

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 5**

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

1. Commenter Information

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1. Commenter Information

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 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 (“AAC”) 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

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 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). Specifically, such an exemption would adhere to the wording used by the Librarian in 2012

Motion pictures, as defined in 17 U.S.C. § 101, on DVDs that are lawfully made and acquired and that are protected by the Content Scrambling System, where the circumvention, if any, is undertaken using screen capture technology that is reasonably represented and offered to the public as enabling the reproduction of motion picture content after such content has been lawfully decrypted, when such representations have been reasonably relied upon by the user of such technology, when the person

engaging in the circumvention believes and has reasonable grounds for believing that the circumvention is necessary to achieve the desired criticism or comment, and where the circumvention is undertaken solely in order to make use of short portions of the motion pictures for the purpose of criticism or comment in the following instances: . . . in nonfiction multimedia ebooks offering film analysis. . . .

See 2012 Recommendation at 141-42.

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 been recognized as a TPM in this proceeding as early as the first rulemaking and by the courts. *Id.* at 135.

5. Asserted Non-Infringing Uses

The proponents allege that “Excerpted 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.¹ Fair use permits limited use of protected material without a license or permission from the copyright owner. Courts determine fair use by 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.

¹ *See* 2012 Recommendation at 128.

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, relevant case law interprets that term and sets 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,² and 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.”

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.

² 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.

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 those of clips 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 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 CSS and DVD content, the proponents allege that certain uses require DVD quality images to make use of the work. These points are addressed below.

I. Fair Use Does Not Require Access 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 are not obtaining the quality of images that they desire.

In *Universal City Studios v. Corley*, 273 F.3d 429 (2d 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 harm 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.” Further, fair use does not 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. 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. 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 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.

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 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.

A. Video Capture Software Is Affordable

The following table lists the cost of a variety of video capture software and the video editing software Adobe InDesign.³

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.

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 DVDs. Thus, embedding an mpeg-2 or mpeg-4 file made from video

³ See <http://video-capture-software-review.toptenreviews.com/> for list of top rated software and their cost.

capture software takes no more technical skill than the technical skills of embedding those files from a DVD.

Adobe InDesign handles many other file formats.⁴ 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.

■ Example: James Bond

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.

⁴ See <https://helpx.adobe.com/indesign/kb/supported-file-formats-indesign-cs5.html> for complete list of supported file formats.

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.

C. Alternatives to Circumvention Result in No Adverse Effect

i. Video Capture of DVD Playback

Any adverse effect that the prohibition has on proponents' ability to make use of the works on DVDs 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.

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 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 that copy of the work is now in the clear it can be freely copied and redistributed - perfectly. The more that perfect copies of the work are 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 has remained 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 putting at risk the DVD distribution model.

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.