

**Responses of  
MOTION PICTURE ASSOCIATION OF AMERICA  
to Copyright Office Questions in  
§1201 Rulemaking Proceeding**

**CAPTURE SOFTWARE**

Q: Please explain whether the legal consequences of using capture software differ from the legal consequences of using a digital video camera (with particular reference to 17 U.S.C. § 1201).

A: With respect to §106, the legal consequences of using screen capture technology are the same as using a digital video camera to copy copyrighted material. If the copying does not qualify as a non-infringing use, it is a violation of §106 in either case. With respect to §1201, the answer will depend upon the operation, design and marketing of the particular technology used. See response to next question.

Q: Is it a violation of § 1201(a)(1) to use screen or video capture software (hereinafter "capture software") to reproduce clips from copyrighted motion pictures or audiovisual works?

A: The term "capture software" could apply to a vast array of technologies currently in use, invented but not yet deployed, and yet to be developed. Thus, it is impossible to make a categorical statement that use of "capture software" is, or is not, a violation of §1201(a)(1). That determination must be made on a case-by-case basis, taking into consideration the particular device used and how it operates. Trafficking in a device that is primarily designed or marketed to record audiovisual content protected by an access control measure or that has no other commercially significant purpose is prohibited under §1201(a)(2). Use of such a device (or any other) to avoid, bypass, remove, deactivate, or impair a

technological measure would be a violation of §1201(a)(1). It is possible that some capture software technology is in fact designed and operates in a way that enables capturing images from an unencrypted and otherwise unprotected signal without circumventing any technological measure in violation of §1201(a). But use of capture software technology to gain access to a signal (whether or not encrypted) that is protected at the point of capture against unauthorized access by some means, would be a violation of the statute. Again, it is impossible to make a categorical assessment, or to characterize a particular technology without a detailed analysis of the technology itself, the way it is used, and how it is marketed.

It is worth noting, however, that we believe this question is rendered largely academic by the evidence in the record. To the extent there are software applications that allow users to capture images from the screen lawfully, such applications would represent yet another means of gaining access to the works desired without circumvention. But as we have demonstrated, there are multiple ways of doing that very thing, including use of a camcorder, making copies from unprotected media, recording from in-the-clear broadcast and telecasts, and even obtaining copies directly from the copyright owner. As demonstrated in the hearing, the quality of the resulting clip is likely to be even better than the copy that would result from the use of screen capture software. Thus, the possibility that lawful software capture applications may exist to enable making copies without circumventing CSS would certainly strengthen the argument against new exemptions in this area, but the fact that there exist a number of better options to meet the needs of the exemption proponents should be determinative.

Q: Is there particular capture software that decrypts the Content Scrambling System on DVDs?

A: Not that we are aware of.

Q: Is there particular capture software that does not decrypt the Content Scrambling System on DVDs?

A: If the previous answer is correct, this question is also answered.

Q: To the best of your ability, please explain how screen capture software operates, e.g., does reproduction take place after the work is lawfully decrypted? Does the capture software reproduce the digital output from the computer, or does the capture software reproduce the analog output from the computer? Does this analog/digital distinction matter for determining whether a violation of §1201(a)(1) is taking place?

A: As we understand the operation of DVD playback devices and capture software currently in general use, encrypted content (a DVD) is decrypted by a licensed computer DVD player and moves to the computer motherboard to an AV card to a monitor. The screen capture software makes a digital copy of the digital content from the signal going from the AV card to the monitor. Thus, the reproduction takes place after the work is decrypted, the reproduction is from a digital source (not really an "output"), and there is no analog/digital distinction because the stream is all-digital. It is important to note that some existing technological protection measures are designed to provide secure paths for unencrypted video content and that capture software that is designed to defeat those measures would run afoul of §1201.

Q: Is the output encrypted at the time of capture by the software or is the output decrypted at the time of capture?

A: To the best of our understanding and with regard to the products we have examined, current capture software captures the content unencrypted at the time of capture. The content, once captured, remains unencrypted.

Q: Do different screen capture programs involve significantly different methods of capturing screen and/or audio output?

A: To the best of our knowledge, the capture programs currently in general use employ similar methods of capturing video material, though we understand there may be some variations in the manner of audio capture.

Q: There was an example of screen capture software at the §1201 hearings and some witnesses pointed out that the example presented revealed quality degradation, e.g., pixelation. Can capture software be adjusted in order to affect the quality of the reproduction of the video or audio captured? If so, how?

A: While the capture programs employ similar methods of capturing video and audio material, and the capture software settings can generally be adjusted as suggested, different applications will differ in terms of their ability to optimize particular aspects of the capture process. As a result, some, but not all, capture software applications may be able to produce a copy of equal quality as the original.

Q: Can the computer on which the capture software resides be adjusted to affect the quality of the output, i.e., by adjusting the settings of the operating system, video card or sound card software rather than the settings within the capture software itself?

A: Both the computer adjustments and the capture software adjustments can affect quality of copies.

Q: It was claimed that screen and video capture technology does not work with Microsoft Vista. Is this true, and if so, why?

A: To the best of our knowledge, all widely used, recent vintage capture software works with all widely used operating systems.

Q: Are there other operating systems on which screen capture software will not operate?

A: Not that we know of.

## **DOCUMENTARY FILMMAKERS**

Q: The first two questions envision a scenario where a user intends to reproduce a small portion of a motion picture or audiovisual work on a CSS-encrypted DVD for a particular use, such as the use of a portion in a documentary film.

Can a portion of a motion picture on a DVD protected by CSS be decrypted, leaving the remainder of the motion picture encrypted by CSS?

A: Yes, using CSS decryption tools, it is possible in some cases to decrypt individual VOB files and possibly chapters containing a pre-defined portion of a motion picture, but it is not possible as far as we know to decrypt arbitrary portions of the motion picture in order to access only the portion intended for a particular use. Moreover, once an act of circumvention is sanctioned, we are unaware of any effective means to determine how much of a motion picture protected by technical measures was actually decrypted. MPAA is not opposed to uses of AV material that do not violate copyright laws, and has demonstrated how AV material protected by technical measures can be accessed without circumvention. MPAA is opposed to broad and unnecessary exemptions to the circumvention prohibition aimed at particular categories of users rather than particular classes of works because such exemptions will, over time, create a public perception that circumvention is morally and legally acceptable, and the distinction between uses that infringe and uses that do not infringe will be ignored.

Q: Is it necessary to make a copy of the entire motion picture as a first step in order to make a copy of only a portion of the motion picture?

A: No, but see previous answer.

Q: Documentary filmmakers' proposed class of works limited the persons who would be eligible to invoke the exemption to a documentary filmmaker, who is a member of an organization of filmmakers, or is enrolled in a film program or film production course at a post-secondary educational institution. Is it appropriate to limit the persons who would be eligible to invoke the exemption? Why? If you believe it would be appropriate, what criteria could be used?

Are there any other appropriate ways to properly tailor the scope of the exemption?

A: It is worth pointing out that MPAA member companies are part of the subject class of "documentary filmmakers." Among the world-class documentary films produced and/or distributed by MPAA member companies are Sony's "Fog of War" and "It May Get Loud." Both as producers of fictional entertainment content and documentary films, MPAA member companies devote much time and resources to determining the copyright status of works incorporated in their productions and obtaining requisite use permissions. Although burdensome to be sure, these activities are regarded as a necessary and not unreasonable part of the business of filmmaking.

As stated above, MPAA is opposed to ANY exemption for documentary filmmakers because an exemption is not necessary and exemptions tend to erode the public policy embodied in the DMCA that circumvention of technical measures is both wrong and illegal. Documentary filmmakers, many of whom are professional cinematographers and/or producers, are well situated to obtain, and indeed are accustomed to obtaining, authorized use of non-original

material directly from copyright owners. When authorization cannot be obtained, documentary filmmakers have particular expertise and professional equipment, and the time to employ these resources, that enable them to obtain high quality copies of the materials they seek without engaging in otherwise prohibited acts of circumvention. Exemption proponents have provided no convincing evidence that circumvention of technical measures is the only way documentary filmmakers can access copyrighted AV material desired for inclusion in documentary productions.

This request for an exemption by documentary filmmakers illustrates the undesirable public policy effects of the decision by the Copyright Office in its last review to depart from the statutory directive to consider exemptions for "a particular class of works," and to embark down a slippery path of considering particular groups of users and intended uses. In its initial decisions, the Copyright Office found that, with respect to the class of audiovisual works, non-infringing uses have not been adversely affected and that an exemption to the circumvention prohibition in the DMCA was not justified. By introducing into its analysis the nature of particular uses and particular types of users, the Copyright Office has invited and necessitated the type of line-drawing reflected in this question. Such an exercise inexorably will lead either to hair splitting or a lack of precision, and ultimately threatens creation of an ever-expanding list of exemptions which would render the statutory prohibition on the act of circumvention unenforceable and meaningless, particularly so if limiting principles are not assiduously applied.

In Section II(A) of the previously filed comments of the Joint Creators and Copyright Owners, copyright industry organizations noted the danger of focusing on external criteria such as the nature of use or users rather than the class of works as directed by the statute. To lessen the risk of detrimental outcomes, those comments suggested a number of limiting principles that the Register should apply to all granted exemptions. If the Register recommends a DMCA exemption

for documentary filmmakers, that exemption should reflect these principles so as not to undermine the purpose of the statutory prohibition further and to minimize the contagion effect of any such new exemptions.

We also note that the limiting elements suggested by the proponents of the exemption are not only contrary to the statute, but also unacceptably broad. To the extent the Register were to recommend an exemption limited to a particular class of user(s), it would need to be narrowly tailored to include only those individuals whose needs clearly align with the facts and circumstances demonstrated as forming the basis for the exemption. To be clear, we do not believe a case has been made that the ability of ANY documentary filmmakers to make non-infringing uses of audiovisual works on DVD is being adversely affected today as a result of the prohibition on circumvention. But to the extent the Register is persuaded by the arguments put forward in support of the exemption, those considerations appear to apply only with respect to a small portion of the documentary film productions that would otherwise be covered by the proposed exemption. For example, there is no evidence in the record that would justify the need for an exemption for non-professional documentary filmmakers. Yet the proposed exemption would extend far more broadly, to include students, hobbyists, and film enthusiasts. Membership in an organization of filmmakers is simply not a meaningful limitation and does not achieve the aim of copyright education claimed by the exemption's proponents. Membership in the International Documentary Association, for example, requires nothing more than registration and payment of a \$85 fee (\$45 for full-time students). Even among those engaged professionally in documentary film production, only a portion of those projects would be intended for HD broadcast or mainstream theatrical exhibition, requiring video resolution and other quality requirements which formed the entirety of the basis for arguments in favor of the exemption. Even fewer would involve material available only in protected DVD format and unavailable from the copyright owner. Any exemptions

that do not hew carefully to the circumstances justifying the exemption would only serve to exacerbate the problems associated with granting exemptions based on the nature of the use or class of user.

Finally, the proposed limitation that the material accessed through circumvention be in the public domain or used in a manner protected by the fair use defense runs counter to determinations in prior rulemaking proceedings, in which the Register has rejected claims for so-called “fair use works.” There is no basis for finding the use of a portion of a work in a documentary film, without more, is categorically likely to be a “fair use.” A categorical exemption for audiovisual works when used by documentary filmmakers in a manner protected by fair use is not easily distinguishable from an exemption for audiovisual works when used by any other user for a non-infringing purpose. Such exemptions stray far from the kind of exemption approved in the last triennial rulemaking proceeding for clip compilations created by film studies professors for classroom use – a use the Register determined categorically “would generally constitute a non-infringing use.”

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