

*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 (“AACSLA”) ON PROPOSED CLASS 5**

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

## **2. Proposed Class Addressed**

These comments address Class 5 – Audiovisual Works – Derivative Uses – Multimedia E-Books. As set forth in the Federal Register Notice of December 12, 2014, the proponents of the exemption have stated it as follows:

An exemption “that permits authors of multimedia e-books to circumvent Content Scramble System (“CSS”) on DVDs, Advanced Access Content System (“AACCS”) on Blu-ray discs, and encryption and authentication protocols on digitally transmitted video in order to make fair use of motion picture content in their e-books.

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

## **3. Overview**

AACS LA opposes the creation of an exemption for Proposed Class 5 that would permit the circumvention of AACCS on Blu-ray discs. As discussed below – proponents offer no evidence that the desired exemption for what amounts to “all other fair uses” (i.e., not limited to “criticism or comment”) will in fact be noninfringing uses. But even assuming *arguendo* that the activity is indeed noninfringing, an exemption is still not warranted because fair use has never required that a user have access to the highest quality of images of work such as the high definition found on a Blu-ray disc. Accordingly, e-book authors’ use of any work will be satisfied either by the circumvention of DVDs pursuant to a renewal of the existing exemption for such circumvention or by the high quality images recorded by video capture software of DVD playback.

Blu-ray exclusive content is truly *de minimis*. Far more titles are available on DVDs than on Blu-ray discs. Furthermore any Blu-ray exclusive content that does exist

is almost all in the form of special or anniversary editions that offer bonus features, and in no way suggest that the underlying work has not been released in the DVD format. But there are alternatives to circumvention to make use of even Blu-ray exclusive content. This content can be recorded by an HD camera as it is played back on an HD display.

Finally, an exemption to circumvent Blu-ray discs would not be warranted because it would threaten the Blu-ray disc distribution model which many consumers enjoy and potentially harm the market for the work across the various high definition platforms.

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

These comments specifically address the proposed circumvention of the Advanced Access Content System (“AACCS”) as licensed by AACCS LA. AACCS has been recognized as a TPM both in this proceeding previously, and by the courts in the United States. *See* Section 1201 Rulemaking: Fifth Triennial Proceeding, Recommendation of the Register of Copyrights at 126 (October 12, 2012) [hereinafter 2012 Recommendation]; *see also AACCS LA v. Shen*, 14-CV-1112, Memorandum & Order at 10 (S.D.N.Y. Mar. 16, 2015).

The proponents of exemption covered by Class 5 have not offered any explanation for how they propose to circumvent AACCS Technology.

#### **5. Asserted Non-Infringing Uses**

The proponents allege that “[e]xcerpted use of copyrighted multimedia clips in e-books, especially in e-books intended for educational purposes, makes a strong case for fair use.” Multimedia e-book Authors Comment at 7 (footnote omitted). This point is addressed below.

## I. Fair Use and Multimedia E-Books

Multimedia e-book authors that appropriate short movie clips for the specific purpose of film criticism or comment may be able to claim fair use. *See* 2012 Recommendation at 128. Fair use permits limited use of protected material without a license or permission from the copyright owner. Courts determine fair use on a case-by-case basis using a four-factor analysis that includes 1) the purpose and character of the use; 2) the nature of the copyrighted work; 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and 4) the effect of the use upon the potential market for or value of the copyrighted work.

When considering whether the use of a first work's material in a second work is fair use of the copyrighted content of the first work, courts have focused their inquiries on the first fair use factor to determine to what extent the use is "transformative." Typically, a work that is found to be very transformative will succeed with a fair use defense, with less weight given to the remaining three factors. Although "transformative work" is not defined in statute, there is relevant case law interpreting that term and setting some boundaries as to what is considered sufficiently "transformative" to qualify as fair use.

In 1994, the Supreme Court clarified when an otherwise infringing work becomes transformative enough to warrant a fair use defense. *See Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994). In considering whether the music group 2 Live Crew made fair use of Roy Orbison's classic "Oh, Pretty Woman," the Court explained that whether or not the use of the first work is "transformative" is important to the first fair use factor,<sup>1</sup> and

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<sup>1</sup> Fair use advocates often mistakenly focus on the commercial nature of a work, when *Campbell* clearly illustrates that whether a work is commercial or noncommercial is only the beginning of a determination of its purpose and character.

found that the inquiry into the purpose and character of the use must focus, “on whether the new work merely supersedes the objects of the original creation, or whether and to what extent it is ‘transformative,’ altering the original with new expression, meaning, or message.” *Campbell*, 510 U.S. at 579.

#### **A. Insufficiently Transformative Uses May Be Found to Infringe**

Even when a second work exhibits some transformative characteristics from the underlying work, the new work will infringe if it takes an unnecessary amount, slavishly copies from the original, or the purpose of the secondary work is no different than that of the original.

In *Castle Rock Entertainment v. Carol Publishing*, 150 F.3d 132 (2nd Cir. 1998), the creators of the *Seinfeld* television show sued the publisher of a trivia book for copyright infringement. Finding for the creators, the court stressed that any transformative purpose possessed by the trivia book was slight to non-existent. *Castle Rock*, 150 F.3d at 142. The court rejected defendant’s arguments that the trivia book was a critique of the show, finding that the purpose of the book was to entertain the *Seinfeld* audience with a book about *Seinfeld*, and that this entertainment function was no different than that of the television show. *Castle Rock*, 150 F.3d at 142. With no unique commentary or new purpose, the trivia book was simply not sufficiently transformative.

In 2007, J.K. Rowling, author of the Harry Potter series, brought suit against defendants for their work “The Harry Potter Lexicon,” a reference book to the fictional Harry Potter universe. *See Warner Bros. Entertainment, Inc. and J.K. Rowling v. RDR Books*, 575 F. Supp.2d 513 (S.D.N.Y. 2008). Although literary reference guides and compendiums could be protected by the fair use doctrine, Rowling claimed the lexicon planned to slavishly copy excerpts from her novels and stills from the films without

offering sufficient transformative material to be considered a separate work. The court agreed that the Lexicon appropriated too much of Rowling's creative work and that the unnecessary verbatim copying of highly aesthetic expression diminished any finding of transformative fair use. *Warner Bros. Entertainment*, 575 F. Supp.2d at 544.

### **B. Comments Fail to Identify Any Use Other than Film Analysis**

The uses that proponents identify all involve clips that would be taken from movies to engage in film analysis (i.e., criticism or commentary on the underlying work).

- Mark Berger claims he wants to make an e-book that will explore the use of sound in film in relation to the moving images.
- Pamela Samuelson wants to create an e-book that incorporates images of movie characters to discuss the copyrightable nature of a fictional character.
- Jiliann Spitzmiller wants to make e-books on film criticism that use the work of others.

All of these uses are engaged in film analysis which could avail themselves of the fair use defense provided they do not take too much, do not take the heart of the work, and are otherwise sufficiently transformative.

Any use other than film analysis, such as "all other use fair uses," is not supported by the submissions of the proponents and necessarily invites questions into whether any particular use would, in fact and law, be considered "fair use" or otherwise noninfringing. Accordingly, a determination cannot be made to grant an exemption based on the much broader scope requested by proponents.

### **6. Asserted Adverse Effects**

With respect to AACS and Blu-ray disc content, the proponents allege that certain content is not available on DVD and that certain uses require the high definition quality that is available on Blu-ray disc. These points are addressed below.

## **I. Blu-Ray Exclusive Content is *De Minimis***

Content exclusive to Blu-ray discs is *de minimis* in comparison to material available on DVDs. Proponents' own evidence in Appendix E identifies only 17 titles with Blu-ray disc exclusive content. Most of these titles constitute special or anniversary editions and the Blu-ray exclusive content may only be bonus features such as deleted scenes. It does not mean that the work is not available on DVDs.

E-book authors should have no problem finding sufficient content from the vast amount of works available on DVDs. DVD sales continue to far exceed Blu-ray sales and it is a trend that doesn't appear to be changing. (See <http://www.the-numbers.com/weekly-dvd-sales-chart> for up to date statistics on DVD and Blu-ray sales). DVDs, specifically James Bond DVDs, are widely available in the secondary market. A visit to two used book/movie stores found 7 of the 23 James Bond movies, and all 23 are available on eBay, most for under \$5.

## **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, as proposed here, have clearly stated that fair use is satisfied even when beneficiaries of the doctrine are not obtaining the quality of images that they desire.

In *Universal City Studios v. Corley*, 273 F.3d 429 (2nd Cir. 2001), the Second Circuit examined the bound of 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 which resulted 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 alternatives, the court identified, 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.” *Corley*, 273 F.3d at 459. The court concluded that the DMCA, like other laws, 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.” *Corley*, 273 F.3d at 459.

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.” The court concluded that that even if the user

could not “[cut and paste] from the existing digital media. . . . fair use is still available.” For that matter 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”).

## **7. Alternatives to Circumvention**

### **I. DVDs Constitute an Alternative to Circumvention**

AACS LA is aware that the DVD Copy Control Association does not oppose granting the same exemption as was done in the 2012 Ruling. If the Librarian does, in fact, grant such an exemption, the limited authorized circumvention of DVDs would become a prime alternative to circumventing AACS protected Blu-ray discs as a source for short clips to be used for the purpose of comment or criticism in multimedia e-books. As described above, access to the highest 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 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. The technology is constantly improving, making it easier than ever for film critics to create professional looking multi-media e-books. We note that the proponents’ comments almost exclusively cite the 2012 exemption proceeding or other sources from the same vintage. As demonstrated below, the improvements in screen capture software makes those references completely obsolete.

The rapid advance of technology has resulted in more effective, affordable, and accessible video/screen capture software. 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.

In the submitted clip of *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 e-book authors 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 for the use e-book authors want to make.

#### **A. Video Capture Software Is Affordable**

The following table lists the cost of a variety of video/screen capture software and Adobe *InDesign*.<sup>2</sup>

Product	Software Type	Price
Adobe InDesign	Desktop Publishing	\$29.99 (per month)
Camtasia	Video/Screen Capture	\$299.00 (free trial)
Movavi	Video/Screen Capture	\$49.95
Snagit	Video/Screen Capture	\$44.95
WM Capture	Video/Screen Capture	\$39.95
EzVid, CamStudio, Jing	Video/Screen Capture	FREE

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

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<sup>2</sup> See <http://video-capture-software-review.toptenreviews.com/> for list of top rated software and their cost.

## **B. Easy to use - Permits Users to Make Use of Works Including Embed Image in Ebook**

Video capture outputs can be used with e-book authors' preferred software, *Adobe InDesign*. *Adobe InDesign* permits users to embed a variety of different file formats, including mpeg-2 and mpeg-4, into their works.

Video capture software, such as *Camtasia*, outputs the same mpeg-2 and mpeg-4 formats found on Blu-ray discs. Thus, embedding an mpeg-2 or mpeg-4 file made from video capture software takes no more technical skill than the technical skills of embedding those files from a Blu-ray disc.

*Adobe InDesign* handles many other file formats.<sup>3</sup> As such, an e-book author is readily able to use video capture software that outputs to any of the supported file formats. If a video capture software does not output to a file format immediately compatible with *Adobe InDesign*, that output file can be converted to a file supported by *Adobe InDesign*.

As far as possible audio sync or video quality issues are concerned, video capture software, such as *Camtasia*, does not present either issue. If, however, such problems exist with other video capture software, an e-book author could reasonably hire professionals to resolve these issues and other hurdles such as file conversion. In fact, costs associated with such professionals can be expected as part of the production costs, particularly for those multimedia books that will be offered for sale.

### **1.Examples: James Bond**

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<sup>3</sup> See <https://helpx.adobe.com/indesign/kb/supported-file-formats-indesign-cs5.html> for complete list of supported file formats.

The submitted video exhibits the capability of the *Camtasia* video capture software to reproduce high quality images from DVDs. The video compiles clips of different actors playing James Bond in order to represent the different portrayals of the character over the last 50 years. *Camtasia* captures the video in a quality that allows the viewer to notice age differences by seeing the lines in the actors' faces, and to see details like the texture of clothing, cufflinks and watches the actors are wearing.

Beginning with Sean Connery in *Thunderball*, the submitted video tracks the James Bond character over five decades and five different actors. The clip, recording DVD playback, captures facial expressions, wrinkles, hairstyles and the overall physique of the actors. Details of the different tuxedos and clothing are visible, whether it's the classic style tuxedo worn by the earlier Bonds, or the more casual unbuttoned shirt worn by Daniel Craig in *Casino Royale*.

The casino scenes from the movies, including *License to Kill* and *On Her Majesty's Secret Service*, are reproduced in a quality that allows viewers to notice the subtleties in the texture of clothing as well as sparkling jewelry, watches and cigarette lighters.

These clips, compiled using the *Camtasia* video capture software, result in video that clearly shows the transformation of the James Bond character over time, and represent a highly suitable alternative to circumvention that will achieve the film analysis goals of the proponents.

### **III. Smartphone and Professional Cameras Can Record in HD Blu-ray Playback on an HD Display**

Phone and camera technology advances at such a rapid pace, what we considered quality three years ago is now totally obsolete. Recording on a phone or other digital

camera now provides clear, high quality video that can easily be used as an alternative to hacking into a Blu-ray disc.

E-book authors have the option of recording the Blu-ray disc playback on professional digital cameras. Whether they rent their own equipment or hire a videographer, neither constitutes an unreasonable production cost. In fact, such production costs can be expected.

#### **IV. Alternatives to Circumvention Result in No Adverse Effect**

Any adverse effect that the prohibition has on proponents' ability to make use of the works on Blu-ray discs is mitigated by the alternatives to circumvention. First, video capture of the playback of DVDs produces sufficiently high quality images for e-book authors to make use of the work. The submitted clip of James Bond captured from DVDs shows such high quality images. The clip demonstrates that the details proponents want to show – lines in the actors' faces, the clothes, watches and cufflinks – are all clearly visible – enabling the use that proponents claim Professor Samuelson wants to show.

If a particular e-book author needs to use some part of the *de minimis* amount of content that is available only on Blu-ray disc, smartphones or professional camera recordings are viable alternatives to circumvention. Smartphones and professional cameras can record in high definition and produce professional videos, ready to embed into e-books.

## **8. Statutory Factors**

### **I. Factor (iv) - An Exemption Applicable to AACS Technology Would Threatens Harm to the Blu-ray Disc Market and to AACS As Provider of Content Protection Technology for Blu-ray Discs**

An exemption is not warranted because any exemption will result in harm to the works distributed on Blu-ray discs. Any Blu-ray disc 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 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 on the Blu-ray disc.

The Blu-ray disc format’s growth, while very impressive, has not had the sustained success that the DVD format has seen. At the time DVDs were introduced, VHS and cable were the only competitive distribution models, and both were significantly lower quality. Unlike DVDs, Blu-ray discs have had to compete with not only its predecessor format (the DVD) but also a high definition distribution system that encompasses cable, satellite and various online distribution platforms. Blu-ray disc has done quite well as an additional option for consumers, and movie studios have found that the improved content protection offered by AACS (as compared with CSS for DVD) has been sufficient to maintain the incentive to release content using the Blu-ray disc format. However, in a competitive high definition environment, an authorized exemption to allow circumvention of AACS would undermine the confidence that copyright owners have had in the protection system and, hence, the Blu-ray disc format generally.

The protection system relies on the consistency of the law in protecting and preserving AACS technology. On March 4, 2014, the District Court issued a preliminary injunction to prevent the trafficking of DVDFab technology that, among other things, enables consumer copying for space-shifting purposes. Most recently, the court expanded the injunction to cover products and services intended to evade the original injunction. In analyzing how AACS LA met the standard for injunctive relief (both as to the original injunction and the now expanded injunction), the court found:

There is no doubt that AACS is a technological measure designed to control access to copyright protected materials. (*Id.* at 10.) Nor is there any doubt that Defendants' primary, if not sole, business purpose is to decrypt these technological measures. (*Id.* at 10-11) Plaintiff made a clear showing that traditional legal remedies would be inadequate to compensate Plaintiff. (*Id.* at 13.) In this case, Plaintiff "lacks an adequate remedy at law, because its business model rests upon its being able to prevent the copying of copyrighted works. If it is unable to prevent the circumvention of its technology, its business goodwill will likely be eroded, and the damages flowing therefrom extremely difficult to quantify." *Macrovision v. Sima Products Corp.*, No. 05-CV-5587, 2006 WL 1063284, at \*3 (S.D.N.Y. Apr. 20, 2006).

*AACS LA v. Shen*, 14-CV-1112, Memorandum & Order at 15 (S.D.N.Y. March 16, 2015)

(footnote omitted) The harm that warranted an injunction in the DVDFab case is the same harm that AACS LA would suffer as a result from granting any exemption to permit circumvention for the purposes of the proposed class.

### **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 against 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 e-book authors 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 against 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 outweigh the alleged harm that e-book authors may suffer because they cannot make use of the work in high definition. The legal precedent clearly states that a 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 5 must be denied.