



New Media Rights

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David O. Carson
General Counsel
U.S. Copyright Office
P.O. Box 70400
Washington, DC 20024

Dear David,

Please find our responses to the Copyright Office's follow-up questions regarding the May 17, 2012 1201 exemption hearing below.

1. (For all witnesses who testified relating to proposed Classes 7 and 8): The screen capture products "Replay Video Capture" offered by Applian, as well as "Jing," "Camtasia," and "Snagit" offered by Techsmith, have been referred to in the record as potentially viable alternatives to circumvention which diminish or remove the need for several of the requested exemptions. Please state and explain your position as to whether and why (or why not) one who uses the current version of any of the above named screen capture products in order to copy all or part of a copyrighted motion picture "circumvent[s] a technological measure that effectively controls access to a work protected by this title" in violation of 17 U.S.C. § 1201(a)(1)(A).

Despite the availability of video screen capture software, there is still a need for a DMCA exemption for those seeking to circumvent a technological barrier for a legitimate purpose. The ambiguity between the intent of the anti-circumvention provision in the DMCA and the actual language used therein, creates the need for an exemption allowing circumvention for legitimate purposes. 1201(a)(1) is designed to stop people from gaining unlawful access to copyrighted materials. However, there exist a number of legitimate reasons for circumvention beyond unlawful access to materials, many of which are reflected in this exemption proceeding. There is a need to distinguish between circumvention aimed at getting unauthorized access to a work and circumvention aimed at making non-infringing uses of a lawfully obtained copy.¹ Specifically, the mere availability of screen capture software is not enough to obviate the need for the requested exemptions because a) its legality is ambiguous, and regardless of its legality b) it does not provide a viable legal alternative for the artists, teachers, and ordinary people who have legitimate reasons for circumvention.

¹ Pamela Samuelson, Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised (1999) 14 Berkeley Tech. L.J. 519, 550-51

Screen Capture technology does not obviate the need for proposed DMCA exemptions because the legality of screen capture software is ambiguous

The statute states that to “circumvent a technological measure” as by any means used to descramble [...], to decrypt [...], or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner is a violation of federal law. This is an expansive definition. Open-ended words like “avoid” and “bypass,” potentially lead to arguments that a wide variety of methods of accessing content, including otherwise lawful, legitimate, or even necessary uses, violate federal law. Our own position is that a screen capture software where the screen is captured after a legal accessing or decryption of the work would not violate the anti-circumvention laws. However, because of broad terms such as “avoid” and “bypass” used in the definition of what it means to circumvent, the argument that might be made, and has been made, for how video and screen capture software might be illegal under 1201(a)(1), becomes apparent.² This lack of clarity reinforces the need for an exemption.

Screen capture technology is typically used to capture segments of what is being displayed on screen *after* a software program has already legally decrypted the encrypted movie data. In contrast, for *illegal* circumvention to have occurred when someone accesses DVD content, the content of the DVD would have to have been *unlawfully* decrypted or accessed by the end user. Again, this is different from a screen capture program, where a legal decryption took place before the copying.

The uncertain legal status of screen capture software limits its applicability as a viable alternative to circumvention. Even the MPAA has apparently claimed “[I]t is impossible to make a categorical statement that use of ‘capture software’ is, or is not, a violation of §1201(a)(1).”² With no court decisions that speak to this question, it’s impossible to expect a lay person to form the correct legal opinion on the matter. Moreover, even if video capture was deemed to not violate the anti-circumvention provisions, the question is largely obviated by the fact that it is still not a viable alternative for professional artists and video editors for a variety of technological reasons.

Screen Capture technology does not obviate the need for proposed DMCA exemptions because it is not a viable alternative to other methods of circumvention

Practically speaking, screen capture software has limited application for a number of legitimate users. For example, a producer of video remixes. Even for an amateur producer, screen capture programs frequently produce video that is choppy, distorted, or otherwise of diminished quality as testified to by Jonathan McIntosh in the May 17, 2012 testimony regarding proposed DMCA exemptions under class 7. For the video remixer who frames each shot, crops out unwanted elements, zooms, and tweaks things to their liking, starting work with the highest quality source material is of the

² Rebecca Tushnet, [I Put You There: User-Generated Content and Anticircumvention](#) (2010) 12 Vand. J. Ent. & Tech. L. 889, 936. See, e.g., Letter from Motion Picture Ass'n of Am., to U.S. Copyright Office, Library of Cong. 3 (July 10, 2009) available at: http://www.copyright.gov/1201/2008/answers/7_10_responses/dmca-questions-6-09-mpaa.pdf

utmost importance. Generally speaking, the lower quality the source material, the lower quality the final product. As we argued in our initial comments, remix artists and cultural critics should not be limited to the use of inferior quality content. Jean-Luc Godard famously claimed that “film is truth 24 times a second; screen capture video, with its missing frames, is something else.”³

When it comes to artists who reuse video clips for legitimate purposes, the existence of screen capture technology does not diminish the need for an exemption under the DMCA for proposed Class 7.⁴

Conclusions

An exemption to the anti-circumvention laws is necessary so that creators making legal reuses of content can obtain the highest quality content available and have an equal cultural playing field. The proposed exemption would be limited to uses that do not infringe copyright, and would not modify existing fair use law. Moreover, if video artists were limited to the use of video capture software for their work to avoid breaking the law, it would likely have a chilling effect on the expressive medium of video remixing.

For the foregoing reasons, we argue that the existence of screen capture software does not diminish or obviate the need for exemptions under the DMCA.

Respectfully submitted,



Art Neill and Alex Johnson
New Media Rights

³ See Letter from Peter Decherney, Professor of English, Univ. of Pa., to Rob Kasunic, Principal Legal Advisor, Office of the Gen. Counsel, U.S. Copyright Office, Library of Cong. 1 (July 9, 2009) available at: http://www.copyright.gov/1201/2008/answers/7_10_responses/decherney-reply-to-post-hearing-questions_1.pdf

⁴ Has the Digital Millennium Copyright Act Really Created A New Exclusive Right of Access?: (2001) 49 J. Copyright Soc'y U.S.A. 277, 298