

**LIBRARY OF CONGRESS  
COPYRIGHT OFFICE**

In the Matter of

Exemptions to Permit  
Circumvention of Access Controls  
on Copyrighted Works

Docket No. 2017–10

**COMMENTS OF THE DVD COPY CONTROL ASSOCIATION (“DVD CCA”) AND  
THE ADVANCED ACCESS CONTENT SYSTEM LICENSING ADMINISTRATOR  
(“AACCS LA”) ON THE PETITION FOR RENEWAL OF THE EXEMPTION FOR  
COLLEGE AND UNIVERSITY FACULTY AND STUDENTS**

**Summary**

DVD CCA and AACCS LA do not object to the renewal of the exemption, which permits college and university faculty and students to circumvent when close analysis of the film is required. However, the explanation of need for renewal, filed by Peter Decherney on behalf of the Joint Educators, focuses on some uses that the current exemption does not authorize, and those uses should not be authorized by the renewal of the current exemption. Specifically, his explanation does not focus on the need for close analysis of the film.<sup>1</sup> Instead, based on the description in the explanation for the renewal, the cited uses (including video essays) *do not necessarily* require close analysis of the film. Including uses such as video essays that do not require close analysis as examples of authorized uses in a renewal of the existing exemption would constitute a modification of the current exemption. Therefore, pursuant to the instructions

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<sup>1</sup> See Decherney, Peter, Doc. No. 2017-10, Item C (Explanation) (Aug. 1, 2017) (Petition for Renewal Exemption for Motion Pictures: For Education Purposes by College and University Instructors and Students) (hereinafter, “Joint Educators’ Petition”).

of the Notice of Inquiry, such a modification should have been submitted as a petition for a new exemption.

### **The Current Exemption for College and University Faculty and Students**

The exemption at issue for renewal permits circumvention when it is undertaken solely in order to make use of short portions of the motion pictures for the purpose of criticism or comment . . . :

[b]y college and university faculty and students, for educational purposes,

(A) Where the circumvention is undertaken using screen-capture technology that appears to be offered to the public as enabling the reproduction of motion pictures after content has been lawfully acquired and decrypted, or

(B) In film studies or other *courses requiring close analysis of film and media excerpts* where the motion picture is lawfully made and acquired on a DVD protected by the Content Scramble System, on a Blu-ray disc protected by the Advanced Access Control System, or . . . and where the person engaging in circumvention reasonably believes that screen-capture software or other non-circumventing alternatives are unable to produce the required level of high-quality content[.]

37 C.F.R. 201.40(b)(1)(iv) (emphasis added). The current exemption is predicated on the need for close analysis of the film in uses that constitute criticism or comment. Close analysis has been described as requiring higher-quality images for the purpose of a “conveying a point that depends on the ability to perceive details or subtleties in a motion picture excerpt.” *See* Recommendation of the Register of Copyrights, Section 1201 Rulemaking: Fifth Triennial Proceeding at 134 (Oct. 2012) (hereinafter “Recommendation”). For example, close analysis may

be important to show rippling muscles or particles of dust to make a point. Similarly, educational uses that depend upon close analysis of film or media images may be adversely impacted if students are unable to apprehend the subtle detail or emotional impact of the images they are analyzing, such as the full brilliance of a diamond or the glint of an eye.

Id. (citations omitted). Consequently, the beneficiaries of the exemption may circumvent a protected DVD or Blu-ray disc only when a higher quality image will convey the subtle detail or

provide the emotional impact essential for the analysis and when the use is for criticism or comment.

### **Petition for Renewal of the Exemption**

The Notice of Inquiry instructs petitioners to provide a brief explanation summarizing the basis for claiming a continuing need and justification for the exemption. *See* 82 Fed. Reg. 29804, 29806 (June 30, 2017) (Notice of Inquiry, hereinafter “NOI”). The Joint Educators’ explanation includes only a brief reference to close analysis of digital media as being a tool for pedagogy. Otherwise, it is devoid of any reference to the need to communicate subtle detail or the emotional impact only possible from the close analysis of high quality images of DVDs and Blu-ray discs. The explanation provides the following examples of use:

- Professors make use of excerpts for class presentations, as well students do for their own classroom presentations and coursework.
- Law schools have created a field Visual Legal Advocacy where videos serve a formal legal function (like a clemency video) or advocate for a particular policy objective.
- Scientists and their students make use of works as part of their teaching and assignments.
- “In [Decherney’s] course, students produce short videos analyzing media. Sometimes the video essays resemble written essays. One video essay, for example, compared Disney characters to feminist media criticism published contemporaneously with the films’ release. Other video essays draw more from the genres of fan criticism, such as a video that compressed the history of dance on film into a few minutes.”

*See* Joint Educators’ Petition at Item C. None of these examples even attempt to demonstrate how close analysis of the higher quality images is necessary to serve their pedagogical purposes. Instead, the explanation notes that “being able to excerpt and comment on news media or other digital media performs a similar function as a citation in an essay.” *Id.*

The current exemption does not authorize circumvention for the purpose of using excerpts of film as citation in an essay. Citation generally serves as a source for additional reference and while informative, its purpose is supplemental to the work (i.e., the work could be

understood without the benefit of citation). Consequently, this use for a supplemental purpose does not comply with the close analysis requirement. In fact, this “citation” use more closely approximates the use, such as illustrating a historical event, that the Register explained, the exemption does not authorize.

Again, however, where precise detail is not required for the particular use in question – for example, where a clip is presented simply to illustrate a historical event – lower-quality screen capture images may be fully adequate to fulfill the noninfringing use.

Recommendation at 134. Citation can be expected to provide additional information such as referencing a historical event. Thus, this use as mere citation does not require the higher quality images from a protected DVD or Blu-ray disc.

But even if the video essay use is more than citation, the use does not necessarily require close analysis. In the most detailed example of use, the Joint Educators mention how a student’s video essay “compared Disney characters to feminist media criticism published contemporaneously with the films’ release.” Based on this limited description, there is no basis to conclude that this use of images to make a social commentary requires the use of high quality images from DVD and Blu-ray discs. The Register has recognized that some uses of images for the purposes of criticism and commentary in noncommercial videos did not rely on “a high level of image detail. For example, the noncommercial video *Planet of the Arabs* appears to convey the desired comment on the treatment of Arabs by American media quite successfully despite diminished image quality.” Recommendation at 134. There is no reason to believe that the student’s comparisons could not also have been accomplished with diminished image quality.<sup>2</sup> Accordingly, DVD CCA and AACCS LA urge the Librarian to make clear that renewal of this

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<sup>2</sup> In fact, the complementary provision permitting the same beneficiaries to engage in authorized screen-capturing would facilitate this very use.

exemption is limited to those uses where close analysis is necessary in the particular circumstance.

### **Conclusion**

Since the examples of use are not well-grounded in the close-analysis requirement of the current exemption, the Joint Educators' explanation seeks to expand the exemption to activities clearly not permitted under the current exemption. The Notice of Inquiry instructed that modifications, which would permit "activities not currently permitted by [the] existing exemption," should be submitted as a new exemption. *See* NOI at 29806. Consequently, the Joint Educator's explanation for the renewal of the exemption should be rejected as a basis for the renewal of the current exemption.

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Respectfully submitted,

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