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July 10, 2009

BY EMAIL

Robert J. Kasunic, Esq.
Principal Legal Advisor
United States Copyright Office
101 Independence Avenue, SE
Washington, DC 20559-6000

Re: Docket No. RM 2008-8

Dear Mr. Kasunic:

This letter responds to your emails of June 22, 2009, requesting that I respond to various questions that have arisen in light of the hearings in this proceeding. On behalf of our client, the DVD Copy Control Association, Inc. ("DVD CCA"), we appreciate this opportunity to testify before the Copyright Office in this proceeding. In relation to the questions in your emails, we offer the following responses:

Part I. Questions Posed to DVD-related Panelists

Questions:

- *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).*
- *Is it a violation of § 1201(a)(1) to use screen or video capture software to reproduce clips from copyrighted motion pictures or audiovisual works?*

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Answer:

Please note that DVD CCA's answers throughout this letter are strictly limited to the capture software mentioned in Mr. Kasunic's email dated June 22, 2009. Specifically, DVD CCA's response defines "Capture Software" to include only SnagIt (TechSmith), Snapz Pro X (Ambrosia Software, Inc.), and WM Capture (Applian Technologies Inc.). To the extent other software exists that is similar to these programs, DVD CCA cannot comment on such software without having the opportunity to individually consider each program.

Although DVD CCA has been able to examine how the Capture Software generally functions and review certain publicly available website materials, DVD CCA has not had access to the source code of the Capture Software noted above. Without the source code, it is not possible for DVD CCA to fully analyze how the Capture Software functions. That said, it is DVD CCA's understanding, in relation to movie content that was originally protected using CSS, that these particular Capture Software products appear to access the movie content after it has been decrypted by a CSS-playback system and capture such content concurrent with the playback of such content to the screen. If this is indeed how the Capture Software functions, we are not aware of a difference in legal consequences between using Capture Software and a digital video camera as far as § 1201 (a)(1) is concerned (at least in so far as neither required cracking the CSS encryption). Again, our assessment is based on our review of the publicly available information about the particular Capture Software and our observation of the operation of the Capture Software, but not on any detailed analysis of the Capture Software, including each program's source code.

Questions:

- *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?*
- *Is the output encrypted at the time of capture by the software or is the output decrypted at the time of capture?*

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Answer:

Subject to DVD CCA's comments above regarding DVD CCA's lack of access to the source code of the Capture Software, it is DVD CCA's understanding that the Capture Software captures video from the video buffer of the video card (or shared memory function of the computer) and audio from either the microphone of the computer (capturing the sound from the actual playback of the movie by the computer) or the audio buffer of the sound card (or the shared memory function of the computer). Apart from the sound captured through the microphone, the capture of video and audio digital data is accomplished in the context of the computer's normal playback process. The Capture Software accesses the video and/or audio at that point to make a copy of the unencrypted content. In the case of one program, it appears that the audio is in analog form (from the microphone) and must be re-digitized before recording. In relation to the analog vs. digital capture as described above, DVD CCA is not aware of any distinction that matters for the purpose of determining whether a violation of § 1201(a)(1) is taking place in this case.

Question:

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

Answer:

As mentioned above, DVD CCA has not had access to the source code of the Capture Software. Without the source code, it is not possible for DVD CCA to fully analyze how the Capture Software functions. That said, it does appear that the Capture Software utilizes at least some different methods of capturing screen and/or audio output. For example, Snag-It appears to capture audio from a computer's microphone, while WM Capture appears to capture audio from the computer's sound card. Also, the website material concerning WM Capture indicates that it is capable of capturing compressed video as well as uncompressed video (at least in MPEG 2 format), whereas SnagIt appears to capture only uncompressed video.

Questions:

- *Is there particular capture software that decrypts the Content Scrambling System on DVDs?*
- *Is there particular capture software that does not decrypt the Content Scrambling System on DVDs?*

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Answer:

As indicated throughout this letter, DVD CCA's response is limited to the three specific Capture Software programs listed in Mr. Kasunic's letter. Based on DVD CCA's understanding of the three programs that comprise "Capture Software," these programs do not appear to decrypt CSS.

We note, however, that with respect to certain content protection technologies--particularly newer and more advanced systems--circumvention analysis does not necessarily begin and end with whether content is captured after the point of initial decryption. Under such systems, content may be protected by effective technical measures after it is decrypted and as it is processed through playback devices.

Questions:

- *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., pixilation. Can capture software be adjusted in order to affect the quality of the reproduction of the video or audio captured? **If so, how?***
- *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?*

Answer:

Based on the materials available to DVD CCA as discussed above, it is DVD CCA's understanding that adjustments can be made to the Capture Software program settings to affect the quality of the captured audio-visual content. We expect that these adjustments would affect the quality of the captured content as it is displayed and rendered on playback. We do not know whether adjustments to the settings of the operating system, video card, or sound card would have an effect on the quality of the audio and/or video that is captured by the Capture Software.

Questions:

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

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- *Are there other operating systems on which screen capture software will not operate?*

Answer:

According to a number of online sources, there are no such restrictions, either as to Microsoft Vista or other operating systems on which the Capture Software is capable of operating. We note that WM Capture appears to be specifically written for Windows operating systems, whereas Snapz Pro X appears to be written for the Mac OS.

Part II. Questions Posed to Documentary Filmmaker and Non-Commercial Use Panels

Questions:

- *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?*
- *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?*

Answer:

It is DVD CCA's understanding that there are certain programs available that allow a user to decrypt certain defined portions of a DVD encrypted by CSS. However, based on the information available to DVD CCA, such programs do not enable decryption of only user-selected clips at a level any more granular than that of a full VOB file, which generally contains up to 1 gigabyte of data (containing as much as 20 to 30 minutes of content). This is due to the method by which the content is encrypted, which is based on a VOB unit. Such an amount is, obviously, beyond the amount that would be used in a clip (whether in a documentary or for classroom display) and could encompass the entire length of a television program or short film.

DVD CCA continues to believe that no exemption is warranted for virtually all of the requests made in this proceeding, especially in light of the alternatives discussed in the reply comments and during the hearings. One alternative that was demonstrated at the hearing—the ability to make a clip using a camcorder and a television—presents users with a mechanism that can make a high-quality clip without the need to circumvent CSS or copy more content than necessary.

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Should the Copyright Office nonetheless decide to grant any exemptions, at the very least, such exemptions should be tailored to the limited functionality required to satisfy the asserted need for clips of protected DVD content. DVD CCA suggests that the following limitations be applied to all exemptions, if any, that are granted in this proceeding. Any exemption should: (i) be carefully limited so as not to authorize those asserting an exemption to generate and retain permanent copies of content (on any type of storage medium) beyond that necessary to use clips (an entire DVD or unnecessary portions of a DVD unrelated to the use may not be retained); and (ii) not facilitate the spread of circumvention devices that enable the generation and retention of permanent copies of more than clip-length selections from DVD content. Otherwise, the exemption will be far beyond what is necessary for the narrow goal to extract a clip.

Questions:

- *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?*

Proposed Class IIB, as submitted by the proponents, is overly broad. If granted as written, it would be altogether too simple for any member of the public to join an "organization of filmmakers" in order to take advantage of the exemption and avoid the prohibition against circumvention codified in the DMCA. For example, for only \$85.00 per year, anyone can join the International Documentary Association.!

While the DVD CCA appreciates the efforts of some of Class IIB's proponents to educate filmmakers about the elements of fair use, if this exemption is granted, there is a serious concern that certain uses that may be made under color of the exemption will not qualify as fair uses. We appreciate the proponents' effort to narrow the exemption to situations in which the prospective user may have been exposed to training about "fair use," but we respectfully submit that that effort has failed, given the easy membership that can be obtained. Accordingly, we request that the Copyright

¹ See "Order IDA Membership," available at <http://www.documentary.org/membership/order> (last visited July 7, 2009).

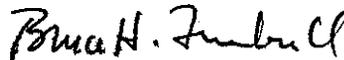
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Office recommend that this exemption be denied or, at the very least, that it be tailored much more tightly so as to ensure that any exemption granted is not subject to abuse by the purported users. Several suggestions as to how to narrow Propose Class IIB are discussed in the comments of the Joint Creators and Copyright Owners.²

* * * *

We appreciate the opportunity to respond to these questions and stand ready to respond to any further questions that you or others in the Copyright Office may have on the proposed exemptions.

Sincerely,



Bruce H. Turnbull
Counsel to the DVD Copy Control
Association, Inc.

² See Comments of Joint Creators and Copyright Owners, Feb. 2, 2009, at 69-70, available at <http://www.copyright.gov/1201/2008/responses/association-american-publishers-47.pdf>.