

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 DVD COPY CONTROL
ASSOCIATION (“DVD CCA”) ON PROPOSED CLASS 1**

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1. Commenter Information

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The DVD Copy Control Association (“DVD CCA”) is a not-for-profit corporation with its principal office in Morgan Hill, California. DVD CCA licenses Content Scramble System (“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.

2. Proposed Class Addressed

These comments address Class 1 - Audiovisual Works – Educational Uses – Colleges and Universities. As set forth in the Federal Register notice of December 12, 2014, the proponents of the exemption have stated it as applying to:

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).¹

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

3. Overview

Although DVD CCA does not object to issuance of a new three-year exemption under the same terms and conditions as were contained in the 2012 exemption applicable to this class, DVD CCA does object to any expansion of the exemption, including as requested by the proponents, and requests that the Librarian reinforce the conditions applicable to any exemption

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.

that may be granted (including the renewal of the exemption on the same terms and conditions that are applicable to the current exemption, as granted in 2012).

DVD CCA objects to the following proposed expansions of the existing exemption: (1) that the use may be *any educational use* “accomplished by college or university students or faculty” rather than uses limited to criticism or comment (although see footnote 1, above); (2) that the use is not limited to circumstances where “close analysis” of the video is necessary; (3) that the use is not limited to “short portions” of the video; (4) that the use is not limited to situations where “circumvention is necessary because reasonably available alternatives, such as noncircumventing methods or using screen capture software as provided for in alternative exemptions, are not able to produce the level of high quality content required to achieve the desired criticism or comment on such motion pictures.”

The reasons for DVD CCA’s position as outlined above are: (1) the expansion of the class as described above would have a substantial risk of including uses that are not clearly “fair uses” (or other noninfringing uses); (2) the proponents have failed to meet their evidentiary burden to establish that circumvention of CSS is necessary in order to avoid adverse effects on the allegedly noninfringing uses of the content protected using CSS, as those uses would be included in the expanded exemption; and (3) the alternatives to circumvention of CSS are more than sufficient to satisfy the additional uses that would be included in the expanded exemption.

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

These comments specifically address the proposed circumvention of the Content Scrambling System (“CSS”) as licensed by DVD CCA. CSS has long been recognized as a TPM by the courts and the earliest of the Triennial Rulemakings.²

The proponents did not state how they would accomplish circumvention.

5. 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.

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

² See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64556, 64568 (2000).

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

the request here, the proponents treat educational uses as *per se* fair by, for example, not limiting their request to short portions 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 because, as described below in greater detail, there are ample alternatives to enable those uses.

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

To the extent proponents are requesting an exemption for “any educational use” the evidence does not support that such a definition 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 Recommendation rejected a similar request to expand the exemption. *See* 2012 Recommendation at 140.

6. Asserted Adverse Effect

The proponents fail to demonstrate the “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 Recommendation at 7-8. The Copyright Office has also stated that mere convenience is no justification for granting an exemption as long as there are viable alternatives. *See* 2012 Recommendation at 8.

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

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 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 (2d 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' ability 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* at 459.

Further, the court found the alternatives to circumvention were acceptable to achieve fair use. The court found that the alternatives to circumvention 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 *U.S. 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. 2d 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”).

A. Failure to Identify CSS-Protected Works.

Throughout their comments, proponents of the proposed exemptions fail to identify any particular CSS-protected works that they have made use of under the current exemption (or for that matter that they desire to make use of in the next three years). Historically this rulemaking has required such a showing. See 2006 Report at 9. The failure to do so in this case indicates that any future need for the proposed exemptions is merely speculative.

B. Video Capture Quality Is Sufficient for Educational Purposes

For the educational purposes claimed by proponents, images recorded from video capture software 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.

7. Alternatives to Circumvention

I. Video Capture Recording 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 Recommendation, 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.⁵ Programs like 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.

⁵ See <http://fanvidbasics.tumblr.com/post/107500411530/ive-decided-i-want-to-start-making-fan-videos-but>

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 that proponents have criticized in the past are simply no longer present. This quality of images is available to remix 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 even 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 can

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. Video Capture Software Permits Users to Make Use of High Quality Images

Video capture technology has advanced significantly in the past three 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 play back of even the most complex, full-motion videos.

Example: Birds of New Guinea

This clip uses video capture software to record 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 so without circumvention.

Example: Roxie Hart on the Witness Stand

Proponents assert 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 recording DVD playback, 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.

B. Video Capture Software Allows Educators to Make Compilations

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 needs of the compilation. Thus an educator can prepare a compilation to have as many scenes as necessary to complete his lesson, and have them all in one convenient video, even without the use of separate editing software.

Example: Compilation of Films Depicting Shakespearean or Medieval Life.

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.

8. Statutory Factors

I. Factor (iv) - Any Exemption Broader than Past Narrowly Tailored Exemptions to Circumvent CSS Technology Would Harm the DVD Market

Past exemptions recommended by the Register have been narrowly tailored to strike a balance between the noninfringing activity and the DVD format, which to date remains a successful digital distribution channel for motion pictures. Creating a broad new exemption for any educational use is not warranted and would otherwise risk the DVD distribution model.

Any DVD that has been circumvented results in a perfect copy of the work being “in the clear” (i.e., free of any technical restrictions limiting copying or redistribution of the work) and as perfect as the original. As that perfect copy of the work is now in the clear it can be freely copied and redistributed. 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.

The DVD format remains widely popular notwithstanding the advent of high definition format offered on Blu-ray discs and the online services with standard and high definition offerings. Whether it remains available to consumers, particularly those slow to adopt to the more expensive high definition formats will depend upon copyright owners’ confidence in the format, particularly as they examine their increasing opportunities in the high definition market – and the more robust content protection technologies developed for that market. An overly broad exemption could hasten business decisions to abandon the DVD market sooner for the greater security of the high definition market.

II. Factor (v) – The Librarian Should Curb Abuse of the Exemption

In granting any exemption for university and college professors and students, including the renewal of the current exemption, the Librarian should consider how best to curb the abuse of the exemption that is demonstrated in the proponents’ proffered evidence. Proponents’ own evidence of past usage of the current exemption demonstrates that professors and students have failed to adhere to the limitations in the current exemption. In 2012, the Librarian of Congress promulgated a rule allowing the circumvention of CSS only when alternatives proved insufficient for the purposes of close analysis to achieve criticism and comment on the work. In all other cases, video capture technology was found to be “sufficient for uses that do not require

close analysis”. The proponents’ submissions demonstrate that the strictures of the current exemption are widely ignored for no better reason than convenience, despite the improvement of video capture technology.

Further, in the 2012 Recommendation to the Librarian, the Registrar cautioned those who would avail themselves of the exemption:

[U]sers of the limited exemptions should be prepared to defend their activities in light of the alternatives as they exist at the time of their use of the exemption, including any further innovations in screen capture or other technologies that may produce higher-quality results than are obtainable as of this Recommendation.

2012 Recommendation at 140. All except a single proffer of use failed to mention how or why video capture software proved inadequate for the intended use. Thus professors disregarded the Register’s warnings as much as they disregarded the limitations of the exemption.

A. Abuse of the Current Exemption

The current exemption requires that circumvention of CSS be only for close analysis, when video capture software cannot provide the necessary quality to achieve the desired criticism or comment. Proponents’ examples demonstrate circumvention to be the first and only resort professors went to in order to make use of copyrighted works. Many of the educators quoted focus on the benefits of adding audiovisual works to their curriculum, but few of the professors cited could articulate reasons for needing the high-quality images available through the circumvention of CSS in courses covering disparate fields, from Ethnomusicology to Medieval Literature. Their justifications for circumvention included providing visual context for world music, and showing film representations of medieval life. The justifications for circumvention do not satisfy the requirements of the current exemption.

1. Circumvention is Not Permissible Merely to Save Classroom Time.

Circumvention is no longer permissible merely to save classroom time. For example, one film professor interviewed stated that she primarily used clips because scrolling through films to find the right place wasted valuable class time. Saving class time is insufficient to justify circumventing DVDs as the current rule requires close analysis. Instead of circumvention, professors could have availed themselves of video capture software to create a compilation of clips.

Conclusion

Although DVD CCA does not oppose granting a new three-year exemption under the same terms and conditions applicable to the exemption granted in 2012, DVD CCA does object to any proposed expansion of an exemption to include “any educational uses”. Such an expansion would encompass uses that are not limited in scope or limited to the close analysis of film for criticism or comment. Proponents have plainly failed to argue that they have suffered any substantial adverse effects from their inability to circumvent CSS in order to make noninfringing use of copyrighted works. Additionally, the alternatives to circumvention are even more robust now than three years ago when the Register recommended that circumvention only be permitted in situations where close analysis demanded it. In consideration of all these factors, DVD CCA requests that the Copyright Office deny proponents proposed exemption.