

**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 NONCOMMERCIAL VIDEOS**

**Summary**

DVD CCA and AACCS LA do not object to the renewal of the existing exemption that permits creators of noncommercial videos to circumvent for the purpose of criticism or comment when alternatives to circumvention or authorized screen-capturing are not able to produce the required level of high-quality content. However, DVD CCA and AACCS LA do object to the proposed “renewal,” because the proponent requests that the existing exemption language be replaced with the now expired and outdated version granted in 2008, which does not include the foregoing framework.<sup>1</sup> Indeed, the Petitioner’s explanation list noncommercial uses that *do not necessarily* require high-quality content for the purpose of accomplishing criticism or comment. Modifying the existing exemption to sanction these uses would constitute a modification of the

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<sup>1</sup> See Tushnet, Rebecca, Doc. No. 2017-10, Item C (Explanation) (Aug. 1, 2017) (Petition for Renewal Exemption for Motion Pictures: For Noncommercial Videos).

current exemption and pursuant to the instructions of the Notice of Inquiry should have been submitted as a petition for a new exemption.

### **The Current Exemption for Noncommercial Videos**

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 . . . :

[f]or use in noncommercial videos (including videos produced for a paid commission if the commissioning entity’s use is noncommercial),

(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) 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 via a digital transmission protected by a technological measure, 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)(ii) (emphasis added). The exemption is predicated on the need for high-quality content in order to achieve the criticism or comment. *See* Recommendation of the Register of Copyrights, Section 1201 Rulemaking: Sixth Triennial Proceeding at 99 (Oct. 2015) (hereinafter, “Sixth Recommendation”) (“Proponents seeking exemptions for noncommercial videos, . . . have further established that they are, or are likely to be, adversely affected by the prohibition against circumvention, including when it is necessary to use high-quality motion picture material to convey intended criticism or commentary.”) This is the same high-quality requirement established in the 2012 rulemaking that permitted circumvention in noncommercial video when “noncircumventing methods or using screen capture software as provided for in alternative exemptions, are not able to produce the level of high-quality content required to achieve the desired criticism or comment . . . .” Recommendation of the Register of Copyrights,

Section 1201 Rulemaking: Fifth Triennial Proceeding at 140 (Oct. 2012) (hereinafter, “Fifth Recommendation”). In the Fifth Recommendation, the Register explained the need for high quality images as source material

[D]iminished quality likely would impair the criticism and comment contained in noncommercial videos. For example, the Register is able to perceive that *Buffy vs Edward* and other noncommercial videos would suffer significantly because of blurring and the loss of detail in characters’ expression and sense of depth. But the record does not support a finding that all noncommercial videos necessarily require high-quality images. Some noncommercial videos offered into the record could apparently accomplish the proposed noninfringing use without 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.

Fifth Recommendation at 133-34.<sup>2</sup>

The screen-capture exemption for noncommercial videos makes the high-quality distinction clear. In the Sixth Recommendation, the Register found that

not . . . all noncommercial videos covered by Proposed Class 7 require high-quality images that would be obtained through circumvention of access controls on DVDs, Blu-ray discs, . . . . For example, EFF/OTW submitted “mash-up” videos that mix images from one source with audio from another, and other videos that simply add subtitles over material from a single source. Because these examples do not obviously require high quality source material to serve their objectives, it is not apparent that screen-capture technology would not be a suitable alternative.

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<sup>2</sup> The high-quality content requirement is very much akin to the close-analysis requirement. 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 Fifth Recommendation at 134. 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).

Sixth Recommendation at 86 (citation omitted). Consequently, the screen-capture exemption supports the high-quality content requirement. In those instances of non-infringing use that do not require higher-quality image to convey the criticism or comment noncommercial, then the screen-capture exemption is expected to be relied upon to facilitate the non-infringing use.

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

The Notice of Inquiry instructs that petitioners must 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”). Other than the example of teaching *Lola Feist* the explanation discusses quality from the aesthetic value of high-quality content. *See* Renewal Petition (“The use of Blu-Ray and DVD footage is still considered the artistic standard in the community.”). In the last rulemaking, the Petitioners argued that “remix artists should be allowed access to the highest quality of source material desired, arguing that the ability to make such aesthetic choices goes to the ‘heart of copyright.’” Sixth Recommendation at 53. This argument has been rejected as a proper basis for circumvention. *See* Sixth Recommendation at n.573 (identifying the specific purposes that high-quality images are intended to facilitate).

Nevertheless, the Petitioner’s proposed language would deviate from the current exemption permitting circumvention for the purpose of criticism or comment regardless whether high-quality content is required to accomplish the criticism or comment. It simply does not include any reference to high-quality content, and presumably it would not include the screen-

capture exemption.<sup>3</sup> In light of the absence of high-quality content requirement and the screen-capture exemption, which complements this requirement, the petition for renewal is in fact proposing to modify the current exemption by permitting circumvention for any use in a noncommercial video regardless whether the criticism or comment could be achieved without the use of high-quality images. Because the proposed language would allow activities not currently authorized, that proposed language must be rejected.

### **Conclusion**

Since some of the examples of use seek to abandon the high-quality content requirement and the complementary screen-capture exemption, the Petitioner's 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 part of the Petitioner's explanation for the renewal of the exemption which argues for the use of DVDs and Blu-ray for aesthetic purposes should be rejected as a basis for the renewal of the current exemption and those uses which are not currently authorized under the exemption should be considered under a new petition.

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<sup>3</sup> The Petitioner complains that the current exemption has become unwieldy in its word count. However, the additional words, in large measure, are the result of the framework that the Register has created by making the screen-capture exemption available to all beneficiaries. In essence, beneficiaries are expected to first make use of the screen-capture exemption and if that use proves insufficient for the purpose of accomplishing the criticism or comment, then beneficiaries are authorized to circumvent DVDs and Blu-ray discs to gain access to the high-quality images.

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Respectfully submitted,

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