

*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 DVD COPY CONTROL  
ASSOCIATION (“DVD CCA”) ON PROPOSED CLASS 6**

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**1. Commenter Information**

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The DVD Copy Control Association (“DVD CCA”) is a not-for-profit corporation with its principal office in Morgan Hill, California. DVD CCA licenses Content Scramble System (“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.

**2. Proposed Class Addressed**

Proposed Class 6: Audiovisual Works - Filmmaking Uses. The joint filmmaker group<sup>1</sup> comments propose the following definition of the class:

Audiovisual works that are lawfully made and acquired from DVDs protected by Content Scramble System, or, if the work is not reasonably available in sufficient audiovisual quality on DVD, then from Blu-Ray discs protected by Advanced Access Content System, or, if the work is not reasonably available in sufficient audiovisual quality on DVD or Blu-Ray, then from digitally transmitted video protected by encryption measures, when the circumvention is accomplished solely in order to incorporate portions of motion pictures into new works for the purpose of fair use in filmmaking.

Joint Filmmakers' Comments at 1.

**3. Overview**

DVD CCA does not object to a renewal of the exemption applicable to CSS and DVDs, as granted in the 2012 Rulemaking. For the reasons stated in more detail below, DVD CCA does object to the expansion of this exemption to cover non-documentary films, to permit more than short portions of CSS encrypted motion pictures to be used in such films, and to cover uses other than criticism and comment.

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<sup>1</sup> Comments of the Independent Documentary Association, Film Independent, Kartemquin Educational Uses, National Alliance for Media Arts+Culture, Indie Caucus, University Film and Video Association, Center for Independent Documentary, Women in Film and Video, and Women in Film (hereinafter referenced as "Joint Filmmakers"). Other comments were filed in support of a Class 6 exemption by New Media Rights, Free Software Foundation, and a number of others whose comments were bundled through the Digital Right to Repair website.

**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 Rulemaking.

Proponents of an exemption for Class 6, specifically those led by IDA, state software is available to circumvent CSS encryption technology. New Media Rights Center, the other main proponent for an exemption covered by Class 6, has not offered any explanation for how it proposes to circumvent CSS.

**5. Asserted Non-Infringing Uses**

Below DVD CCA addresses the allegedly noninfringing uses covered by the proposed class 6. The following comments should be understood as addressing uses other than short portions of motion pictures used in documentary films for the purpose of criticism or comment – the exemption as granted in 2012, the extension of which DVD CCA does not object to.

**I. General Principles Regarding Fair Use and Filmmaking**

Documentary filmmaking that appropriates short movie clips for the specific purpose of comment or criticism of the underlying work in the short movie clip may be able to claim fair use. *See* 2012 Recommendation at 128. Fair use permits limited use of protected material without a license or permission from the copyright owner. Courts determine fair use on a case-by-case basis using a four factor analysis that includes 1) the purpose and character of the use; 2) the nature of the copyrighted work; 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and 4) the effect of the use upon the potential market for or value of the copyrighted work.

When considering whether the use of a first work’s material in a second work is fair use of the copyrighted content of the first work, courts have focused their inquiries on the first fair use factor on the issue of to what extent the use is “transformative.” A work that is found to be very transformative is more likely to succeed with a fair use defense than one that is less transformative. Although “transformative work” is not defined in statute, there is relevant case law interpreting that term and setting some boundaries as to what is considered sufficiently “transformative” to qualify as fair use.

In 1994, the Supreme Court clarified when an otherwise infringing work becomes transformative enough to warrant a fair use defense. *See Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994). In considering whether the music group 2 *Live Crew* made fair use of Roy Orbison’s classic “Oh, Pretty Woman,” the Court explained that whether or not the use of the first work is “transformative” is important to the first fair use factor,<sup>2</sup> and found that the inquiry into the purpose and character of the use must focus, “on whether the new work merely supersedes the objects of the original creation, or whether and to what extent it is ‘transformative,’ altering the original with new expression, meaning, or message.” *See Campbell*, 510 U.S. at 579.

#### **A. Documentary Filmmaking May Be Insufficiently Transformative and Found to Infringe**

Filmmaking, particularly documentary filmmaking, which claims transformative purpose such as the dissemination of information and increase of public knowledge when making use of other works such as a clip, does not always constitute fair use. In *Iowa*

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<sup>2</sup> Fair use advocates often mistakenly focus on the commercial nature of a work, when *Campbell* clearly illustrates that whether a work is commercial or noncommercial is only the beginning of a determination of its purpose and character.

*State University v. American Broadcasting*, 621 F. 2d 57 (2nd Cir. 1980), the court rejected the argument that “pursuit of disseminating the life history of an important public figure involved in an event of intense public interest” was sufficient to find in favor of fair use. In that case ABC News had during the airing of the 1974 Olympics made a feature on an American wrestler competing in the 1974 games. The allegedly infringing activity at issue was ABC’s use of two and a half minutes from a 28 minute film on the Olympian’s life. When evaluating the first factor of the fair use analysis the court rejected the argument that the “development of historical and biographical works suitable for mass distribution” weighed in favor of fair use. The court explained that to the purpose

[Defendant] possessed an unfettered right to use any factual information revealed in [the 28 minute film] for the purpose of enlightening its audience, but it can claim no need to "bodily appropriate" [plaintiff]'s "expression" of that information by utilizing portions of the actual film, The public interest in the free flow of information is assured by the law's refusal to recognize a valid copyright in facts. The fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance.

*Iowa State Univ.*, 621 F. 2d at 61 (quotations and citations omitted).

Documentary filmmakers, who make use of the work to engage in criticism and comment of the underlying work, could avail themselves of the fair use defense provided they do not take too much, do not take the heart of the work, and there is use is otherwise sufficiently transformative.

### **B. Filmmaking for Entertainment Purposes, including Fictional Filmmaking Must Be Transformative**

Even when a second work exhibits some transformative characteristics from the underlying work, the new work will infringe if it takes an unnecessary amount, slavishly

copies from the original, or if the purpose of the secondary work is no different than that of the original.

In *Castle Rock Entertainment v. Carol Publishing*, 150 F.3d 132 (2nd Cir. 1998), the creators of the *Seinfeld* television show sued the publisher of a trivia book for copyright infringement. Finding for the creators, the court stressed that any transformative purpose possessed by the trivia book was slight to non-existent. *Castle Rock*, 150 F.3d at 142. The court rejected defendant's arguments that the trivia book was a critique of the show, finding that the purpose of the book was to entertain the *Seinfeld* audience with a book about *Seinfeld*, and that this entertainment function was no different than that of the television show. *Castle Rock*, 150 F.3d at 142. With no unique commentary or new purpose, the trivia book was simply not sufficiently transformative.

In 2007, J.K. Rowling, author of the Harry Potter series, brought suit against defendants for their work "The Harry Potter Lexicon," a reference book to the fictional Harry Potter universe. See *Warner Bros. Entertainment, Inc. and J.K. Rowling v. RDR Books*, 575 F. Supp.2d 513 (S.D.N.Y. 2008). Although literary reference guides and compendiums could be protected by the fair use doctrine, Rowling claimed the Lexicon planned to slavishly copy excerpts from her novels and stills from the films without offering sufficient transformative material to be considered a separate work. The Court agreed that the Lexicon appropriated too much of Rowling's creative work and that the unnecessary verbatim copying of highly aesthetic expression diminished any finding of transformative fair use. *Warner Bros. Entertainment*, 575 F. Supp.2d at 544.

As these cases suggest, there is no basis to determine that use of even limited portions of copyrighted material from entertainment motion pictures in other

entertainment contexts generally constitutes noninfringing activity.<sup>3</sup> In the previous proceeding, the Register could not recommend an exemption that would include circumvention for clips to be used in films made for entertainment purposes. The proponents had failed to develop the record in order for her to conduct the four-factor fair use analysis in order to conclude whether the proposed use was indeed noninfringing. Filmmakers did not “offer a full analysis of the proposed [other noninfringing] uses under the four fair use factors.” *See* 2012 Recommendation at 111. In particular, the Recommendation notes that there is no basis to assume that a fictional film’s use of a clip from another work would be primarily for the purpose of criticism and comment (a purpose that might suggest the possibility of fair use). “Rather, the purpose of a fictional film is typically entertainment.” *Id.* Moreover the proponents merely “describe[d] their desired uses and have not presented concrete examples – such as existing films that make use of preexisting material in a clearly transformative manner – that permit the Register to make a finding of fair use in this context.”<sup>4</sup> *Id.* Accordingly, the Recommendation concluded that it was impossible to determine the nature of the proposed use, the amount

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<sup>3</sup> *See Wade Williams Distrib., Inc. v. AM Broad Co.*, 2005 WL 774275 (S.D.N.Y. Apr. 5, 2005) (rejecting the proposition that there can be no fair use when copyrighted excerpts are used for entertainment); *Hofheinz v. Discovery Communications, Inc.*, 2001 U.S. Dist. Lexis 14752 at \*13 (SDNY 2001) (“Section 107 does not explicitly distinguish between entertaining and serious, plausible and implausible, or weighty or frivolous commentaries.”).

<sup>4</sup> Interestingly, the Recommendation questioned where even some of the descriptions would constitute fair use. “The use of an earlier work to flesh out characters and motivations in a new work, or to develop a storyline, does not inherently serve the purpose of criticism or comment on the existing work. Indeed, the use of an earlier work or works as the basis for a new work could give rise to a concern that the new use might supplant the derivative market for the existing work.” *See* 2012 Recommendation at 111

of the underlying work that would be used, and how such use would affect the market for the original work.

In this proceeding, the Joint Filmmaker comments seek to establish such a record, but their attempt fails for several reasons.<sup>5</sup> While they cite a couple of instances where actual clips of copyrighted works were used and a court found the use to be fair use (such as the short clip from the *Ed Sullivan Show* that was used in the play *Jersey Boys*), the remainder of their examples are either (a) asserted fair use where no finding was made to that effect, or (b) use of something other than a clip of a prior film (such as the use of a puppet, works of art, a song, or a recreation of scenes that are depicted in the film). Proponents also identify a single filmmaker who wants to make a fictional work satirizing the representation of women in movies. However, there is no basis to determine any part of the four fair use factors. These limited efforts by the proponents should be found to be insufficient to enable the Register to recommend, or the Librarian to grant, an exemption covering the vast expanse of fictional filmmaking.

## **6. Asserted Adverse Effects**

With respect to CSS and DVD content, the proponents allege that certain uses require DVD quality images to make use of the work. These points are addressed below.

### **I. Fair Use Does Not Require Either Access to Optimum Images or Access to the Work**

#### **A. Optimum Images**

Fair use does not entitle a user of the copyrighted work to optimum images of the work. In fact, courts confronted with some of the same allegedly noninfringing activity

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<sup>5</sup> As noted above, New Media Rights' comments relative to Class 6 speak only to the use of clips for documentary films.



have clearly stated that fair use is satisfied even when beneficiaries of the doctrine are not obtaining the quality of images that they desire.

In *Universal City Studios v. Corley*, 273 F.3d 429 (2nd Cir. 2001), the Second Circuit examined the fair use claims premised on the user's inability 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 being able 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). *See Corley*, 273 F.3d at 459. 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 fair use. The court stated 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 alternatives, the court identified, 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." *Corley*, 273 F.3d at 459. The court concluded that the DMCA, like other laws, which may limit the ability to make use of a work in a preferred or even technologically superior, manner did not frustrate fair use. *Corley*, 273 F.3d at 459. 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.”  
*Corley*, 273 F.3d at 459.

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 or convenient way to engage in fair use.” *Elcom Ltd.*, 203 F. Supp. 2d 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.” For that matter 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”).

### **B. Access to the Work**

This jurisprudence for access to high quality images is consistent with the real world reality that fair use does not guarantee access to the work. Ken Rabin, whose statements are proffered by the proponents, acknowledged that fair use has never guaranteed access to the work. Rabin states

Unfortunately for many, the fair use statute includes no provision or precedent for how a justified user of that right might obtain access to the physical materials (films, videotapes, digital files, lab elements, etc.) that are needed for the fair use expression itself. This is an issue that’s not unique to audiovisual storytelling, but it is especially troubling because of the nature and technical needs of production in the audiovisual realm. My clients wonder what they can do when I explain that, . . .then licensing wouldn’t be an issue . . . .

App. D at 3. What Rabin explains is that fair use does not compel a copyright holder to hand over a copy of the work so that fair use can be made. So consequently even if an intended use may otherwise qualify as fair use, Rabin’s clients still have to license the work to obtain access to the work.

## **II. Time and Money Limit Filmmaking Not TPMs**

Proponents’ own evidence demonstrate that the cause of any adverse effect is not technological protection measures (or in this case CCS) but the lack of resources. Namely filmmakers suffer the same constrains that all businesses do – time and money. Thus the proposed exemption must be denied because these causes however unfortunate cannot be the basis upon which an exemption is granted. *See* H. Rept. 105-551 at 37 on the Digital Millennium Copyright Act (House Energy and Committee Report) (“Adverse impacts that flow from other sources or that are not clearly attributable to the implementation of technological protection measures are outside the scope of the rulemaking.”).

### **(1.) Proponents’ Examples Demonstrate Their Projects Suffered from Lack of Resources**

Schroeder states that the “alternatives to ripping are very inconvenient and inefficient.” He immediately explains that “copyright holders are not set up to provide the content, and in many cases don't want you to use the content, if it is something critical of them.” First, Schroeder does not suggest that the works are unavailable in an unprotected form. He does not make such a statement because he knows that the content is available to him in an unprotected format if he licenses it from the copyright holders. He, however, recites a common refrain in this proceeding from exemption proponents that obtaining a license can be difficult, time consuming and expensive.

When noting that his clip came from a DVD Daniel McCable similarly explained “Within the constraints of the production there was probably no other viable way for me to get that content.” Just as Schroeder did not, neither does McCable assert that the content was otherwise unavailable to him in an unprotected format. What he explicitly states is that the production had constraints, and he suggests that those constraints discouraged him from seeking the other ways to get the content (i.e., time and money, the biggest production constraints, did not make “other way to get the content” *viable*).

### **B. Time and Money Involved in Licensing**

Indisputably filmmaking takes time and cost money, particularly licensing. Acclaimed documentary film director Robert Stone has complained, “Copyright fees are insane and want to make me give up this whole business entirely. Particularly as I’ve spent the better part of my career making heavily archival films.” *See* Rosenthal, Alan, *Succeeding as a Documentary Filmmaker A Guide to the Professional World* at [pinpoint cite] (2011). In his guide, Rosenthal, an award winning documentary filmmaker, explains that up until the mid-seventies, archival footage was fairly cheap. “Today, though, those film archives have turned into big business, demanding immense sums for archival clips.” *Id.* at 108 (cautioning the reader to “build in a huge sum” of money in their budgets to cover archival rights if the film deals with historic events or personalities). Rosenthal then credits some of the participants of the proceeding for a ‘growing rebellion against the exorbitant costs being demanded for rights.’ According to Rosenthal, “Their basic argument is that in many cases payment for rights in unnecessary. The basis for their argument the evolution of a new legal doctrine called

“fair use.” Admittedly, Rosenthal is skeptical of the fair use claim because earlier he identified contacting and paying the copyright holder to be the “golden rule.”<sup>6</sup>

Leading articles on how a documentary filmmaking can obtain footage, whether archival or stock, do not readily suggest using Blu-ray discs or DVDs as a means to obtain needed footage, even in the context of the existing exemption specific to DVDs.<sup>7</sup> The most commonly cited means include: commercial archives, news networks, internet sources, and government sources including the National Archives and Library of Congress.

### **C. TPMs Have Not Altered Historic Filmmaking Challenge**

The use of CSS or any other TPM, along with the DMCA, has not changed anything about filmmaking. There has been no outcry, no news media reports that content which was once available for license or even for free from public sources has disappeared. Not even the proponents have suggested that. Those sources for content that were available to filmmakers prior to the passage of the DMCA remain equally available to filmmakers today. (In fact more, rather than fewer, sources are available to filmmakers than there ever was before the DMCA.) What TPMs, and more specifically the threat of DMCA liability, have done is prevent a few filmmakers from taking advantage of those copies of works meant for the consumer market as an alternative to

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<sup>6</sup> He cautions,

To avoid trouble, obtain permission before use. I know that many people don't. They pinch from everyone and pay nothing. It seems a stupid policy, one that ultimately works against the film and the director

<sup>7</sup> In fact, the only places we could find that suggest DVDs to be a source for footage are on the proponents' websites and even those suggestions involve their advocacy efforts in this proceeding.

those traditional sources available to filmmakers, namely licensing. The real concern troubling filmmakers is not that content is unavailable to them as a result of TPMs but rather it is unavailable to them because licensing has become so expensive.

In the past two rule makings, proponents have managed to enlist the Copyright Office and the Librarian in their rebellion against the high costs of licensing by convincing them that the DMCA is interfering with their ability to make noninfringing uses of works. The DMCA however only so interferes with any such noninfringing use if that noninfringing use is dependent on the filmmaker unfairly taking advantage of the offerings in the consumer market. Otherwise the DMCA prohibition on circumvention and its authorized TPMs have had no effect on the ability of filmmakers to make noninfringing use of content, which remains available for license and for free from traditional and new sources alike.

#### **D. No Adverse Effect as Documentary Films Succeeding in the Marketplace**

The proponents concede that, “this year’s eight Academy Awards Best Picture nominees, four are biopics telling true stories of historical and modern figures.”<sup>8</sup> This suggests that documentary films, at least in regard to biopic films, are succeeding in the marketplace without regard to either the prohibition on circumvention or the past narrowly-tailored exemption. Notably proponents do not suggest that any of these films relied on the past exemption to make use of works that may be contained in the films.

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<sup>8</sup> See International Documentary Association Comment at p. 17 (citing *Nominees – The 87th Academy Award Nominations for the 2015 Oscars*, [Oscar.go.com/nominees](http://Oscar.go.com/nominees)).

(1.) Proponents Misconstrue Dispute about Selma

While proponents argue that producers of *Selma* had to license the archival footage from copyright holders due to TPMs, they fail to state which TPMs allegedly are employed to protect archival footage of the 1965 Voting Rights March from Selma to Montgomery. This archival footage is clearly not TPM-protected and is, in fact, widely available from other sources than copyright holders. The significance of the march makes finding archival footage in any major broadcasters' archives almost a certainty. This is best evidenced by broadcasters own practice. On March 9, 2015, Fox News most recently distributed a story discussing the plans to reenact the march 50 years later.<sup>9</sup> The story is replete with archival footage of the march. If Fox News has this archival footage, then every other network including PBS should have archival footage of the march so that they too can produce their own news stories. But a filmmaker would not have to search stations' archives for this footage, as a mere Internet search shows that a search for video produces hundreds of hits.

**7. Alternatives to Circumvention**

**I. Video Capture Recording of DVD Playback**

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 a much more viable alternative to circumvention for filmmakers. We note that the proponents' comments almost exclusively cite the 2012 exemption proceeding or other sources from the same

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<sup>9</sup> See Celebrating 50th Anniversary of Selma Civil Rights Marches, available at [http://video.foxnews.com/v/4097554852001/celebrating-50th-anniversary-of-selma-civil-rights-marches/?playlist\\_id=941536881001#sp=show-clips](http://video.foxnews.com/v/4097554852001/celebrating-50th-anniversary-of-selma-civil-rights-marches/?playlist_id=941536881001#sp=show-clips).

vintage. As demonstrated below, the improvements in screen capture software makes those references completely obsolete.

### **A. Changes to Video Capture Software**

The rapid advance of technology has resulted in more effective, affordable, and accessible video capture software. Programs like *Greenshot*, *VLC*, *Snagit* and *WM Capture* are specifically designed for high-speed video capture that results in high quality video, and they are continually releasing upgraded versions.

#### **(1.) Permits Users to Make Use of High Quality Images**

Video capture technology has advanced significantly in the past few years, allowing for high quality reproductions of whatever the user sees on the screen. The pixilated and choppy images that exemption proponents 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 perfect play back of even the most complex, full-motion videos. (See <http://wmrecorder.com/products/wm-capture/> for description of advanced capture technology.)

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.



## (2.) Affordable

The following table lists the cost of a variety of video capture software and the video editing software Adobe Premiere Pro and Final Cut Pro.<sup>10</sup>

Product	Software Type	Price
Final Cut Pro X <sup>11</sup>	Video Editing	\$299.00
Adobe Premiere Pro <sup>12</sup>	Video Editing	\$239.88/Annually
Camtasia	Video Capture	\$299.00 (free trial)
Movavi	Video Capture	\$49.95
Snagit	Video Capture	\$44.95
WM Capture	Video Capture	\$39.95
EzVid, CamStudio, Jing	Video Capture	FREE

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.

## (3.) Easy to use - Permits Users to Make Use of Works

Video capture software, such as Camtasia, outputs the same mpeg-2 and mpeg-4 formats found on DVDs. Thus, embedding an mpeg-2 or mpeg-4 file made from video capture software takes no more technical skill than the technical skills of embedding those files from a DVD.

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10 See <http://video-capture-software-review.toptenreviews.com/> for list of top rated software and their cost

11 See <https://www.apple.com/final-cut-pro/>.

12 See [http://www.adobe.com/products/premiere.html?sdid=KKQPE&kw=semgeneric&skwid=AL!3085!3!51560612002!e!!g!!adobe%20premiere%20pro&ef\\_id=VQCrNA AAY0F1wON:20150318163201:s](http://www.adobe.com/products/premiere.html?sdid=KKQPE&kw=semgeneric&skwid=AL!3085!3!51560612002!e!!g!!adobe%20premiere%20pro&ef_id=VQCrNA AAY0F1wON:20150318163201:s).

## **B. Video Capture of DVD Playback Mitigates Against Any Adverse Effect**

Any adverse effect that the prohibition has on proponents' ability to make use of the works on DVDs is mitigated by the alternatives to circumvention. First, video capture of the playback of DVDs produces sufficiently high quality images to make use of the works cited by proponents. Therefore circumvention of DVDs is not necessary to make use of the works proponents described.

### **(1.) Example: Family Guy and Portlandia Clips**

The works readily identifiable as likely CSS-protected works were found in Joel Schroeder's documentary. For the purpose of this rulemaking – we are presenting clips of the works that Dan Schroeder made use of in the documentary – *Family Guy and Portlandia*. Both clips were recorded with Camtasia – the more expensive video capture software. In each clip, the images are clear, the colors seem accurate and consistent, and most importantly the images do not suffer from pixilation. Furthermore the video is smooth – no choppiness as the result of noticeable dropped frames. The video clearly shows how the creators of Family Guy and Portlandia made reference to Calvin + Hobbes the very same use that Schroeder made in his film Dear Mr. Watterson.

The video capture renders images of sufficiently high quality that the viewer can find subtleties and details in the images. For example in the video capture clip of *Family Guy* numerous details are clearly discernable, including folds in the bedding and curtain fabric, streaks on the windowpane, and shadows on the furniture. The images are equally compelling in *Portlandia*.

### **1. Statutory Factors**

**I. Factor (iv) - Any Exemption Broader than Past Narrowly Tailored Exemptions to Circumvent CSS Technology Would Threaten Harm to the DVD Market**

Past exemptions recommended by the Register have been narrowly tailored to strike a balance between the noninfringing activity and the DVD format, which to date remains the successful digital distribution channel for motion pictures. Broadening the exemption any further is not warranted and would otherwise risk the DVD distribution model.

Any DVD that has been circumvented 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 - perfectly. The more that perfect copies of the work are 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 in any other format or part of any offering of an online service.

The DVD format has remained widely popular notwithstanding the advent of high definition format offered on Blu-ray discs and the 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 for that market. An overly broad exemption could hasten business decisions to abandon the DVD market sooner for the greater security of the high definition market. Consequently, any exemption should remain narrowly tailored as a

better balance to enabling the noninfringing activity while not unnecessarily putting at risk the DVD distribution model

## **II. Factor (v) – The Librarian Should Curb Abuse of the Exemption**

In granting any exemption for filmmaking, most importantly renewing the current exemption, the Librarian should consider how best to curb the abuse of the exemption that is demonstrated in the proponents’ proffered evidence.

### **A. Filmmakers Failed to Adhere to the Limitations in the Exemption**

Examples of the “uses” made under the current exemption by documentary filmmakers indicate that they have failed to observe the limitations in the current exemption. As a result of the last rulemaking, the current exemption provides in relevant part:

Motion pictures, as defined in 17 U.S.C. § 101, on DVDs that are lawfully made and acquired and that are protected by the Content Scrambling System, where the person engaging in circumvention believes and has reasonable grounds for believing that circumvention is necessary because reasonably available alternatives, such as noncircumventing methods or using screen capture software as provided for in alternative exemptions, are not able to produce the level of high quality content required to achieve the desired criticism or comment on such motion pictures, and where circumvention is undertaken solely in order to make use of short portions of the motion pictures for the purpose of criticism or comment : . . . in documentary films[. . .].

37 C.F.R. § 201.40(b)(4). Essential for documentary filmmakers to avail themselves of this exemption is (1) the need for high quality images required to achieve the desired criticism or comment on such motion pictures, and (2) the use has to be for the purpose of criticism or comment.

The Register of Copyrights recommended this exemption on the grounds that higher-quality images were necessary to facilitate the criticism or comment. According to the Register for the documentary filmmaker to make a point, higher-quality images

may be important to show “rippling muscles or particles of dust . . . .” 2012

Recommendation at 134. In those cases “where precise detail [from a high-quality image] is not required for the particular use in question – for example, where a clip is presented simply to illustrate a historical event – lower-quality screen capture images may be fully adequate to fulfill the noninfringing use.” *Id.*

The proponents proffer statements by Joel Schroeder, McCabe and Michael Singh on how they circumvented DVDs to include clips in their works. Joel Schroeder, who directed *Dear Mr. Watson*, a documentary about the cartoon strip *Calvin + Hobbs*, states

I needed to show very brief clips of TV shows that were referenced in the film. The narration talked about how “*Calvin + Hobbes*” was referenced in pop culture. So we ripped DVDs to find the relevant parts of episodes from “*Family Guy*,” “*Portlandia*,” “*Robot Chicken*,” and “*The Big Bang Theory*.”

IDA Comments at 8. Daniel McCabe says he made use of a clip from a DVD for a PBS documentary about walking robots. He explains, “Brief excerpts such as these serve as an audio/video reference in an educational context to deepen the understanding of the work itself and larger ideas.” IDA Comments at 9. Michael Singh who apparently made clips of various Hollywood films in his documentary explained that *Valentino’s Ghost* “reuses a wide variety of copyrighted media. . . . These excerpts illustrate and clarify the arguments that the documentary’s several analysts develop over the course of the film.” NMR Comments at [cite].

None of the uses depended on the ability to perceive details or subtleties in the work contained on the DVDs. Schroeder readily admits that the purpose of his use was to show clips of the same shows referenced in the film. He does not state that the DVD images were necessary to make a point that depended on the ability to perceive details or

subtleties in the images on the DVD such as “rippling muscles or particles of dust.” Instead, his use was nothing more than a reference. A reference akin to the historical reference that Register warned was a purpose that the exemption was not intended to serve.

Similarly McCable makes no mention that his use of the work depended on the audience’s ability to perceive some subtleties or details in the robot. Instead, he admits his use is an audio/visual reference that facilitates the understanding of the PBS documentary. (McCabe’s use also failed to satisfy the requirement that the use criticize or comment on the work that was the source of the clip.)

While Singh’s use of works on DVDs is unclear, he does not ever proffer that his use was predicated on the ability to perceive details and subtleties only available on the DVD images. Like the uses made by Schroeder and McCable, Singh’s use seems to be for reference purposes as he says, use of the clips “illustrate and clarify the arguments that the documentary’s several analysts develop over the course of the film.”

### **B. Screen Capture Justification**

In the 2012 Recommendation to the Librarian, the Registrar cautioned those who would avail themselves of the exemption:

[U]sers of the limited exemptions should be prepared to defend their activities in light of the alternatives as they exist at the time of their use of the exemption, including any further innovations in screen capture or other technologies that may produce higher-quality results than are obtainable as of this Recommendation.

2012 Recommendation at 140. At no time did any of the filmmakers, who allegedly availed themselves of the current exemption, explain why the images from video capture software were insufficient. The absence of such testimony cannot be due to the lack of

opportunity as the Proponents have submitted extensive statements proffered by these individual filmmakers.

### **Conclusion**

DVD CCA does not object to the narrowly tailored exemption created in the last proceeding. It should be renewed on the same terms and conditions as approved previously. Most importantly, the Librarian should reinforce that users need to be prepared to defend their decision to circumvent, particularly in light of the current capabilities of video capture software.