scholarly authors are not paid for journal articles and do not expect payment. They are paid by their employers and share their research articles freely for the sake of advancing knowledge. They write for impact and not for money. When they retain copyright, or transfer it to an open-access journal, then the copyright holder will typically consent to open access. Access-blocking DRM would frustrate this intention.

For the purpose of this rule-making, it shouldn't matter whether copyright-holder consent to open access is rare or frequent (hence, whether this class is small or large). In fact, the class is small but growing larger every day. The exemption is needed on the merits and in order to give this class a better chance of growing larger.

The argument: When copyright holders consent to relinquish revenue, or consent to open access, then the copyright statute should not stand in their way. Copyright holders have a right to waive their rights, just as much as they have a right to enforce them. When authors sacrifice revenue in order to reach a larger audience, or in order to share and advance knowledge, then readers ought to get the benefit of the author's sacrifice. At the very least, access-blocking DRM will thwart, not serve, this class of copyright holders.

For this class of works, an exceptionless anti-circumvention clause threatens readers with criminal penalties for gaining the kind of access that the copyright holder desires to make available. When authors consent to open access, then all use is non-infringing use. Preventing readers from taking advantage of this gift from authors not only frustrates copyright holders who wish to make this gift, but negates their sacrifice in relinquishing revenue, obstructs the free exchange of scientific ideas, and impedes research.

For these reasons, most works in this class will be published in open-access archives or open-access journals, without DRM, and consequently circumvention will never be an issue. But the exemption is needed for the occasional works of this class for which user access is hindered by DRM barriers. Here are some examples:

1. A scholar makes a point of publishing her research in an open-access journal. But several years later, the journal is sold to a publisher who changes the business model of the journal, and makes back issues accessible only to paying customers. The copyright holder's consent to provide open access has not changed.
2. A scholar's work is published online by an open-access journal. But that journal is indexed by a search engine that also indexes many priced and access-restricted journals. Rather than discriminate and give free access to the free articles and priced access to the priced articles, it charges for full-text access to any article that comes up in response to a search.
3. A government agency decides to outsource its publishing, bypassing the GPO and its open-access policies. The private-sector publisher makes the (public-domain) papers and other documents of the agency available only to paying customers.

The general principle behind this request for an exemption was also asserted in a public statement by France's Académie des Sciences on December 6, 2001. The French Académie called on the European Commission not to apply ordinary copyright rules to scientific publications for which the authors seek no payment.

<http://www-mathdoc.ujf-grenoble.fr/DA/>

For more on open access, see the Budapest Open Access Initiative. (For example, the BOAI makes clear that many authors consenting to open access wish to retain copyright rather than put their works into the public domain.)

<http://www.soros.org/openaccess/>