

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 2**

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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 2 – Audiovisual Works—Educational Uses—Primary and Secondary Schools (K–12). As noted in the Copyright Office’s notice, the proponents seek

an exemption that enables educators and students in grades K–12 . . . to ‘rip’ encrypted or copy-protected lawfully accessed audiovisual works used for educational purposes.

See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 79 Fed. Reg. 73856, 73861 (2014).

3. Overview

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 for K-12 educators. That sufficiently narrowly-tailored exemption permitted K-12 educators to circumvent CSS on DVDs when the use of the motion picture was for the purpose of criticism or comment on the motion picture and when such criticism or comment could only be achieved through the use of high quality images. DVD CCA does however object to any expansion of the exemption that would permit an exemption for any other educational purposes or extend the exemption to K-12 students.

DVD CCA further requests that the Librarian reinforce the conditions applicable to any exemption that may be granted (including the renewal of the K-12 educators’ exemption on the same terms and conditions applicable to the current exemption, as granted in 2012).

Specifically, any exemption would adhere to the wording codified in the regulation:

Motion pictures on DVDs that are lawfully made and acquired and that are protected by the Content Scrambling System when circumvention is accomplished solely in order to accomplish the incorporation of short portions of

motion pictures into new works for the purpose of criticism or comment, and where the person engaging in circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use in the following instances:

37 C.F.R. § 201.40 (2012).

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.¹

The proponents of exemption covered by Class 2 state that there is “de-encrypting software.” Proponents’ Comments at 3.

5. Asserted Noninfringing Use

A. 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 setting,² 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

¹ See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64556, 64568 (2000).

² U.S. Copyright Office, Reproduction of Copyrighted Works by Educators and Librarians, Circular 21, August 2014 (hereinafter “Circular 21”).

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 the request to short segments of works that they intend to copy. This begs the question whether at least some of the uses in their request are fair uses, in fact and law.³

More importantly, 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. As described below in sections 6 and 7, there has been no substantial adverse effect on the allegedly noninfringing uses as a result of the prohibition against circumvention. There are ample alternatives to circumvention that enable these noninfringing uses. Consequently, there is no need for the exemption from the prohibition against circumvention in order to allow the users to be able to make any of the described noninfringing uses.

B. Evidence of Proponents' Use

Educational Use: Proponents state that educators and students use “film clips for a wide range of teaching and learning purposes characterized broadly as educational use.” Comments at 3. These uses are not limited to criticism and comment. *Id.* The proponents then go on to describe what proponents termed as “student-created media projects.”

Film Analysis: Proponents describe how teachers and students may make use of motion pictures for film analysis.

Compilations of Clips: Proponents describe (a) how teachers create compilations of clips to facilitate classroom instruction and (b) how teachers and students can create “customized

³ *Id.* at 5-7; *see also Encyclopedia Britannica Educational Corp v. Crooks*, 542 F. Supp. 1156 (W.D.N.Y. 1982) (holding that the wholesale copying of educational broadcast programs for use in classrooms was not fair use).

compilations for other educational purposes” such as instructional uses and the development of students’ critical thinking.

Prior exemption proceedings have recognized that (1) film analysis, which would involve criticism and comment on the underlying film and (2) the creation of a compilation of scenes, which would save classroom time, may constitute noninfringing use. *See* 2012 Recommendation at 139-40, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68472 (Nov. 27, 2006) (Final Rule) (establishing an exemption for film professors to create compilations).

Prior exemption proceedings have also found a generalized “all other uses for educational purposes,” as requested by proponents, lacks sufficient description to determine whether any possible activity, which could claim educational purpose, is indeed noninfringing.⁴ 2012 Recommendation at 138. Proponents have specifically referred to student-created media projects as falling within this broad category of use. DVD CCA would also acknowledge “customized compilations” created by teachers for instructional use and those created by students to develop their critical thinking skills as possible other examples of educational purpose.

Notwithstanding proponents’ descriptions of the three activities that could qualify as uses for educational purposes, a proposed class for “any educational uses” is too broad. Even attributing the three descriptions of activities to “any educational uses,” far too many undescribed uses are possible – none of which of course are described here for the purpose of the four fair-use factors analysis.

⁴ Proponents also use terms like “a variety of educational uses” and “a wide range of teaching and learning purposes” to describe the uses for which they desire an exemption to circumvention. These vague descriptions, without any supporting examples do not constitute sufficient evidence or fair use analysis.

Even narrowing the scope to the described activities, there is insufficient basis to determine that these activities constitute noninfringing uses. In order to show that the proposed uses are noninfringing, proponents must provide enough context so that the Register of Copyrights may conduct an evaluation of the four fair use factors. This analysis requires a discussion, *inter alia*, of the nature of the proposed use, the amount of the underlying works they would use, and how such use would affect the market of the original work. Consequently, no determination of noninfringing use is possible even for the three proposed activities that are scantily described in the proponents' filing.

6. Asserted Adverse Effects

Proponents have failed to demonstrate substantial adverse effects beyond those addressed by the current exemptions. 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. 2012 Report 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. *Id.* at 8.

I. 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' 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*, 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 *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. 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”).

II. K-12 Students Have Suffered No Harm

A. Evidence Shows, Students Are Making Use of Works

Examples included in proponents’ comments show that K-12 students are currently making use of works for purposes allowed by the current exemption, and are not suffering an adverse effect. Proponents cite students’ use of copyrighted material in the production of videos for National History Day. They also point to Scott Zabielski, the winner of a Super Bowl Advertisement contest, who credited his accomplishment to video editing and training he received as a high school student. These examples demonstrate that students are successfully gaining the necessary video skills without the need for an exemption.

The only suggestion of harm resulting from the prohibition is that the students felt a diminished sense of pride due to the inability to make use of the higher quality images of Scooby Doo. While diminished student pride is unfortunate, it does not rise to the level of a substantial adverse effect when high quality video and images could have been obtained through video capture software.

A. Alternatives to Circumvention

I. Alternatives to the Circumvention of CSS Mitigate Any Harm

A. Video Capture Recording of DVD Playback

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. The technology is constantly improving, making it easier than ever for anyone to create their own content.

1. The Changes to Video Capture Software

The rapid advance of technology has resulted in more effective, affordable, and accessible video capture software. Programs like Greenshot, VLC, Snagit and WM Capture are specifically designed for high-speed video capture that results in high quality video, and they are continually releasing upgraded versions.

2. Video Capture Software Is Affordable

The following table lists the cost of a variety of video capture software.⁵

Product	Software Type	Price
Camtasia	Video Capture	\$299.00 (free trial)
Movavi	Video Capture	\$49.95
Snagit	Video Capture	\$44.95
WM Recorder	Video Capture	\$39.95
EzVid, CamStudio, Jing	Video Capture	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.

3. 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

⁵ See <http://video-capture-software-review.toptenreviews.com/> for list of top rated software and their cost

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.

The submitted video featuring the movie *Chicago* exhibits the ability of video capture to produce high quality images. 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 the costumes, gestures, and facial and emotional expressions are all clear to the viewer and allow for a close analysis in the classroom.

More importantly high quality video is not limited to the most expensive products. 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.

4. Video Capture Software Allows 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 educator's preference. Thus, an educator can prepare a compilation with as many scenes as desirable and all the scenes will be in one convenient video. This alleviates any need to handle multiple DVDs during the instructional period.

a. 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.

8. Statutory Factors

I. Factor (iv) - Any Exemption Broader than Past Narrowly Tailored Exemptions to Circumvent CSS Technology Would Threaten Harm to 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 the most successful digital distribution channel for motion pictures. Broadening the exemption any further 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). As the 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. Consequently, any exemption should remain narrowly tailored as a better balance to enabling the noninfringing activity while not unnecessarily threatening the DVD distribution model.

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

In granting any exemption for any part of Proposed Class 2, specifically renewing the current exemption for K-12 educators, 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 K-12 educators 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". 2012 Recommendation at 140. The proponents' submissions demonstrate that the strictures of the current exemption are widely ignored for no better reason than convenience, and no adherence made despite the improvement of video capture technology.

Further, in the 2012 Report 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. None of the educators explained why video capture software was insufficient.

A. Circumvention Become Impermissible -Merely to Save Classroom Time.

Proponents describe a Minneapolis high school teacher circumventing DVDs (and possibly even Blu-ray discs) to create a compilation of scenes from the works of Shakespeare. *See* Comments at 4. 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. *See* 2012 Recommendation at 140. It says nothing about circumventing to create a compilation of clips for the purpose of saving classroom time. (However, such a compilation could result from circumvention if the use was for the purpose of criticism and comment which could only be achieved through close analysis.) Consequently, circumventing DVDs for the sole purpose of creating a compilation to save classroom time is not permissible under the current exemption.

B. Students May Be Engaged in Circumvention

Proponents admit that students are creating their own clips from motion pictures.

As part of their formal learning elementary and secondary students sometimes engage in creating transformative content using motion picture excerpts. These projects are often designed for authentic audiences including parents, peers and members of the local community and thus students have an authentic need for high-quality source material.

Comments at 4. Proponents also note in an assignment comparing characters in the book, *the Great Gatsby*, to the motion picture, *Chicago*, students are creating clips.

In this assignment, when students have the ability to create clips, they access and use specific details from the films that support close reading and critical analysis through activities that include comparison and contrast.

Comments at 4. To the extent that these clips come from DVDs, then circumvention is not authorized. To the extent that the clips were recorded through video capture software, then it evidences that there was no harm due to the lack of an exemption applicable to students.

Conclusion

DVD CCA does not object to the narrowly tailored exemption created in the last proceeding. It should be renewed on the same terms and conditions as approved previously. Most importantly, the Librarian should reinforce that users need to be prepared to defend their decision to circumvent, particularly in light of the current capabilities of video capture software.