

**BEFORE THE COPYRIGHT OFFICE  
LIBRARY OF CONGRESS**

**IN THE MATTER OF  
EXEMPTION TO THE PROHIBITION ON CIRCUMVENTION OF COPYRIGHT  
PROTECTION SYSTEMS FOR ACCESS CONTROL TECHNOLOGIES**

**Docket No. RM 2008-8**

**REPLY COMMENT OF  
PETER DECHERNEY, KATHERINE SENDER, MICHAEL DELLI CARPINI**

This reply comment is submitted on behalf of Peter Decherney, Katherine Sender, and Michael Delli Carpini, University of Pennsylvania (collectively referred to as “Petitioners”); in response to the Notice of Inquiry (NOI) issued by the Copyright Office and Library of Congress regarding Exemptions to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies.

Petitioners submit this reply comment in support of the following classes of works for which exemptions were proposed in the initial round of comments:

- *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.* Comment by: Gary Handman, Media Resources Center UC Berkeley (4A)
- *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.* Comment by: Kevin L. Smith, Duke University (4B)
- *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.* Comment by: Renee Hobbs (4C)
- *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.* Comment by: Renee Hobbs (4D)

- *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.* Comment by: Peter Decherney, University of Pennsylvania (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 coursework by media studies or film students.* Comment by: Peter Decherney, University of Pennsylvania (4F)
- *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.* Comment by: Library Copyright Alliance and the Music Library Association (4G)
- *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.* Comment by: Gail Fedak (4H)
- *Audiovisual works released on DVD, where circumvention is undertaken solely for the purpose of extracting clips for inclusion in non-commercial videos that do not infringe copyright.* Comment by: Fred Von Lohmann and Jennifer S. Granick, Electronic Frontier Foundation (5A)

## **I. Introduction**

In 2006, Petitioners proposed an exemption for media studies professors, which the Librarian of Congress granted. In the current Rulemaking, Petitioners submitted a proposal to renew and expand the 2006 exemption for media studies professors [hereinafter 2006 Exemption] and also express strong support for several other proposals submitted during the initial comment period. In Section II of our Reply Comment, Petitioners will examine some specific examples of media professors’ work in order to demonstrate how the 2006 Exemption has been employed and why it should be renewed. Petitioners will also consider an example of

student multimedia coursework to demonstrate the type of important educational work that would be enabled by the expansion of that exemption to apply to students.

Petitioners have submitted this Reply Comment both electronically and via hand-delivery because Petitioners created a supplemental DVD in support of this Reply Comment. The DVD includes lecture slides typical of those Professor Decherney would use in his media studies courses and contains descriptions and examples of the benefits of the 2006 Exemption, providing rationale for its renewal and expansion. Some of the clips are taken from *Young Sherlock Holmes*, *Willow*, *Inner Space*, *Indiana Jones and the Last Crusade*, *Total Recall*, *Terminator 2*, *The Abyss*, and a DVD extra from *Star Wars: Revenge of the Sith*. The DVD also includes a short video essay made by undergraduate students in the course, “Race and Popular Culture” at the University of Pennsylvania. This video is submitted in support of proposed class 4E. Section III is devoted to voicing support for the Category 4 Comments. Section IV is devoted to voicing support for Comment 5A, submitted by Fred von Lohmann and Jennifer S. Granick of Electronic Frontier Foundation, in support of a non-infringing video remix exemption.

**II. Petitioners support renewal and expansion of the 2006 Exemption to include all audiovisual works contained in a college or university library and also to allow for use of these works for media studies students as part of their coursework.**

In the first example presented on the accompanying DVD, Professor Decherney demonstrates the use of clips in a typical undergraduate lecture. He discusses the rise of digital characters in Hollywood films since the late 1980s and, more specifically, the technique of “morphing.” The fourteen slides are taken from a longer lecture on the development of computer graphics (CG) that Professor Decherney regularly delivers in a course called “The Hollywood Film Industry.” The course examines the history of Hollywood, focusing on how government

regulation and commerce have translated into Hollywood aesthetics. A syllabus for the course is available at [decherney.org/Hollywood](http://decherney.org/Hollywood).

In the video, Professor Decherney models several ways that media professors use clips. A clip from the film *Terminator 2: Judgment Day* (1991), for example, demonstrates a few different points. On the one hand, it is a stunning example of the sophisticated CG that made this film a watershed in the history of digital characters. We see the T1000 robot morphing seamlessly as it interacts with its environment and even with another character in a fast-paced action sequence. Yet, as Professor Decherney points out, this breakthrough film used CG sparingly. In the clip shown, for example, you can also see a few of the shortcuts the film's producers took to make it look as though CG contributed much more to the scene than it really did. In several shots in the scene, the T1000 is represented by a man in a silver-colored suit, giving the impression that many more CG shots were used. This filmmaking technique would not be apparent to students if it were shown at a lower resolution.

The use of digital characters in Hollywood films led to speculation that digital actors might someday displace real actors. In a second clip, taken from a DVD extra included with *Star Wars: Episode II: Attack of the Clones* (2002), George Lucas discusses this very concern. Lucas and his team of animators make the point that while the characters may be digital, the director must still work with the artists—the people—who animate the characters. Lucas and his team discover that directing digital actors often takes longer and can be much more difficult than directing real actors. It is a point that Professor Decherney might have made in class himself, but witnessing Lucas and his animators struggling with this issue in the midst of making a film makes the point much more forcefully. This DVD extra is only available in a copy-protected

format, and it could not have been used as effectively in a classroom before the creation of the 2006 Exemption.

In addition to the specific value gained from using these two clips, you can also see the general effectiveness of inserting clips into presentations and allowing them to be used fluidly while lecturing. No time is wasted fumbling with discs; teachers and students may move from lecture and discussion to viewing and back without pause. The high-quality images are thus essential for teaching. The high-quality images are especially important when teaching about color, lighting, performance, and other aspects of media production where the high-quality image makes visible a technique that would have been lost at lower resolutions.

Clips are also used in transformative ways. Not only is the recontextualization of the clips transformative, but clips are often shown in presentation (PowerPoint or Keynote) slides and mixed with text, still images, or other moving images. Finally, as you can see from the George Lucas example, it is extremely valuable to be able to access and take clips from material that is only available in encrypted formats.

The second video on the accompanying DVD, “Racism in Disney,” was created by three students at the University of Pennsylvania for a course entitled “Race in Popular Cinema.” In the course, students worked in teams to create multimedia projects that analyzed popular culture. In the students’ clever five-minute video essay, they set up the fairy-tale expectations we anticipate when we see the Disney Company’s logo, and then they reveal the assumptions about race and ethnicity that often underlie those fairy-tale fantasies. In a scene of Brazilians dancing, for example, we might see only white faces, eliding the mixed racial makeup of the country, or racial stereotypes might be reproduced in depictions of animals. By including clips that were left

off of recent video releases, the students also suggest that Disney has responded to historically changing attitudes toward representations of race and ethnicity.

At a formal level, the students used text, sound, and editing to create an argument about representation in popular film and video. They intercut clips for comparison; they inserted text to pose and answer questions; and they mixed soundtracks to draw connections across films. This is only one example of the thousands of such video essays that students are creating at the University of Pennsylvania and at other colleges and universities every semester.<sup>1</sup> Video essays are becoming staples of college and university education, and it is important that the law keep pace with educational techniques.

### **III. Petitioners support the Category 4 comment proposals requesting the expansion of the 2006 Exemption.**

Petitioners strongly support the other comments designated as Category 4 comments. These comments seek to expand the 2006 Exemption in various ways, either with respect to the source of the works, the class of works, the class of uses of the works, the class of users, or a combination thereof. All of the Category 4 comment submitters are considered experts in their respective fields of study and each of the submitters has specific knowledge about the use of media in particular disciplinary contexts. Mr. Gary Hardman works with librarians and educators nationwide in order to develop a more robust and meaningful curriculum; Mr. Kevin Smith of Duke University oversees scholarly communications at a leading institute of scholastic research, always seeking to build on a long tradition of excellence; Professor Renee Hobbs is a nationally recognized expert in the field of Media Literacy; the representatives of the Library Copyright

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<sup>1</sup> Some examples may be viewed on the University of Pennsylvania's Information Commons Website: <http://wic.library.upenn.edu/> and <http://wic.library.upenn.edu/mashup/sadashige.html>.

Alliance and the Music Library Association are global leaders in the field of arts and literacy, who seek increased knowledge of both aesthetic and technical aspects of the arts and music; and Ms. Gail Fedak is Director of Media Resources at a major university who wishes to eliminate any hurdles between teachers, students, and access to media.

Having used the 2006 Exemption to the extent to which they were able, these highly respected experts have each identified the inadequacies of the 2006 Exemption for their particular field, and they have persuasively argued that the 2006 Exemption must be expanded. Their comments include compelling proposals for reshaping the 2006 Exemption in ways that would empower educators to further specific teaching purposes.

To be clear, Petitioners feel strongly that their submissions (4E and 4F) are necessary expansions of the 2006 Exemption, based on the evidence about the uses both enabled and limited by the 2006 Exemption in the years since it was granted. The Petitioners have carved out their proposed exemption with narrow boundaries specific to the needs of media professors and students, having recognized that the 2006 Exemption, while beneficial, was constructed too narrowly. The Petitioners seek to broaden the 2006 Exemption for the reasons described in their earlier submission, as well as in Section II, *supra*, but also recognize that the other Category 4 comments raise valid and important points, many of which were described by the Petitioners themselves in Comments 4E & 4F. The other Category 4 comments have merely submitted proposed exemptions that are, for the most part, broader than the exemptions proposed by Petitioners.

Most of the proposals are broader than the exemption sought by the Petitioners; ranking the Category 4 submissions proposed from broadest to narrowest would produce the following scale: 4A (Broadest) → 4H → 4G → 4B → Petitioners Comments (4E/4F) → 4C/4D

(Narrowest). Under this analysis, it would appear that a grant of any of 4A, 4B, 4G, or 4H would encompass the exemption proposed by the Petitioners; such a grant would obviate the need to grant Petitioner's exemption.

Each of the Category 4 comments, including those submitted by the Petitioners, saw the inadequacy of restricting the source of works to only university Media Studies department libraries. While the Petitioners, along with Comment 4G, seek to expand the source of works covered by the exemption to any or all university libraries, all of the other Category 4 comments seek to remove any restriction on the source of exempted works; so long as the works were legally obtained, they hold, the origin or source of the works should not impact their use for non-infringing activities.

Additionally, many of the Category 4 comments recognize, as do the Petitioners, that it is important to expand the class of protected users to include students. Petitioners stated their rationales for this expansion in their earlier submission and thus will not restate them here. The fact that so many others recognized this same inherent inadequacy and, for many of the same reasons, sought to protect students from penalties that might arise from circumvention in the pursuit of furthering their education and sharpening the skills necessary to succeed in their future endeavors, shows just how imperative a broadened exemption truly is.

The voices of experts in these wide-ranging fields, bolstered by their arguments and evidence, have proven the necessity of broadening the 2006 Exemption. The more uses and users protected by an exemption, the greater the rewards. All of the experts have analyzed the 2006 Exemption, and, recognizing its potential, have turned their attention toward crafting an exemption that will be as powerful and as useful as possible for educators and students making

educational, non-infringing uses of media. Petitioners humbly add their full support behind the proposals contained in the Category 4 comments.

#### **IV. The Continued Rise in Popularity of YouTube and YouTube Remixers and Vidders Supports the Granting of an Exemption for Non-infringing Remix Videos Posted on YouTube.**

Remix videos have become a popular and important form of online expression. In Comment 5A, the Electronic Frontier Foundation, recognizing the significance of this form of expression, requested an exemption for “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,” that would include these remix videos. As the term is used in this Reply Comment, and as it was used in Comment 5A, remix videos encompass original, noncommercial videos incorporating clips from movies and television shows that have been released on DVD. A Pew Internet & American Life Project reports that nearly two-thirds of teenagers are content creators online, and nearly one-quarter create remix videos.<sup>2</sup> These remix videos are often posted online to YouTube so that the messages and creativity inherent in the works can be shared with the public. YouTube is increasingly developing into a vital tool for communication and dissemination of thought and expression, with figures such as the Pope<sup>3</sup> and the President<sup>4</sup> recognizing and taking advantage of the site’s

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<sup>2</sup> Pew Internet & American Life Project, “Teens and Social Media,” Dec. 19, 2007, *available at* [http://www.pewinternet.org/pdfs/PIP\\_Teens\\_Social\\_Media\\_Final.pdf](http://www.pewinternet.org/pdfs/PIP_Teens_Social_Media_Final.pdf).

<sup>3</sup> See Nicole Winfield, *Vatican 2.0: Pope Gets His Own YouTube Channel*, WASH. POST, Jan. 24, 2009, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/23/AR2009012300766.html> (describing Pope Benedict XVI’s attempt to broaden his audience to encompass the nearly 1.4 billion people who are online today).

<sup>4</sup> Kevin Merritt, *How Obama Will Use Technology*, WASH. POST, Jan. 24, 2009, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/24/AR2009012400646.html> (explaining the Obama administration’s use of technology, including Obama’s promise to post “fireside chats” on YouTube to reach the viewers who do not listen to AM radio regularly).

popularity. With the help of YouTube, remix videos have become more than a mere hobby – a “remix culture” has emerged, with a strong following.

Thousands of the videos posted daily consist of content that incorporates clips from DVD sources. These remix videos, which can now reach millions of people, frequently rely on DVD clips in order to communicate their messages. Petitioners believe that it is important that this forum for expression be allowed to mature, and thus strongly support Comment 5A’s proposal for an exemption for these remix videos.

Remixing itself is not a new phenomenon. Early silent filmmakers created remixes; avant-garde filmmakers have been creating remixes continuously since the 1910s, and amateur filmmakers have been making remixes at least since the 1940s.<sup>5</sup> The number of remix artists and the size of the audience for remixes, however, have exploded as a result of video sharing sites like YouTube. Online remix video has emerged as an important new cycle in the history of remixing, one that is of great interest to scholars of art, media, and culture. Books and articles are written about remix culture.<sup>6</sup> Courses are taught on remix culture. And students are taught to make remix videos in classes. An exemption is necessary to allow this important form of expression to continue to develop unhampered by the ban on circumvention, which not only interferes with fair use in this case but also stifles the growth of an art form.

Petitioners strongly support the grant of a non-infringing video remix exemption for several reasons. First, these videos are important to the promotion and encouragement of

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<sup>5</sup> Terry Ramsaye, *A Million and One Nights: A History of the Motion Picture Through 1925* (New York: Simon and Schuster, 1926); A.L. Rees, *A History of Experimental Film and Video* (London: British Film Institute, 2008); Malcolm Le Grice, *Abstract Film and Beyond* (Boston: MIT, 1977); P. Adams Sitney, *Visionary Film: The American Avant-Garde* (New York: Oxford University Press, 1974). David Curtis, *Experimental Cinema: A Fifty Year Evolution* (London: Studio Vista, 1971); Gene Youngblood, *Expanded Cinema* (New York: Dutton, 1970).

<sup>6</sup> See, e.g., Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin, 2008); Bruce Gerrish, *Remix: The Electronic Music Explosion* (ArtistPro, 2001); Lawrence Lessig, *Free(ing) Culture for Remix*, 2004 UTAH L. REV. 961 (2004); Henry Jenkins, *Convergence Culture: Where Old and New Media Colide* (New York: New York University Press, 2006).

creative and transformative works. Second, video remixing is already a popular genre, and it relies on DVD clips to express significant political, social, and artistic commentary. Third, remix videos have become an important form of academic communication.<sup>7</sup> Finally, the proposed class is narrow enough to encompass only those videos that are non-infringing fair uses.

Video remixing is an original form of expression that frequently has a critical purpose, informing and commenting on works of visual art, such as film and television. According to Professor Francesca Coppa, an expert on “vidders,” or fan video communities, “Vids are arguments. A vidder makes you see something. Like a literary essay, a vid is a close reading. It’s about directing the viewer’s attention to make a point.”<sup>8</sup> These videos promote creativity, stimulate reflection, and encourage freedom of expression.

The proposal is limited only to uses that do not infringe copyright, and the vast majority of these YouTube compilations constitute fair use and should thus be granted an exemption from the anti-circumvention measures of Section 1201. These video remixes are used for noncommercial and often educational purposes; they incorporate only minimal parts of copyrighted works; and they are transformative expressions of creativity and thought. Thus the artists of these non-infringing videos should be granted an exemption that would allow them to circumvent DVD encryption for incorporating clips into these videos, which are considered to be a non-infringing fair use. Grant of this exemption would not harm the market for the original DVDs; in fact, through the commentary offered in these remix videos, it is possible that the viewer’s interest may be stimulated, thus encouraging the viewer to watch the original works in full.

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<sup>7</sup> See, e.g., “Racism in Disney” student video essay on accompanying DVD.

<sup>8</sup> *Id.*

For the foregoing reasons, we support the grant of an exemption for “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.”

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