

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
under 17 U.S.C. § 1201

Docket No. 2014-7

**COMMENTS OF THE ADVANCED ACCESS CONTENT SYSTEM
LICENSING ADMINISTRATOR LLC (“AACS LA”) ON PROPOSED CLASS 2**

[X] Check here if multimedia evidence is being provided in connection with this comment

1. Commenter Information

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Advanced Access Content System, Licensing Administrator, LLC (“AACS LA”), is a cross-industry limited liability company that developed and licenses the Advanced Access Content System technology (“AACS” or “AACS Technology”) for the protection of high definition audiovisual content on optical media, in particular Blu-ray discs (“Blu-ray discs”). The Founders of AACS LA are Warner Bros, Disney, Microsoft, Intel, Toshiba, Panasonic, Sony, and IBM.

2. **Proposed Class Addressed**

These comments address Class 2 – Audiovisual Works—Educational Uses—Primary and Secondary Schools (K–12). As noted in the Copyright Office’s notice, the proponents seek an exemption that enables educators and students in grades K–12 . . . to ‘rip’ encrypted or copy-protected lawfully accessed audiovisual works used for educational purposes.

See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 79 Fed. Reg. 73856, 73860 (2014).

3. **Overview**

AACS LA objects to the creation of an exemption for the proposed class, which would permit K-12 educators and students to circumvent AACS technology on Blu-ray discs. The prohibition against the circumvention of AACS has not resulted in any substantial adverse effect. Nor do the proponents’ comments even allege such adverse effects, mentioning Blu-ray discs only once (in a story about a teacher who was quite evidently perfectly happy to be able to use DVD content), “high definition” only in relation to the cost of a 60-inch LED television, and AACS not at all (other than in the request to circumvent AACS). The alternatives to circumvention – whether the renewal of the more limited exemption previously approved for the circumvention of DVDs or the recordings of DVD playback obtained from improved video capture software – provides K-12 educators and students with sufficiently high quality images of motion pictures for the uses described. Consequently, an exemption as to AACS and Blu-ray discs must be denied.

4. **Technological Protection Measure(s) and Method(s) of Circumvention**

These comments specifically address the proposed circumvention of the Advanced Access Content System (“AACS”) as licensed by AACS LA. AACS has been recognized as a

TPM by in both prior proceedings with respect to Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies¹ and courts both in the United States and in other countries. *See AACS LA v. Shen*, 1:14-cv-01112-VSB (S.D.N.Y. Mar. 16, 2015).

The proponents of exemption covered by Class 2 have referred generally to circumvention software that would disable AACS. According to the proponents, these “methods of circumvention included de-encrypting software.” Proponents Comments at 3

5. Asserted Noninfringing Use

I. Fair Use in the Educational Context

The proponents of the exemption assert that the uses would be “fair uses” and, hence, noninfringing. While it is certainly the case that some educational uses are fair uses, it is also the case that not all educational uses are fair uses. The Copyright Office has produced a document describing considerations relevant to fair use in the education setting,^[1] which does not directly address the issue of copying motion pictures (in whole or in part) for educational purposes. The document does, however, illustrate the general principle that educational use may be fair use, especially when the copying is done by an individual (whether educator/teacher, librarian, or student), but that it is critical that certain limits are observed in order to qualify for fair use, even in the educational context. In their request, the proponents appear to ignore such limitations, for example, not limiting the request to short segments of works that are copied. This calls into question whether at least some of the uses in their request are fair uses, in fact and law. More importantly, however, even if any exemption were to be limited to ensure that the uses authorized are fair uses, there is no need for the exemption from circumvention in order to allow

¹ U.S. Copyright Office, *Reproduction of Copyrighted Works by Educators and Librarians*, Circular 21, August 2014 (hereinafter “Circular 21”).

the users to make those uses. As described below in greater detail, there are ample alternatives to enable those uses.

A. Evidence of Proponents' Desired Uses

None of the described uses of video material references Blu-ray discs or high definition, other than a single situation in which a teacher (Rebecca Hrianj) wished to use clips from Shakespeare movies for teaching purposes. Surprisingly, proponents admit that “After Hranj legally created a single DVD with all of the necessary clips for the entire unit, it made everything much easier during class.” There was no need for her to use Blu-ray discs, and that is the only mention of Blu-ray discs in the entire comment (other than in the request to be able to circumvent AACCS used in Blu-ray discs). Based on that submission, there is no evidentiary basis for granting an exemption.

The various uses that proponents do describe may fit generally into categories that have been found to be fair uses for educational purposes, although the failure to identify that the uses are for criticism or comment or that the uses would be of only short segments of motion pictures suggest the need for further inquiry into the uses.

Prior exemption proceedings have recognized that (1) film analysis, which would involve criticism and comment on the underlying film and (2) the creation of a compilation of scenes, which would save classroom time, may constitute noninfringing use.² This use may be noninfringing provided that such use neither takes too much nor take the heart of the work, and the work is otherwise transformative.

² See 2012 Recommendation at 139-40, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68472 (Nov. 27, 2006) (Final Rule) (establishing an exemption for film professors to create compilations).

In prior exemption proceedings, a generalized request for “all other uses for educational purposes” has been found to lack sufficient description to determine whether any possible activity, which could claim educational purpose, is indeed noninfringing.³ Proponents have specifically referred to student-created media projects as falling within this broad category of use, but further detail is required before a fair use determination can be made.

Even narrowing the scope to the described activities, there is insufficient basis to determine that these activities constitute noninfringing uses. In order to show that the proposed uses are noninfringing, proponents must address the fair use factors to show how their desired uses are noninfringing. This analysis requires a discussion, *inter alia*, of the nature of the proposed use, the amount of the underlying works they would use, and how such use would affect the market of the original work. Without such analysis, no determination is possible, even for these three limitedly described activities.

6. Asserted Adverse Effects

Proponents have failed to demonstrate that any substantial adverse effects result from the current exemptions. The Copyright Office has made clear in prior recommendations that ‘substantial’ means such adverse effects cannot be *de minimis*, purely speculative, or supported only by anecdote and conjecture. The Copyright Office has also stated that mere convenience is no justification for granting an exemption as long as there are viable alternatives. 2012 Report at 6.

³ Proponents also use terms like “a variety of educational uses” and “a wide range of teaching and learning purposes” to describe the uses for which they desire an exemption to circumvention. These vague descriptions, without any supporting examples do not constitute sufficient evidence or fair use analysis.

I. Fair Use Does Not Entitle Users to Optimum Image Quality

Fair use does not entitle a user of the copyrighted work to high quality images of the work. In fact, courts confronted with some of the same allegedly noninfringing activity as proposed here have clearly stated that fair use is satisfied even when beneficiaries of the doctrine have not obtained the quality of images that they desire.

In *Universal City Studios v. Corley*, 273 F.3d 429 (2nd Cir. 2001), the Second Circuit examined fair use claims premised on the user's ability to make use of the work in its original DVD format. The defendants alleged that the prohibition against circumvention interfered with their ability to make fair use of the work on the DVD. While noting that all the examples proffered involved users' ability to digitally manipulate the content on the DVD, the court specifically addressed the example of a student making use of DVD content to create a documentary film (i.e., the student wanted to insert the DVD images directly into the documentary film). The court wrote, "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." *Corley*, 273 F.3d at 459.

Further, the court found the alternatives to circumvention were acceptable to achieve fair use. The court found that the alternatives to circumvention resulting from the prohibition did not "impose even an arguable limitation on the opportunity to make a variety of traditional fair uses of DVD movies, [which the court-identified alternatives included] 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." *Id.*

The court concluded that the DMCA, which may limit the ability to make use of a work in a preferred, even technologically superior, manner did not harm fair use. For example, fair use tolerated a film critic being denied the ability to camcord parts of a movie while in a movie

theater – even though camcording would have been technologically superior than merely quoting the dialogue. According to the court, “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.” *Id.*

Other courts examining whether fair use warranted use of the DVD content to make use of the work agreed with *Corley*. In *U.S. v. Elcom Ltd.*, 203 F. Supp. 2d 1111 (N.D. Ca 2002), the court recognized that fair use did not require the use to be “technologically convenient” as the court noted that those seeking to circumvent provided “no authority which guarantees a fair user the right to the most technologically convenient way to engage in fair use.” *Elcom*, 203 F. Supp. at 1131. The court concluded that that even if the user could not “[cut and paste] from the existing digital media. . . fair use is still available.” *Id.* Furthermore, fair use does not even entitle those who would circumvent technological protection measures the right to make use of a digital copy at all. See *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1102 (N.D. Ca. 2004) (“users can copy DVDs, including any of the material on them that is unavailable elsewhere, by non-digital means”)

II. No AACS-protected Work Identified

As noted above, although proponents’ request an exemption for the exemption of audiovisual works on Blu-ray disc, or “BD,” format, they identify no AACS-protected works as an example of the use they desire to make. The proponents discuss the need for Blu-ray once, specifically that a teacher “sometimes wanted to de-encrypt HD or Blu-Ray disks.” This short remark is wholly inadequate to conclude that there has been any adverse effect resulting from the prohibition against the circumvention of AACS on Blu-ray discs. Similarly the lack of detail on the desired use of Blu-ray discs makes it impossible to discuss meaningfully the sufficiency of

any proposed alternative to circumvention. Consequently the lack of any discussion specific to Blu-ray discs makes it impossible to consider the merits of any exemption.

III. K-12 Students Have Suffered No Harm

A. Evidence Shows Students Are Making Use of Works

Examples included in proponents comments show that K-12 students are currently making use of works for purposes allowed by the current exemption, and are not suffering an adverse effect. Proponents cite students' use of copyrighted material in the production of videos for National History Day. They also point to Scott Zabielski, the winner of a Super Bowl Advertisement contest, who credited his accomplishment to video editing and training he received as a high school student. These examples demonstrate that students are successfully making use of copyrighted works.

The only suggestion of harm resulting from the prohibition is the diminished sense of pride students felt due to the inability to make use of the higher quality images of Scooby Doo. But then it becomes apparent that even this "higher quality" reference is not to Blu-ray or "high definition" but rather to DVD quality, since the students were said to have to use low quality video from YouTube. Even if the reference to "higher quality" might be read to mean Blu-ray or high definition, diminished student pride may be unfortunate, but it does not constitute a substantial adverse effect when high quality video and images could have been obtained through video capture software from DVD playback.

7. Alternatives to Circumvention

I. Alternatives to the Circumvention of Blu-ray Discs Mitigate Any Harm

A number of alternatives to the circumvention of Blu-ray discs exist

A. An Exemption to Circumvent DVDs

AACS LA is aware that the DVD Copy Control Association is not opposing granting the same exemption as was done in the 2012 Ruling. If the Librarian does, in fact, grant such an exemption, the limited authorized circumvention of DVDs would become a prime alternative to circumventing AACS protected Blu-ray discs as a source for short clips to be used for the purpose of comment or criticism in documentary filmmaking. As described above, access to the highest quality content is not necessary in order to satisfy fair use, and, in any event, most of the examples provided in the proponents' comments relate to DVD quality.

B. Video Capture Software

Video capture software has developed significantly over the past three years into an effective tool that allows users to appropriate high quality, broadly compatible images and video. The technology is constantly improving, making it easier than ever for anyone to create their own content.

1. Improved

The rapid advance of technology has resulted in more effective, affordable, and accessible video/screen capture software. Additionally, the open source movement has made easy-to-use professional grade video/screen capture and editing tools available to the public at little to no cost. Programs like Greenshot, VLC, Snagit and WM Capture are specifically designed for high-speed video/screen capture that results in high quality video, and they are continually releasing upgraded versions.

2. Video Capture Software Permits Users to Make Use of High Quality Images

Video capture technology has advanced significantly in the past three years, allowing for high quality reproductions of whatever the user sees on the screen. The pixilated and choppy

images that proponents of 1201 exemptions complained of in past rulemakings are simply no longer an issue when using the advanced software. New versions of capture software use a unique high-speed capture technology to process video data faster than ever, and enable high-quality play back of even the most complex, full-motion videos.

a. Example: The Matrix Reloaded

In the submitted clip of *The Matrix Reloaded*, WM Capture software is used to record a frenzied fight sequence. The resulting high quality video captures all the details of the DVD, including a barrage of bullets and dizzying martial arts action. The choppy and pixilated images that proponents have criticized in the past are simply no longer present. This quality of images is available to remix creators from software that retails at \$39.95. The clip is a testament to how far video capture software has come in the past three years, representing an entirely sufficient alternative to circumvention.

b. Example: Roxie Hart on the Witness Stand

The submitted video featuring the movie *Chicago* exhibits the ability of video capture to produce high quality images. By playing the clip first at full speed we show the context of the scene, a woman on trial for murder. In going back and pausing on certain scenes we can see the full range of emotions the character goes through on the stand. She starts with a plaintive face pleading her case to the court, then she hikes up her skirt for the benefit of the jury, and finally we can see that she breaks down in tears as the prosecutor dramatically questions her. The performance is highly dramatic, and through the use of video capture software, students can closely analyze the subtle choices in performance made by the actress.

3. Video Capture Software Allows Compilations That Save Classroom Time

Video capture software permits educators to create a compilation of scenes. The programs record what is displayed on screen and can be started and stopped depending on the

educator's preference. Thus, an educator can prepare a compilation with as many scenes as desirable and all the scenes will be in one convenient video. This alleviates any need to handle multiple DVDs during the instructional period.

a. Compilation of Films Depicting Medieval Life or Scenes from Shakespeare

The submitted compilation, made using video capture software, features clips from various motion pictures representing either medieval life or sense from the work of Shakespeare. The first clip uses several scenes from the film *A Knight's Tale* showing the characters' preparations for a jousting tournament. The second clip shows various scenes from throughout a 1999 version of Shakespeare's *A Midsummer Night's Dream* and demonstrates how an instructor can scroll through an entire movie in the course of making a compilation using video capture software, even without pausing the software, going back and forth as necessary. The final clip shows scenes from an adaptation of *Hamlet*. Again, the the clips demonstrate that an educator can utilize video capture software with DVD playback in order to create an effective compilation.

8. Statutory Factors

I. Factor (iv) - An Exemption Applicable to AACCS Technology Would Harm the Blu-ray Disc Market and to AACCS As Provider of Content Protection Technology for Blu-ray Discs

An exemption is not warranted because any exemption will harm the work distributed not only on Blu-ray discs but to all services offering the work in high definition. Any Blu-ray disc that has been circumvented results in that perfect copy of the work being "in the clear" (i.e., free of any restrictions limiting copying or redistribution of the work). As that copy of the work is now in the clear it can be freely copied and redistributed - perfectly. The more that the work is

available for free from unknown third party sources or even from family and friends the less attraction there is for consumers to actually purchase a copy of the work on the Blu-ray disc.

However, harm is not limited to copies of the work distributed on Blu-ray format but also to any service offering the work in high definition. As the Blu-ray format constitute a copy of the in high definition, this “in the clear” HD copy of the work can discourage consumers who would purchase the HD offering from another service. These consumers are regularly presented with the choice of paying more for the HD offering. If an HD copy is available for free elsewhere there is little incentive to purchase the HD offering if the consumer feels that they could just get the HD offering for free elsewhere. Thus any “leakage” from a Blu-ray disc poses a threat to the offering of the work in high definition on services as well.

The DMCA is inherently a balance between the need in the digital age to protect copyrighted works from easy and perfect infringement and certain side effects of such protections. Congress recognized that the balance could be tilted against noninfringing uses in certain specific situations and allowed the Librarian of Congress to authorize certain exemptions where the requestors of such exemptions could demonstrate substantial adverse effects on their noninfringing uses due to the application of technological protection measures. In determining whether to grant such exemptions, however, the Librarian must also weigh the harmful side effects of any exemptions on the viability of the technological protection measure and more generally on the ability of the DMCA-enabled technological regime to work as intended to protect copyrighted works against unauthorized uses.

Conclusion

An exemption to circumvent AACS on Blu-ray discs is unwarranted. The alternatives to circumvention – any exemption renewed to circumvent CSS on DVDs and video capture

recordings of DVD playback – completely mitigate any possible adverse effects resulting from the continued prohibition against the circumvention of AACS technology. Blu-ray exclusive content remains *de minimis*. DVD content is ubiquitous, and the number of titles distributed on DVDs far exceeds those titles released on Blu-ray discs. But students and educators can take advantage of other alternatives to circumvention, such as smartphone recordings, even to obtain the use of Blu-ray exclusive content.

Finally, an exemption is still not warranted even if the alternatives to circumvention do not mitigate completely what must otherwise constitute substantial adverse effect. The statutory analysis, namely the harm done to the work as distributed in high definition on Blu-ray discs and other distribution means, greatly outweighs the alleged harm that college students and professors may suffer because they cannot make use of the work in high definition. The legal precedent clearly states that fair use is not harmed just because the user cannot obtain use of the work at their desired level of quality. Consequently, any request for an exemption to circumvent AACS technology on Blu-ray discs be premised on proposed class 2 must be denied.