

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 7**

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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 7 – Noncommercial Remix Videos.

This proposed class would allow circumvention of access controls on lawfully made and acquired audiovisual works for the sole purpose of extracting clips for inclusion in noncommercial videos that do not infringe copyright. This exemption has been requested for audiovisual material made available on DVDs protected by CSS, Blu-ray discs protected by AACS, and TPM-protected online distribution services.

See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 79 Fed. Reg. 73856, 73862 (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 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: . . . (iii) Noncommercial videos.

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

5. Asserted Noninfringing Use

I. Remix Videos Are Generally Infringing

Remix or mashup videos (“vids”), which make use of clips from other protected works, are likely infringing if created for entertainment purposes and are not sufficiently transformative. But even if a remix video can avoid infringement by showing that its use of clips from other movies is fair use, an exemption should not allow access to the highest quality content available when there are alternatives to circumvention that effectively mitigate any adverse effect the prohibition has on the creation of noncommercial video remixes.

A. Derivative Works

A derivative work, as defined by the Copyright Act, is a “work based upon one or more preexisting works...consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship.” 17 U.S.C. § 101. The right to prepare and control a derivative work is an exclusive right granted to the copyright owner, and where a second work makes use of an original work without the permission of the copyright owner, infringement has occurred.

B. Fair Use and Remix Videos – Criticism and Comment

Video remixers creating noncommercial remixes that address social or political issues unrelated to the original content, parody the original work, or in some other way comment on or criticize another work may qualify as fair use for the use of clips from the original works used in the remix. *See* 2012 Recommendation at 129. Fair use permits limited use of copyrighted 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,¹ 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.” *See Campbell*, 510 U.S. at 519.

C. 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 if 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. 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

¹ 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.

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 can 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.

1. Most Remix Videos are Infringing, Nontransformative Uses

An Internet search for the most viewed remixes results in videos that are essentially montages of popular television shows and movies. Whether it's *Game of Thrones*, *Breaking Bad*, *Sherlock* or *The Hunger Games*, many of the most celebrated and shared remixes are spliced together scenes from the original works, frequently combining them with popular music to create a trailer-like video. *See* <http://vividcon.info/top/> for the stats on the most popular fanvids at VividCon, an annual convention celebrating video remixing; *see* <http://mmhm-vids.tumblr.com/> and <http://fuckyeahfanvideos.tumblr.com/> displaying popular infringing vids. These video remixes, comparable to trailers for the TV shows or movies, lack commentary or criticism. They, like the *Seinfeld* trivia book, are created for the audience of a work, with no purposes other than to entertain that audience. *Castle Rock*, 150 F.3d at 142. As the *Seinfeld* trivia book served to satisfy fans' between episode cravings *Castle Rock*, 150 F.3d at 142., so too do remix videos. Editing down a film or television series is an abridgement of the underlying work, and case law has shown that simply re-cutting the creative product of another will not be considered independent artistic creation. *See Twin*

Peaks Productions, Inc. v. Publications International, Ltd., 996 F.2d 1366 (2nd Cir. 1993) (explaining how abridgements, as derivative works, became the exclusive rights of the copyright holder).

Finally, the Second Circuit – in discussing the transformative threshold for the use of a work – suggests looking to whether the defendant had “a genuine creative rationale for borrowing [her source]” and cautions that the court will not “find a transformative use when the defendant has done no more than find a new way to exploit the creative virtues of the original work.” *Blanch v. Koons*, 467 F.3d 244, 252 (2nd Cir. 2006).

In her 2008 article “Visions and Revisions: Fanvids and Fair Use,” Sarah Trombley, a proponent of video remix culture, acknowledges the varying degrees of transformativeness found in remixes known as “fanvids”,

Some fanvids are quite clearly parodies, using an ironic contrast between particular visual images from the source and the tone of the music to poke fun at the original. Many more are not, and so require a more careful analysis. A fanvid which merely recapitulates the plot of a work or the development of a relationship between previously-existing characters is perhaps the least transformative use.

Sarah Trombley, *Visions and Revisions: Fanvids and Fair Use*, 25 *Cardozo Arts & Ent. J.* 647 (2008). Recapitulating or simply summarizing an original work is exactly what the majority of remix vids achieve, and appropriating protected content for this purpose cannot constitute fair use.

In sum, the problem with these noncommercial remix videos is that they do not sufficiently transform the underlying content or represent a new purpose not contemplated by the original creators. Remix videos that fail to be sufficiently transformative should be seen as nothing more than entertainment, which are infringing the copyrights of the works that they appropriate. Because these vids fail the purpose and

character test of a fair use analysis, their noncommercial nature is inconsequential, and they constitute unlawful works that cannot claim fair use. As unauthorized and infringing works, there is no basis to consider an exemption for these works as the proposed activity cannot be shown to be noninfringing.

6. No Substantial Adverse Effect

I. Fair Use Does Not Entitle Users to Optimum Quality Images

Fair use does not entitle a user of the copyrighted work to optimum 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 (2nd Cir. 2001), the Second Circuit examined the fair use claim premised on the user's inability to make use of the work in its original DVD format. The defendants alleged that the prohibition against circumvention interfered with their ability to make fair use of the work on the DVD. While noting that all the examples proffered involved users being able to digitally manipulate the content on the DVD, the court specifically addressed the example of a student making use of DVD content to create a documentary film (i.e., the student wanted to insert the DVD images directly into the documentary film). The court wrote, "We know of no authority for the proposition that fair use, as protected by the Copyright Act, much less the Constitution, guarantees copying by the optimum method or in the identical format of the original." *Corley*, 273 F.3d at 459.

Further, the court found the alternatives to circumvention were acceptable to achieve fair use. The court found that the alternatives to circumvention resulting from the prohibition did not "impose even an arguable limitation on the opportunity to make a

variety of traditional fair uses of DVD movies, [which the court-identified alternatives included] even recording portions of the video images and sounds on film or tape by pointing a camera, a camcorder, or a microphone at a monitor as it displays the DVD movie.” *Id.* The court concluded that the DMCA, like other laws, which may limit the ability to make use of a work in a preferred or 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.” *See Elcom Ltd.*, 203 F. Supp. 2d at 1131. The court concluded that that even if the user could not “[cut and paste] from the exist 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”)

A. Recording of DVD Playback is Sufficient for Video Remixing Purposes

For the purpose of video remixing, the recording of DVD playback using video capture software produces sufficiently high quality video that remix creators can use to make their allegedly noninfringing use of the work on the DVD.

Numerous examples of the high quality images are submitted. In each of these the video does not stutter, the pictures are clear and void of pixilation. They are fairly pristine.

1. Washington Football Team Example

For example, remix creators identify one particular use in “Take it Away” which covers the team logo on the helmet with a white dot. The same effect can be applied to video created from video capture software. Specifically, with the original footage taken from “Take it Away,” we have replicated the white dot effect from the video obtained from video capture software.

7. Alternatives to Circumvention

Video capture software is a complete alternative to circumvention.

I. Video Capture Recording Is an Alternative to Circumvention

Video capture software has improved 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 amateur remixer to create professional looking content.

Even experienced video remixers recognize the improvement of video/screen capture tools. The video remix blog *So You Want to Vid?: A Beginner’s Guide to Fan Vidding* encourages the use of video/screen capture software as a suitable and affordable alternative to circumvention.

There are also plenty of screen capture devices available. I currently use WMCapture, but again, this wasn't a free program. It was around the same price as the ripper. A google search should be able to provide you with low-priced or free options. Just remember that screen capture programs record in real time, so it's necessary to start the program and allow the DVD to play in full.

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

A. Video Capture Software Has Improved

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.

1. 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 the images on the computer 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 improved software. New versions of capture software use a unique high-speed capture technology to process video data faster than ever, and enable perfect play back of even the most complex, full-motion videos. See <http://wmrecorder.com/products/wm-capture/> for description of advanced capture technology.

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.

2. Video Capture Software Is Affordable

The following table lists the cost of a variety of video/screen capture software and the video editing software Adobe Premiere Pro and Final Cut Pro.²

Product	Software Type	Price
Final Cut Pro X ³	Video Editing	\$299.00
Adobe Premiere Pro ⁴	Video Editing	\$239.88/Annually
Camtasia	Video Capture	\$299.00 (free trial)
Movavi	Video Capture	\$49.95
Snagit	Video Capture	\$44.95
WM Capture	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 professional grade video/screen capture and editing tools available to the public at little to no cost.

3. Video Capture Includes Video Editing Features

The continuous evolution of video capture software has resulted in these programs including advanced editing tools, which allow remixers to create professional

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

³ See <https://www.apple.com/final-cut-pro/>.

⁴ See http://www.adobe.com/products/premiere.html?sdid=KKQPE&kw=semgeneric&skwcid=AL!3085!3!51560612002!e!!g!!adobe%20premiere%20pro&ef_id=VQCrNAAAAY0F1wON:20150318163201:s_

looking content. Of the top ten video capture software ranked by toptenreviews.com, every program includes editing tools. Now, instead of having to use multiple programs for different steps in the remixing process, creators can use video capture software to appropriate the images and video they choose and then edit the clips into a ready to share finished video. Editing tools included in video capture software allow users to crop, resize, and implement effects into their vids in the same program they used to capture the content.

4. Video Capture Software Can Be Exported to Remixers' Preferred Software

Remixers' preferred editing programs, *Final Cut Pro* and *Adobe Premiere Pro*, support a number of video formats.⁵ While video/screen capture software support fewer formats, the development of decoding, or “codec”, tools has eliminated compatibility issues.

Codec refers to a type of file, such as FLAC, MP3, or FLV, and in the past, certain programs would only play certain codecs. This resulted in compatibility issues like Windows Media Player for example not being able to play a FLAC file. But today, readily downloadable codec devices enable the decoding of any type of codec format for playback and editing, thus removing any compatibility barriers and allowing remixers to create remix videos using whatever combination of software, programs and platforms they desire.

⁵ See https://support.apple.com/kb/PH12754?locale=en_US and <https://helpx.adobe.com/premiere-pro/using/supported-file-formats.html> for a complete list of formats.

5. Video Capture Software Compatible with Mac Platform

For those remixers who prefer the Mac platform, there is Mac-compatible video capture software for creating vids on a Mac. They offer the same high quality screen capture tools for those creating vids on a Mac. Programs like *Screenflick* and *Camtasia* offer navigable interfaces that allow for high quality screen capture and editing. Describing their video capture tools, *Screenflick* explains that their software “contains a highly tuned recording engine which can capture very large resolutions at high speed and high quality.” (See <http://www.araelium.com/screenflick> for software descriptions.)

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 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 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.