

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**

Docket No. 2014-07

**Petition of Electronic Frontier Foundation and Organization for Transformative
Works**

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The Electronic Frontier Foundation and the Organization for Transformative Works respectfully petition the Librarian of Congress to exempt the following class of works from 17 U.S.C. § 1201(a)(1)'s prohibition on the circumvention of access control technologies for 2015-2018:

Audiovisual works that are lawfully made and acquired via online distribution services, where circumvention is undertaken solely for the purpose of extracting clips for inclusion in noncommercial videos that do not infringe copyright.¹

I. The Commenting Parties

The Electronic Frontier Foundation (EFF) is a member-supported, nonprofit public interest organization devoted to maintaining the traditional balance that copyright law strikes between the interests of copyright owners and the interests of the public. Founded in 1990, EFF represents thousands of dues-paying members, including consumers, hobbyists, computer programmers, entrepreneurs, students, teachers, and researchers, who are united in their reliance on a balanced copyright system that ensures adequate protection for copyright owners while facilitating innovation and broad access to information in the digital age.

The Organization for Transformative Works (OTW) is a nonprofit organization

¹ Petitioners expect to further develop the proposed exemption consistent with the principles identified in this petition and the record developed in the course of this proceeding.

established in 2007 to protect and defend fanworks from commercial exploitation and legal challenge. “Fanworks” are new, noncommercial creative works based on existing media; outside media fandom, the term “remix” is often used. The OTW provides services to fans who need assistance when faced with related legal issues or media attention. The OTW’s nonprofit website hosting transformative noncommercial works, the Archive of Our Own, has over 400,000 registered users and receives over 4.8 million unique visits per month.

In filing this petition, EFF and OTW represent the interests of the tens of thousands of noncommercial remix video creators who have or would like to include clips from audiovisual works in their own creations.

II. Proposed Exemption: Circumvention Necessary to Extract Clips From Online Sources for Use in Remix Videos

A. Overview

Remix video creators often find that the cultural works from which they need to excerpt to engage in their critical commentary are not readily or timely available in DVD or Blu-Ray, yet creators still need to comment upon them while the original works are still fresh in the mind of the audience. Therefore, video makers turn to other sources, such as iTunes, Amazon Instant Video (formerly Amazon Unbox)² and Netflix to obtain the audiovisual works they need. Obtaining material from those sources may require circumventing access controls using a number of commonly-available tools. Because these uses include many non-infringing fair uses, they should be sheltered from any risk of DMCA 1201 liability, as the Copyright Office recognized in 2012.

B. Copyrighted Works Sought to Be Accessed

This proposed exemption applies to audiovisual works available from authorized online distribution sources.

C. Technological Protection Measures

There are many encryption and authentication schemes used by sites that seek to make videos available to end-users. For example, Amazon Instant Video (formerly Amazon UnBox) uses Adobe’s Flash plugin, among other programs, as do Hulu and DIRECTV.com. RTMPE (Real Time Messaging Protocol Encryption) is an extension that adds an encryption layer to the Adobe-designed RTMP streaming media protocol. Adobe markets RTMPE in its multimedia streaming products, such as Flash Media Server, as a means of deterring people from recording videos and says RTMPE was designed for this purpose. Nonetheless, RTMPE has long since been successfully reverse-engineered by third parties, and several implementations have been produced that successfully interoperate with Adobe’s Flash Media Server.

Other services can and do use technologies other than RTMPE. For example, Apple encodes video using its proprietary FairPlay DRM scheme. Various tools exist for overcoming FairPlay’s restrictions.

² Amazon now calls this service “Amazon Instant Video” but it is nonetheless commonly referenced by its former name in the remix community.

D. Non-infringing Uses

1. The Proposed Exemption is Tailored to Supporting Remix Creativity

The targeted practice of the proposed exemption—the creation of videos that include clips taken from authorized online distribution sources—is well-established and highly likely to continue over the next three years.

The creative practice of “remixing” existing video content to create original expression is a time-honored tradition stretching back to 1918 when Lev Kuleshov began splicing and assembling film fragments to tell new stories.³ Today, the ability to remix and share existing video content has been democratized to an unprecedented degree, thanks to the combination of inexpensive video editing tools and free, easy-to-use video hosting services such as YouTube.

Dr. Michael Wesch has identified a number of genres of short-form videos on YouTube that are popular among viewers and frequently depend on clips drawn from film or television sources. These genres include everything from movie trailer remixes to fanvids to supercuts.⁴ One popular video genre is “political remix videos.” PRVs are a powerful and persuasive way to raise public awareness on a variety of issues. For example, one popular video combines selected clips from the TLC show “Toddlers and Tiaras” to create a re-imagined reality show called “Moms and Tiaras” that comments on the behavior of the parents of beauty pageant contestants. All of these forms of remix are valuable not only in themselves, but also because they help create the next generation of artists, who can gain skills and exposure otherwise unavailable to them.

These remix creators frequently rely on source material extracted from online distribution sources. This type of use is not unusual for remixers who wish to comment on a currently airing show; waiting for the DVD or Blu-Ray disc would in many cases require up to a year (or may never occur at all). Many commentaries on television shows are most relevant soon after the shows air, whereas DVDs are released many months later. And many anime series, such as the very popular Sailor Moon Crystal never see authorized release in the U.S. except via online distribution mechanisms.⁵

Timeliness is particularly important for political remixers, who often need to create and share their videos quickly, while their message is still timely. For this community, delayed access can mean a less effective message – or no message at all. A study of political videos concluded that the most successful political remix videos were vastly more successful than traditional party or candidate-sponsored ads, and “in all cases they were not typical ads, but edited footage.”⁶

Another reason these sources are important is that remix artists care deeply about high-quality source material. Low quality detracts from the message and makes it hard to

³ Lev Kuleshov, *Kuleshov on Film* (1974).

⁴ See, e.g. <http://screencrave.com/2010-08-04/the-10-best-youtube-trailer-remixes-ever/>; <http://transformativeworks.org/projects/vidtestsuite>; <http://supercut.org>.

⁵ See <http://www.hulu.com/sailor-moon-crystal>; <http://blog.hulu.com/2014/05/19/sailor-moon-returns/>.

⁶ Limor Shifman, Memes in Digital Culture 125 (2014).

reach audiences. Further, remix often requires multiple rounds of editing. Each edit degrades the quality of the video, so unless the creator starts with high-quality source, the output may be unwatchable or artistically insufficient.

2. The Standard Fair Factors Favor a Fair Use Finding

With respect to the first factor—the purpose and character of the use—two characteristics of remix videos will generally favor a fair use finding. First, remix videos are inherently transformative in nature. Second, the exemption sought here for remix videos is limited to remix videos created for noncommercial purposes—*i.e.*, that are not intended primarily to propose a commercial transaction, but rather to comment, criticize or educate. Such activities have historically been favored under the first fair use factor.⁷

The second fair use factor—the nature of the work—grants greater protection to creative works than to factual ones. Nevertheless, courts have recognized that this factor is likely to be of little importance in fair use cases involving the creation of transformative, original works.⁸ In addition, remix usually targets works that have already been widely disseminated.⁹ Moreover, in the case of political remix videos, the source work will often be highly factual, suggesting this favor would likely favor fair use.¹⁰

The third fair use factor—the amount taken—also tips in favor of remix video creators. The excerpts taken from films or television programs will generally comprise only a small fraction of the original work. Existing fair use precedents make it clear that where only small excerpts are taken, a fair use determination is favored.¹¹

The fourth fair use factor—the effect of the use on the potential market for the work—also supports remix video creators. These videos are transformative works that do not substitute for the original works; if anything, they support them.¹² Moreover, to the extent that any particular remix video is a parody of the original, or associates the original work with any political message or controversial subjects, it is unlikely that the copyright owner would license the remix. Courts have found that a fair use finding is appropriate where these considerations make licensing unlikely or impossible.¹³ As the experience of the past three years under the existing online exemption shows, digital distribution models are thriving in the presence of authorized circumvention for remix.

E. Adverse Effects

If this exemption is not renewed, the anti-circumvention provisions of the DMCA will adversely affect remix creators who wish to use online distribution mechanisms. Given

⁷ See, e.g., *Campbell*, 510 U.S at 579.

⁸ See, e.g., *id.* at 598.

⁹ *Arica Inst. v. Palmer*, 970 F.2d 1067, 1078 (2d Cir. 1992).

¹⁰ *Harper & Row*, 471 U.S. at 563.

¹¹ See e.g. *Arrow Productions, LTD. v. Weinstein Co. LLC*, – F. Supp. 2d – (S.D.N.Y. Aug. 25, 2014).

¹² 2010 Recommendation, *supra*, note 2, at 39-40; 2012 Recommendation, at 127-28; see *Authors Guild, Inc. v. Google Inc.*, 954 F.Supp.2d 282, 293 (S.D.N.Y. 2013).

¹³ *Campbell*, 510 U.S. at 592-93.

the substantial litigation involving CSS circumvention for DVDs,¹⁴ remix creators have a legitimate reason to fear circumvention liability, even though their activities are otherwise protected by the fair use doctrine. Certainly, any competent legal counsel they might obtain would have to advise them of the risk—which means fair uses will be chilled. Alternatively, if they do not obtain such counsel, they may inadvertently engage in circumventing activity, unknowingly subjecting themselves to liability. In either event, legitimate creative activity is harmed to the detriment of both the creator and his or her potential audience.

In addition, a remix creator that finds herself on the wrong end of a DMCA takedown notice could be chilled from counter-noticing, no matter how noninfringing her work, by the threat of a circumvention claim. This is particularly true if, as will often be the case, the takedown notice has spurred her to consult a lawyer for the first time. Without an exemption, the main effect of the anti-circumvention prohibitions on remixers was to surprise them when they received a takedown notice, believed they had a valid fair use defense, and discovered that the DMCA made that fair use defense irrelevant because of how they had acquired the footage they used. The OTW’s experience under the 2009 and 2012 exemptions indicates that such remixers are now able to contest notices, asserting their fair use arguments, and that they have been able to successfully use counter-notifications under the DMCA as well as other dispute resolution mechanisms.

Thus, absent an exemption Section 1201 continues to represent a set of perverse incentives and traps for the unwary. As it stands, remixers turn to online sources such as iTunes in part because they can be confident that they have paid for the right to access the content. Dr. Coppa’s observation that “for most vidders, the big legal (and ethical) line remains between ‘paying’ and ‘not paying’ for source footage” applies equally whether the compensation is in the form of a DVD sale or an iTunes purchase.¹⁵ Remixers concerned about § 1201 liability, however, are likely to turn to unauthorized Internet sources that offer no means for compensating the rightsholder.¹⁶

III. Conclusion

EFF and OTW urge the Librarian to renew the exemption for circumventing access controls on audiovisual works made available via online distribution services in order to extract noncommercial video clips.

¹⁴ See, e.g., *Studios v. Metro-Goldwyn-Myer Studios*, 307 F. Supp. 2d 1085 (N.D. Cal. 2004).

¹⁵ See 2012 EFF Comments, at 42-43, 63; see also communication from luvtheheaven, Oct. 10, 2014 (“many people like me would be willing to spend their money places like iTunes on TV shows they love, if that was a way to vid with an amazingly perfect quality copy of the episode.”).

¹⁶ See, e.g., Lucas Hilderbrand, *Inherent Vice: Bootleg Histories of Videotape and Copyright* 79 (2009).