

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

**JOINT COMMENTS OF THE DVD COPY CONTROL ASSOCIATION
("DVD CCA") AND THE ADVANCED ACCESS CONTENT SYSTEM
LICENSING ADMINISTRATOR LLC ("AACCS LA") ON PROPOSED CLASS 4**

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

1. Commenter Information

Submitted by

Bruce H. Turnbull
TURNBULL LAW FIRM PLLC
5335 Wisconsin, Avenue, NW
Suite 440
Washington, DC 20015
202-274-1801
turnbull@bhtlawfirm.com

Counsel to DVD CCA and AACCS LA

David J. Taylor
RIGHT SIZE LAW PLLC
621 G ST, SE
Washington, DC 20003
202-546-1536
david.taylor@rightsize.com

Counsel to DVD CCA and AACCS LA

These comments are filed jointly by the DVD Copy Control Association ("DVD CCA") and the Advanced Access Content System, Licensing Administrator, LLC ("AACCS LA"). DVD CCA is a not-for-profit corporation with its principal office in Morgan Hill, California. DVD CCA licenses CSS for use to protect against unauthorized access to or use of prerecorded video content contained on DVD discs. Its licensees include the owners of such

content and the related authoring and disc replicating companies; producers of encryption engines, hardware and software decrypters; and manufacturers of DVD players and DVD-ROM drives.

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 (“BDs”). The Founders of AACS LA are Warner Bros, Disney, Microsoft, Intel, Toshiba, Panasonic, Sony, and IBM.

2. Proposed Class Addressed

These comments address Class 4 - Audiovisual Works – Educational Uses – Educational Programs Operated by Museums, Libraries, or Nonprofits. Based on the Proponents’ comments, the Class would

allow educators and learners in libraries, museums and nonprofit organizations to circumvent access controls on lawfully made and acquired motion pictures and other audiovisual works for educational purposes. This exemption has been requested for audiovisual material made available in all formats, including DVDs protected by CSS, Blu-ray discs protected by AACS¹

Comments at 2.

¹ This is consistent with the initial petition that requested “an exemption that enables . . . educators and learners in libraries, museum and nonprofit organizations to ‘rip’ encrypted or copy-protected lawfully accessed audiovisual works used for educational purposes.” *See* Fed. Reg. Notice at 73861, N.23 (hereinafter “Notice”).

3. Overview

DVD CCA and AACS LA oppose the grant of any exemption for what proponents' described as programs operated by museums, libraries or nonprofits (referred hereafter as "Nonprofit Programs") as an unreasonably large, unworkable class where the allegedly noninfringing activity is unbounded as the only requirement would be that they have some sort of educational purpose. But even if such activities could be narrowed to approximate those classes previously established by the Librarian, the allegedly noninfringing activity would likely fall outside the bounds of the TEACH Act. While it is possible that some of proponents intended use might be characterized as a fair use under the Copyright Act, it is well established that the fair use doctrine requires a case-by-case evaluation of the facts and circumstances surrounding each intended use. Absent the precise contours of an intended use, the Register of Copyrights cannot properly assess whether such use is noninfringing. Accordingly, proponents have failed to satisfy their burden to demonstrate harm to a noninfringing use.

Even if proponents could establish that their intended uses are likely to be fair, the fair use doctrine does not entitle users to the level of video quality that they desire. Video capture software provides participants in nonprofit programs with access to sufficiently high quality images of motion pictures, thereby mitigating any possibly adverse effects on the allegedly noninfringing activity that might be said to result from the continued prohibition on circumvention of CSS and AACS.

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

These comments specifically address the proposed circumvention of the Content Scrambling System (“CSS”) as licensed by DVD CCA. CSS has long been recognized as a TPM by the courts and the earliest of the Triennial Rulemakings.² These comments also specifically address the proposed circumvention of the Advanced Access Content System Technology (“AACSS” or “AACSS Technology”), which has also been recognized as a TPM by the courts and in previous Triennial Rulemakings.³

The proponents did not state how they would accomplish circumvention.

5. Asserted Non-infringing Uses

DVD CCA and AACSS LA address the allegedly noninfringing use below.

I. Educational Use is not Fair Use *Per Se*

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, the mere fact that a use is educational in nature does not render it necessarily a fair use. The Copyright Office has produced a document containing source materials relevant to fair use in the education setting⁴ which illustrates that while the general principle that educational use may be fair use, especially when the particular use is undertaken by an individual (whether educator/teacher, librarian, or student), it remains true that a finding of fair use still requires compliance with

² See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64556, 64568 (2000).

³ See Section 1201 Rulemaking: Fifth Triennial Proceeding Recommendation of the Register of Copyrights at 126 (Oct. 2012) (“2012 Recommendation”).

⁴ U.S. Copyright Office, *Reproduction of Copyrighted Works by Educators and Librarians*, Circular 21, August 2014.

certain limits. Put differently, the mere fact that a use is educational does not obviate the need for a full analysis of the four familiar fair use factors. As noted previously, a proper fair use analysis is performed on a case-by-case basis in view of the facts of a particular circumstance. In the request here, the proponents treat educational uses as *per se* fair by, for example, not limiting their request to short segments of works that they intend to copy. This begs the question of whether at least some of the uses in their request are fair uses, in fact and law.⁵ 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 proponents to engage in circumvention in order to facilitate those uses since, as described below in greater detail, there are ample alternatives to enable those uses.

II. Proponents' Description of Non-Infringing Activities for Education Purposes Fails to State a Clearly Articulated, Narrowly Defined Class

It is difficult to discern exactly what the proponents envision as the particular uses of the CSS or AACCS protected work would be. As such, the proposal lacks the narrowly defined purpose that the statute requires and that prior proceedings have required. The lack of clarity also makes it impossible to know whether proposed the activities “for education purposes” would be noninfringing. The exemption would serve what the proponents’ term, the “Digital Media and Learning” community. The “educators,” in the words of the comments, are a “constellation of mentors, educators, knowledgeable peers and parents.” Comments at 2. The “students” are individuals described as follows:

Learners come to the library to “hang out, mess around and geek out” and learn how to create and express themselves using digital media tools, including music, video and multimedia.

⁵ See, e.g., Circular 21 at 6 (discussing guidelines for brevity).

Comments at 2. Based on this description of the activity, no determination could ever be assured that such uses would be educational at all, nor whether a particular “learner” might take more than what is fairly characterized as fair or might take the heart of the work. The plain lack of structure in the activities that would make use of the copyright content through circumvention is simply not the kind of circumstances that have compelled the Librarian to grant exemptions in prior proceedings.

In a few places, proponents suggest that the learning would be done through remote applications and online classes. But even if the activities could be restricted to those activities which this proceeding has previously been found to be noninfringing, the activities done over digital networks would still likely infringe the public performance right, one of the exclusive rights of the copyright holder. *See* 17 U.S.C. § 106. Streaming a copyrighted work over a digital network implicates the public performance right. *See Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F. Supp. 2d 607, 622-24 (S.D.N.Y. 2007). Section 110 of the Copyright Act limits the public performance right to specifically permit the performance of a copyrighted work “in the course of face-to-face teaching activities of a nonprofit educational institution.” The TEACH Act expanded this limitation to allow the same educational activity to occur over digital networks (distance learning), but only under very limited circumstances.

In order to qualify for exemption under the TEACH Act, educational institutions engaging in distance learning must be nonprofit and accredited. Even were the beneficiaries of the proposed exemptions to all be nonprofits,⁶ the proposed exemption omits any requirement that they must be accredited.

⁶ Museums and libraries are not necessarily non-profit.

Another requirement of the TEACH Act is that learners must be “officially enrolled in the course for which the transmission is made.” 17 U.S.C. § 110(2)(C)(i). Whether that condition would be satisfied by users of the proposed exemption is unclear from the proponents’ filing. The Senate Judiciary Committee Report to the TEACH Act explains that this requirement was made in consideration that benefits of Section 110 have historically only been available to educators and students in classrooms or similar places of instruction. Senate Report 107-31 at 11.

The legislative history further indicates that the TEACH Act was never meant to facilitate the use that the proponents claim to be noninfringing activity. The Senate Judiciary Report instructs that transmissions containing copyrighted works only be made to those identified persons authorized to receive them, either by password-protected website accounts or other technological means. *Id.* The proponents do not suggest that the nonprofit programs that would be entitled to its proposed exemption have any such requirement.

Finally, the allegedly noninfringing activity is at odds with the Congressional intent of the TEACH Act. The legislative history of the TEACH Act indicates that Congress deliberately placed these requirements on distance learning, because it realized that the Internet makes it possible for any entity to distribute educational materials, including copyrighted works, over the Internet. The non-profit and accredited institution requirements, as well as official enrollment requirements serve as a safeguard against abuse. Senate Report 107-31 at 9.

In light of the foregoing, a determination that the allegedly noninfringing activity is indeed noninfringing would be impossible.

6. Asserted Adverse Effect

I. Proponents Submission Lacks Evidence of Specific Adverse Effects

The proponents fail to demonstrate the requisite “substantial adverse effects”. 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. 2012 Report at 7-8. The Copyright Office has also stated that mere convenience is no justification for granting an exemption as long as there are viable alternatives. *Id.* at 8. In this case, the Proponents have made very generalized statements about the value of “learners” being able to “learn how to create and express themselves using digital media tools, including music, video and multimedia.” Comments at 2. While the comments state that they are not able to “rip” DVDs, there is no discussion of specific works that a would-be beneficiary of the proposed exemption seeks to use but has been unable to do so, nor is there even a passing reference to Blu-ray discs (other than in the requested exemption language itself) or to the need to have access to high definition video. In short, the presentation lacks the kind of “detailed evidence of actual noninfringing uses that are precluded by the TPM” but rather makes the very sort of “conclusory declarations” that the Copyright Office cautioned against. Notice at 73857.

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

Even if the Proponents were to provide specific examples of the need to use portions of particular works and to demonstrate that the proposed use is a fair use, the user is not entitled 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 (2d 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* 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, like other laws, which may limit the ability to make use of a work in a preferred, even technologically superior, manner did not harm fair use. 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* 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”).

7. Alternatives to Circumvention

I. Video Capture Recording Is an Alternative to Circumvention

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 from DVD playback which, as the Register stated in the 2012 Report, is suitable in most circumstances. The technology is constantly improving, making it easier than ever for anyone to create their own content.

The rapid advance of technology has resulted in more effective, affordable, and accessible video capture software. These tools have improved so much that some users are going so far as encouraging their use on “how to vid” blogs and explaining that they provide a suitable alternative to circumvention.⁷ Learners and other participants in the DML community can certainly make use of these new tools as well. The recent shift in technology companies to offer their software on a free/open source basis has fostered the availability of easy-to-use professional grade video capture and editing tools available to the public at little to no cost. Video capture programs such as Greenshot, VLC, Snagit and WM Capture are specifically designed for high-

⁷ See <http://fanvidbasics.tumblr.com/post/107500411530/ive-decided-i-want-to-start-making-fan-videos-but>

speed video and screen capture that results in high quality video, and they are continually releasing upgraded versions that allow for better resolution and capture technology.

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

Video capture technology has advanced significantly in the three years since the last triennial rulemaking, allowing for high quality reproductions of whatever the user sees on the screen. The pixilated and choppy images that proponents of exemptions complained of in past rulemakings are simply no longer an issue when using the latest versions of readily available commercial video software. Such software uses 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. Moreover, computing technology generally, and graphics processing specifically, has improved dramatically in the years since the last rulemaking. These improvements in hardware and software have resulted in videos that have virtually no blurring, pixilation, dropped frames, and should satisfy the vast majority of required uses.

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 proponents have criticized in the past are simply no longer present and, hence, the criticism of the alternative is no longer present. This quality of images is available to 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.

Example: Birds of New Guinea

This clip uses video capture software to capture scenes from the DVD version of the BBC's *Planet Earth* series. The clip shows the mating dances of New Guinean Birds-of-paradise. The high level of detail in this video shows the first bird hanging upside down from a tree, shaking its bright blue, black, and gray plumage. Each bird shown in the clip makes its own unique display, whether it's a swoop of the head, a ruffling of feathers, or even a display that makes the bird appear to change shape entirely, in an attempt to secure a mate. These are the details that professors utilize in order to make a description of animal behavior come to life for their students, and video capture software technology allows them to do so without circumvention, demonstrating that the lack of an exemption has no substantial adverse effects on the ability to make use of noninfringing video for proponents' purposes.

B. Video Capture Software Allows for Compilations

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 needs of the compilation. Thus, an educator can easily prepare a compilation that comprises as many scenes as necessary to complete his or her lesson, and have them all in one convenient video, without the need for separate editing software.

Example: Media Breaker

The submitted clip shows the use of Media Breaker software to upload and edit clips that were recorded using video screen capture software. The clip shows a user uploading a media file of *Family Guy* that was recorded using video capture software and subsequently using the program to manipulate the content, add text to the video, and sync desired music. The Media Breaker software is a free and suitable editing alternative to the software discussed by proponents.

***Example: Compilation of Films Depicting
Shakespearean or Medieval Life***

The submitted compilation, made using video capture software, features clips from various motion pictures representing either medieval life or scenes 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 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 clips demonstrate that an educator can utilize video capture software with DVD playback in order to create an effective compilation.

II. Smartphone Video

Smartphone recording capabilities have consistently improved since the 2012 Ruling and continue to rival stand-alone cameras. Smart phones with 4K recording capabilities are now becoming prevalent in the marketplace.

Smartphone and digital camera videos exhibit the ability of these alternative recording methods to produce high quality replications of the Blu-ray disc content. Because these alternative methods result in sufficient capture of clips only available on Blu-ray, there is no adverse effect to the educator.

8. Statutory Factors

I. Factor (iv) - Any Exemption Broader than Past Narrowly Tailored Exemptions to Circumvent CSS Technology Would Harm the DVD and Blu-ray Disc Markets

Past exemptions recommended by the Register have been narrowly tailored to strike a balance between the noninfringing activity and the integrity of the DVD and Blu-ray formats,

both of which remain successful digital distribution channels for motion pictures. Creating a new, overbroad exemption for nonprofit program uses, most of which would very likely be infringing under the Copyright Act, is not warranted and would otherwise risk the DVD and Blu-ray disc distribution models.

A circumvented DVD or Blu-ray disc results in a perfect copy of the work being “in the clear” (*i.e.*, free of any technical restrictions limiting copying or redistribution of the work). As that perfect copy of the work is now in the clear it can be freely copied and redistributed without limitation. The more that the work is available for free from unknown third party sources, or even from family and friends, the more likely it becomes that consumers will use the circumvented copy as opposed to purchasing a physical copy of the work, or enjoying it on an online service (e.g., Netflix).

The DVD and Blu-ray formats have remained widely popular notwithstanding the increasing adoption of online services with standard and high definition offerings. Whether it remains available to consumers, particularly those slow to adopt to the more expensive high definition formats, will depend upon copyright owners’ confidence in the format, particularly as they examine their increasing opportunities in the high definition market – and the more robust content protection technologies developed in that space. An overly broad exemption could hasten business decisions to abandon the DVD or Blu-ray markets sooner in favor of distribution options that offer greater security.

The Blu-ray disc format is in a different but also somewhat difficult competitive position. The continued growth of the market for Blu-ray discs depends on the continued protection of AACS. In the absence of protection, physical media distribution of HD content will be undermined as a business model. As it stands today, Blu-ray disc competes for the high

definition video market against an array of distribution models. Given the current market reality, any weakening of AACS could do great harm to the use-facilitating business model and damage efforts to bring further high definition physical media formats to market.

In both case – Blu-ray and DVD – a reduction in the efficacy of the security will result in fewer producers willing to release their audiovisual works on those formats, leading to an overall reduction in the availability of such works for the benefit of consumers.

Conclusion

The broad “educational purposes” identified in proposed class 4 cannot form the basis for an exemption. The proposed activities very likely fall outside of those permitted by the TEACH Act, and while some may constitute fair uses under the Copyright Act, the lack of specific examples renders it impossible to draw that conclusion vis-à-vis the proposed class.

Consequently, creating such an exemption would not only undermine Congress’ clear direction but more importantly – and unnecessarily – undermine copyright owners’ (1) confidence in the legal system, including this rulemaking, that supports the DVD and Blu-ray disc distribution and consequently (2) their continued investment in these same models. Finally, an exemption is further not warranted as the proposed uses do not require the highest quality video and can be satisfied by various alternatives to circumvention.