

# Did the Digital Millennium Copyright Act Hinder Researchers in Discovering VW's Emissions Defeat Device?

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By now, everyone has probably heard about the Volkswagen “emissions scandal” involving the company’s alleged use of software on its vehicles that evaded testing to pass emission standards.

Amidst this, several articles and news organizations have speculated that copyright laws prevented researchers from discovering Volkswagen’s defeat device sooner. The story goes that the Digital Millennium Copyright Act, a 1998 law enacted to address copyright enforcement problems in the digital age, prevented researchers from accessing the computer software code to analyze it, thus allowing vehicles manufacturers to hide their defeat devices software from scrutiny.

Is this true? After all, the DMCA specifically says “Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.”<sup>[1]</sup>

But surprisingly, the answer is yes.

Fair use is a defense to the exclusive rights granted under copyright law.<sup>[2]</sup> There are six exclusive rights to their copyrighted work: the right to reproduce, to prepare derivative works, to distribute copies, to perform publically, to display the work, and to publically perform by digital transmission.<sup>[3]</sup>

The DMCA, however, prohibits acts beyond those exclusive rights. Paraphrasing for the sake of simplicity, the DMCA prohibits three acts:

- (1) it prevents someone from circumventing protections that restrict “access” to a copyrighted work;
- (2) it prevents someone from making, selling, or trafficking in a device that circumvents protections that restrict “access” to a copyrighted work; and
- (3) it prevents someone from making, selling, or trafficking in a device that circumvents measures that protect “a right of a copyright owner.”<sup>[4]</sup>

The first and second prohibited category of acts prohibit circumventing protections to “access” the copyrighted work. Access is not one of the six enumerate exclusive rights of copyright holders. Fair use simply does not come into consideration.

The third prohibited act does speak of the exclusive rights (the “rights of the copyright owner”) but as written, it only prevents someone from making, selling or trafficking **in a device** that circumvents those protections, it does not actually prohibit **the act** of circumventing the protections of a copyright owner. Thus, for instance, it may be fair use for you to make a copy of a DVD you own for a back-up, even if it means circumventing some protection on the DVD that prohibits copying.<sup>[5]</sup> But no one can make or sell a device to you to allow you to circumvent that protection to make that copy because that person would violate the DMCA. As one court aptly put it, “while it is not unlawful to circumvent for the purpose of engaging in fair use, it is unlawful to traffic in tools that allow fair use circumvention.”<sup>[6]</sup> The situation is akin to allowing people to open the radio to see how it works, but forbidding anyone from selling screwdrivers to unwind the bolts on the back.

This may all sound bizarre but keep two things in mind. One, DMCA has a long list of exemptions, one of which is to government agencies in connection with investigative activities. Second, the DMCA enables the Librarian of Congress to enact further exemptions to allow circumvention of technology devices that prevent access to copyrighted works.

In fact, one of these rulemaking sessions is occurring right now and, wouldn’t you know it, one of the exemption presented for consideration is to allow research for cars.<sup>[7]</sup>

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[1] 12 U.S.C. § 1201(c).

[2] 12 U.S.C. 107 (“limitations on exclusive rights”).

[3] 12 U.S.C § 106.

[4] 12 U.S.C. § 1201(a)(1), (a)(2), and (b)(1).

[5] See *Realnetworks, Inc. v. DVD Copy Control Ass’n*, 641 F. Supp. 2d 913 (N.D. Cal. 2009).

[6] *State v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1125 (N.D. Cal. 2002).

[7] <https://www.eff.org/cases/2015-dmca-rulemaking>.

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