

UNITED STATES COPYRIGHT OFFICE

**Exemption to Prohibition on Circumvention of
Copyright Protection Systems for Access Control Technologies**

Docket No. RM 2008-8

**COMMENTS
of
MOTION PICTURE ASSOCIATION OF AMERICA**

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Motion Picture Association of America, Inc. (MPAA)¹ submits these comments in response to the Copyright Office's Notice of proposed rulemaking published in the Federal Register on December 29, 2008, at page 79425. These comments supplement the Joint Comments of Creators and Copyright Owners filed by MPAA and others in this proceeding.

In these supplemental comments MPAA wishes to focus primarily on movies and television material protected against unauthorized access by technical measures such as the Content Scramble System (CSS), in the case of standard definition DVDs, and the Advanced Access Content System (AACS) in the case of high definition Blu-Ray discs. These protection technologies have enabled producers of movies and TV shows to distribute their valuable content in higher quality, more convenient digital formats such as DVDs and Blu-Ray. DVDs, have become one of the most widely adopted consumer electronics products in history, and the pace of adoption has been unprecedented. Consumers have greater access to movies and TV shows than ever before. In deciding whether to allow circumvention of the technical measures that protect movies and TV programs against unauthorized access, it is critical that the Copyright Office carefully consider the contributions such technical protection measures have made to all uses, both authorized uses and unauthorized "fair" uses, and how the proliferation of exemptions to the circumvention prohibition in 17 USC 1201(a)(1) might undermine those contributions.²

¹ MPAA members include Paramount Pictures Corporation, Sony Pictures Entertainment, Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLLP, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment, Inc.

² "In assessing the impact of the implementation of technological measures, and of the law against their circumvention, the rulemaking proceedings should consider the positive as well as the adverse effects of these technologies on the availability of

The ubiquity of DVDs in today's consumer marketplace tends to obscure the fact that the DVD was first introduced only in the spring of 1997, just a little more than a decade ago, after adoption of the anti-circumvention provisions in the WIPO Treaties³ and as Congress was considering implementation of those treaties in what was to become Section 1201 of the Digital Millennium Copyright Act ("DMCA"). Until that time, no one was able to make a legal, noninfringing use of movies or TV shows on DVDs, because they were not available on DVDs. Today, educators, for instance, can perform a wide range of movies and TV programs in their classrooms under Section 110(1) in a more convenient, higher quality digital format that did not exist before 1997. As noted in its first triennial DMCA review, technical protection measures, specifically CSS, provided the necessary incentive for movie companies to release their content in the new DVD format which offered consumers a much improved viewing experience, but posed substantially greater piracy risks than the then existing VHS home video format.⁴ In that review proceeding, the Copyright Office rejected all proposals for circumvention exemptions relating to CSS, concluding that:

because motion picture producers are generally unwilling to release their works in DVD format unless they are protected by access control measures, it cannot be said that enforcing section 1201(a)(1) would, in the words of the Commerce Committee, result "in less access, rather than more, to copyrighted materials that are important to education, scholarship, and other socially vital endeavors." See Commerce Comm. Report, at 35. Thus, it appears that the availability of access control measures has resulted in greater availability of these materials.⁵

copyrighted materials." House Manager's Report, at 6. "Since the circumvention of technological access control measures will delay the availability of 'use facilitating' digital formats that will benefit the public and that are proving to be popular with the public, the promulgation of an exemption must be carefully considered ..." Final Rule, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64555, at 64570, October 27, 2000.

³ WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) adopted in Geneva on December 20, 1996.

⁴ "It appears from the comments and testimony presented in this proceeding that the motion picture industry relied on CSS in order to make motion pictures available in digital format. ... An exemption for motion pictures on DVDs would lead to a decreased incentive to distribute these works on this very popular new medium. It appears that technological measures on DVDs have increased the availability of audiovisual works to the general public, even though some portions of the public have been inconvenienced." Final Rule, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64555, at 64569, October 27, 2000.

⁵ Id., at 64568, footnote 13.

It is imperative that the Copyright Office approach this proceeding in the context intended by Congress, as it has in the past, by focusing foremost on the role of technical protection measures in encouraging the widest possible dissemination of copyrighted works to the greatest number of potential users, and exercising utmost caution in applying the "fail-safe" mechanism provided by Congress "selectively" and "for limited time periods" only "if necessary to prevent a diminution in the availability to individual users of a particular category of copyrighted materials."⁶

The Copyright Office has properly rejected proposed exemptions for legitimate fair use purposes if the uses could be accomplished by means other than circumvention of CSS, noting:

Existing case law is clear that fair use does not guarantee copying by the optimum method or in the identical format of the original. On balance, an exemption, which would permit circumvention of CSS, could have an adverse effect on the availability of such works on DVDs to the public, since the motion picture industry's willingness to make audiovisual works available in digital form on DVDs is based in part on the confidence it has that CSS will protect it against massive infringement.⁷

As discussed in the Joint Comments of Creators and Copyright Owners, the DMCA has spawned a veritable cornucopia of content made available to consumers on a variety of platforms and in a variety of formats. And as pointed out by the Second Circuit, "the DMCA does not impose even an arguable limitation on the ability to make a variety of traditional fair uses" of movies and TV programs in these new formats – an ability that would not exist but for the DMCA-supported technical and legal frameworks.⁸ Moreover, the vast majority of motion pictures and TV

⁶ "The rulemaking proceeding, to be conducted by the Register of Copyrights, was considered a 'fail-safe' mechanism, monitoring developments in the marketplace for copyrighted materials, and would allow the enforceability of the prohibition against the act of circumvention to be selectively waived, for limited time periods, if necessary to prevent a diminution in the availability to individual users of a particular category of copyrighted materials." Final Rule, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 68 Fed. Reg. 62011, at 62012, October 31, 2003.

⁷ Id, at 62016.

⁸ See *Universal City Studios Inc. v. Corley*, 273 F.3d 429, at 459 ("the DMCA does not impose even an arguable limitation on the opportunity to make a variety of traditional fair uses of DVD movies, such as commenting on their content, quoting excerpts from their screenplays, and 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.").

programs distributed in the United States are also made available in formats that lack technical protection measures that prohibit copying. They are available in digital formats through cable and satellite networks, broadcast stations and, in some cases, on Internet platforms that do not employ technical measures that prevent copying. There can be no justification for circumvention of technical measures that may be applied to material in certain formats when that same material is available in other formats that do not prevent copying. Although it is often argued that it may be more convenient to access protected formats such as DVDs than unprotected formats such as broadcast television, it has been clearly established that access to fair uses does not require access to the most convenient copy, or the most perfect quality copy, or the copy of the user's choice.⁹ And whatever inconvenience may be suggested by exemption proponents is more than offset by the benefits of the vastly expanded ability to access and make noninfringing uses of more works in higher quality formats than ever before.

Turning to the specific proposed exemptions listed in the Copyright Office's Notice, with one possible exception, none of the proposals warrants an exemption from the DMCA's prohibition against circumvention of technical protection measures to gain access to copyrighted motion pictures or TV programs. Either the proposals fail to establish that a fair use is being or is likely to be substantially adversely affected by the prohibition, or they fail to establish that access for fair use purposes cannot be obtained by means other than circumvention of technical measures.

2. "Subscription based services that offer DRM-protected streaming video where the provider has only made available players for a limited number of platforms, effectively creating an access control that requires a specific operating system version and/or set of hardware to view purchased material."

⁹ See *id.* ("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. The fact that the resulting copy will not be as perfect or as manipulable as a digital copy obtained by having direct access to the DVD movie in its digital form, provides no basis for a claim of unconstitutional limitation of fair use. A film critic making fair use of a movie by quoting selected lines of dialogue has no constitutionally valid claim that the review (in print or on television) would be technologically superior if the reviewer had not been prevented from using a movie camera in the theater, nor has an art student a valid constitutional claim to fair use of a painting by photographing it in a museum. 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.").

3. *"Motion pictures protected by anti-access measures, such that access to the motion picture content requires use of a certain platform."*

These requests to engage in circumvention of technical measures seem to relate to dissatisfaction with the platforms chosen for distribution of movies and other audiovisual content or the commercial terms on which they are offered, rather than to the ability to engage in noninfringing uses. No evidence is offered that the marketing decisions complained of have substantially adversely affected the proponents' ability to make noninfringing uses of particular content. There has been no attempt to demonstrate that the content for which proponents would like to make noninfringing uses is not available from other sources. Proponents' justifications for an exemption to the DMCA circumvention prohibition relate no more to the subject of this proceeding than complaints that certain content is marketed in specialty stores but not big box outlets, or that the prices asked by content owners for access to their works are too high. Section 1201(a)(1)(C) was not intended to provide relief to customers who are unhappy with the commercial terms on which copyright owners make their works available or the platforms on which they choose to distribute their works.¹⁰ Accordingly, and as discussed by the Register in her previous DMCA review recommendations concerning space shifting,¹¹ these requests should be denied.

That said, it bears mentioning that owners of movies and TV programming are not unmindful of the fact that many of their customers desire to access content on multiple platforms and devices. And they are responding aggressively to the demands of their customers in a variety of ways that are vastly expanding consumer access to their content. Consumers are now offered time, platform and device options to view movies and TV shows when and how they want. For example, television shows continue to be available through traditional broadcast and linear cable/satellite channels, but they are also now available on demand via the Internet on computers, cell phones and other interactive devices. Consumers can choose to stream their favorite shows for free, with commercials, on sites like abc.com, Hulu, and cbs.com, or to purchase shows through services like iTunes or by using their Sony PlayStation consoles via the PlayStationNetwork. Movies are similarly made available for download through services like iTunes, Blockbuster or CinemaNow

¹⁰ As the Copyright Office has said in a related context, "The need for a particular device on which to view the work is not a novel concept and does not constitute an effect on section 109. VHS videocassettes for example, must be played on VHS VCRs." DMCA Section 104 Report, U.S. Copyright Office, August 2001, at page xvi.

¹¹ Recommendation of the Register of Copyrights in RM 2005-11; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, November 17, 2006, at pages 69-72.

and on-demand streaming through sites like AmazonVOD, Hulu, Fancast and Netflix. Several services offer both "rental" and "purchase" models and the ability to make copies for use on portable devices.¹²

Consumers' interest in "device shifting" is also being met by digital copy offerings. Many motion picture studios are making movies available with a feature called "digital copy" that allows the movie to be easily transferred to a PC, iPod, iPhone and other portable media players.¹³ When a consumer buys a DVD with digital copy, a second copy of the movie is provided along with the traditional CSS-encrypted copy. This second copy is formatted to allow easy and secure transfer from a computer to other media players. No decryption and certainly no circumvention of the CSS copy takes place.

4A. *“Commercially produced DVDs used in face-to-face classroom teaching by college and university faculty, regardless of discipline or subject taught, as well as by teachers in K-12 classrooms.”*

4B. *“Audiovisual works used by instructors at accredited colleges or universities to create compilations of short portions of motion pictures for use in the course of face-to-face teaching activities.”*

4C. *“Audiovisual works that illustrate and/or relate to contemporary social issues used for the purpose of teaching the process of accessing, analyzing, evaluating, and communicating messages in different forms of media.”*

4D. *“Audiovisual works that illustrate and/or relate to contemporary social issues used for the purpose of studying the process of accessing, analyzing, evaluating and communicating messages in different forms of media, and that are of particular relevance to a specific educational assignment, when such uses are made with the prior approval of the instructor.”*

4E. *“Audiovisual works contained in a college or university library, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by media studies or film professors.”*

4F. *“Audiovisual works contained in a college or university library, when circumvention is accomplished for the purpose of making compilations of*

¹² For a comprehensive list of authorized on-line movie and TV program sites, see http://www.mpaa.org/piracy_LegalOpt.asp and <http://www.respectcopyrights.org/getmovies.html>

¹³ For example, see www.foxdigitalcopy.com

portions of those works for coursework by media studies or film students.”

4G. “Audiovisual works included in a library of a college or university, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by professors.”

4H. “All audiovisual works and sound recordings ‘used in face-to-face classroom teaching by college and university faculty, regardless of discipline or subject taught’ and regardless of the source of the legally acquired item.”

All of the foregoing exemption proposals, with the exception of 4E relating to media studies or film professors, would create new exemptions to allow circumvention of technical measures for educational purposes by teachers or students. None of the proponents of new exemptions offers compelling evidence that the non-infringing uses they wish to make require circumvention of technical measures. For instance, the comments of Kevin L. Smith of Duke University refer to numerous movies widely available "in the clear" from broadcast stations and cable networks.¹⁴

Movies telecast by broadcast stations and basic cable networks could be copied and used for noninfringing purposes before the DMCA was enacted, and continue to be available for those purposes today. The fact that these movies are also available today on DVDs with CSS to protect against unauthorized copying and redistribution has not "adversely affected" noninfringing uses. There is no evidence that the availability of movies on protected DVD has diminished the availability of movies in unprotected formats. On the other hand, it is an accepted fact that protection against reproduction and redistribution was a necessary prerequisite to induce movie companies to release their content on DVDs. It may be that acquiring clips for educational purposes from DVDs is more convenient than acquiring them from broadcasts or cablecasts, but there is nothing in the concept of fair use that "guarantees copying by the optimum method."¹⁵

¹⁴ Among the examples offered by Mr. Smith to justify his proposed exemption is Dean Sarah Deutsch's desire to use clips of "My Man Godfrey" and "Meet John Doe" in her Social Sciences classes at Duke University. "Meet John Doe" has been broadcast "in the clear" by a number of TV stations, including Greenville, South Carolina, station WYFF on December 25, 2007. "My Man Godfrey" was also subject to numerous broadcasts, including by Tampa/St. Petersburg station WTSP on August 8, 2008. Mr. Smith also refers to Professor Orin Starn's desire to use a clip from "A League of Their Own" in his class on Anthropology of Sports. That movie has been widely broadcast "in the clear" by TV stations, including Atlanta station WTBS on May 3 and 4, 2008.

¹⁵ See note 6, supra.

Certainly there is no justification for permitting the circumvention of technical measures with respect to movies that are available without technical measures that prevent copying on other platforms. And for movies not available on unprotected platforms, there is always the option of recording from a television screen, which has been recognized as a reasonable alternative to circumventing technical measures by the Second Circuit Court of Appeals¹⁶ as well as the Copyright Office.¹⁷

The fair use doctrine and other limitations on the exclusive rights of copyright owners strive for a balance between the interest of society in stimulating creation and dissemination of new works of authorship, and the interest of society in facilitating social goals such as teaching and scholarship. That balance is required in the instant proceeding. The Copyright Office must weigh the benefits of creating exceptions to the DMCA prohibition against the disincentives such exemptions will impose on creativity and particularly on decisions to make works available on new, innovative platforms like DVD. Where available alternatives to circumvention exist to carry out social goals, there should be a presumption against eroding incentives to create and disseminate works of authorship, even when circumvention might be more convenient than avenues that do not require circumvention.

In her previous DMCA review recommendation, the Register found that the ability to use alternatives to circumvention, such as making screen shots with a digital recording device, was sufficient to meet the needs of educational users, "including those wanting to comment on the historical context of a film or create a parody, or to show a film clip in class unrelated to cinematographic significance."¹⁸ Nothing in the record of this proceeding suggests that that finding is not longer valid. To the contrary, all potential non-infringing users, and most particularly educational institutions, have access to more efficient, and often less expensive, equipment that can be used for making screen shots than was available three years ago.¹⁹ Moreover, the broader availability of works

¹⁶ See note 6, supra.

¹⁷ Recommendation of the Register of Copyrights in RM 2005-11; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, November 17, 2006, at page 20.

¹⁸ Id.

¹⁹ For instance, according to Duke University's website, the Film, Video, Digital Program contains a wide variety of film-related equipment. This includes twelve mid-range digital video cameras with various lenses, grip and camera support accessories such as tripods and stands, and high-end Macintosh video editing workstations with tape decks, professional monitors and DVD duplicators. The entire list can be found at <http://fvd.aas.duke.edu/production/documents/FVDEquipmentList.pdf>. The newer high definition digital camcorders – such as the Sony Z1U – are more than sufficient to

through on-demand services on the Internet has materially increased the variety of works available and the convenience of obtaining them through these means.

Although technological advances have improved the quality of screen shots, MPAA does not oppose a limited reinstatement of the film and media studies exemption provided in the previous DMCA review, if the Register determines that the proponents of this exemption have met their burden of showing that this exemption is still justified. Such exemption, if granted, should be limited to standard definition DVDs protected by CSS, as no showing has been made that movies available in the high definition format are not also available in standard definition format, or that a high definition format is necessary to carry out the pedagogical needs of film and media studies professors.

The members of the MPAA have devoted considerable efforts to facilitate educational uses of film clips by film studies professors without the need for circumvention of technical protection measures. In fact, the University of Southern California School of Cinematic Arts (“USC”) has been in discussions with all six studio members of the MPAA to design an online film clip service (“Service”). The Dean of USC and certain film professors met with representatives of the studios and supplied to the studios a list of film and TV titles that professors would like to see available on the Service.

As contemplated, the Service would allow film professors to register and create an account. The professor would then be able to go online and browse through a full copy of each film title available on the Service. Using a custom player application, the professor would be able to select the exact clips from the film that he or she desires (subject to reasonable limits on the length and number of clips). When finished, the professor would submit online the clip requests. The Service would then either download the clips directly to the professor or make them available to the professor on a secure URL.

The Service would be made available to facilitate non-infringing educational uses and there would be no charge for the clips. Furthermore, there would be no requirement that the film professor or the associated school own or possess a copy of the film title for which clips were requested. As long as the film title was available on the

produce excellent screen and audio captures off the monitors and speakers from DVDs played on the workstations. They are also capable of recording in both 16:9 and 4:3 aspect ratios.

Service, any professor with an account on the Service would be able to access the full title and copy and use clips from the title.

While the complete parameters of the Service still need to be finalized and clearances obtained, all six major motion picture companies are committed to this project. The studios also look forward to working with other non-MPAA content providers to enable their participation in the service. While this Service has not yet launched, the studios and USC anticipate that it will be ready for beta-testing this year.

Thus, there is a realistic expectation that within the next three years, and possibly much earlier, a server-based service will be implemented by which film clips will be made available at no cost to bona fide film and media studies professors, thereby eliminating the need to engage in circumvention and, consequently, the need for a DMCA exemption. MPAA therefore requests that, if the Register determines that an extension of the film and media studies professor exemption has been justified based on the existing record, such extension be limited to works not available to film and media studies professors through a consensual process such as that being designed by MPAA, and be narrowed in the manner proposed in the Joint Comments of Creators and Copyright Owners.

It has been proposed that media studies and film students, as well as professors, be allowed to engage in circumvention for use in coursework. Such an exemption would vastly expand the universe of individuals exempted from the DMCA prohibition against circumvention and pose substantial enforcement problems. Because the existing exemption is limited to a relatively small number of film and media studies professors familiar with the DMCA and whose faculty member status provides strong incentives to act responsibly, there have been few, if any known abuses. However, if the exemption is dramatically expanded to include students, abuses are much more likely to occur. Moreover, by greatly expanding the universe of individuals who are exempt from the DMCA prohibition, there is danger that the exception will overshadow the rule, leading to widespread confusion as to what circumventions are and are not allowed and whether hacking tools are legitimate.

The Copyright Office must weigh these obvious downsides to expanding the existing exemption against the need for film and media studies students to engage in circumvention. No showing has been made that alternatives to circumvention are not adequate for student coursework.

In light of the foregoing, MPAA urges the Register not to recommend any of the exemption proposals relating to instructional non-infringing uses, except that for film and media studies professors which, if justified, should be limited and conditioned on the unavailability of the desired material through a consensual process.

9A. “Audiovisual works delivered by digital television (“DTV”) transmission intended for free, over-the-air reception by anyone, which are marked with a “broadcast flag” indicator that prevents, restricts, or inhibits the ability of recipients to access the work at a time of the recipient’s choosing and subsequent to the time of transmission, or using a machine owned by the recipient but which is not the same machine that originally acquired the transmission.”

In her previous review the Register considered a similar request and concluded: "No evidence has been presented that a 'broadcast flag' is currently being deployed and the case has not been made that a 'broadcast flag' is likely to be deployed in the next three years (or whether it would constitute an access control). The proposed exemption is simply premature at best."²⁰ Nothing has changed in the subsequent three years to alter that conclusion.

9B. “Audiovisual works embedded in a physical medium (such as Blu-Ray discs) which are marked for ‘down-conversion’ or ‘down-resolutioning’ (such as by the presence of an Image Constraint Token “ICT”) when the work is to be conveyed through any of a playback machine’s existing audio or visual output connectors, and therefore restricts the literal quantity of the embedded work available to the user (measured by visual resolution, temporal resolution, and color fidelity).”

No evidence has been presented that such "down-conversion" or "down-resolutioning" is occurring, or if it were, that fair uses would be substantially adversely affected. As in the case of proposals 2 and 3 discussed above, proponents of an exemption to permit circumvention appear to be complaining about the terms on which works are or may be offered rather than any existing or potential adverse effects on fair uses. The fair use doctrine does not require copyright owners to offer their audiovisual works in any particular resolution. Any decision to require "down-conversion" or "down-resolutioning" in certain circumstances is a commercial decision, like pricing, that has no relationship to the subject of this proceeding.

²⁰ Recommendation of the Register of Copyrights in RM 2005-11; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, November 17, 2006, at pages 83, 84.

11A. "Audiovisual works released on DVD, where circumvention is undertaken solely for the purpose of extracting clips for inclusion in noncommercial videos that do not infringe copyright."

11B. "Motion pictures and other audiovisual works in the form of Digital Versatile Discs (DVDs) that are not generally available commercially to the public in a DVD form not protected by Content Scramble System technology when a documentary filmmaker, who is a member of an organization of filmmakers, or is enrolled in a film program or film production course at a post-secondary educational institution, is accessing material for use in a specific documentary film for which substantial production has commenced, where the material is in the public domain or will be used in compliance with the doctrine of fair use as defined by federal case law and 17 U.S.C. § 107."

Similar to the exemption proposals relating to teaching activities discussed above, these proposals fail to establish that content desired for non-infringing uses is not available from sources other than DVDs, or that the desired non-infringing uses cannot be made by means that do not require circumvention of technical measures, such as screen shots. Proponents simply ask for a blanket exemption from the law to circumvent technical protection measures on DVDs whenever members of their broad classes of users unilaterally decide that a particular use may be non-infringing.

Granting such requests would, in effect, rewrite Section 1201 in a way Congress specifically declined to do. Congress rejected a broad fair use defense to the prohibitions on circumvention and instead chose to provide a narrow, limited "fail safe" mechanism to insure that noninfringing uses are not substantially adversely affected with respect to particular classes of works.

Moreover, as noted earlier, such a broad exemption would encourage massive disregard for the DMCA's prohibition against circumvention of technical measures, create public confusion as to when circumvention is or is not permitted, and present copyright owners with insurmountable enforcement problems. The proponents of these broad exemptions have not met their burden of showing that their requests are even subject to the "fail safe" mechanism of Section 1201(a)(C), much less that their ability to make noninfringing uses has been, or is likely to be, substantially adversely affected. Their proposals are unjustified, contrary to the purposes of the DMCA, and, consequently, should be rejected.