

Before the
Library of Congress
Copyright Office
Washington, D.C.

In the Matter of :
: :
Exemption to Prohibition on Circumvention : Docket No. RM 2008-8
of Copyright Protection for Access Control :
Technologies :
_____ :

REPLY COMMENTS OF THE
DVD COPY CONTROL ASSOCIATION, INC.

Pursuant to the Notice of Inquiry (“Notice”) that the United States Copyright Office (“Office”) published in the Federal Register on October 6, 2008, and the Notice of Proposed Rulemaking published by the Office in the December 29, 2008 Federal Register, the DVD Copy Control Association, Inc. (“DVD CCA”), by and through its attorneys, submits the following comments addressing initial comments that proposed exemptions from “anti-circumvention” prohibitions found in the Digital Millennium Copyright Act of 1998 (“DMCA”) for certain “classes of works,” access to which is protected by the Content Scramble System (“CSS”). Below the DVD CCA specifically responds to certain initial comments requesting exemptions for (1) the use of portions of DVDs for non-commercial remixes; (2) the use of portions of DVDs for inclusion in documentary films; (3) playing DVDs on operating systems such as Linux; (4) the creation of clip compilations from DVDs from a college or university’s library for educational use in the classroom by media studies or film professors; (5) the creation of clip compilations from DVDs for educational uses by all professors and elementary

education teachers; and (6) the creation of clip compilations from DVDs for educational uses by students.

I. THE DVD CCA

DVD CCA is a not-for-profit corporation with its principal office in Morgan Hill, California. DVD CCA licenses CSS for use to protect against unauthorized access to or use of prerecorded video content contained on DVD discs. Its licensees include the owners of such content and the related authoring and disc replicating companies; producers of encryption engines, hardware and software decrypters; and manufacturers of DVD players and DVD-ROM drives. The availability of CSS was essential to inducing content owners to release their valuable content in digital form on DVD, thereby allowing consumers to enjoy movies and other video content in much higher resolution than previously available on analog VHS and exciting new ways. This in turn lay the groundwork for the fastest growing consumer electronics product in history. This was possible because CSS allowed content owners to protect their copyrighted works encoded onto DVDs. The technology does so by allowing the content owner to encrypt the content in a manner that requires the use of a licensed decryption product to view the content. In order for a product to be licensed to decrypt the content, the manufacturer of the product is required by the CSS license to equip the product in a manner that adheres to certain rules that are specifically designed to protect copyright interests of the content owner.

At the outset, it is important to note that CSS is “an effective technological protection measure” covered by the anti-circumvention provisions of the DMCA, including the “access control” anti-circumvention provisions of Section 1201(a). *See*

Universal City Studio v. Corley, 273 F. 3d 429, 441-42 (2d Cir. 2001) (noting that the trial court had found that the posting of DeCSS, a program designed to defeat CSS, was a violation of Section 1201(a)(2)(A) because CSS was a technological measure that “effectively controls access to a work”); *see also* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 68 Fed. Reg. 62011, 62015-17 (Oct. 31, 2003) (rejecting several proposed classes seeking exemptions to circumvent CSS, an access control technology).

CSS continues to be a viable technical digital protection measure because of the legal framework that supports it – from patent protection to the DVD CCA licenses to the provisions of the DMCA. Although over a dozen years old at this point, CSS is critical to the ongoing success of the DVD market. Requests for exemption from the DMCA’s circumvention prohibitions must be viewed in light of this continued critical role and the legal regime on which it is based.

DVD CCA also notes that in each of the prior proceedings convened by the Copyright Office, DVD CCA has expressed its willingness to work with interested parties to find ways to meet legitimate needs for content use and analysis. Although no party has ever come to DVD CCA to discuss ways of meeting alleged needs without triggering the adverse effects that legally authorized circumvention of CSS would cause, DVD CCA reiterates its willingness to discuss possible means of accommodating legitimate uses.

II. THE COPYRIGHT OFFICE SHOULD REJECT PROPOSED EXEMPTIONS THAT CONSTITUTE IMPERMISSIBLE “USE-BASED EXEMPTIONS.”

Many of the proposals at issue constitute impermissible “use-based exemptions” (i.e., the proponents justify their requested exemptions on the grounds that the proponent wishes to make a specific use of the content on the DVD) and, hence, each of the requested exemptions identifies some use to be made by the consumer that purports to justify the request for exemption from the circumvention prohibition found at Section 1201(a). Consequently, DVD CCA believes that these requested exemptions should be rejected as not identifying a proper “class of works” as required by the statute.

In 2000, the Register examined the “class of works” issue in light of both the statutory language and the legislative history. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 65 Fed. Reg. 64,556, 64559-61 (Oct. 27, 2000). After “a review of the statutory and the legislative history” the Register determined that “the view that a ‘class’ of works can be defined in terms of the status of the user or the nature of the intended use appears to be untenable.” 65 Fed. Reg. at 64559. In reviewing the relevant Commerce Committee Report, the Register concluded that a “class” of works cannot be based upon use or users of the works:

Because the term “category” of works has a well-understood meaning in the copyright law, referring to the categories set forth in section 102, the conclusion is inescapable that the starting point for any definition of a “particular class” of works in this rulemaking must be one of the section 102 categories.

65 Fed. Reg. at 64560.

Until 2006, the Register had consistently interpreted “class of works” to be “primarily based on attributes of works themselves, and not by reference to some external criteria such as the intended use or the users of the works.” Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Notice of Inquiry, 73 Fed. Reg. 58073, 58076 (Oct. 6, 2008). Indeed, even the initiation notice for the 2006 proceeding stated that the Register cannot recommend exemptions based on use or user-defined categories. *See* Notice of Inquiry, 70 Fed. Reg. 57256, 57529 (Oct. 3, 2005). Yet, the Register admittedly modified her interpretation of the statutory phrase “particular class of works” in her 2006 decision:

in certain circumstances, it will also be permissible to refine the description of a class of works by reference to the type of user who may take advantage of the exemption or by reference to the type of use of the work that may be made pursuant to the exemption.

The Recommendation of the Register of Copyrights in RM 2005-11; Rulemaking on exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (Nov. 17, 2006) (hereinafter “*2006 Recommendation of the Register of Copyrights*”) at 10; *see also* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 71 Fed. Reg. 68472, 68473 (Nov. 27, 2006).

The DVD CCA respectfully suggests that the initial interpretation of “class of works,” as applied by the Register in the 2000 and 2003 rulemakings, was the correct one based on both statutory construction and legislative intent. While it appears that this new approach to defining a “class of works” may continue in the current rulemaking proceedings, the Notice of Inquiry suggests that the approach to this issue

“may continue to develop in this and subsequent proceedings.” Notice of Inquiry, 73 Fed. Reg. at 58076.

The DVD CCA fears that the new approach to the “class of works” issue may result in an increase of exemptions specific to particular groups of users and uses and stray further afield from the statutory language and intent. Indeed, this possibility is evidenced by the comments submitted in connection with the present rulemaking, many of which seek to take advantage of the new approach to “class of works,” enunciated in the 2006 rulemaking. *See* Comments 4A, 4B, 4C, 4D, 4F, 4G, 4H, 11A, 11B. If granted, the exemptions will likely cause confusion among users, not to mention the difficulties of administering such exemptions. Further, the granting of such use-based exemptions will surely heighten the demand for circumvention services. Such results will significantly detract from content owners’ ability to control access to their copyrighted works. Accordingly, the DVD CCA respectfully submits that the Register should return to the approach to “class of works” that was utilized during the 2000 and 2003 rulemaking proceedings (as well as the initiation notice for the 2006 proceeding).

III. THE COPYRIGHT OFFICE SHOULD REJECT CERTAIN PROPOSALS TO EXEMPT CLASSES OF WORKS RELATED TO CSS.

A number of submissions request, for various purposes, exemptions to allow circumvention of CSS for all content distributed on prerecorded DVDs protected using CSS, for various purposes. For purposes of this response, the proposed exemptions discussed in this section are grouped together as they reflect general exemptions premised on individuals’ use of DVDs. They include consumers (1) using portions of DVDs for

inclusion in “non-commercial” remixes; (2) playing DVDs on Linux operating systems; and (3) using portions of DVDs for inclusion in documentary films.

General Objections:

1. These proposals constitute impermissible “use-based exemptions” (i.e., the proponents justify their requested exemptions on the grounds that the proponent wishes to make a specific use of the content on the DVD) and, hence, each of the requested exemptions identifies some use to be made by the consumer that purportedly justifies the request for exemption from the circumvention prohibition found at Section 1201(a). Consequently, DVD CCA believes that these requested exemptions should be rejected as not identifying a proper “class of works” as required by the statute.

2. No matter how well-intended the proponents may be in their advocacy for these broad exemptions, the record does not demonstrate any cognizable need to permit CSS to be “hacked” for the various uses suggested by the proponents. As the Copyright Office has previously observed, even if an exemption seems reasonable on its own terms, granting exemptions for broad purposes would create a significant enforcement problem for “hacks” that would remain unlawful. In short, granting a broad exemption, or even a significant number of narrow exemptions, imperils the efficacy of CSS as a means of protecting copyrighted content generally.

3. Given the strong public policy interest in allowing content owners to protect their copyrighted works and the integral role that CSS plays in regard to content in the DVD video format, DVD CCA respectfully requests that the Copyright Office reject the requested exemptions in this group. It is clear, as the Copyright Office found in its 2003 triennial rulemaking, that “the DVD medium has increased the

availability of motion pictures . . . to the general public.” DVD CCA submits that this public benefit—which is supported by the use of CSS and its attendant legal protections against circumvention under the DMCA—far outweighs the benefit of these “use-based exemptions” sought by the proponents. DVD CCA further suggests that to the extent that any of these proponents is unhappy with the anti-circumvention provisions of the DMCA, exemptions of the sort they propose are more appropriately addressed to Congress, rather than through a narrow regulatory proceeding to achieve their goals.

Proposed Class: Using portions of DVDs for non-commercial remixes.

Initial Round Submissions: 11A

Summary of Argument for Proposed Class:

In Comment 11A, the Electronic Frontier Foundation (“EFF”) has requested an exemption that would permit circumvention of access controls for “audiovisual works released on DVD, where circumvention is undertaken solely for the purpose of extracting clips for inclusion of non-commercial videos that do not infringe copyright.” According to the EFF, CSS technology is interfering with society’s ability to make clip compilations (referred to as both “viding” and “remixing”) where such clips constitute fair use.

Facts and Argument in Opposition to Proposed Class:

DVD CCA incorporates and renews general objections 1 through 3 identified above, and it further states the following:

This request seemingly builds on and seeks to expand the exemption granted to film studies professors granted in 2006. *See* Final Rule, 71 Fed. Reg. 68472, 68473-74 (Nov. 27, 2006). Far different from the narrowly-tailored exemption it seeks to

expand, however, the EFF's proposed exemption is impossibly overbroad. It is far more similar to previously rejected proposed exemptions for "all works and fair use works" than to the exemption granted to film professors. *See* Fed. Reg. 71 at 68479. This proposed exemption exits the realm of limited educational uses and enters the much larger universe of consumer uses. If granted, hacking of CSS would essentially be legal, so long as the user claimed to be making a "non-commercial" use (in itself, a vague standard). Indeed, although the EFF claims such uses would be limited to the "vidding communities" and so forth, the proposed exemption as written essentially allow users to hack CSS for *any* reason, so long as the users are not making a profit. Such a broad and expansive exemption must be rejected.

The EFF admits in its own comment that it is quite possible that many "non-commercial" uses encompassed by the proposed exemption may not be fair uses by stating that "the general characteristics of these videos make it clear that many qualify as noninfringing fair uses under existing precedents, and many others *may qualify, depending on the future development of fair use jurisprudence.*" *See* Comment 11A at 18 (emphasis added). The proposed exemption, if granted, would thus invite users to hack CSS for whatever purpose they want, leaving DVD CCA or copyright holders to challenge the hacking on a case-by-case basis in order to obtain court rulings that the particular use is not a fair use.

Ironically, (given EFF's opposition to suits against consumers in other contexts), this exception request actually *invites* such suits by encouraging litigation over fair use to define the boundaries of this proposed exemption. Not only would this proposed exemption potentially force DVD CCA or copyright holders to sue individuals

over whether their particular uses are “fair uses,” but also would effectively eviscerate the value of the DMCA circumvention prohibition in the process. The value of—and, indeed, a major purpose of—the DMCA is to allow technology to operate so that there do not have to be lawsuits against individual consumers.

As the Copyright Office has previously recognized, the unauthorized reproduction of DVDs is already a critical problem facing the motion picture industry. *See* Final Rule, Fed. Reg. 71 at 68479. To grant this exemption would sanction widespread circumvention to facilitate reproduction for works under the guise that such reproduction is for “non-commercial” uses. This exemption would be difficult, if not impossible to administer, and would cause widespread confusion among consumers as to what types of uses properly fall within the scope of the exemption. If granted, this exemption would swallow the rule.

As early as the first triennial rulemaking in 2000, DVD CCA made clear that the CSS technology was developed and utilized to provide security for the high-value copyrighted audiovisual content made available to consumers in the DVD format. The motion picture industry would not have released such high-value content without assurances that it would be protected from piracy, and the consistent presence of such protections has sustained the viability of the DVD format to the present day. It is unlikely that consumers will continue to benefit from future releases of audiovisual works on DVD if such protections do not remain in place, and unless those protections are enforced by federal law. That was a vital part of the basis and reasoning behind the inclusion of Section 1201 into the DMCA and it remains relevant today. The EFF’s proposed exemption threatens the balance struck by Section 1201, and should be rejected.

Proposed Class: Using portions of DVDs for inclusion in documentary films.

Initial Round Submissions: 11B

Summary of Argument for Proposed Class:

Kartemquin Education Films, Inc. and The International Documentary Association have requested an exemption that would permit circumvention of access controls for audiovisual works if such works are not generally available commercially to the public on a DVD not protected by CSS provided that circumvention is accomplished for use of a work in the public domain or in compliance with the doctrine of fair use. *See* Comment 11B. The proponents of the exemption argue that because these works are otherwise unavailable to filmmakers in digital format, the DMCA is preventing filmmakers from “making certain points in their films” or not being able to make their films “at all.” *Id.* at 1.

Facts and Argument in Opposition to Proposed Class:

DVD CCA incorporates and renews general objections 1 through 3 identified above, and it further states the following:

First, this proposed exemption is outside the realm of educational use. The fact that the 2006 film professors’ exemption was deemed to be “necessary” for “pedagogical purposes” was key to the Register’s decision. *See* Final Rule, 71 Fed. Reg. at 68474. Here, no such pedagogical purposes are present.

Second, there are other methods for documentary filmmakers to obtain the clips allegedly needed. Recognizing the quality issue described by the proponents of the exemption, filmmakers can use formats other than DVD. These alternatives have been recognized by the Register in previous proceedings. *See, e.g., 2006 Recommendation of*

the Register of Copyrights at 23. Further, filmmakers can seek permission from movie studios to use unencrypted clips for their documentary films. Movie studios regularly work with documentary filmmakers to license clips. Indeed, most if not all movie studios have clip-licensing departments that deal precisely with this issue. *See* Transcript of Public Hearing on Exemption to Prohibition on Circumvention of Copyright Protection Systems For Access Control Technologies, Docket No. RM 2005-11A (Apr. 3, 2006) (testimony of Sandra Aistars, Time Warner Inc.) at 42 (stating that Warner Brothers has a clip and still licensing department that works with educational institutions and non-profit entities).

Third, and perhaps most importantly, documentary filmmakers do not face the same time constraints as film and media studies professors. The 2006 decision to grant an exemption to film and media studies professors was premised on the particular time constraints that such professors face in a classroom setting, namely, professors are limited to a 50 minute class period to teach their students, and that “each time a professor wanted to show a clip of more than one DVD, one disc would have to be removed and a new one placed into the player. . . . in a fifty minute lecture, this means that ten percent of the class time is lost to meaningless DVD juggling.” *See 2006 Recommendation of the Register of Copyrights*, at 20-21. Conversely, documentary filmmaking is a long process, and there is ample time for a filmmaker to take the necessary steps to legally obtain a film clip, if it is necessary to do so. Accordingly, there is no need for a filmmaker to circumvent CSS technology, and the proposed exemption should be denied.

Proposed Class: Playing DVDs on operating systems such as, but not limited to the Linux operating system.

Initial Round Submissions: 3

Summary of Argument for Proposed Class:

An individual member of the public has requested an exemption for technology that allows DVDs to be played on certain platforms, such as the Linux Operating System. *See* Comment 3. According to the proponent of the exemption, Linux users are prevented from watching legally-purchased DVDs on Linux because of the requirement of royalty payments.

Facts and Argument in Opposition to Proposed Class:

DVD CCA incorporates and renews general objections 1 through 3 identified above, and it further states the following:

In the 2003 triennial rulemaking, the Copyright Office considered similar proposed exemptions for the benefit of the Linux operating system. The Copyright Office denied the request. *See* Final Rule, 68 Fed. Reg. 62011, 62017 (Oct. 31, 2003).

In 2006, the Copyright Office once again considered proposed exemptions for “DVDs that cannot be viewed on Linux operating systems.” *See* Final Rule, 71 Fed. Reg. 68472, 68478 (Nov. 27, 2006). In denying the request, the Copyright Office ruled that: “[a]n exemption is not warranted simply because some uses are unavailable in the particular manner that a user seeks to make the use, when other options are available.” 71 Fed. Reg. at 68478. With respect to Linux, nothing has changed in the past three years. Numerous other options are *still available*.

First, as DVD CCA has advised the Copyright Office in the past two triennial rulemakings, CSS is licensed royalty-free on reasonable and non-discriminatory terms to a variety of manufactures. Accordingly, there is nothing to prevent Linux

manufacturers from obtaining a CSS license so as to satisfy the demand from Linux users for such product.

Second, the proponent of the exemption admits that Linux DVD players “do exist.” *See* Comment 3 at 7 (emphasis in original). According to proponent Mark Rizik, there are two commercial options available, “Linspire and Turbolinux,” but Mr. Rizik claims that such distributions of Linux are “unpopular.” *Id.* There are, however, additional Linux DVD players available. For example, Dell offers at least three PCs that come configured with Ubuntu 8.04 with DVD playback.¹ Indeed, according to Mr. Rizik, Ubuntu is one of the more popular distributions of Linux. *See* Comment 3 at 7. The Dell offering shows that there is no need for this exemption in order for a commercial form of an Ubuntu implementation to be offered. Thus, there is ample evidence in the record that Linux-based DVD players exist in the marketplace and Mr. Rizik and others with similar concerns may avail themselves of such players.

Third, as previously pointed out by the Copyright Office in 2006,

there are many readily available ways in which to view purchased DVDs. Standard DVD players that can connect to televisions have become inexpensive and portable DVD players have decreased in price. Similarly, Linux users can create dual-boot systems on their computers in order to use DVD software that is compatible with, for example, the Microsoft operating system.

¹ More information on Dell computers with Ubuntu 8.04 is available at http://www.dell.com/content/topics/segtopic.aspx/linux_3x?c=us&cs=19&l=en&s=dhs.

See Final Rule, 71 Fed. Reg. 68472, 68478 (Nov. 27, 2006). Indeed, the cost of DVD players has continued to decrease since the previous rulemaking.² Finally, as in previous rulemaking proceedings, DVD CCA maintains that even if there were no such implementations available, the Copyright Office should not grant an exemption to hack CSS simply because some consumers may desire a product that, for a variety of reasons, may not be available as yet in the marketplace. Indeed, as the Copyright Office found in 2006:

The proposal by users of Linux operating system is a matter of consumer preference or convenience that is unrelated to the types of use to which Congress instructed the Librarian to pay particular attention, such as criticism, comment, news reporting, teaching, scholarship, and research as well as the availability for use of works for nonprofit archival, preservation and educational purposes.

See 71 Fed. Reg. at 68478. Nothing has changed to alter this conclusion and accordingly, the Copyright Office should deny the proposed exemption.

IV. IN THE EVENT THE REGISTER CONTINUES TO ALLOW “USE-BASED EXEMPTIONS,” THE COPYRIGHT OFFICE SHOULD REJECT CERTAIN PROPOSALS TO EXEMPT CLASSES OF WORKS RELATED TO CSS.

A. The DVD CCA Does Not Object To Renewal of the “Film Studies” Proposed Exemption, Subject to One New Further Limitation.

Proposed Class: Creating clip compilations from DVDs from a college or university’s library for educational use in the classroom by media studies or film professors.

Initial Round Submissions: 4E

² Several DVD players are available to purchase over the Internet for less than \$50.00. For example, at Target, there is a Philips Compact Size DVD player available for \$34.99. See http://www.target.com/Philips-Compact-Size-DVD-Player/dp/B000OQYXMG/ref=sc_qi_detailink?ie=UTF8&pf_rd_r=13NEPE231TDSDD8GBAWK&pf_rd_p=436115101&pf_rd_i=B000OQYXMG&pf_rd_s=right-1&pf_rd_m=A1VC38T7YXB528&pf_rd_t=5101.

Summary of Argument for Proposed Class:

Professors at the University of Pennsylvania seek an exemption for “audiovisual works contained in a college or university library, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by media studies or film professors.” This is similar to the exemption granted by the Copyright Office in the last triennial rulemaking, except it seeks to expand the source of the audiovisual work to all college or university libraries (as opposed to just film studies libraries).

Facts and Argument in Opposition to Proposed Class:

Although the DVD CCA continues to object to the existence of “use-based exemptions” in general, to the extent the Copyright Office continues to grant such exemptions, the DVD CCA will not object to this exemption, subject to one further limitation. The DVD CCA refers to the comments submitted by the Motion Picture Association of America (“MPAA”) and the stated plans of the major studios to work in conjunction with the USC School of Cinematic Arts (“USC”) to make an online service available whereby film professors can select and copy clips from full length films and television programs. The DVD CCA fully supports the efforts of USC, the MPAA and the studios with respect to this project. The DVD CCA submits that when this new online service becomes operational and to the extent that the service contains a movie or television program and, hence, the film and media studies professors are able to make clips for their educational use from this server, the exemption should prohibit the circumvention of CSS with respect to that particular movie or television title.

B. The Record Does Not Support Granting Broader Exemptions for “Educational” Uses of DVDs

Proposed Class: Creating clip compilations from DVDs for educational uses by all professors and elementary education teachers.

Initial Round Submissions: 4A, 4B, 4C, 4G, 4H

Summary of Argument for Proposed Class:

One proposed exemption seeks to permit circumvention of access controls for audiovisual works when circumvention is accomplished for educational classroom purposes, regardless of the level of education. A number of professors and other members of the academic community request various exemptions that would permit circumvention of access controls for audiovisual works when circumvention is accomplished for educational purposes, regardless of whether the professor is a member of the film or media studies department. Generally, proponents of the exemptions think it is unfair to limit an exemption to film and media studies professors because there are many other educational uses for DVDs outside the realm of film and media studies. Further, proponents of the exemptions advocate that the exemption should apply to more than just DVDs in a university’s film studies library. For example, one comment advocates that the exemption should include DVDs located “in a library of a college or university.” *See* Comment 4G. Others go further, seeking to allow the exemption to apply to all “commercially produced DVDs,” *see* Comment 4A, or all “lawfully made DVDs.” *See* Comment 4B.

Facts and Argument in Opposition to Proposed Class:

The proposed comments exponentially expand the current exemption for film and media studies professors. First, educators-at-large do not all have the same

needs as film and media studies professors, whose areas of instruction are uniquely concerned with film and television *qua* visual mediums. Second, there are non-circumventing alternatives available to address to the concerns raised by the proponents of these exemptions. Third, permitting circumvention of CSS technology for these purposes would undermine the technological and legal underpinning of the content protection system that is the basis for the DVD video business, as explained in Section I above.

The proponents of these overly-broad exemptions fail to meet their burden. Film studies professors were granted an exception because they demonstrated that:

the encrypted DVD versions of motion pictures are often of higher quality than copies in other formats and contain attributes that are extremely important to teaching about film for a number of reasons. For example, the DVD version of a motion picture can preserve the original color balance and aspect ration of older motion pictures when other available alternatives fail to do so.

Final Rule, 71 Fed. Reg. 68472, 68474 (Nov. 27, 2006). These specific pedagogical needs are not likely to be present for disciplines outside the film studies department. Indeed, educators seeking to show film clips do not all need to “preserve the original color balance” the same way that film studies professors do. *Id.* At most, educators need the ability to show certain film clips in classrooms, and as explained below, there are a variety of ways to do so without permitting circumvention of CSS technology.

There are alternatives in the marketplace that meet the needs of educators who would like to show clips in face-to-face classroom teaching. While DVD CCA does not collect information from its licensees concerning the products they make using CSS,

DVD CCA is aware of products from at least one CSS licensee that enable exactly the kind of playback experiences that educators allege is not possible without circumventing CSS.

Pioneer offers two players, specifically developed for and marketed to the education community, that offer the functionality sought by the proponents of the exemptions. The Pioneer DVD-V5000 player³ offers a command stack feature, that allows the user to select the beginning and end frames of specific clips of video and store them in the player's flash memory for later playback. The playback can either be in the form of sequential video clips (up to 300) that the teacher has pre-selected, or in real time where the teacher plays any clip by reading and transmitting information from printed barcodes using a wired/infrared barcode reader. Pioneer has another player in the marketplace, offering the command stack feature - the DVD-V8000.⁴ One article reviewing the newer DVD-V8000 states:

The graphics user interface (GUI) allows for easy creation and use of command stack operations; allows the user to save video play lists that will automatically control playback via "stacks" of linked instructions making it ideal for demonstrations and display presentations. Save the play

³ More information about Pioneer's DVD-V5000 player is available at <http://www.pioneerelectronics.com/PUSA/Products/BusinessProducts/ProfessionalDVD/ProfessionalDVDPlayers/DVD-V5000>.

⁴ More information about Pioneer's DVD-V8000 player is available at <http://www.pioneerelectronics.com/PUSA/Products/BusinessProducts/ProfessionalDVD/ProfessionalDVDPlayers/DVD-V8000?tab=D>.

lists on USB Flash Memory for loading to other DVD-V8000 players.⁵

Alternatively, educators could plan their courses in advance and seek permission from the movie studios to use certain clips. During the 2006 rulemaking proceedings, there was testimony from a major motion picture studio that the studio receives, and routinely and effectively grants, requests for showing clips in an educational setting. *See* Transcript of Public Hearing on Exemption to Prohibition on Circumvention of Copyright Protection Systems For Access Control Technologies, Docket No. RM 2005-11A (Apr. 3, 2006) (testimony of Sandra Aistars, Time Warner Inc.) at 42-3.

Educators can also obtain clips from sources other than CSS-encrypted DVDs. For example, users can employ the screen shot method for making a digital clip of any motion picture that can be displayed on a television or computer screen. The viability of such alternatives were acknowledged by the Register in 2006: “As the proponents readily admit in response to written questions posed to parties following the hearing, in some cases (*and in non-film or media courses*), *analog copies or other available alternatives may be fully adequate to accommodate the purpose of the use.*” *2006 Recommendation of the Register of Copyrights* at 23 (emphasis added).

⁵ *Pioneer Continues to Meet Growing Demands of DVD Professionals with New DVD-Video Player*, Business Wire (June 7, 2006), available at <http://www.thefreelibrary.com/Pioneer+Continues+to+Meet+Growing+Demands+of+DVD+Professionals+with...-a0146732417>.

In light of the above evidence showing that there are marketplace solutions already in place, DVD CCA believes that the concerns raised by the educators in support for the proposed classes are misplaced.

Finally on this point, DVD CCA notes that permitting circumvention of CSS to enable the creation of clip compilations would expose the CSS technical and legal protection regime to possible undermining for purposes far beyond those proposed in the exemption request. Once the technology is legally circumvented, the ability to limit the scope of the use of the circumvention may well be impossible, thereby undermining the whole system. Further, the exemptions, if granted, would be so overly-broad that it would be virtually impossible to administer. Given that there are existing and potential marketplace alternatives to provide for the uses cited in the requests to enable easy playback of “clip” portions of CSS protected audiovisual content, there is no basis to grant the requests, and DVD CCA requests that they be denied.

Proposed Class: Creating clip compilations from DVDs for educational uses by students.

Initial Round Submissions: 4D, 4F

Summary of Argument for Proposed Class:

Certain professors and members of the academic community have requested an exemption that would permit circumvention of access controls for audiovisual works when circumvention is accomplished for educational purposes by students. Professors argue that students’ inability to do more with clip compilations consistent with the law is restricting educational options for students.

Facts and Argument in Opposition to Proposed Class:

First, the referenced comments propose to expand the current exemption broadly in another direction: to all students. The exemptions, if granted, would confound efforts to administer and police circumvention.

Second, the proponents of the exemptions articulate that in part, the exemption is needed so that students can “become familiar with basic aspects of manipulating visual media” and to move students towards “an audiovisual form of academic presentation.” *See* Comment 4F at 17. Students can achieve such skills in the absence of the proposed exemption, as there is an increasingly large amount of original material available from sources *other* than motion picture studios. For example, Creative Commons is a nonprofit corporation devoted to the facilitation of sharing and building upon the work of others within the confines of copyright law. Using such a resource, a student can access original material and “share, remix, use commercially, or any combination thereof.”⁶ Such sources can provide a student the ability to become conversant in visual media without the need for circumventing access technology such as CSS.

Third, this exemption would also cause widespread confusion among students as to whether a particular use falls under the exemption, and if anything, increase illegal circumvention on college and university campuses. Further, allowing such an exemption would promote confusion about the legality of circumvention technology in

⁶ More information about Creative Commons is available at <http://creativecommons.org>.

general, a result that would impair the integrity of CSS as well as the legal regime of the DMCA. Thus, the proposed exemption should be denied.

V. CONCLUSION

For all the reasons stated above DVD CCA urges the Copyright Office to reject the proposed classes. DVD CCA would be happy to provide further detail about its views and to answer any question that may arise from this submission.

February 2, 2009

Respectfully submitted,

DVD Copy Control Association, Inc.

By: -/S/-

Bruce H. Turnbull
Jaime S. Kaplan
Weil, Gotshal & Manges, LLP
1300 Eye Street NW, Suite 900
Washington, DC 20005
(202) 682-7000 (phone)
(202) 857-0940 (fax)

Counsel to DVD Copy Control
Association, Inc.