

*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 7**

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

**1. Commenter Information**

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The 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 7 – Noncommercial Remix Videos.

This proposed class would allow circumvention of access controls on lawfully made and acquired audiovisual works for the sole purpose of extracting clips for inclusion in noncommercial videos that do not infringe copyright. This exemption has been requested for audiovisual material made available on DVDs protected by CSS, Blu-ray discs protected by AACS, and TPM-protected online distribution services.

See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 79 Fed. Reg. 73856, 73862 (2014).

## 3. **Overview**

AACS LA opposes the creation of an exemption for Proposed Class 7 that would permit the circumvention of AACS on Blu-ray discs. As discussed below – the vast majority of remix videos cannot be defended under the fair use doctrine. But even assuming *arguendo* that the activity is indeed noninfringing, an exemption is still not warranted because fair use has never required that a user have access to the optimum quality of images of a work such as the high definition found on a Blu-ray disc. Accordingly, remix creators’ desired use of any work will be satisfied either by the circumvention of DVDs or by the high quality images recorded by video capture software of DVD playback.

Blu-ray exclusive content is truly *de minimis*. Far more titles are available on DVDs than on Blu-ray discs. Blu-ray exclusive content is overly represented by special or anniversary editions that offer bonus features, and in no way suggests that the underlying work has not been released on DVD. There are alternatives to circumvention

to make use of Blu-ray exclusive content, such as recording this content with an HD camera as it is played back on an HD display.

Finally, an exemption to circumvent Blu-ray discs would not be warranted because it would threaten the Blu-ray disc distribution model which many consumers enjoy and potentially harm the market for the work across the various high definition platforms.

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

These comments specifically address the proposed circumvention of the Advanced Access Content System (“AACCS”) as licensed by AACCS LA. AACCS has been recognized as a TPM both in this proceeding previously and by the courts. See Section 1201 Rulemaking: Fifth Triennial Proceeding, Recommendation of the Register of Copyrights at 126 (October 12, 2012) [hereinafter 2012 Recommendation]; *see also AACCS LA v. Shen*, 14-CV-1112, Memorandum & Order at 10 (S.D.N.Y. Mar. 16, 2015).

The proponents have not described what method(s) would be used to circumvent AACCS for the purposes of enabling the class of works (and uses and users) for which exemption has been requested.

**5. Asserted Noninfringing Use**

**I. Remix Videos Are Generally Infringing**

Remix or mashup videos (“vids”), which make use of clips from other protected works, are likely infringing if created for entertainment purposes and are not sufficiently transformative. But even if a remix video can avoid infringement by showing that its use of clips from other movies is fair use, an exemption should not allow access to the highest quality content available when there are alternatives to circumvention that

effectively mitigate any adverse effect the prohibition has on the creation of noncommercial video remixes.

### **A. Derivative Works**

A derivative work, as defined by the Copyright Act, is a “work based upon one or more preexisting works....consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship.” 17 U.S.C. § 101. The right to prepare and control a derivative work is an exclusive right granted to the copyright owner, and where a second work makes use of an original work without the permission of the copyright owner, infringement has occurred.

### **B. Fair Use and Remix Videos – Criticism and Comment**

Video remixers creating noncommercial remixes that address social or political issues unrelated to the original content, parody the original work, or in some other way comment on or criticize another work may qualify as fair use for the use of clips from the original works used in the remix. *See* 2012 Recommendation at 129. Fair use permits limited use of copyrighted 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 to determine to what extent the use is “transformative.” Typically, a work that is found to be very transformative will succeed with a fair use defense, with

less weight given to the remaining three factors. 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>1</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 519.

### **C. Insufficiently Transformative Uses May Be Found to Infringe**

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*

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<sup>1</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.

*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. 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 can 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.

#### **D. Most Remix Videos are Infringing, Nontransformative Uses**

An Internet search for the most viewed remixes results in videos that are essentially montages of popular television shows and movies. Whether it's *Game of Thrones*, *Breaking Bad*, *Sherlock* or *The Hunger Games*, many of the most celebrated and shared remixes are spliced together scenes from the original works, frequently combining them with popular music to create a trailer-like video. See <http://vividcon.info/top/> for the stats on the most popular fanvids at VividCon, an annual convention celebrating video remixing; see <http://mmhm-vids.tumblr.com/> and <http://fuckyeahfanvideos.tumblr.com/> displaying popular infringing vids. These video

remixes, comparable to trailers for the TV shows or movies, lack commentary or criticism. They, like the *Seinfeld* trivia book, are created for the audience of a work, with no purposes other than to entertain that audience. *Castle Rock*, 150 F.3d at 142. As the *Seinfeld* trivia book served to satisfy fans' between episode cravings *Castle Rock*, 150 F.3d at 142., so too do remix videos. Editing down a film or television series is an abridgement of the underlying work, and case law has shown that simply re-cutting the creative product of another will not be considered independent artistic creation. *See Twin Peaks Productions, Inc. v. Publications International, Ltd.*, 996 F.2d 1366 (2nd Cir. 1993) (explaining how abridgements, as derivative works, became the exclusive rights of the copyright holder).

Finally, the Second Circuit – in discussing the transformative threshold for the use of a work – suggests looking to whether the defendant had “a genuine creative rationale for borrowing [her source]” and cautions that the court will not “find a transformative use when the defendant has done no more than find a new way to exploit the creative virtues of the original work.” *Blanch v. Koons*, 467 F.3d 244, 252 (2nd Cir. 2006).

In her 2008 article “Visions and Revisions: Fanvids and Fair Use,” Sarah Trombley, a proponent of video remix culture, acknowledges the varying degrees of transformativeness found in remixes known as “fanvids”,

Some fanvids are quite clearly parodies, using an ironic contrast between particular visual images from the source and the tone of the music to poke fun at the original. Many more are not, and so require a more careful analysis. A fanvid which merely recapitulates the plot of a work or the development of a relationship between previously-existing characters is perhaps the least transformative use.

Sarah Trombley, *Visions and Revisions: Fanvids and Fair Use*, 25 *Cardozo Arts & Ent. J.* 647 (2008). Recapitulating or simply summarizing an original work is exactly what

the majority of remix vids achieve, and appropriating protected content for this purpose cannot constitute fair use.

In sum, the problem with these noncommercial remix videos is that they do not sufficiently transform the underlying content or represent a new purpose not contemplated by the original creators. Remix videos that fail to be sufficiently transformative should be seen as nothing more than entertainment, which are infringing the copyrights of the works that they appropriate. Because these vids fail the purpose and character test of a fair use analysis, their noncommercial nature is inconsequential, and they constitute unlawful works that cannot claim fair use. As unauthorized and infringing works, there is no basis to consider an exemption for these works as the proposed activity cannot be shown to be noninfringing.

## **6. No Substantial Adverse Effect**

### **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 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 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 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). 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.” *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. 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 convenient way to engage in fair use.” The court concluded that that even if the user could not “[cut and paste] from the existing digital media. . . . fair use is still available.”

*See Elcom*, 203 F. Supp. 2d at 1131. Further, fair use does not 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”)

#### **A. DVD Quality is Sufficient for Video Remixing Purposes**

For the purpose of video remixing, images either from a DVD circumvented under a limited, renewed exemption or recorded from a DVD are sufficient in that they provide a high quality image capable of expressing whatever commentary the remixer is attempting to convey. Video remixers’ desire to use the optimum quality content available does not mean it is essential to the creation of an effective, noninfringing remix.

Numerous examples of the high quality images are submitted. In each of these the video does not stutter, the pictures are clear and void of pixilation. They are fairly pristine images.

##### **1. Washington Football Team Example**

Remixers argue that HD content is necessary for them to achieve certain uses – namely the effect in “Take It Away” covering the team logo on the helmet with a white dot. The same results can be achieved with video capture software. We have found the source clip that was used and recreated the white-dot effect that was done in “Take It Away.”

The submitted video shows that the same effect (i.e., covering the Washington football team’s logo with a small dot) can be created from the standard definition recording made with video capture software. The use of video capture software as an alternative to circumvention enables the remix creator to effectively make use of the

work in standard definition in the same manner that proponents claim high definition is necessary for their desired uses.

## **II. Content Exclusive to Blu-ray Is *De Minimis***

Nearly every title released on Blu-ray is also released on DVD. In fact, proponents for class 5 have identified along with any title from Pixar, nineteen titles exclusive to Blu-ray. *See* Comments Appx E. However, even within this very limited list, a majority of the titles are in fact special, anniversary or collector editions and in many cases, the main title is released on DVD, with only “bonus” materials being unique to Blu-ray. Furthermore the number of Blu-ray releases is dwarfed by the number of titles released on DVD. Looking at DVD format in Movies & TV on *Amazon.com*, there are 816,665 results, while in the Blu-ray format there are 26,611 results. Consequently, the amount of Blu-ray exclusive content is *de minimis*.

If a remixer must capture a clip only available on Blu-Ray, there are recording alternatives they can employ instead of hacking the AACS protection. Improved digital camera technology has enabled smartphone users to record high quality images on their hand held devices. Recording video on a professional digital camera will also capture high quality images from a Blu-ray disc without the need for circumvention.

## **7. Alternatives to Circumvention**

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

### **I. A Limited, Renewed Exemption to Circumvent DVDs**

AACS LA is aware that the DVD Copy Control Association does not oppose granting the same exemption as was granted in the 2012 proceeding. If the Librarian does, in fact, grant such an exemption, the limited authorized circumvention of DVDs would be 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 remix videos. 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.

## **II. Video Capture Recordings of DVD Playback**

Video capture software has improved 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 amateur remixers to create professional looking content.

Even experienced video remixers recognize the improvement of video/screen capture tools. The video remix blog *So You Want to Vid?: A Beginner's Guide to Fan Vidding* encourages the use of video/screen capture software as a suitable and affordable alternative to circumvention.

There are also plenty of screen capture devices available. I currently use WMCapture, but again, this wasn't a free program. It was around the same price as the ripper. A google search should be able to provide you with low-priced or free options. Just remember that screen capture programs record in real time, so it's necessary to start the program and allow the DVD to play in full.

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

### **A. Video Capture Software Has Improved**

The rapid advance of technology has resulted in more effective, affordable, and accessible video/screen capture software. 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.

## **B. 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 the images on the computer screen. The pixilated and choppy images that exemption proponents complained of in past rulemakings are simply no longer an issue when using the improved software. New versions of capture software use a unique high-speed capture technology to process video data faster than ever, and enable perfect playback of even the most complex, full-motion videos. See <http://wmrecorder.com/products/wm-capture/> (describing 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 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 for use the remix creators want to make.

## **C. Video Capture Software Is Affordable**

The following table lists the cost of a variety of video/screen capture software and the video editing software Adobe Premiere Pro and Final Cut Pro.<sup>2</sup>

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<sup>2</sup> See <http://video-capture-software-review.toptenreviews.com/> for list of top rated software and their cost.

Product	Software Type	Price
Final Cut Pro X <sup>3</sup>	Video Editing	\$299.00
Adobe Premiere Pro CC <sup>4</sup>	Video Editing	\$239.88/Annually
Camstasia	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 professional grade video/screen capture and editing tools available to the public at little to no cost.

#### **D. Video Capture Includes Video Editing Features**

The continuous evolution of video capture software has resulted in these programs including advanced editing tools, which allow remixers to create professional looking content. Of the top ten video capture software ranked by toptenreviews.com, every program includes editing tools. Now, instead of having to use multiple programs for different steps in the remix process, creators can use video capture software to appropriate the images and video they choose and then edit the clips into a ready to share finished video. Editing tools included in video capture software allow users to crop,

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<sup>3</sup> See <https://www.apple.com/final-cut-pro/>.

<sup>4</sup> See [http://www.adobe.com/products/premiere.html?sdid=KKQPE&kw=semgeneric&skwcid=AL!3085!3!51560612002!e!!g!!adobe%20premiere%20pro&ef\\_id=VQCrNAAAAY0F1wON:20150318163201:s\\_](http://www.adobe.com/products/premiere.html?sdid=KKQPE&kw=semgeneric&skwcid=AL!3085!3!51560612002!e!!g!!adobe%20premiere%20pro&ef_id=VQCrNAAAAY0F1wON:20150318163201:s_)

resize, and implement effects into their vids in the same program they used to capture the content.

#### **E. Video Capture Software Can Be Exported to Remixers' Preferred Software**

Remixers preferred editing programs, *Final Cut Pro* and *Adobe Premiere Pro*, support a number of video formats.<sup>5</sup> While video/screen capture software support fewer formats, the development of decoding, or “codec”, tools has eliminated compatibility issues.

Codec refers to a type of file, such as FLAC, MP3, or FLV, and in the past, certain programs would only play certain codecs. This resulted in compatibility issues like Windows Media Player for example not being able to play a FLAC file. But today, readily downloadable codec devices enable the decoding of any type of codec format for playback and editing, thus removing any compatibility barriers and allowing remixers to create remix videos using whatever combination of software, programs and platforms they desire.

#### **F. Video Capture Software Is Compatible with Mac Platform**

For those remixers who prefer the Mac platform, there is Mac-compatible screen/video capture software for creating vids on a Mac. They offer the same high quality screen capture tools for those creating vids on a Mac. Programs like *Screenflick* and *Camtasia* offer navigable interfaces that allow for high quality screen capture and

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<sup>5</sup> See [https://support.apple.com/kb/PH12754?locale=en\\_US](https://support.apple.com/kb/PH12754?locale=en_US) and <https://helpx.adobe.com/premiere-pro/using/supported-file-formats.html> for a complete list of formats.

editing. Describing their video capture tools, *Screenflick* explains that their software “contains a highly tuned recording engine which can capture very large resolutions at high speed and high quality.” (See <http://www.araelium.com/screenflick> for software descriptions.)

### **III. Filming the Image**

Proponents of the exemption argue that creating a clip via smartphone does not result in a high enough quality to allow editing. They also claim that 2/3 of Americans do not own smartphones capable of recording video, but this argument ignores the fact that members of the video remix community represent tech savvy individuals who likely have access to or own a smartphone with video recording capability.

Phone and camera technology advances at such a rapid pace, what we considered quality three years ago is now totally obsolete. Recording on a phone or other digital camera now provides clear, high quality video that can easily be used as an alternative to hacking into a Blu-ray disc.<sup>6</sup>

## **8. Statutory Factors**

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

An exemption is not warranted because any exemption will result in harm to the work distributed not only on Blu-ray discs but to all services offering the work in high definition. The DMCA is inherently a balance between the need in the digital age to protect copyrighted works from easy infringement and certain side effects of

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<sup>6</sup> See <http://www.let-the-right-one-in.com/forum/viewtopic.php?f=13&t=3131> for a discussion of using a video camera to shoot a remix vid.



technological protections against such easy infringement. 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 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 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.

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 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 on the Blu-ray disc.

Thus 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 work in high definition, this “in the clear” perfect HD copy of the work can discourage consumers, who would purchase the HD offering from online services. These consumers are regularly presented with the choice of paying more for the HD offering. If a perfect 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 the distribution model Blu-ray disc poses a threat to the offering of the work in high definition distribution services as well.

The Blu-ray disc format’s growth, while very impressive, has not had the sustained success that the DVD format has seen. At the time DVDs were introduced, VHS and cable were the only competitive distribution models, and both were significantly lower quality. Unlike DVDs, Blu-ray discs have had to compete with not only its predecessor format (the DVD) but also a high definition distribution system that encompasses cable, satellite and various online distribution platforms. Blu-ray disc has done quite well as an additional option for consumers, and movie studios have found that the improved content protection offered by AACS (as compared with CSS for DVD) has been sufficient to maintain the incentive to release content using the Blu-ray disc format. However, in a competitive high definition environment, an authorized exemption to allow circumvention of AACS would undermine the confidence that copyright owners have had in the protection system and, hence, the Blu-ray disc format generally.

The protection system relies on the consistency of the law in protecting and preserving AACS technology. On March 4, 2014, the District Court issued a preliminary injunction to prevent the trafficking of DVDFab technology, which circumvented AACS technology. Most recently, the court expanded the injunction to cover products and services intended to evade the original injunction. In analyzing how AACS LA met the standard for injunctive relief (both as to the original injunction and the now expanded injunction), the court found:

There is no doubt that AACS is a technological measure designed to control access to copyright protected materials. (*Id.* at 10.) Nor is there any doubt that Defendants’ primary, if not sole, business purpose is to decrypt these technological measures. (*Id.* at 10-11) Plaintiff made a

clear showing that traditional legal remedies would be inadequate to compensate Plaintiff. (*Id.* at 13.) In this case, Plaintiff “lacks an adequate remedy at law, because its business model rests upon its being able to prevent the copying of copyrighted works. If it is unable to prevent the circumvention of its technology, its business goodwill will likely be eroded, and the damages flowing therefrom extremely difficult to quantify.” *Macrovision v. Sima Products Corp.*, No. 05-CV-5587, 2006 WL 1063284, at \*3 (S.D.N.Y. Apr. 20, 2006)

*AACS LA v. Shen*, 14-CV-1112, Memorandum & Order at 15 (S.D.N.Y. March 16, 2015)

(footnote omitted) The harm that warranted an injunction in the DVDFab case is the same harm that AACS LA would suffer as a result from granting any exemption to permit circumvention for the purposes of the proposed class.

### **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 against 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 remix creators can take advantage of other alternatives to circumvention, such as smartphone recordings, 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 against 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 remix creators may suffer because they cannot make use

of the work in high definition. The legal precedent clearly states that a 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 7 must be denied.