

Before the
U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS

In the matter of Exemption to Prohibition on
Circumvention of Copyright Protection
Systems for Access Control Technologies
under 17 U.S.C. § 1201

Docket No. 2014-7

**COMMENTS OF THE ADVANCED ACCESS CONTENT SYSTEM
LICENSING ADMINISTRATOR LLC (“AACS LA”) ON PROPOSED CLASS 1**

[X] Check here if multimedia evidence is being provided in connection with this comment

1. Commenter Information

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Advanced Access Content System, Licensing Administrator, LLC (“AACS LA”), is a cross-industry limited liability company that developed and licenses the Advanced Access Content System technology (“AACS” or “AACS Technology”) for the protection of high definition audiovisual content on optical media, in particular Blu-ray discs (“Blu-ray discs”). The Founders of AACS LA are Warner Bros, Disney, Microsoft, Intel, Toshiba, Panasonic, Sony, and IBM.

2. Proposed Class Addressed

These comments address Class 1 – Audiovisual Works – Educational Uses – College and University Students and Faculty. As set forth in the proponents’ comments filed on February 6, 2014, the exemption requested is as follows:

Audiovisual works embodied in physical media (such as DVDs and Blu-Ray Discs) or obtained online (such as through online distribution services and streaming media) that are lawfully made and acquired and that are protected by various technological protection measures, where the circumvention is accomplished by college and university students or faculty (including teaching and research assistants) for the purpose of criticism or comment.¹

See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 79 Fed. Reg. 73856, 73860 (2014).

This would expand the 2012 Exemption in the following ways – by expanding to cover all audiovisual works (as opposed to motion pictures), by not limiting the use to “short portions”, and by including uses beyond those in classes that require close analysis of the video.

Proponents’ Comments at 23.

3. Overview

AACS LA opposes the grant of an exemption for the circumvention of AACS technology for the proposed class because the evidence does not warrant the creation of an exemption. The continued prohibition against the circumvention of AACS has not resulted in substantial adverse effects on the ability of the proposed class to make use of copyrighted works. First, the amount

¹ Although this is the proposed exemption as stated in the Copyright Office’s Notice, DVD CCA notes that the proponents of the exemption have spoken in terms of the exemption being solely “for the purpose of criticism or comment.” See Comment of Peter Decherney, Michael X. Delli Carpini, American Association of University Professors, College Art Association, International Communication Association, Library Copyright Alliance, and Society for Cinema and Media Studies (“proponents”). Other comments in support of the proposed Class 1 exemption were filed by others, but those from the proponents were the most extensive and developed. Accordingly, except as otherwise specifically indicated, the DVD CCA comments herein are directed at points made in the proponents’ filing.

of Blu-ray exclusive content is *de minimis*. Second, alternatives to circumvention mitigate any possible harm. Most importantly, the harm to the work in the high definition format would outweigh the possible harm articulated by proponents. Consequently the exemption request should be denied.

4. Technological Protection Measure(s) and Method(s) of Circumvention

These comments specifically address the proposed circumvention of the Advanced Access Content System (“AACS”) as licensed by AACS LA. AACS has been recognized as a TPM, both by the Register of Copyrights in this proceeding previously, and by courts in the United States. *See AACS LA v. Shen*, 1:14-cv-01112-VSB (S.D.N.Y. Mar. 16, 2015).

The proponents of the exemption covered by Class 1 have referred generally to circumvention software.² AACS LA notes that in the AACS/BD situation, such software is offered solely as a commercial product sold by the proprietor of each type of circumvention software, for prices ranging from approximately \$50 to 100, often with annual fees for updates.

5. Asserted Noninfringing Use

A threshold question before determining whether any exemption is warranted is whether the proposed use is indeed noninfringing. An affirmative finding is of little consequence as all possible exemptions are premised on facilitating the allegedly noninfringing activity.

² “The most common method of circumvention for educational use is through software programs that disable the various TPMs referenced above. These programs are able to rewrite the desired portion of a protected work with the exact same frame rate, preserving content and maintaining the same resolution. The techniques used may differ widely based on the experience and sophistication of the student or faculty attempting to use the copyrighted work for any of the fair uses described below.” Proponents’ Comments at 4.

I. Educational Use is Not Fair Use *Per Se*

The proponents of the exemption assert that the uses would be “fair uses” and, hence, noninfringing. While it is certainly the case that some educational uses are fair uses, the mere fact that a use is educational in nature does not render it necessarily a fair use. The Copyright Office has produced a document containing source materials relevant to fair use in the education setting³ which illustrates that while the general principle that educational use may be fair use, especially when the particular use is undertaken by an individual (whether educator/teacher, librarian, or student), it remains true that a finding of fair use still requires compliance with certain limits. Put differently, the mere fact that a use is educational does not obviate the need for a full analysis of the four familiar fair use factors. As noted previously, a proper fair use analysis is performed on a case-by-case basis in view of the facts of a particular circumstance. In the request here, the proponents treat educational uses as *per se* fair by, for example, not limiting their request to short segments of works that they intend to copy. This begs the question of whether at least some of the uses in their request are fair uses, in fact and law.⁴ More importantly, however, even if any exemption were to be limited to ensure that the uses authorized are fair uses, there is no need for proponents to engage in circumvention in order to facilitate those uses since, as described below in greater detail, there are ample alternatives to enable those uses.

³ U.S. Copyright Office, *Reproduction of Copyrighted Works by Educators and Librarians*, Circular 21, August 2014.

⁴ *See, e.g.*, Circular 21 at 6 (discussing guidelines for brevity).

A. Evidence Does Not Support an Exemption for “Any Educational Use”

Each of the uses cited by proponents in their submission involve the use of clips for the purposes of criticism or commentary on the underlying work.

- Stephanie Brown described an assignment requiring the use of sequential still images from a film in order to draw inferences from the changes
- Dr. Phil Rhea uses clips to illustrate complex cellular processes in his microbiology course.
- An anonymous speaker described using scenes from the BBC series *Planet Earth* to study avian mating rituals.

Each of these uses involve criticism or comment on the underlying work and could constitute noninfringing activity provided they do not take too much, do not take the heart of the work, and are otherwise sufficiently transformative.

To the extent proponents are requesting an exemption for “any educational use” the evidence does not support a finding that such a broad definition of the class could constitute noninfringing activity. Despite proponents’ attempts to conflate the two, educational use does not necessarily equal fair use. A determination of fair use requires analysis of the four statutory factors enumerated above, and the 2012 report rejected a similar request to expand the exemption for DVDs. *See* 2012 Report at 140.

6. Asserted Adverse Effect

The proponents fail to demonstrate the requisite “substantial adverse effects”. The Copyright Office has made clear in prior recommendations that “substantial” means such adverse effects cannot be *de minimis*, purely speculative, or supported only by anecdote and conjecture. *See* 2012 Report at 7-8. The Copyright Office has also stated that mere convenience is no justification for granting an exemption when there are viable alternatives. *Id* at 8.

II. Fair Use Does Not Entitle Users to Optimum Image Quality

Fair use does not entitle a user of the copyrighted work to high quality images of the work. In fact, courts confronted with some of the same allegedly noninfringing activity have clearly stated that fair use is satisfied even when beneficiaries of the doctrine have not obtained the quality of images that they desire.

In *Universal City Studios v. Corley*, 273 F.3d 429 (2nd Cir. 2001), the Second Circuit examined fair use claims premised on the user's ability to make use of the work in its original DVD format. The defendants alleged that the prohibition against circumvention interfered with their ability to make fair use of the work on the DVD. While noting that all the examples proffered involved users being able to digitally manipulate the content on the DVD, the court specifically addressed the example of a student making use of DVD content to create a documentary film (i.e., the student wanted to insert the DVD images directly into the documentary film). The court wrote, "We know of no authority for the proposition that fair use, as protected by the Copyright Act, much less the Constitution, guarantees copying by the optimum method or in the identical format of the original." *Corley*, 273 F.3d at 459.

Further, the court found the alternatives to circumvention were acceptable to achieve fair use. The court found that the alternatives to circumvention resulting from the prohibition did not "impose even an arguable limitation on the opportunity to make a variety of traditional fair uses of DVD movies, [which the court-identified alternatives included] even recording portions of the video images and sounds on film or tape by pointing a camera, a camcorder, or a microphone at a monitor as it displays the DVD movie." *Id.* The court concluded that the DMCA, which may limit the ability to make use of a work in a preferred, even technologically superior, manner did not frustrate fair use. According to the court, "Fair use has never been held to be a guarantee of

access to copyrighted material in order to copy it by the fair user's preferred technique or in the format of the original.” *Id.*

Other courts examining whether fair use warranted use of the DVD content to make use of the work agreed with *Corley*. In *US v. Elcom Ltd.*, 203 F. Supp. 2d 1111 (N.D. Ca 2002), the court recognized that fair use did not require the use to be “technologically convenient” as the court noted that those seeking to circumvent provided “no authority which guarantees a fair user the right to the most technologically convenient way to engage in fair use.” *Elcom*, 203 F. Supp. at 1131. The court concluded that that even if the user could not “[cut and paste] from the existing digital media. . . fair use is still available.” *Id.* Furthermore, fair use does not even entitle those who would circumvent technological protection measures the right to make use of a digital copy at all. See *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1102 (N.D. Ca. 2004) (“users can copy DVDs, including any of the material on them that is unavailable elsewhere, by non-digital means”)

III. Alternatives to Circumvention Provide Sufficient Quality for Educational Purposes

For the educational purposes claimed by proponents, images recorded from a DVD or from video capture are sufficient in that they provide a high quality image capable of expressing whatever commentary the educator is attempting to convey. Educators desire to use the best quality content in the most convenient manner available does not mean it is essential to their pedagogical purpose. As demonstrated below, there are numerous examples of the high quality images created with alternative technology, in each of these examples, the video does not stutter and the pictures are clear and void of pixilation.

IV. Consumers Have Not Abandoned Standard Definition

Notwithstanding assertions that students' attention will wander unless some of the video is in high definition form, viewers continue to prefer standard definition to higher definition as evidenced by the fact that the DVD market continues to be larger than the Blu-ray market. In 2014 at least one hundred DVDs sold 500,000 copies while only thirty-eight titles on Blu-ray broke that threshold. This is the case even though Blu-ray Disc players have significantly dropped in price over the past few years and the cost difference between DVD and Blu-ray Discs has largely evened out, with Blu-ray Discs only costing a few dollars more per disc. (See <http://www.the-numbers.com/home-market/dvd-sales/2014> <http://www.the-numbers.com/home-market/bluray-sales/2014>).

A. No Support for the Assertion that Lower Quality Video Biases Students.

Proponents' claim that the use of lower quality videos in classes biases students and causes them to afford less respect and importance to those events viewed in lower quality is meritless. This is precisely the kind of anecdotal and speculative harm that the Copyright Office has warned it will not consider in determining whether an exemption is appropriate. This claim would suggest that students afford less importance to the events of the Civil Rights Movement or World War II because they were not in color or even in standard definition. Contrary to such a result, the clips of marches, speeches, dogs, and fire hoses remain as powerful today even if they are not in high definition. When students understand the ideas behind the images, and the images are placed in context, the relative quality of the images they see cannot reasonably deter the students' understanding of the subject matter.

7. Alternatives to Circumvention

I. Limited Renewed Exemption to Circumvent DVDs

AACS LA is aware that the DVD Copy Control Association is not opposing granting the same Class 1 exemption as was authorized in the 2012 Ruling. If the Librarian grants such an exemption again, the limited authorized circumvention of DVDs would be a prime alternative to circumventing AACS protected Blu-ray discs for the uses covered by such an exemption. Short clips from DVDs may then be used for the purpose of comment or criticism in college and university settings where close analysis of the video is essential. Access to the optimum quality content is not necessary in order to satisfy fair use, and, in any event, most of the examples provided in the proponents' comments relate to DVD quality.

II. Video Capture Recording of DVD Playback Is an Alternative to Circumvention

Video capture software has developed significantly over the past three years into an effective tool that allows users to appropriate high quality, broadly compatible images and video from DVD playback which, as the Register stated in the 2012 Report, are suitable for all uses not requiring close analysis. The technology is constantly improving, making it easier than ever for anyone to create their own content.

The rapid advance of technology has resulted in more effective, affordable, and accessible video/screen capture software. These tools have improved so much that some users are going so far as encouraging their use on "how to vid" blogs and explaining that they provide a suitable alternative to circumvention. Video capture programs such as Greenshot, VLC, Snagit and WM Capture are specifically designed for high-speed video/screen capture that results in high quality video, and they are continually releasing upgraded versions that allow for better resolution and capture technology.

The following table lists the cost of a variety of video/screen capture software:

Product	Price
Camstasia	\$299.00 (free trial)
Movavi	\$49.95
Snagit	\$44.95
WM Capture	\$39.95
EzVid, CamStudio, Jing	FREE

The recent shift in technology companies to offer their software on a free/open source basis has fostered the availability of easy-to-use professional grade video/screen capture and editing tools available to the public at little to no cost.

Example: The Matrix Reloaded

In the submitted clip of *The Matrix Reloaded*, WM Capture Software is used to record a frenzied fight sequence. The resulting high quality video captures all the details of the DVD, including a barrage of bullets and dizzying martial arts action. The choppy and pixilated images proponents have criticized in the past are simply no longer present and, hence, the criticism of the alternative is no longer present. This quality of images is available to creators from software that retails at \$39.95. The clip is a testament to how far video capture software has come in the past three years, representing an entirely sufficient alternative to circumvention.

Example: The Soviet Story

The improvement of video capture technology allows educators to use the software in situations where the source material is not of the highest quality, as with archival or documentary footage. In this clip from the 2008 documentary *The Soviet Story*, we see archival footage used to illustrate scenes from the 1932 Soviet famine. The first image shows a young girl standing

hungry next to a field full of grain. As the narrator describes the harsh conditions of the famine and the tactics the Soviets used to keep people out of the grain reserves, we hear a loud gunshot. In the next image, the same girl is lying dead on the ground. Because of the poor quality of the source material, past video capture software may not have been able to show the distinction between the two photos. With the technology that is available today, the details are clear on the screen and retain the impact intended by the documentarian.

A. Permits Users to Make Use of High Quality Images

Video capture technology has advanced significantly in the past few years, allowing for high quality reproductions of whatever the user sees on the screen. The pixilated and choppy images that proponents of 1201 exemptions complained of in past rulemakings are simply no longer an issue when using the advanced software. New versions of capture software use a unique high-speed capture technology to process video data faster than ever, and enable high-quality playback of even the most complex, full-motion videos.

Example: Roxie Hart on the Witness Stand

It is asserted that without the benefit of the highest quality video that students will be unable to properly analyze small details such as facial expressions in films. This clip from the film *Chicago*, produced using video capture software with a DVD source, demonstrates that this is not the case. By playing the clip first at full speed we show the context of the scene, a woman on trial for murder. In going back and pausing on certain scenes we can see the full range of emotions the character goes through on the stand. She starts with a plaintive face pleading her case to the court, then she hikes up her skirt for the benefit of the jury, and finally we can see that she breaks down in tears as the prosecutor dramatically questions her. The performance is highly

dramatic, and through the use of video capture software, students can closely analyze the subtle choices in performance made by the actress.

Example: Illustrated Biology Lecture

Audiovisual demonstrations can be useful teaching aids, even outside the courses normally requiring close analysis of video. By using a video representation of a process in a step-by-step format students can gain a deeper appreciation of the natural phenomena they encounter in the classroom or laboratory. This clip, taken from a DVD using video capture software, illustrates a cellular process resulting in bacterial bioluminescence. The clip illustrates this process by creating brightly colored representations of the ribosomes, genes, RNA, and other proteins and showing how they interact with each other at the smallest scale. The clip then shows the scale of the process by zooming out to show the process occurring many times within the same cell, and then zooming out even further to show how the cells interact when they reach a certain density, producing bacterial bioluminescence. Circumvention is clearly not necessary to create these kinds of visual aids.

Example: Birds of New Guinea

This clip uses video capture software to capture scenes from the DVD version of the BBC's *Planet Earth* series. The clip shows the mating dances of New Guinean Birds-of-paradise. The high level of detail in this video shows the first bird hanging upside down from a tree, shaking its bright blue, black, and gray plumage. Each bird shown in the clip makes its own unique display, whether it's a swoop of the head, a ruffling of feathers, or even a display that makes the bird appear to change shape entirely, in an attempt to secure a mate. These are the details that professors utilize in order to make a description of animal behavior come to life for

their students, and video capture software technology allows them to do that without circumvention.

Example: The Wizard of Oz

The submitted clip demonstrates that video capture software enables close analysis required by film studies. In this clip from *The Wizard of Oz*, the quality of the video capture is so high that viewers can see “behind the scenes” of the film. In particular, a wire can be seen connecting to an off-screen operator controlling the Cowardly Lion’s tail. Video capture software allows educators to demonstrate these details to their students without circumvention.

B. Video Capture Software Allows Educators to Create Compilations That Save Classroom Time

Video capture software permits educators to create a compilation of scenes. The programs record what is displayed on screen and can be started and stopped depending on the educator’s preference. Thus, an educator can prepare a compilation with as many scenes as desired and all the scenes will be in one convenient video. This alleviates any need to handle multiple DVDs during the instructional period.

Example: Compilation of Films Depicting Medieval Life or Scenes from Shakespeare

The submitted compilation, made using video capture software, features clips from various motion pictures representing either medieval life or scenes from the work of Shakespeare. The first clip uses several scenes from the film *A Knight’s Tale* showing the characters’ preparations for a jousting tournament. The second clip shows various scenes from a 1999 version of Shakespeare’s *A Midsummer Night’s Dream* and demonstrates how an instructor can scroll through an entire movie in the course of making a compilation using video capture software, even without pausing the software, going back and forth as necessary. The final clip

shows scenes from an adaptation of *Hamlet*. Again, the clips demonstrate that an educator can utilize video capture software with DVD playback in order to create an effective compilation.

III. **Smartphone and Professional Camera Recording**

Phone and camera technology advances at such a rapid pace that what we considered quality three years ago is now totally obsolete. Today, many smartphones are capable of shooting HD video, and some even shoot in 4K resolution. Recording on a phone or other digital camera now provides clear, high quality video that can easily be used as an alternative to circumvention. This is especially suitable for content that is available only on Blu-ray, though to the extent any such content exists, we believe it is *de minimis* and should not impact this proceeding.

8. **Statutory Factors**

I. **Factor (iv) – Any Exemption Allowing for Circumvention of AACS Would Harm the Blu-ray market.**

The continued growth of the market for Blu-ray discs depends on the continued protection of AACS. Any Blu-ray disc that has been circumvented results in that perfect copy of the work being “in the clear” (i.e., free of any technical restrictions limiting copying or redistribution of the work). As that copy of the work is now in the clear it can be freely copied and redistributed – perfectly. The more that the work is available for free from unknown third party sources or even from family and friends, the less attraction there is for consumers to actually purchase a copy of the work in any other format or part of any offering of an online service. In the absence of protection, physical media distribution of HD content will be undermined as a business model. Even nine years after the introduction of Blu-ray discs, its older brother, DVD, continues to outperform it in the marketplace by a significant margin. As it

stands today, Blu-ray disc competes for the high definition video market against an array of distribution models. Given the current market reality, any weakening of AACS could do great harm to the use-facilitating business model and damage efforts to bring further high definition media formats to market.

Conclusion

An exemption to circumvent AACS on Blu-ray discs is unwarranted. The alternatives to circumvention – any exemption renewed to circumvent CSS on DVDs and video capture recordings of DVD playback – completely mitigate any possible adverse effects resulting from the continued prohibition against the circumvention of AACS technology. Blu-ray exclusive content remains *de minimis*. DVD content is ubiquitous, and the number of titles distributed on DVDs far exceeds those titles released on Blu-ray discs. But college students and professors can take advantage of other alternatives to circumvention, such as smartphone recordings, even to obtain the use of Blu-ray exclusive content.

Finally, an exemption is still not warranted even if the alternatives to circumvention do not mitigate completely what must otherwise constitute substantial adverse effect. The statutory analysis, namely the harm done to the work as distributed in high definition on Blu-ray discs and other distribution means, greatly outweighs the alleged harm that college students and professors may suffer because they cannot make use of the work in high definition. The legal precedent clearly states that fair use is not harmed just because the user cannot obtain use of the work at their desired level of quality. Consequently, any request for an exemption to circumvent AACS technology on Blu-ray discs be premised on proposed class 1 must be denied.