

Before the

**United States Copyright Office
Library of Congress**

In the Matter of)

Exemption to Prohibition on)
Circumvention of Copyright Protection)
Systems for Access Control Technologies)

) Docket No. RM 2011-07
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**REPLY COMMENTS OF
MARK BERGER AND GENE ROSOW**

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RE: PROPOSED CLASS OF WORKS 7E

Motion pictures that are lawfully made and acquired from DVDs protected by the Content Scrambling System or, if the motion picture is not reasonably available on DVD or not reasonably available in sufficient audiovisual quality on DVD, then from digitally transmitted video protected by an authentication protocol or by encryption, when circumvention is accomplished solely in order to incorporate short portions of motion pictures into new works for the purpose of fair use, and when the person engaging in circumvention reasonably believes that circumvention is necessary to obtain the motion picture for multimedia e-book authorship.

I. Introduction

As multimedia e-book authors, we are producers and creators who rely on fair use to produce new works of commentary and criticism. American jurisprudence has long recognized the importance of fair use in authorship. As the Register noted in 2010, “[w]hen a motion picture is used for purposes of criticism and comment, such a use is a form of quotation, *long recognized as paradigmatic productive use with respect to textual works*, which is at the core of fair use’s function as a free-speech safeguard.”¹

Like filmmakers, whose reply comment we incorporate by reference², we are currently being harmed by access controls on DVD and digitally transmitted video that prohibit our ability to make noninfringing uses. Our craft and livelihood as multimedia authors requires that we have access to high quality motion pictures that allow subtle and detailed analysis of the motion pictures. No alternative to circumvention can provide this requisite level of quality, and most of the proposed alternatives introduce unacceptable audio and visual distortions that would cripple our ability to assess the work in a scholarly manner.

We therefore urge the Register to recommend that the Librarian of Congress grant the proposed exemption covering Class 7E.

II. CSS-Protected DVDs Are Causing a Substantial Adverse Effect on Multimedia E-Book Authors

We have gone well beyond the required showing for substantial effect in showing how CSS-protected DVDs are harming our ability to make hallmark fair uses. We provide specific examples of the adverse effects including the persons being affected, projects that are being negatively impacted by the DMCA, and what motion pictures are required. In the responsive round of comments, numerous scholars and e-book authors

¹ 2010 Rec. at 50 (emphasis added).

² See *infra* Reply Comment of International Documentary Association and Kartemquin Educational Films, Inc.

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such as Pat Aufderheide, Diane Carson, Elizabeth Coffman, Tony Conrad, and Chiara Ferrari³ have come forward in support of the proposed exemption, and discussed how the DMCA's prohibition on circumvention is causing an adverse effect on their ability to make fair use. Furthermore, the University Film and Video Association (UFVA), the preeminent national association representing film educators and practitioners, wrote in support of our proposed exemption confirming the broad need multimedia e-book authors have to access motion pictures in order to make fair use of this material for scholarly and educational purposes.⁴

DVD CCA alleges that we have failed to “link [the] harm to . . . [our] inability to circumvent CSS technology.”⁵ This statement completely overlooks the well-established fact that virtually all commercially-distributed DVDs are sold with the CSS access control. Thus, for example, when Mark Berger discusses his need for a short clip from *Citizen Kane* on DVD to illustrate how background sound can be used to heighten a the tension of an argument in the foreground, it goes without saying that the commercially-distributed DVD of a well known movie such as *Citizen Kane* is protected by access controls.

DVD CCA also suggests that we must include an explicit description of why Barnet Kellman “ha[s] not yet made use of the work or that CSS prevented Professor Kellman from making use of the work.”⁶ The answer is obvious: because scholars have a reasonable apprehension that to circumvent CSS on DVDs is illegal, any fair use requiring circumvention is necessarily foreclosed. As the filmmakers' reply comment notes, and is well-established in previous filings in this and previous Rulemakings, virtually all commercially released DVDs contain CSS.⁷ DVD CCA's suggestion represents a fundamental misunderstanding of both the legal standard for what constitutes substantial adverse effect and the reality facing e-book authors. The DMCA and the 2011

³ See Patricia Aufderheide, Need for an Exemption to Produce Multimedia E-Books, Responsive Comment No. 500, http://www.copyright.gov/1201/2012/comments/Patricia_Aufderheide.pdf. Diane Carson, Need for an Exemption to Break Encryption to Access Copyrighted Material Under Fair Use, http://www.copyright.gov/1201/2012/comments/Diane_Carson.pdf. Elizabeth Coffman, Need for an Exemption to Excerpt Short Portions of Motion Pictures into New Works for the Purpose of Criticism or Comment; and Circumvention Is Accomplished Solely in Order to Incorporate Short Portions of Motion Pictures into New Works for the Purpose of Fair Use, http://www.copyright.gov/1201/2012/comments/Elizabeth_Coffman.pdf. Tony Conrad, Need for an Exemption to Produce Multimedia E-Books, http://www.copyright.gov/1201/2012/comments/Tony_Conrad.pdf. Chiara Ferrari, Need for an Exemption to Teach Media Students in the Classroom and to Produce Multimedia E-Books, http://www.copyright.gov/1201/2012/comments/Chiara_Ferrari.pdf.

⁴ University Film and Video Association, Re: Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, http://www.copyright.gov/1201/2012/comments/Robert_Sabal.pdf.

⁵ See DVD CCA at 45.

⁶ See DVD CCA at 47 (emphasis added).

⁷ See *supra* Filmmaker Reply Comment, note 17.

NOI define the standard as whether the access control is or *is likely* to have a substantial adverse effect on noninfringing use.⁸ Our showing has met this standard.

III. Factor §1201(a)(1)(C)(i) Favors Granting an Exemption Because No Alternative to Circumvention Can Meet the Scholarly Needs of E-Book Authors

DVD CCA proposes a number of alternatives to circumvention and summarily concludes that these proposals are sufficient for e-book authors.⁹ We explain in detail at Appendix B of the Documentary and Fictional Filmmaker Reply Comment how each of the proposed alternatives either degrades the image and audio quality, distorts the image and audio quality, or imposes a significant cost on proponents.

Those problems, of course, also occur for e-book authors. As scholars who analyze, comment, and critique motion pictures, the degradation and distortion introduced by the proposed alternatives would foreclose our ability to closely evaluate the audiovisual elements of the motion pictures and what they signify for the movie and about society. Mark Berger’s e-book *Listening to Movies* closely analyzes how sound influences and relates to the film’s moving images.¹⁰ To require Professor Berger to record the film using a smartphone would introduce a significant amount of audio distortion that could obscure important but subtle changes in the movies unadulterated sound recording. For example, in Professor Berger’s analysis of *Citizen Kane*, his argument about how the background noises of the “bustling news room” relates to conflict between Kane and a supporter in the foreground could be undermined by the loss of key sounds or the addition of environmental sounds such as echoes or rustling. Additionally, smartphones record only monophonic sound. This completely removes the possibility of any discussion of stereophonic, left-center-right, or 5.1 technologies, and how the spatial aspects of sound presentation influences the perception of images, or how the change in technologies has influenced the use of sound in cinema.

The loss or distortion of visual information could also critically impede our fair uses. For example, in Gene Rosow’s e-book that explores the “interplay between American history and the gangster film genre” he will need to closely analyze key visual information in detail, including movement, clothing, and camera framing.¹¹ However, much of this information could be lost through screen capture’s degradation of image resolution or dropping of frames, and through the color and contrast distortions that video editing software would introduce.

The ability to explore motion pictures in detail is critical to multimedia scholarship, particularly film scholarship. The proponents must be able to access at least DVD-quality material, and no proposed alternative comes close to providing the requisite

⁸ See 17 U.S.C. §1201(a)(1)(C) (“are, or are likely to be ... adversely affected by the prohibition ... in their ability to make noninfringing uses”); 2011 NOI at 60,403 (“the technological measure has had or is likely to have a substantial adverse effect on noninfringing uses”).

⁹ See DVD CCA at 8-15; 48.

¹⁰ See Mark Berger at 9.

¹¹ See Mark Berger at 8.

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levels of quality and fidelity. As a result, this important form of authorship will be severely compromised unless the requested exemption is granted.