

July 9, 2009

Rob Kasunic  
Principal Legal Advisor  
Office of the General Counsel  
United States Copyright Office

Re: Screen Capture Questions

Dear Mr. Kasunic:

The undersigned entities jointly respond to your June 22, 2009 questions concerning screen capture software and their relationship to Section 1201. Some of these entities may provide separate supplemental responses.

At the outset, we stress that we have not reverse engineered the screen capture programs you listed in your letter, and we do not have the ability to confirm independently how they operate in a computer. Our responses are based on product descriptions whose accuracy we cannot assess. With those caveats, we provide the following responses:

1. We believe that the use of screen capture software does not violate § 1201(a)(1)(A). We understand that screen capture software “captures” content from a computer’s video buffer *after* that content has been decrypted. The software, therefore, does not “circumvent a technological measure” within the meaning of § 1201(a)(3)(A).
2. Notwithstanding this legal analysis, we believe that rightsholders may well argue that the use of screen capture software does violate § 1201(a)(1)(A). In the pending litigation concerning the RealNetworks RealDVD software, rightsholders have asserted that the Content Scrambling System is a system with many layers of protection, of which encryption is just one layer. They contend that RealDVD, which copies content while still encrypted, violates § 1201(a)(2) because that copying occurs after the unlocking of the DVD drive. The rightsholders assert that unlocking the DVD drive is one of the layers of CSS, and that Real DVD unlawfully “bypasses” the other layers by copying the content before the content reaches those layers.

In essence, the rightsholders are arguing that CSS converts the entire computer into a closed system, and that interception of content at any point within the computer constitutes an unlawful circumvention of the rest of the system. Given the breadth of this argument, it stands to reason that some rightsholders will argue that capturing content while it passes through the video buffer violates § 1201(a)(1)(A) because the capture occurs within the closed system before the computer transmits the content to the user’s screen.

To be sure, a court might ultimately reject this argument with respect to screen capture software, just as the court may reject the rightsholders' arguments in the RealDVD case. But until a court of appeals rules that use of screen capture software does not violate § 1201(a)(1)(A), no person interested in copying clips from a CSS-protected DVD can do so with any legal confidence.

3. As demonstrated at the hearing in Washington, D.C., screen capture software degrades image quality. This is inevitable, we understand, because screen capture software compresses the images captured in the video buffer. The image degradation becomes more apparent as the image size increases, e.g., when a user watches a documentary on his high definition television or a teacher projects clips on a screen in a large lecture hall.
4. Assuming that the problems of legal uncertainty and image quality could be overcome in theory, a regime that permits the use of one kind of software to copy film clips, but not another, would be extremely difficult to implement in practice. Many instructors and documentary filmmakers do not have ready access to IP counsel. In the absence of clear, authoritative guidance, many instructors and filmmakers will not know which kind of software they can use and when.
5. Because of the problems of legal uncertainty and quality relating to screen capture software, such software does not present a viable alternative for most teachers, learners, scholars, filmmakers, and video makers seeking to use film clips from protected DVDs. At the same time, expansion of the film clip exemption as we have requested will have no effect "on the market for or value of copyrighted works," § 1201(a)(1)(C)(iv), because of the widespread availability of DeCSS and other circumvention software.

Please let us know if you have any other questions.

Respectfully submitted,

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