



UNITED STATES COPYRIGHT OFFICE

Long Comment Regarding a Proposed Exemption Under 17 U.S.C. § 1201

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

ITEM A. COMMENTER INFORMATION

DVD Copy Control Association

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

Advanced Access Content System Licensing Administrator, LLC

The Advanced Access Content System Licensing Administrator, LLC (“AACSLA”), is a cross-industry limited liability company with its principal offices in Beaverton, Oregon. The Founders of AACSLA are Warner Bros., Disney, Microsoft, Intel, Toshiba, Panasonic, Sony, and IBM. AACSLA licenses the Advanced Access Content System (“AACSLA”) technology that it developed for the protection of high definition audiovisual content distributed on optical media. That technology is associated with Blu-ray Discs (“BDs”).

As ultra-high definition products are entering the marketplace, AACSLA has developed a separate technology for the distribution of audiovisual content. This technology is identified as AACSLA2 and not AACSLA 2.0. This distinction in nomenclature is significant as the latter would suggest that it replaced AACSLA distributed on Blu-ray. It has not. AACSLA2 serves only audiovisual content distributed on Ultra HD Blu-ray discs, which will not play on (HD) Blu-ray players.

Privacy Act Advisory Statement: Required by the Privacy Act of 1974 (P.L. 93-579)

The authority for requesting this information is 17 U.S.C. §§ 1201(a)(1) and 705. Furnishing the requested information is voluntary. The principal use of the requested information is publication on the Copyright Office Web site and use by Copyright Office staff for purposes of the rulemaking proceeding conducted under 17 U.S.C. § 1201(a)(1). NOTE: No other advisory statement will be given in connection with this submission. Please keep this statement and refer to it if we communicate with you regarding this submission.

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ITEM B. PROPOSED CLASS ADDRESSED

This comment addresses Class 2: Audiovisual Works—Accessibility

ITEM C. OVERVIEW

DVD CCA and AACS LA are open to a reasonable exemption that facilitates the proposed activities in circumstances where the market has not provided accessibility. However, that exemption is not what the proponents have proposed. First, proponents have not taken into account the extent to which DVDs and BDs already include closed captions and audio description. In this regard, the blanket proposal is, at a minimum, overbroad. While DVD CCA and AACS LA are not contesting that some titles distributed on DVD and Blu-ray do not have captioning and/or audio description, as a matter of how the Copyright Office has set for the rules for how this proceeding is conducted, it is unfortunate that the proponents have not identified a single title distributed on DVD or Blu-ray that lacks captioning or audio description. In fact, proponents do not discuss a single work distributed on DVD or Blu-ray. DVD CCA and AACS LA's review of the market shows that audio description and captioning are now often included in DVDs and Blu-ray discs. Consequently, the current record does not support the requested exemption as applied to CSS and AACS.

ITEM D. PROTECTION MEASURE(S) AND METHOD(S) OF CIRCUMVENTION

CSS and AACS are encryption-based technologies that have been recognized for a number of cycles of this proceeding as technology protection measures.

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

I. Proponents Have Not Shown Harm to the Noninfringing Use Related to CSS and AACS

Proponents are requesting an exemption for a class that would include motion pictures distributed on DVD and Blu-ray discs, which are protected by CSS and AACS, respectively. Comments at 5. They allege that the exemption would permit disability service professionals to render video content assessable for students with disabilities by adding captions and audio descriptions to videos. *See* Comments at 8-9. However, proponents have failed to allege a single DVD or Blu-ray title that lacks captioning and audio description. Consequently, they have not developed a record that supports the proposed exemption for the particular class to the extent that it would include the circumvention of CSS and AACS.

In the absence of evidence as noted above, the proponents cannot show that the alleged noninfringing use is being adversely affected by the prohibition against circumvention. The Commerce Committee’s description of how this proceeding should be conducted stated that the harm had to be “distinct, verifiable” and measurable.¹ Because there is no evidence, measuring and verifying any alleged harm is not possible.

Motion pictures distributed on DVDs and Blu-ray discs often include captioning and audio description. In the Fifth Triennial Proceeding, DVD CCA and AACS LA demonstrated that the market was responding to the concerns of ensuring accessibility,² and they correctly predicted that this market practice would continue to grow.³

The Audio Description Projects, an Initiative of the American Council of the Blind, maintains a list of titles distributed on DVDs and Blu-ray Discs that includes audio description. The site notes,

¹ WIPO Copyright Treaties Implementation and On-Line Copyright Infringement Liability Limitation, H. Rept. 105-551 at 37 (“House Commerce Committee Report”).

² Register of Copyrights, Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights 147 (2012) (“2012 Recommendation”).

³ DVD CCA and AACS LA remain optimistic. Since the passage of the Twenty-First Century Communication and Video Accessibility Act (“CVAA”) programmers must comply with requirements to include more accessibility to works distributed on the airwaves and the Internet. *See, e.g.*, Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, Federal Communication Commission, 82 Fed. Reg. 37345 (Aug. 10, 2017) (Final Rule) (increasing the amount of described programming from 50 hours per calendar quarter to 87.5 hours per quarter). While works distributed on packaged media are not subject to the regulatory obligations, compliance with CVAA undoubtedly influences how content providers can market the same content through other channels.

The first commercial DVD with audio description was released in 1997, and our listing continues through the current week. Starting in 2009, Blu-ray discs also began to include description tracks. The year shown below is the year in which each disc was released, not necessarily the year the movie itself was released.⁴

The site identifies some eight ninety-seven (897) titles that include audio description.

Based on the information available on that website, it appears that discs containing audio description are provided as a part of the discs as released in the marketplace. For example, the page leads with the most recent title, which is *Only the Brave*, released on February 6, 2018,⁵ the same date it was commercially available on Amazon.⁶

Captioning is even more ubiquitous than audio description as the DVD revolutionized the possibilities for captioning.⁷ For example, RedBox says that most of its discs includes “closed captions or SDH subtitles.”⁸ The National Association of the Deaf has stated a similar view of the marketplace,

⁴ The Audio Description Project, American Council of the Blind, available at <http://www.acb.org/adp/dvdsalpha.html> (last visited Feb. 8, 2018).

⁵ DVDs and Blu-ray Discs with Audio Description Released in 2018, The Audio Description Project available at <http://acb.org/adp/dvds.html#ordering> (last visited Feb. 12, 2018).

⁶ *Only The Brave 2017*, Amazon available at https://www.amazon.com/Only-Brave-Andie-McDowell/dp/B076MG4TMW/ref=sr_1_1?ie=UTF8&qid=1518483727&sr=8-1&keywords=only+the+brave+dvd&dpID=51RZKz7IKML&preST=_SY300_QL70_&dpSrc=srch (last visited Feb. 12, 2018).

⁷ See, e.g., The DVD Media Format – Is It the Best Example of Closed Captioning and Subtitles Workflow?, i heart subtitles (“When the DVD replaced the VHS it was a revolution in access to media for those of us that use subtitles or closed captioning.”) available at <https://iheartsubtitles.wordpress.com/2013/02/26/the-dvd-media-format-is-it-the-best-example-of-closed-captioning-and-subtitles-workflow/> (last visited Feb. 8, 2018).

⁸ Do your discs have closed captioning?, Redbox Help Center, available at https://redbox.custhelp.com/app/answers/detail/a_id/1516/~do-your-discs-have-closed-captioning%3F

Closed captioning has been provided on a voluntary basis by many movie producers, studios, and distributors for movie videos and DVDs produced for sale or rent. Today, captioning is also being provided by movie studios and distributors for most wide-release movies. These captions are being displayed by hundreds of movie theaters nationwide.⁹

As another example, the Student Disability Access Services (“DAS”) at Oregon State University acknowledges that closed-captions exist on many titles on DVD. It explains that it is important to verify whether or not “the video(s) have or do not have captions”. It notes:

Hardcopies of videos (DVD’s, Blu-Ray’s)

Videos that are closed-captioned often have the symbol "CC" displayed inside a black square on the box of the video. Most classrooms on campus have equipment that allows the use of closed-captioned videos/DVD’s/Blu-ray’s.

Please note that although most DVD’s/Blu-Ray’s now have subtitles, English subtitles are not always available. We recommend that the faculty check the DVD/Blu-Ray in advance to determine if the media contains English subtitles.¹⁰

These examples suggest that the proponents have, at a minimum, overstated the need for circumvention to provide closed captioning and audio descriptions.

⁹ When Is Captioning Required?, National Association of the Deaf available at <https://www.nad.org/resources/technology/captioning-for-access/when-is-captioning-required/>.

¹⁰ Accessible (Captioned) Media, Oregon State University available at <http://ds.oregonstate.edu/accessible-captioned-media>. The information on this page is further instructive to proponents’ claims. First, apparently the Office believes that subtitles are sufficient for the purpose of captioning. Subtitles capture the spoken words, while captioning will include all audible references such as music playing and sound effects.

More importantly, nothing in the description suggests that the process is subject to the copyright owners’ approval or even prevented by the prohibition against circumvention. Noting captioning is a time intensive activity, DAS needs “72 hours prior to show date” for clips under 10 minutes, and “14 business days prior to show date” for video that is more than twenty minutes.

II. Conclusion

Proponents have presented a case without proffering any evidence relevant to motion pictures distributed on DVDs or BDs. More importantly, contrary evidence that is publicly available undermines any basis to exempt the broad requested class as proposed. That said, DVD CCA and AACS LA share the Register's sentiment that universal accessibility should be encouraged¹¹ and DVD CCA and AACS LA stand willing to work with the proponents to see if agreement can be reached on a more tailored proposal.

DOCUMENTARY EVIDENCE

Commenters are encouraged to submit documentary evidence to support their arguments or illustrate pertinent points concerning the proposed exemption. Any such documentary evidence should be attached to this form and uploaded as one document through regulations.gov.

¹¹ 2012 Recommendation at 155.