

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. 2014-07

**Reply Comments of Electronic Frontier Foundation and Organization for
Transformative Works¹**

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EFF is a member-supported, nonprofit public interest organization devoted to maintaining the balance that copyright law strikes between the interests of copyright owners and the interests of the public. Founded in 1990, EFF represents thousands of dues-paying members, including consumers, hobbyists, computer programmers, entrepreneurs, students, teachers, and researchers, who are united in their reliance on a balanced copyright system that ensures adequate protection for copyright owners while facilitating innovation, access to information and new creativity.

The OTW is a nonprofit organization established in 2007 to protect and defend fanworks from commercial exploitation and legal challenge. “Fanworks” are new, noncommercial creative works based on existing media. The OTW’s nonprofit website hosting transformative noncommercial works, the Archive of Our Own, has over 400,000 registered users and receives over 4.8 million unique visits per month.

2. Proposed Class Addressed

Proposed Class 7: Audiovisual works – noncommercial remix videos

Audiovisual works made available via DVDs, Blu-Ray discs, and online distribution systems, that are lawfully made and acquired and that are protected by Digital Rights Management

¹ Multimedia evidence submitted under separate cover.

schemes, where circumvention is undertaken for the sole purpose of extracting clips for inclusion in primarily noncommercial videos that do not infringe copyright, and the person engaging in the circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use.

3. Overview

Happily, opponents of the proposed exemption do not challenge renewal of the existing exemption.² Unfortunately, they have chosen instead to try prevent its logical expansion (to cover Blu-ray discs) and clarification. Opponents' submissions largely recycle the same arguments we have seen for years in these proceedings.

None of those arguments withstand scrutiny. For example, it is absurd to suggest that remix videos are "generally infringing."³ To the contrary, remix is widely recognized as a thriving genre of fair use, accessible to ordinary citizens and used for all kinds of valuable political and cultural commentary and expression. Similarly, it is untenable to suggest that remix artists should make do with alternatives, such as video capture or source captured via their iPhones. High quality source is essential to the creation of persuasive, compelling works, whether those works be documentaries, Hollywood blockbusters, or short-form videos. As we explain below, none of the available alternative suffices to meet that need, in 2015 as in 2012 and 2009. Finally, Opponents offer nothing more than sheer speculation as to any potential adverse effect of expanding the existing exemption to Blu-ray discs and clarifying that the exemption would cover any video produced for reasons that are not primarily profit-driven.

The existing exemption removes a legal cloud that would otherwise hang over an increasingly broad and mainstream form of cultural work, and allows remixers to assert fair use defenses and file counter-notifications when their uses are challenged pursuant to the Digital Millennium Copyright Act. The exemption should be renewed, clarified, and expanded to cover short clips taken from Blu-Ray discs as well.

4. Technological Protection Measures and Methods of Circumvention

Proponents addressed this category in our opening comments and Opponents seem to agree that the TPMs discussed there are "access controls" for purposes of this proceeding. It is uncontested that tools for circumventing such controls are widely available and, in some cases, have been for many years.

² Second Round of Comments of the Advanced Access Content System Licensing Administrator LLC ("AACSLA") for Proposed Class 7 (March 27, 2015) ("AACSLA Comments"); Second Round of Comments of the DVD Copy Control Association ("DVD-CCA") for Proposed Class 7 (March 27, 2015) ("DVD-CCA Comments"); Second Round of Comments of the Entertainment Software Association; Motion Picture Association of America, Inc.; and Recording Industry Association of America ("Joint Creators and Copyright Owners") for Proposed Class 7 (March 27, 2015) ("Joint Creators Comments")

³ AACSLA Comments at 3.

5. Asserted Noninfringing Uses

Remarkably, some opponents suggest that remix videos are “generally infringing.” Their theory is based on a mistaken view of both copyright law and remix art that the Register should squarely reject.

A. Remix Videos Are Likely Noninfringing

Proponents submitted a host of examples of noninfringing remix videos with our initial comments, offering further evidence of the correctness of the Register’s 2012 conclusion that many remix videos are protected fair uses. In addition, the videos considered in 2009 and 2012, and recognized as likely noninfringing by the Copyright Office, remain fair.

Opponents seek to undermine the 2014 examples by dismissing them as “entertainment” and suggesting that such videos are less likely to be fair.⁴ This is nonsense.

First, it is based on a misreading of the material in question (as well as ignoring the numerous political remix videos, film criticism, and other genres identified).⁵ For example, the Joint Creators and Copyright Owners suggest that the vid *SupreMacy* is simply a “loose ‘narrative’ punctuated by exciting action scenes.”⁶ Actually, as Professor Francesca Coppa explains in Appendix A, the video re-tells the James Bond story with M, Bond’s female boss and sometime mentor, as the protagonist.⁷ This vid, like so many others, is both entertaining and critical, and comments on the meaning, the affect, the genre, and the values of the original source. As initial community reactions to the vid proved, that transformative purpose would be clear to viewers familiar with the original material and the fanvid genre, and is reinforced by the creator’s highlighting of the letter “M” in the title.

Opponents may not understand the values and context of the work, but that failure suggests only the importance of not putting them (or anyone else) in charge of vetoing such uses. “As Justice Holmes explained, ‘[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke.’ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251

⁴ AACS LA Comments at 3, 8.

⁵ See, e.g., Comments of Electronic Frontier Foundation and Organization for Transformative Works for Proposed Class 7 (February 6, 2015) (“EFF/OTW Opening Comments”) at 4 (explaining that the most popular political videos are remix videos).

⁶ Joint Creators Comments at 3.

⁷ Statement of Professor Francesca Coppa, Appendix A.

(1903).”⁸ Museums, mainstream media, and numerous other viewers have recognized the transformative, critical messages in vids; this is far more than enough.⁹ Moreover, Opponents’ misreading of vids highlights the importance, discussed in more detail below, of conforming the exemption to fair use doctrine itself. *See* Section 5.B, *infra*.

Second, there is no legal basis to conclude that videos that are “entertaining” are not “transformative.” Indeed, on that theory the song at issue in *Campbell v Acuff-Rose Music, Inc.* would have been unfair, because, like the original, it happened to be entertaining to some audiences.¹⁰ As Opponents insist in other contexts, entertainment receives the full protection of the First Amendment, and often has profound effects on its audiences, since narrative arguments can be the most powerful kind.¹¹

Third, other than the reference to *SupreMacy*, Opponents make no effort to explain why the many videos identified in our initial comments, or in previous rounds of rulemaking, are not transformative fair uses, or why the Office was wrong in 2009 and again in 2012 in so finding. Instead, they simply point to various online fanvid collections and baldly assert that the works in those collections lack commentary or criticism. As exemplified by their misreading of rhoboat’s

⁸ *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. at 582-83; *see also id.* at 582 (asking whether transformative character could “reasonably be perceived”); *cf. Yankee Publishing Inc. v. News America Publishing, Inc.*, 809 F.Supp. 267, 280 (SDNY 1992) (Leval, J.) (“First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed’.”) (internal citations omitted); *Cariou v. Prince*, 714 F.3d 694, 707 (2d Cir. 2013) (emphasizing role of audience perception in assessing transformativeness, and highlighting Richard Prince’s relation to the appropriation art world to explain why observers familiar with appropriation art would find transformativeness); Laura A. Heymann, *Everything is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 449 (2008) (a work is transformative if it results in “a distinct and separate discursive community around the second work,” a standard easily met by vids). *See also* <http://www.metafilter.com/148169/A-Different-Kind-of-Love-Song> (March 20, 2015, 10:22PM) (ordinary vid watchers explain to non-vid watchers the context and meaning of a vid, and articulating their own complex understandings of vids).

⁹ *See, e.g.,* Luminosity, Vogue (a top vid at Vividcon and one specifically recognized in the 2010 Rulemaking, as well as by New York Magazine and the Museum of the Moving Image).

¹⁰ There is, understandably, consensus in the courts on this point. *See, e.g., Cariou; Sofa Entertainment v. Dodger Prods.*, 709 F.3d 1273 (9th Cir. 2013) (use in play was fair use); *Kienitz v. Sconnie Nation LLC*, 766 F. 3d 756 (7th Cir. 2014) (“Sorry for Partying” humorous shirt was fair use); *Seltzer v. Green Day, Inc.*, 725 F.3d 1170 (9th Cir. 2013) (use in music video was fair use).

¹¹ *See, e.g., Brown v. Entertainment Merchants Association*, 131 S.Ct. 2729, 2732 (2011) (“[W]e have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try. ‘Everyone is familiar with instances of propaganda through fiction. What is one man’s amusement, teaches another’s doctrine.’ Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium . . . That suffices to confer First Amendment protection. Under our Constitution, ‘esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.’”) (citations omitted); *see also Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 969 (10th Cir. 1996) (“Speech that entertains, like speech that informs, is protected by the First Amendment.”).

SupreMacy, Opponents are not qualified to evaluate the transformativeness of those videos. Given the uncontested statistics on the prevalence of remix video, more than 2000-6000 transformative remixes are being added to YouTube each day, not to mention the multiple other locations at which vids are found. Not all of them are good, but they are all trying to say something different—that’s why the creators made them.¹²

Opponents also misleadingly quote Sarah Trombley, *see* AACS at 7, to suggest that scholars have concluded that many remix videos are not transformative. To the contrary, after Opponents’ selective excerpt, Trombley concludes that “virtually all fanvids involve the creation of a distinct work that comments on or transforms the original source video, or uses it as raw material for independent cultural critique. Thus, they should be recognized as transformative use.”¹³

Finally, the Joint Creators assert, contrary to established law, that taking several minutes from a motion picture is unlikely to be fair. It is well-settled that the factor three analysis does not turn on how much is used from the original work. Rather, “the amount and substantiality of the portion used in relation to the copyrighted work as a whole” should be reasonable in relation to the purpose of the copying. *Campbell*, 510 U.S. at 586. The remix video found to be fair in *Northland Family Planning Clinic, Inc. v. Ctr. for Bio-Ethical Reform*, 868 F. Supp. 2d 962, 976 (C.D. Cal. 2012), used “substantial verbatim sections” of the original, a short four-minute video. A remix artist is indeed free to use an entire work, if that is necessary for her purpose. *See, e.g., Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449–50 (1984); *Kelly v. Arriba Soft*, 336 F.3d at 820–21; *Mattel*, 353 F.3d at 803 n. 8 (9th Cir. 2003) (“entire verbatim reproductions are justifiable where the purpose of the work differs from the original”); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006) (same).

B. The Exemption Should Better Match Fair Use Law

Neither do Opponents manage to explain why the existing exemption should not modified be to conform more fully to the fair use doctrine it is designed to protect. As we noted, “Section 1201 operates equally on all forms of transformativeness using video clips, harming them all. There is no need to prejudge potential types of transformative fair uses, or to create an extra category that

¹² EFF/OTW Opening Comment at 3.

¹³ Sarah Trombley, *Visions and Revisions: Fanvids and Fair Use*, 25 *Cardozo Arts & Ent. J.* 647 (2008). *See also, e.g.,* Mel Stanfill, *Spinning Yarn with Borrowed Cotton: Lessons for Fandom from Sampling*, 54 *Cinema J.* 131, 134 (2015) (“[T]he act of reuse can be political. The music scholarship’s examples [include] reusers mocking sickly sweet love songs by making them raunchy. The parallel to fan critique and argumentation through the selection, placement, and recontextualization of reused source text is clear. Certainly the juxtaposition of music to video is the major driver of argument in fan vids: ‘The music and lyrics tell us how to understand what we see.’ Vidding uses positioning as argument by slowing down moments to emphasize their intensity and producing moments that do not exist in the source text by imitating the rhythms of shot-reverse shot, mixing in content from other sources (e.g., sex scenes with sufficiently similar bodies), or layering in dialogue from the source in new combinations and contexts.”) (footnotes omitted).

would need to be separately analyzed even after a factfinder determined that a remix was fair use. Rather, imposing such a requirement would create new uncertainties, mandating distinctions that courts have increasingly recognized they are unequipped to make.”

Indeed, Opponents’ claims to find nothing critical in the many examples we have provided offer a cautionary tale: criticism often requires familiarity with the context. It is in part for this reason that courts have increasingly recognized that the creation of new meanings and messages, rather than courts’ ability to translate those messages into their own words approximating literary criticism, is the proper measure of transformative fair use.

By the same token, Opponents offer little reason to tie the exemption to purely noncommercial videos, as opposed to primarily noncommercial ones. As Opponents recognize, fair use does not turn on commerciality, and there is no rational basis for excluding fair use videos just because they happen to have a whiff of commerciality, or were created for commercial as well as noncommercial purposes.

First, Opponents have a misconception about the operation of intermediary platforms, which sometimes use ads to support themselves, but do not share the revenue with remix creators.¹⁴ “The crux of the profit/nonprofit distinction is whether the *user* stands to profit from exploitation of the copyrighted material without paying the customary price.” *L.A. News Service v. Reuters Television Int’l*, 149 F.3d 987, 994 (9th Cir. 1998) (emphasis added); *see also Zomba Enters., Inc v. Panorama Records, Inc.*, 491 F.3d 574, 583 (6th Cir. 2007) (distinguishing later user from alleged infringer; “the end-user’s utilization of the product is largely irrelevant; instead, the focus is on whether the alleged infringer’s use is transformative and/or commercial”). Tumblr and YouTube may include ads, but vidders do not earn money from their work.¹⁵ To suggest that their work is commercial because they use for-profit intermediaries is like calling their work commercial because they paid for-profit companies for the computers on which they created their vids; it would reduce noncommerciality to a null set. Opponents’ argument merely explains why the exemption should be worded broadly, so that courts and artists will not be confused about the incidental role of economically motivated entities. Artists who use YouTube or other services to reach broader audiences should not be penalized for the fact that most services in the U.S. are provided by commercial entities.

Second, opponents cannot overcome the binding Supreme Court precedent that even fully commercial works are regularly entitled to fair use protection. Artists such as *soda_jerk*, whose works are exhibited in museums and art galleries, *see* EFF/OTW Opening Comments at 24, need not starve for their art. Nor do opponents explain why, for example, advocacy organizations like

¹⁴ As the International Federation of the Phonographic Industry (IFPI) explains, it is major content owners, not individual creators, that are claiming and monetizing some “user-generated content.” *See* IFPI, Digital Music Report 2014, <http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf>.

¹⁵ *See* Trombley, *supra*, at 662.

the NCAI, the Center for Bio-Ethical Reform, or the Lear Center should be prevented from sponsoring remix videos that further their advocacy aims, even when that means paying for their creation. Indeed, the *Northland* court found that (1) payment for creation and (2) use of a remix video in fundraising did not weigh significantly against fair use, given the transformative nature of the remix. 868 F. Supp. 2d at 978-79. At the very least, this precedent makes clear that it should be for courts to determine the role of commerciality in any given fair use remix, rather than excluding concededly fair uses from the protection of the remix exemption. The exemption's restriction to noninfringing uses serves as the proper boundary, not any constrained concept of commerciality.

Third, opponents mistake the relevance of noncommerciality. Noncommerciality *alone* can tilt the balance towards fair use,¹⁶ and is an important reason that many remixes are fair use. In the context of remix, noncommerciality—the fact that an artist created a work in order to convey a message, not to make a profit—weighs in favor of fair use over and above the weight of transformativeness. But likewise, transformative use *alone* can tilt the balance towards fair use. In other words, the first factor can easily be met by all actors, whether or not their purpose is purely noncommercial.¹⁷

C. The Exemption Risks No Harm to Legitimate Interests

As in the past, Opponents pay scant attention to the limitation to noninfringing uses in the proposed exemption. If they are correct about particular videos not being fair uses, they have nothing to fear from the exemption.

More broadly, after exemptions persisting for five years (DVDs) and three years (streaming), there is still no evidence of adverse impact. The opponents fund numerous studies of unauthorized copying, but have produced no evidence about the effect of the existing 1201 exemptions in the real world. That silence is telling. Moreover, DVD-CCA concedes that a renewed exemption is appropriate, and no streaming technology provider has even opposed the streaming remix exemption, indicating that—though the streaming business model is younger than that for Blu-Ray—DVD and streaming providers understand that a technology useful for producing clips for remix is not even of marginal relevance to their business models.

6. **Asserted Adverse Effects**

Proponents identified clear adverse effects on fair use from the absence of an exemption. Opponents do not generally contest these effects, seeking rather to limit the scope of any

¹⁶ *Sony v. Universal*, 464 U.S.417, 451 (1984) (presuming noncommercial uses not to harm legitimate markets); *Princeton Univ. Press*, 99 F.3d at 1385–86 (“The burden of proof as to market effect rests with the copyright holder if the challenged use is of a ‘noncommercial’ nature.”).

¹⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (pointing out that most favored fair uses are in fact created with some hope of financial reward).

exemption. First, Blu-Ray is an increasingly important source of remix material. Second, a distinction between Blu-Ray and other forms makes no practical sense and creates a trap for the unwary. Third, the alternatives proposed are irrelevant, impractical, and insufficient.

A. Blu-Ray Is an Important Source of Material For Vidders

Professor Coppa's appended statement includes a list of a significant number of vids made using Blu-Ray—and these were only people who responded to her directly in a one-week call for statements. As she explains, Blu-Ray is a crucial source for many remix artists for at least two reasons: (1) its quality facilitates close readings of images, which is often crucial to vidder' messages; (2) increasingly, important extra materials are only available on Blu-Ray discs, such as the additional material available on the *Avengers* Blu-Ray. Opponents have not and cannot offer a credible counterargument on any of the above.

1. Blu-Ray Quality

As set forth in our initial comment, the artists who work with footage increasingly choose Blu-Ray because Blu-Ray footage has the necessary quality to survive the editing that is standard in remix art forms such as vidding and GIF-making, as Professor Coppa explains in detail in Appendix A (attached). As one vidder explained, "I've tried both screen capture and DVD rips. With screen capture, I sacrifice framerate, with DVD rips, I sacrifice quality, and I can't stand dropped frames."¹⁸ In particular, lower quality source is inhospitable to the effects that are standard in vidding. Artistic practice is distorted, preventing vidders from making the works that convey the messages they seek to convey. As she elaborated,

Generally, when it comes to the low quality, it just looks unprofessional and makes it nearly impossible to add any artistic effects (which is most of the appeal of editing for me). When people watch these shows in HD, seeing a fanvid in grainy, awful colors is a real distracter from the video. That's without any real effects, either. Color grading is something that I enjoy, as it really determines the tone and feel of a video. The low quality footage doesn't allow me to really do that, as any change to an already low-resolution, pixelated image results in more quality degradation. I also often lose framerate speed when using DVDs, which is frustrating when it skips every few seconds. Often, it limits me to action-style videos as well, with short, quick cuts that switch over before they skip. It is really just increasingly frustrating as video quality is getting better and better and I can't even add color gradation to a video because that one attempt at an effect ruins the entire clip. I used to really enjoy creating more complex effects, working with overlays and layer types, fancy image masks, etc., but

¹⁸ On file with OTW, Apr. 18, 2015.

now I'm too distracted by the terrible pixelation these create to do them. My entire style is changed when I have to use LQ [low quality] footage.¹⁹

Vidder Counteragent agrees:

[In one recent vid of mine,] images are zoomed in significantly from their original footage and/or overlaid on other images. However, they still read clearly because their sources were .mkv files (high quality files that either come from HD broadcast/downloadable sources or blu-ray). Without this high-resolution footage to draw from, the undercurrents of rape and enslavement would have been much obscured.

Effects were crucial for establishing my character's internal POV while he was possessed, something that was not depicted in the show but was critical for the vid. ... Those scenes were color coded to alert the viewer that they were not intended to be read in their original context. Without the color coding, the vid is useless as a critical commentary on rape and coercion. High quality source fares much better than low quality source when effects are applied.²⁰

Rhoboat experienced the same issues, driving her to Blu-Ray:

Working with DVD source on my 1920x1080 machine is like taking a photo that's originally 4x6 in and blowing it up to 8x12 in. You start seeing pixelation and artifacts in the picture. This would be especially noticeable for parts of the vid where I zoomed in or cropped the original source. This is evident in the split screen sections or whenever there's a very deliberate crossfade.²¹

Short-form commenter Laura Shapiro likewise explained:

People watch remix videos the way they watch television now: on a big screen faraway, or on a small screen close-up. Either way, low-resolution footage is noticeable and undesirable. I don't want audiences to be seeing pixels, I want them to be seeing what I'm saying. My message can't come through in a clear, engaging manner when viewers are struggling to read it around video artifacts in low-resolution shots. Give me high-quality, high-resolution footage for my remixes to ensure my audiences see and understand what I'm saying.²²

¹⁹ *Id.* See also Soda_jerk, EFF/OTW Opening Comments at 32 (explaining the crucial role of effects).

²⁰ See Appendix A at A-12 (Counteragent statement).

²¹ See Appendix A at A-11 (Rhoboat statement).

²² EFF Merged Short-Form Comments, http://copyright.gov/1201/2015/comments-020615/EFF_merged_shortform_comments_class07.pdf, at 968.

We urge the Copyright Office not to disparage remix artists' experiences, artistic commitments, and aesthetic goals by assuming, in contradiction to the artists' own statements, that they could satisfy their aims with the video equivalent of crayons instead of oil paints. Transformative fair uses are works of equal dignity to other artforms, and an exemption that protects them goes exactly as far as it should.

2. *Blu-Ray Content Can Be Unique*

Opponents perplexingly insist that not much content is available exclusively on Blu-Ray. That is beside the point. As Proponents have demonstrated, the most prominent films of the day are often subsequently released as special editions with additional material unique to Blu-Ray. Because of their influence on popular culture, these are the same films that are most likely to invite the creation of transformative works in response.²³ Opponents make no efforts to actually refute the testimony of vidders such as thuviaarth, who explained that the Blu-Ray exclusive extras for *Avengers* were vital to the video she made examining and critiquing Captain America's militarized image.²⁴ Vidder Jetpack Monkey found that Blu-Ray was unique in another way: "The Blu-ray is the only available digital source for Halloween H20 that's both in the correct aspect ratio and anamorphic."²⁵ In order to edit the film without distortion, anamorphic source in the correct aspect ratio is required (as Professor Turk explains further in our original submission, and in Appendix B).

B. Failing to Extend the Exemption Creates a Trap for the Unwary

Limiting the exemption to DVD and streamed content creates an unjustified and confusing trap for the unwary. Remix artists assume, sensibly, that any content they lawfully acquire can be used for their fair use purposes. Only when they are hit with a DMCA notice and, perhaps, consult a lawyer, will they discover that, because they relied on Blu-Ray content, counternoticing poses significant legal risk. Unrebutted empirical research in the remix community shows that remixers have a robust ethic of fair use, but often do not understand of the complexities of Section 1201. See EFF/OTW Opening Comments, at 8. They should not be penalized for the choosing the "wrong" source material.

C. The "Alternatives" Opponents Propose Are Woefully Inadequate

1. *Fair Use Case Law Does Not Require Artists to Settle for Low Quality Source*

To contradict evidence from artists about their actual technical capacities, actual artistic and critical messages, and actual needs, opponents offer dictum from *Universal City Studios, Inc. v.*

²³ AACS at 11 (ignoring the identity of the works exclusive to Blu-Ray).

²⁴ EFF/OTW Opening Comments at 12.

²⁵ Appendix A at A-5..

Corley, 273 F.3d 429 (2d Cir. 2001), to the effect that fair use does not entitle a user to “the optimum method.” But no evidence was submitted on fair use in *Corley*, and the appellants in that case didn’t even raise a fair use defense. *Id.* at 458-59 (“[W]hatever validity a constitutional claim might have as to an application of the DMCA that impairs fair use of copyrighted materials, such matters are far beyond the scope of this lawsuit for several reasons. In the first place, the Appellants do not claim to be making fair use of any copyrighted materials . . .”; noting that no evidence about fair use was submitted).

The overwhelming weight of fair use case law is clear: users may use what is needed to accomplish their purpose. *See, e.g., Campbell*, 510 U.S. at 588; *Bill Graham*, 448 F.3d at 613 (finding fair use when copying was of the “size and quality” necessary to the transformative purpose); *Warren Pub. Co. v. Spurlock*, 645 F. Supp. 2d 402, 420, 425 (E.D. Pa. 2009) (high-quality copied images were fair use because they were necessary for transformative purpose; “As to Plaintiffs’ argument that Spurlock could have reduced the larger images or changed all of them to black-and-white, such modifications would undermine the very heart of the publication, which is to chronicle the achievements of a renowned artist. Vivid colors are an important element in depicting monsters, particularly their faces. . . . [M]aking these changes would directly thwart one of the key purposes of the book—to showcase the detailed work of Basil Gogos.”); cf. *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 85 (2d Cir. 2014) (finding fair use where copying audio recording provided additional details on tone of voice and emphasis compared to transcript); *Sony Computer Entertainment America, Inc. v. Bleem, LLC*, 214 F.3d 1022, 1030 (9th Cir. 2000) (finding fair use where real images were necessary for accurate comparisons). If a remix qualifies as a fair use, it furthers “the goal of copyright[:] to promote science and the arts.” *Campbell*, 510 U.S. at 579. Like other protected works, they should not be subject to others’ judgment about their artistic requirements.

2. *Opponents’ Own Exhibits Illustrate the Importance of High Quality Source*

DVD-CCA’s own leading Exhibit, a “replication” of some footage from the National Congress of American Indians’ “Take it Away” video, actually demonstrates the NCAI’s need for high-quality source. The original NCAI video, edited from high quality footage frame by frame, produces the effect of watching a real football game, with all the accompanying details and excitement.²⁶ Exhibit 1, by contrast, has such poor quality that most of the appearances of the Washington team’s logo don’t even need to be edited out; the NCAI’s point that the logo is unnecessary to a high-quality experience is completely lost. The following still images, taken at the same size on the same computer from the two different videos, show the problems. (Please note: due to compression required to make this Reply comply with the 6 mb limit, the comparison is better viewed in EFF-OTW Reply Exh. 10):

²⁶ National Congress of American Indians, *Take It Away*, https://www.youtube.com/watch?v=QW__6RO_-N0.

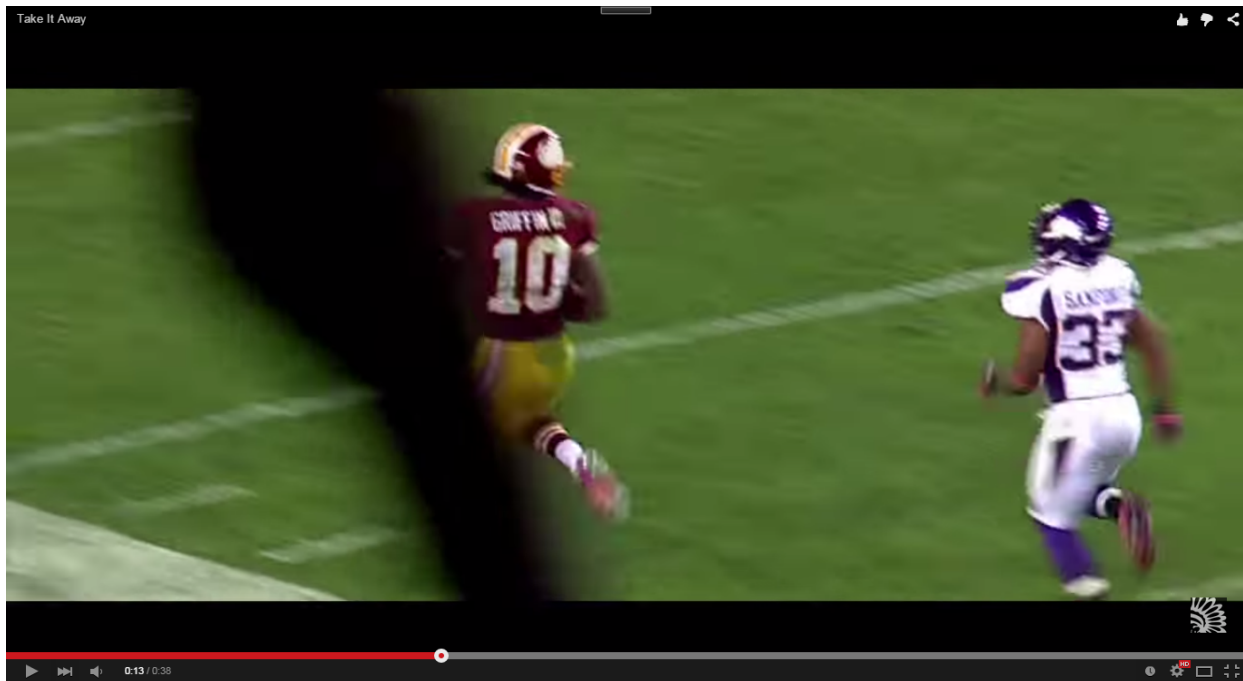
NCAI video beginning (note that every Washington player has had the logo digitally removed):



Opponents' Exhibit 1 beginning (note absence of red dots; this image is too poor for the logo to be intelligible, even unaltered):



NCIA video, at :13 (note that player's name is readable):



Opponents' Exh. 1, at :16:



NCIA video, at :14 (note careful removal of logo on turf):



Opponents' Exh. 1, at :17 (note remaining Washington logo on turf, perhaps because editor failed to notice it given low quality or because editing tools were incapable of removing it):



NCAI video, at :18 (note digital removal of logo on 3 fans' hats and sweatshirt):



Opponents' Exh. 1, at :20 (note remaining, albeit blurry, logos):



Opponents' approach, using a crude red dot sporadically, on top of a heavily pixelated image, would not convey the NCAI's message that the game would be the same without the logo; if anything, it would convey the opposite. The NCAI did not contract for help from a Hollywood effects agency for mere convenience. As the creators explained, "We needed high resolution footage to show removing the offensive branding and replacing it with a white circle did not change the Washington Team. If we had used low resolution footage—replacing the offensive branding with a white circle would not have made as large an impact. In fact, it may have been missed all together."²⁷

3. *Opponents Misunderstand the Remix Creative Process, Particularly Editing*

Separately, Opponents' discussion of screencapture treats playback as equivalent to editing and neglects the amount of processing that remixers do of footage in order to get their end results. Their analysis of the adequacy of alternatives stops when the footage is acquired, before it is *used*. True video editing (for reasons made obvious by Opponents' own Exhibit 1) doesn't just place a dot on one portion of the frame; it compresses, resizes, recolors, and otherwise manipulates the underlying footage. However, as Professor Turk's statement and associated exhibits indicate, Opponents' screencapture results are unusable—when effects are applied to their Exhibit 2, a standard editing program can't render the footage.

This is not a unique result. As vidders routinely report, screencapture is simply not robust enough to be used with standard nonlinear editing programs, and its producers do not pretend that it is.²⁸ Professor Turk's initial statement in the Appendix to our original submission goes into detail about the resulting technical issues surrounding screencapture with respect to importing into editing programs, editing, manipulating, and exporting.²⁹

The basic problem is that, when one is not working with the original source, the result is not an accurate digital copy but a nonidentical copy. Something will be compromised—aspect ratio and pixellization (big squares instead of detail) or frame rate and motion smoothness, or all of them, because of the intervention of the screen between the original and the capturing program. Professor Turk details problems this creates for editing using Opponents' own Exhibit 2 in the attached Appendix.³⁰

Comparing the two exhibits offered by opponents also yields important lessons. First, the size (aspect ratios), format, and frame rate of the two exhibits are completely different. Both aspect ratios are nonstandard: Exhibit 1 is 2048 x 1024, while Exhibit 2 is 776 x 344. A

²⁷ EFF/OTW Opening Comments, at 15.

²⁸ Opponents rely on "A Beginners Guide to Fanvidding" to suggest otherwise. That document is, as it states, a guide for absolute beginners, and does not engage with any of the sophisticated effects and techniques used by vidders as they develop over time.

²⁹ Turk Statement, EFF/OTW Opening Comments.

³⁰ Statement of Professor Tisha Turk, Appendix B.

nonstandard/incorrect frame size means that every single clip would have to be resized, either in pre-processing or in the editing program, resulting in quality loss.³¹ EFF/OTW Exh. 9 shows the results of resizing Exhibit 2 to be as close to standard as is possible. Because screencapture captures the screen, rather than the true video source, this result will be typical. Clips captured from another disc would probably have a slightly different incorrect frame size.³² This is particularly significant for remixers because combining different sources is common in remix,³³ and resizing to match also degrades quality.

The same is true for frame rate (number of frames displayed per second). For best results, clips should be captured and edited at the same frame rate as the original source, but not all playback software displays video footage the same way. Some software restores the original frame rate by removing the interlacing and extra frames added to DVD and Blu-ray video during encoding for distribution; other software does not, or requires special settings to do so. Conflicts between playback and capture framerate are not only possible but likely. For example, Opponents' Exhibit 2 has been captured at 29.97 frames per second, even though the correct frame rate for film is 24 frames per second.

The quality differences in the two examples produced by the opponents, apparently in the same way, also illustrate a separate fundamental flaw of screen capture: it is unreliable. The source, computer processor, monitor, and numerous other factors combine to make its results impossible to predict. Remixers should not be forced to run a pointless gauntlet.

Another aspect that screencapture alters is color. A recent viral remix video, "What if Man of Steel Was IN COLOR?"³⁴ shows the profound changes in mood and meaning that color alteration alone (one common remix technique) can have. Because screencapture captures the screen rather than the original source, the color can be substantially affected by characteristics of the monitor, resulting in inaccurate and varying output.³⁵

³¹ There would be further quality loss after editing if the video were displayed on standard video platforms such as YouTube. See <https://support.google.com/youtube/answer/132460?hl=en> (explaining standard aspect ratios). YouTube will upsample (enlarge) the resized video to fill more of the YouTube widescreen 16x9 player. This creates blurriness in the image.

³² See Turk Statement, EFF/OTW Opening Comments, Appx. 103 ("[E]ven if the artist adjusts the capture area very carefully, it is still not only possible but likely that she will end up capturing video with a non-standard frame size of, say, 718x481 [note that Opponents' Exhibits' frame size is nowhere near this close to standard]. It is even more likely that, when capturing source from multiple discs (as she would if capturing from, for example, multiple episodes of a single TV show), she will end up with captured video at multiple slightly different frame sizes: some 718x481, some 721x482, some 722x479, and so on.").

³³ See, e.g., *Buffy v. Edward* (specifically identified as a fair use with a need for high quality in 2012, 2012 Recommendation at 133).

³⁴ <https://www.youtube.com/watch?t=188&v=Du-eYiD9OfM>.

³⁵ See http://www.princeton.edu/~achaney/tmve/wiki100k/docs/RGB_color_model.html ("RGB is a device-dependent color model: different devices detect or reproduce a given RGB value differently, since the color

Opponents, without any evidence about the demands of the form, also suggest that vidders might use the editing tools in screencapture software, which is very much like telling serious photographers to limit themselves to the editing tools on a smartphone. Actual video remixers, from the full-time artists *soda_jerk* to experienced vidders such as *here's luck*, have explained that, in fact, such editing requires dedicated programs that use much higher-quality input video. Just as people inexperienced with an art form are ill-qualified to judge its meaning, they are ill-qualified to judge the tools needed to make it.³⁶

Opponents finally suggest that remixers could just point a separate camera, such as a smartphone camera, at a screen. This approach was rightly rejected by the Copyright Office in 2010 because of its expense and insufficiency. Now, as then, the laws of physics ensure that the results will be bad; regardless of how technologies improve (and Opponents simply assert that they have), recording a screen with a separate device has inevitable effects on color, framing, and timing. There is a reason that serious video makers use cameras that allow precise control of light, timing, and other settings unavailable on a smartphone camera. Proponents respectfully note that *Avengers: Age of Ultron* was not made on a smartphone, for good reason.

4. *The Proposed Alternatives Do Nothing To Mitigate Legal Risks*

Proponents remind the Register and the Librarian that there is no evidence that remix artists are using these “alternatives.” Alternatives that are unknown and unused are not alternatives at all. Instead, the uncontested ethnographic evidence shows that they *are* using technologies that, without an exemption, risk violating the law.³⁷ The choice the Copyright Office faces is whether to put them at hazard of violating Section 1201 in order to engage in otherwise perfectly lawful and publicly beneficial activities, or to continue to protect those fair uses.

Finally, no participant in this proceeding is privy to the workings of screencapture software, nor can opponents preclude nonparticipants from alleging that the use of particular software constitutes circumvention in violation of Section 1201. As a result, even use of screencapture on Blu-Ray output does not avoid Section 1201 risks.

7. **Statutory Factors**

Opponents have offered no evidence that the proposed exemption will inhibit the availability of copyrighted works. Bald assertions and unfounded speculation should carry no weight in these proceedings, especially given the failure of similar speculative harms to materialize after two previous exemptions.

elements ... and their response to the individual R, G, and B levels vary from manufacturer to manufacturer, or even in the same device over time.”).

³⁶ However, Opponents’ emphasis on the capacities of screencapture does highlight the implausibility of their own claims that an expanded exemption could cause harm.

³⁷ EFF/OTW Opening Comments at 7-8, 10.

Proponents, by contrast, have demonstrated that an exemption will increase the availability of copyrighted works by continuing to dispel the legal cloud that hangs over the creation of some of them. Moreover, as the ethnographic evidence detailed in our initial submission explained, robust protections for fair uses and the removal of traps for the unwary helps support respect for authorship and for legitimate copyright rights among ordinary users and creators. This empirical evidence is uncontroverted, and strongly supports a fair use remix exemption.

As the Supreme Court recently explained in rejecting arguments similar to Opponents' that copyright owners would never really enforce to the limits of their rights, "a copyright law that can work in practice only if unenforced is not a sound copyright law." Instead, the Court wrote, "[i]t is a law that would create uncertainty, would bring about selective enforcement, and, if widely unenforced, would breed disrespect for copyright law itself."³⁸

8. Documentary Evidence

Please see attached.

³⁸ *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S.Ct.1351, 1366 (2013).

APPENDIX A

Statement of Professor Francesca Coppa

(April 26, 2015)

I am the director of film studies and professor of English at Muhlenberg College, where I teach courses in dramatic literature, popular fiction, and mass media storytelling. My writings on media fandom have been included in *Fan Fiction and Fan Communities in the Age of the Internet* and presented at MIT's Media in Transition conference. I have also been involved in online fandom since the mid-1990s as a writer, list administrator, vidder, archivist, and community moderator. To assist the rulemaking process, the following collects both my own observations regarding some of the videos that have been selected as examples by Proponents and Opponents of the Proposed Class 7 and use of Blu-ray source materials by remix artists; and statements and examples I received from remix artists regarding their use of Blu-Ray source materials.

A. Case Study: Context and Transformativeness in the Vid *Supremacy*

Opponents describe submitted BluRay vid *Supremacy* as “five minutes of clips from the most recent *James Bond* films, set to music, to create a loose ‘narrative’ punctuated by exciting action scenes from the films,” and argue that the vid is “primarily entertainment, rather than commentary.” This only demonstrates opponents’ unfamiliarity with the genre they disparage. For the record, let me say as a film professor and scholar of remix that when a woman takes the time and effort to remix James Bond (a paradigmatic representation of masculinity for the last 60 years), there is some political import to the remix and the woman has something at stake in the speech act that it represents. This is not to say that *Supremacy* is not also wildly entertaining - art doesn't have to be like eating your vegetables - but it is also clearly a transformative work and a feminist work of art.

Rhoboat tips her hand to her political and filmic preoccupations right up front, in the vid's title sequence: the “M” in the title card “Supre**M**acy” and in “Song by **M**use” changes size and color in order to draw attention to itself and to the coming clips of the character of “M,” who is in fact the vid's protagonist, and not James Bond. Rhoboat herself notes:

The section before the lyrics start is designed to hook a viewer into thinking that this vid will be all about James Bond. But the titles with the focus on the letter M hint at the true main protagonist. M is the puppet master, the one pulling the strings.¹

¹ Communication from Rhoboat, April 15, 2015, on file with OTW. See below, 31-32, for Rhoboat's full statement

SUPREMACY

Judi Dench's "M" is a figure beloved of female fans; it was she, as early as *Goldeneye* (1995), who blazed onto the screen to tell Bond that he was "a sexist, misogynist dinosaur; a relic of the Cold War," a smackdown many female fans had been waiting for. The Daniel Craig reboot films only gave M more power; she has now always been the young Bond's superior officer, even his mentor - it was a female "M" who discovered Bond, trained him, and is willing to break rules for him. While some read this relationship as maternal (see Gail DeKosnik, "M Stands for Mother," in *The Culture Of James Bond* [2011]) and certainly *Skyfall* gives us something of a "good son"/"bad son" relationship between Bond and the villain DaSilva, other female fans have seen it as romantic or even erotic. Once you get past any age-ist misconceptions (and embrace the mighty sensuality of Judi Dench) the reading becomes inevitable--and certainly would be inevitable if it were a male "M" showing this degree of partiality for an attractive young *female* agent.

Supremacy makes clear to spectators that the video is from M's point of view, cinematically speaking; after a powerful and rhythmic introduction that takes us through the events leading to Bond's "death" at the start of *Skyfall*, M is the character whose face we cut to and whose appearance cues the verse and the start of lyrics and vocal singing (:53). This type of editing conventionally establishes filmic point of view in film, including in vids. It is M's reactions that are important, and it is M's supremacy as leader of MI5 that is under threat in this video.

Rhoboat explains:

"Unsung and lost, invisible to history." That's the lyric I use as a summary for the vid. M is the unsung hero, as many women have been throughout history (or HIStory, given how Matt Bellamy [lead singer of Muse] sings that particular word). "Time, it has come to

destroy you.” The vid is also a commentary on aging and ageism. How often do we have action movies with women over 50?



Rhoboat cuts to M’s face rhythmically and regularly, creating emphasis and centrality for the character despite relatively limited footage of her: there are only so many shots of M to work with and certainly many fewer than there are of Bond. The shots are also less dynamic than those of Bond (being that Dench is 78 years old) and so Rhoboat creates almost dance-like sequences of Bond moving, fighting, gyrating during the tense, guitar-heavy choruses. This, however, doesn’t make the vid any less about M; we are meant, rather, to see events (and Bond in particular) through her eyes.

The vid was understood that way by the community for whom it was made. Supremacy was reviewed by those who saw it after its 2013 premiere at Vividcon. Fellow vidder Thuviaptarth explained at the time:

This is the stand-out vid of the con for me. It makes me want to actually watch the second two Daniel Craig Bond films, even if it makes me want to watch them for Judi Dench and not Daniel Craig. But mostly it makes me want to watch it over and over and over again to figure out the exact details of how the action during the choruses is cut, because, guys, I want to figure it out. The movement and positioning here is phenomenal, and it’s hooked to enough of a character study or emotional or narrative arc to keep me heavily invested. (LiveJournal post, 8-18-13)

Other reactions include Icarus Unchained's reaction:

Oh, I love this. This is ... this is the dying of empire and the staggering forwards into a new world, bloodied and battered and still fighting. This is !M!, most importantly, M and Bond and Silva and Mallory, compare and contrast and bloody, brutal battle. Death and resurgence and sacrifice and moral costs. Truly fantastic study of the Bond universe struggling to enter a new era. (LiveJournal post, 8-20-13)

With no evidence at all, opponents feel justified in dismissing “most” remix videos as “infringing, nontransformative work,” seeing vids only as “abridgment” or comparing vids to commercially produced trailers and other promotional materials, which apparently is their only point of reference for short films. In fact, vids are noncommercial works made purely for expressive and artistic purposes, and opponents’ examples show a continuing indifference to their meanings even though that meaning is often elaborated in commentary and other visible discursive exchanges within the vidding and remix community. The larger meaning and value of vids is also made obvious by the existence of conventions and contests showcasing and celebrating remix video as well as by remix’s increasing incursion into high art spaces like museums and galleries. For example, vids were included in two recent exhibitions at the Museum of the Moving Image (*Spectacle: The Music Video* and *Cut-Up: The Art of Remix*) and will be significantly featured in an upcoming show at the Vancouver Art Gallery, *Mash Up: The Birth of Modern Culture* (2016). The Copyright Office need not sit as a panel of art critics to judge vids and other remixes; art critics and remix community members themselves have already spoken, and found important new meanings and messages in these works.

B. Uses of Blu Ray Footage

Remix artists routinely make substantial edits to clips taken from footage. Because each generation of edits degrades quality, only starting with the highest quality source possible can preserve the artistic freedom necessary to realize many vidders’ visions. At the end of my statement is a list of a significant number of vids made using Blu-Ray in order to take advantage of the higher quality and greater artistic flexibility Blu-Ray affords.

1. Vidders Describe Their Need For Blu Ray Footage

As vidder Counteragent explains,

Several repeated images in my vid are crucial to understanding its message. A closeup of a needle penetrating skin and a spinning cage represent the coercion experienced by the character. These images are zoomed in significantly from their original footage and/or overlaid on other images. However, they still read clearly because their sources were

.mkv files (high quality files that either come from HD broadcast/downloadable sources or blu-ray). Without this high-resolution footage to draw from, the undercurrents of rape and enslavement would have been much obscured.

Effects were crucial for establishing my character's internal POV while he was possessed, something that was not depicted in the show but was critical for the vid. I had to re-purpose scenes out of context to represent the character's feelings about their lack of agency. Those scenes were color coded to alert the viewer that they were not intended to be read in their original context. Without the color coding, the vid is useless as a critical commentary on rape and coercion. High quality source fares much better than low quality source when effects are applied.²

Likewise, the image density of the Blu Ray James Bond footage allowed Rhoboat to crop and alter the image in order to make M, rather than Bond, the protagonist. Rhoboat talks about the difficulty of doing that kind of image processing with standard DVD footage:

Working with DVD source on my 1920 x 1080 machine is like taking a photo that's originally 4x6 in and blowing it up to 8x12 in. You start seeing pixelation and artifacts in the picture. This would be especially noticeable for parts of the vid where I zoomed in or cropped the original source. This is evident in the split screen sections or whenever there's a very deliberate crossfade, e.g. 0:58 with Bond in the water on the left transitioning to M's profile on the right.³

Vidder lim, who collages and re-films the footage with a virtual, software camera explains that she couldn't build many effects with less than HQ footage because the process introduces lens distortion just like taking a picture of a picture: "it's like a photocopy; if you do it too many times it breaks up."⁴

Vidder JetPack Monkey used Blu Ray footage to make his horror vid *White Telephone*, which uses footage from John Carpenter's Halloween series of movies. "I literally switched to Blu Ray vidding because of *White Telephone*," he explains:

The Blu-ray is the only available digital source for Halloween H20 that's both in the correct aspect ratio and anamorphic: The original Dimension/Miramax/Disney DVD release is correct aspect ratio and non-anamorphic. The Echo Bridge DVD release is

² Counteragent, October 5, 2014, on file with OTW. See below for Counteragent's full statement.

³ Rhoboat, April 12, 2015, on file with OTW.

⁴ Lim, April 25, 2015, on file with OTW.

1.78:1 and anamorphic. Very frustrating. Anchor Bay put together a Blu-ray box set in the correct aspect ratio. And anamorphic.⁵

Trying to create a consistency of image using movies made during a 40 year period, Jetpack Monkey needed to use Blu Ray footage. He further notes that, artistically, the Blu Ray was necessary, since Carpenter's film is very dark and muddy (the better to scare the viewer, but lousy for readability):

[V]isually speaking, so much of the vid happens in darkness and shades of light that the HD picture gives me a lot more to work with in terms of subtlety, especially for a vid with a strong suspense edge..... If you want timestamps, specifically 1:22-1:25 and 1:30-1:33 benefit massively from the HD picture.⁶

Vidder Hollywoodgrrl, who has made at least 8 Blu Ray vids herself, notes that "1920 x 1080 is industry standard," and "The kids [making remix videos] on YouTube never go below 1280 x 720. . . . It's HD or bust."⁷ And the reason that they want to use Blu-Ray footage, despite its greater demands on editing programs, is that it produces results in line with their artistic aspirations.

It is worth noting that one can see the discursive practice of vidders, gif-makers, and other artists apologizing for not using Blu Ray or noting that they will remaster their work with Blu Ray as soon as high definition footage becomes available. Just as vidders once re-mastered beloved vids made with VHS into digital DVD footage, vidders and vidfans are remastering DVD vids into Blu Ray or other available high definition formats simply because the work is meaningful and they want to keep it relevant and watchable; see, e.g. the remix of Astolat's *Silence of the Lambs* vid, *Uninvited* (2002) which a fan of hers remastered from DVD into Blu Ray in 2014. As Astolat commented, "you don't want to watch that [original] version, you want to watch THIS beautiful [Blu Ray] one."⁸

2. Emerging Art Forms: GIFsets and remix cinema

While vidding is a long established art form which had a community organized enough to respond to these procedures, vidding is not the only art practice that requires the exemption for noncommercial remixers. GIFs - the term stands for graphics interchange format - have been around for some time, but recently we have seen the rise of animated gifs - that is, the creation of

⁵ Jetpack Monkey, April 2, 2015, on file with OTW.

⁶ Jetpack Monkey, April 2, 2015; White Telephone can be seen at: <http://jetpack-monkey.dreamwidth.org/499476.html>.

⁷ Hollywoodgrrl, April 3, 2015, on file with OTW.

⁸ Astolat, YouTube, July 29, 2015. At <https://www.youtube.com/watch?v=Xf9vteXBa-I>

a graphic image on a Web page that moves - as an artform. Film and art critics both have been interested in the rise of this form: like film, a GIF is a moving image, and it is thus related to photography and to moving pictures. It is an interesting intersection of both.

Like vids, GIFs are beginning to be recognized by the art establishment. For instance, the Museum of the Moving Image (“MOMI”) last year held an exhibition, “The Reaction GIF: Moving Image as Gesture,” (March 12–May 15, 2014). As they note in their catalog copy:

[O]ver the last few years, the reaction GIF has emerged as a form for communicating with short moving images in response to, and often in lieu of, text in online forums and comment threads. These animated GIFs consist of brief loops of bodies in motion, primarily excerpted from recognizable pop culture moments to express common ideas and emotions. Understood as gestures, they can communicate more nuance and concision than their verbal translations.⁹

Similarly, the *Guardian* gave extensive coverage to an exhibition of GIFs at 15Folds, a digital gallery that gave an exhibition, “Everything all at once,”¹⁰ both in a London gallery and on the internet. 15Folds founder Margot Bowman explained, “The gif has allowed a whole new outsider art movement to develop online.”¹¹ The rise in popularity of the form has been so striking that GIF was the Oxford Dictionary’s word of 2012. But despite all this high culture interest, the animated GIF is a grassroots artistic form, made by noncommercial remixers and distributed on sites like Tumblr and Reddit.

As the MOMI notes, GIFs are used to communicate: they are themselves discursive acts, images appropriated from their context to serve as speech. But GIFs are also used to create commentary and criticism of the sources from which they are drawn, in that way resembling the close readings of film done in classroom settings. For instance, in the wake of the movie *Captain America: The Winter Soldier*, many fans were enthralled by the antagonist in that film, The Winter Soldier/Bucky Barnes, as played by Sebastian Stan. These fans have gone back to the first film of the series, *Captain America: The First Avenger*, with renewed interest, since the character appears there too, albeit much less prominently. However, his significance in the later films has made his earlier appearance more important to fans, and his every facial expression and

⁹ “The Reaction GIF, Moving Image as Gesture,” Museum of the Moving Image, March 12 - May 15, 2014. <http://www.movingimage.us/exhibitions/2014/03/12/detail/the-reaction-gif-moving-image-as-gesture/>

¹⁰ Mai-Li Stone, “Quick as a flash: the pioneers of animated art – in gifs,” *The Guardian*, May 23, 2014. <http://www.theguardian.com/artanddesign/2014/may/23/the-pioneers-of-gif-art-everything-all-at-once>

¹¹ Oliver Wainwright, “Teenage clicks: how gifs became the rebellious adolescent of the art world,” *The Guardian*, May 23, 2014. <http://www.theguardian.com/artanddesign/architecture-design-blog/2014/may/23/gifs-the-rebellious-adolescent-of-art-everything-all-at-once>

gesture have been scrutinized for signs of his inner landscape and his (impending) transition into the Winter Soldier.

In an essay about *Captain America: The First Avenger* on the pop-culture/entertainment website, Need to Consume, Hazel Southwell notes that she didn't even *notice* Bucky Barnes in the first film. However, she explained that she was converted to the character and educated by GIFs.

[T]he bit I've seen the most is the moment when Bucky starts to grieve. It's when Steve's rescued him and they've walked back to camp, when he fully recognises what's happened, when he's close enough back to something approaching normal that he can't avoid analysis, when he has to call him Captain America. Sebastian Stan does a great thing with the dead flatness and grief of coming back from the brink, rescued by a friend and this spelling the end of so many things.¹²

Through watching animated GIFs, Southwell has not only noticed something she failed to see in the original film, but created a reading that she is using to inform her understanding of the film's themes and characters. Bucky Barnes loops are typically very cropped so that we can zoom in on reactions. So typical a GIF loop of the scene Southwell describes is:



(see EFF-OTW Class 7 Reply Exhs. 1-2) where his actual positioning in the film frame in that scene looks more like this:

¹²Hazel Southwell, "MCU Retrospective Review: Captain America: The First Avenger," April 22, 2015. <http://www.needtoconsume.com/film/mcu-retrospective-review-captain-america-first-avenger-2011/>



The GIFmaker has used cropping, editing, and light to change our focus. If you're interested in examining Bucky Barnes's reactions rather than Captain America's in this scene, you want the best quality footage so you can zoom close and so the image will withstand image processing. This radically changes the way we value the shot.

GIFmakers not only create single moving images like the ones I've shown above, but are also beginning to create larger artworks by collecting GIFs into sets ("GIFsets") that function as mini-movies. By applying digital effects and coloring, and with careful editing, actors from different movies can appear to interact in the same space and time; captions supply the new dialogue, which has to be written to match facial reactions and sightlines in the frame. The below is a still image of a GIFset¹³ of a story in which Tony Stark (Iron Man) and Steve Rogers (Captain America) have gotten into a relationship and are co-parenting a child, who Natasha Romanov (Black Widow) has been asked to babysit. Female fans often create transformative works like these because they are interested in the ways in which the hypermasculinity of the blockbuster action-adventure movie might intersect with issues of parenting and domesticity. The question of how a man might balance being a superhero and parenting might not be a big theme in Hollywood, but it's certainly something that a lot of women talk and write about.

Please note that each of the six panels below are moving and have multiple shots within them. You can see each of the six GIFs as a multimedia attachment, but they are meant to be seen as

¹³ GIFset by prettiest captain; reblogged by the OTW on Feb 2, 2013. It currently has over 77,000 notes. <http://transformativeworks.tumblr.com/post/42070002995#>

formatted below, as panels in a moving comic book or proto movie. See EFF-OTW Class 7, Reply Exhs. 3-8.



My research has found that GIF makers, who overlap with but are much larger than the vidding community, are also committed to ripping BluRay footage to get high quality images to crop and alter. GIF makers even apologize when an image was not made with Blu Ray and promise to recut the GIF or GIFset when Blu Ray footage becomes available. (I note that there seems to be no sense that this might at all be legally problematic; they admit it openly because, like other

people who aren't copyright lawyers, they don't know that there might be a legal difference between methods of acquiring source.)

This emerging artform, which is particularly popular among young people, also deserves to be protected by the DMCA remix exemption and that exemption should be extended to Blu Ray.

3. Artist statements:

a. Rhoboat's Statement On Her Blu Ray Vid, Supremacy

When I first heard Muse's song, everything about it from the driving guitar riffs to many of the string motifs sounded very much like an homage to the scores for the James Bond films. I knew right away I wanted to make a James Bond vid set to this song. But the more I listened to the lyrics, the more I realized this needed to be a vid about M. The song itself subverted my own expectations.

The section before the lyrics start is designed to hook a viewer into thinking that this vid will be all about James Bond. But the titles with the focus on the letter M hint at the true main protagonist. M is the puppet master, the one pulling the strings. (At one point I wanted to put in imagery of puppet strings in the vid, but I couldn't make it work.)

"Unsung and lost, invisible to history." That's the lyric I use as a summary for the vid. M is the unsung hero, as many women have been throughout history (or HIStory, given how Matt Bellamy sings that particular word).

"Time, it has come to destroy you." The vid is also a commentary on aging and ageism. How often do we have action movies with women over 50?

While this is primarily a Skyfall vid, I used footage from Casino Royale and Quantum of Solace to highlight relationship parallels between M/Bond and M/Silva. For example, 1:45-1:50 shows very visual examples of Bond and Silva undermining M's authority. Bond in Casino Royale used her computer without permission while Silva in Skyfall hacked into Tanner's computer, eventually displaying the phrase "Think on your sins" directed at M.

"Think on your sins" - the other use in the vid with another visual parallel. First is the scene in Skyfall of M looking at the YouTube photos of MI6 agents. I followed this with a scene in Quantum of Solace with M showing Bond the photo of Yusuf Kabira, member of Quantum, and Vesper Lynd, the woman he had seduced into becoming a double agent to betray Bond. As Bond looks at M, this fades into phrase, "Think on your sins." It's a

very short segment, but to me it highlights the feelings of anger/resentment both Bond and Silva had towards M. With a vid, this is something I can show in a matter of seconds that would take so much longer to express in words.

Blu-ray. The project file resolution for Supremacy is 1920 x 800. DVD source is about about half that. Working with DVD source on my 1920 x 1080 machine is like taking a photo that's originally 4 x 6 in and blowing it up to 8 x 12 in. You start seeing pixelation and artifacts in the picture. This would be especially noticeable for parts of the vid where I zoomed in or cropped the original source. This is evident in the split screen sections or whenever there's a very deliberate crossfade, e.g. 0:58 with Bond in the water on the left transitioning to M's profile on the right.

b. Counteragent's Statement on her Blu Ray vid, Radioactive

<http://counteragentfilms.tumblr.com/post/79058540104/laisserais-counteragentfilms-vid>

My favorite show (Supernatural, CW, Season 9) took away the bodily agency of a lead character for half of a season and didn't address the emotional or physiological horror inherent to that kind of invasion. As a woman who worries about bodily agency being taken from me or my fellow women by force or trickery, this hit a nerve. So I made a vid focusing on the horror of that lead character's situation, a horror that was extremely (in my opinion, insultingly) diluted in the source. This vid clearly told its viewer: this is disturbing, pay attention. The show did not. My vid was thus transformative and creative.

Several repeated images in my vid are crucial to understanding its message. A closeup of a needle penetrating skin and a spinning cage represent the coercion experienced by the character. These images are zoomed in significantly from their original footage and/or overlaid on other images. However, they still read clearly because their sources were .mkv files (high quality files that either come from HD broadcast/downloadable sources or blu-ray). Without this high-resolution footage to draw from, the undercurrents of rape and enslavement would have been much obscured.

Effects were crucial for establishing my character's internal POV while he was possessed, something that was not depicted in the show but was critical for the vid. I had to re-purpose scenes out of context to represent the character's feelings about their lack of agency. Those scenes were color coded to alert the viewer that they were not intended to be read in their original context. Without the color coding, the vid is useless as a critical commentary on rape and coercion. High quality source fares much better than low quality source when effects are applied.

My vid was a topical commentary on the injustice occurring in the canon source (the show) at that time. It needed footage that had aired days earlier to make its point. The internet moves fast: the critical punch of the vid may have been lost entirely if a new season were to cloud the memories of viewers.

Either Blu-Ray or high quality digital downloads are critical for creating high quality works of art. Streaming sites can handle HD video now, wifi is everywhere. People won't be interested in art that uses a fuzzy copy of a copy. Plus, digital download sites are constantly in danger of being shut down; validly purchased hard copies may be a more reliable alternative for vidders.

A lot of vids are made as a personal expression of intense pain or joy. Vidders are artists like any others, and deserve the highest quality tools to be able to produce their time-consuming, technically challenging, under-appreciated, and totally non-commercial works.

C. List of Vids using Blu Ray¹⁴

Vidder: Rho

Supremacy (Bond)

The Walker (Ratatouille)

Smash Up! (Marvel Cinematic Universe)

A Thousand Miles (Marvel Cinematic Universe);

<http://archiveofourown.org/works/2381012>

Losing My Religion (Hunger Games)

99 Problems (Red) <http://archiveofourown.org/works/1910139>

Toxic (The Red Shoes) <http://archiveofourown.org/works/1176323>

Vidder: Settiai

The War Was In Color (Marvel Cinematic Universe)

(It is worth noting that this video, which is about Captain America's experience in World War II, needed blu ray extras for the theme of the vid.)

Vidder: astolat and Speranza

Anything for Love (Multi, Thor)

Vidder: astolat

Bukowski (House)

¹⁴ Self-reported over the course of one week in response to open call for examples.

Murder On The Dance Floor (Sherlock BBC)
Uninvited, remastered. (Silence of the Lambs, Hannibal movie)
Mandara (Dune)
Windmills Of Your Mind (Captain America 2)

Vidder: Trelkez
Revolution (A League of Their Own)
“My laptop can't handle it but the desktop can”

Vidder: Jetpack Monkey
White Telephone: (Halloween series of movies)

Vidder: Shati
Let's Get It Started (Raging Phoenix)
White Rabbit (Puella Magi Madoka Magica)
Paper Planes (Bandidas)
One Girl Revolution (Chak De! India)
Hadippa! (Chak De! India)

Vidder: Killa
"Tell Me Baby" (Sucker Punch)
"Two Against One" (Two Guns)
"Dyin' Day" (The Hunger Games)

Vidder: Genus Shrike
The Spaces in Between (Edge of Tomorrow)
<http://genusshrike.dreamwidth.org/324842.html>
A Sword Is (Rurouni Kenshin) <http://genusshrike.dreamwidth.org/318636.html>
Always (Captain America, The Avengers)
<http://genusshrike.dreamwidth.org/315834.html>
I'm On Fire (Stoker)
Chain Gang (Dredd)
In Your Hands (Everything You Needed) (The Hobbit)
<http://genusshrike.dreamwidth.org/288136.html>
Speak (Dredd)
2+2=5 (Detective Dee and the Phantom Flame)
<http://genusshrike.dreamwidth.org/280333.html>
You Know You're Never Coming Back (Thor, The Avengers)
<http://genusshrike.dreamwidth.org/273464.html>

In the Bullpen (Avengers) <http://genusshrike.dreamwidth.org/271973.html>
In Your World (Thor) <http://genusshrike.dreamwidth.org/256013.html>
<http://genusshrike.dreamwidth.org/256013.html>

Vidder: Hollywoodgrll
Faith in Love (Martha Marcy May Marlene)
Into the Groove (Romy & Michele's High School Reunion)
Le Gusta El Fuego (The Purge)
Nothing But Time (Gravity)
Smack My Bitch Up (The Girl With the Dragon Tattoo US)
Stayin' Low! (Alien, Aliens, Alien 3, Alien Resurrection)
The Amazing Sounds of Orgy (Repulsion)

Vidder:chaila
Keep the Streets Empty for Me (Twilight movies)

Vidder: Froggimus Rex
Somebody I Used To Know (The Fall) <http://froggimus-rex.dreamwidth.org/82071.html>
<http://froggimus-rex.dreamwidth.org/82071.html>

Vidder: Starlady
All You Need Is Kill (Edge of Tomorrow)
<http://starlady.dreamwidth.org/695388.html>

Vidder: Cherryice
Make the Girl Dance (Edge of Tomorrow)
Things That Scare Me (Take Shelter)

Vidder: Mithborien
Wanderluster (Thor) <http://mithborien.dreamwidth.org/130295.html>
Tuning Out (Van Helsing)
<http://mithborien.dreamwidth.org/133272.html>

Vidder: Oh Vienna
Sabotage (Mission: Impossible, MI:2, MI:3, & Mission: Impossible Ghost Protocol)
Me & The Devil (The Conjuring)

APPENDIX B

Statement, Professor Tisha Turk

(April 30, 2015)

I am an associate professor of English at the University of Minnesota Morris, where I teach courses on writing, composition studies, narrative, and fan studies. I have been a vidder since the early 2000s; my scholarship on vids and vidding has been published in film and fan studies journals and presented at conferences on composition and rhetoric, fan studies, and media studies. To assist the rulemaking process, I have compiled some observations on the technical needs of remix video artists and the technical limitations of the capture process endorsed by Opponents as an alternative to circumvention.

A. Opponents' Screen Capture of *The Matrix Reloaded*

In their comments on Proposed Class 7, Opponents submitted a clip of *The Matrix Reloaded*, captured from DVD with WM Capture software, intended to demonstrate that “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 [sic] images that proponents have criticized in the past are simply no longer present.”¹ However, this clip serves primarily as a reminder that Opponents are examining their video clip from the perspective of casual consumers rather than remix video artists, who must be concerned not only with a clip’s surface appearance but with its technical specifications and its behavior when imported into and manipulated with editing software.²

Ripped digital source matches the technical specifications of video editing software; peculiarities introduced by encoding for distribution, such as telecining, can be removed to produce footage appropriate for editing. Captured digital source, as the Opponents’ video demonstrates, is unlikely to conform to standard specifications because there are so many ways in which the video can be altered during playback; resizing the playback window will render the frame size nonstandard, and changing capture software settings may produce nonstandard frame rates. These deviations from the standard change how the video will behave when edited.

1. Usability of Captured Footage

I attempted to create a video comparing the effects of zooming and crossfading on ripped footage from *The Matrix Reloaded* DVD and Opponents’ captured clip from the DVD. However, the attempt failed because Adobe Premiere could not render some effects when applied to the Opponents’ MPG file. If screen capture cannot produce footage that can be edited in and exported from editing software, it cannot meet the needs of remix artists.

¹ Second Round of Comments of the DVD Copy Control Association (“DVD CCA”) for Proposed Class 7 (March 27, 2015) (“DVD-CCA Comments”) at 11.

² Note that the Opponents’ captured clip is in MPG format—a lossy compression format (<http://en.wikipedia.org/wiki/MPEG-1>, <http://en.wikipedia.org/wiki/MPEG-2>). Lossy compression is used “to reduce the amount of data that would otherwise be needed to store, handle, and/or transmit the represented content” (http://en.wikipedia.org/wiki/Lossy_compression). It is appropriate for distributing finished video, which is why it is used to encode DVDs, but it is not appropriate for editing; especially when working with files that have already been encoded in a lossy format, editors should strive to minimize further data degradation. Adobe Premiere does import MPG format files, but that doesn’t make MPG a *good* choice.

Premiere did allow the export of still images highlighting key differences between edits applied to ripped and captured footage, and it also allowed the export of a video showing the differences between video files with no additional effects applied; see EFF OTW Reply Exh. 9 for the video and Exh. 11 for stills. Both exhibits show the consequences of importing video captured at non-standard frame rate. Editing captured footage using settings appropriate for widescreen film results in both blurriness and ghosting, in which individual frames are unintentionally overlaid with residual images from the previous frame. Ghosting is most pronounced in the portions of the clip featuring fast motion but is evident even in clips with less dramatic motion, such as the turn of a character's head. It also blurs the hard cuts between shots. These defects result from the video's incorrect frame size and odd frame rate; they are typical of screen capture, which is not designed to capture Blu-Ray or DVD accurately.

2. DVD Frame Size

The Opponents' *Matrix Reloaded* screen capture has a frame size of 776x344 (including the small amount of letterboxing at the bottom of the image). Taking the letterboxing into account, this resolution works out to roughly the correct 2.35:1 aspect ratio. The frame size, however, is not either of the logical resolutions for computer playback of DVD-encoded widescreen cinema. Anamorphically encoded widescreen (16:9 aspect ratio) videos could be resized to 720x400 (keeping the width and reducing the height) OR to 848x480 or 854x480 (keeping the height and expanding the width; 848x480 is better math, but 854x480 is YouTube's preferred resolution³). Anamorphically encoded widescreen cinema like *Matrix Reloaded* (2.35:1 aspect ratio)⁴ would be resized to 720x400 or 848x480 or, more likely, resized and then cropped (to 720x304 or 848x360) to remove the letterboxing for cleaner editing. The numbers aren't even multiples of 16, which is standard for maximum compatibility with most codecs.

Although I generally prefer to edit footage as-is, adjusting display in my editing software, I chose for this example to compare apples to apples: I resized the ripped footage from *Matrix Reloaded* to display correctly on a square-pixel computer monitor and then cropped out the letterboxing. The resulting frame size is 854x360 (I resized as if planning to export to YouTube, as would be typical for many remix video artists). I then resized captured footage to the correct dimensions for the sake of comparison.

3. DVD Frame Rate

The Opponents' *Matrix Reloaded* screen capture has a frame rate of 29.97 frames per second. However, film is shot at 24 frames per second (fps)⁵. When film is telecined (transferred to video), the frame rate is changed to 29.97 fps (for NTSC video) through a process called 2:3 pulldown, also called interlacing, which stretches four frames into five by interpolating two of the frames into an extra frame.⁶

Footage ripped directly from a DVD can be inverse telecined: the 2:3 pulldown is removed, and the footage returns to progressive (not interlaced) frames that display at the correct rate of 24 frames per second—the rate at which it should be edited for best quality. (In editing software, the setting may also be listed as 23.976 fps.)

³ <https://support.google.com/youtube/answer/132460>

⁴ <http://en.wikipedia.org/wiki/Widescreen#Types>; <http://www.imdb.com/title/tt0234215/technical>

⁵ http://en.wikipedia.org/wiki/Frame_rate

⁶ <http://en.wikipedia.org/wiki/Telecine>

These standards matter because, like frame size, they form the basis of editing presets in good editing software. For example, Adobe Premiere CS4 includes NTSC presets for 29.97 fps interlaced video and 23.976 fps non-interlaced or progressive-frame video, but not 29.97 progressive-frame video. The results of editing the captured footage at the correct frame rate for progressive film can be seen in the side-by-side comparison video and the stills that follow.

B. Implications For Blu-ray

Opponents submitted no screen-captured clips of Blu-ray video. However, much of the analysis of their DVD capture applies to Blu-ray as well.

1. Blu-ray Frame Size

Because Blu-ray is typically not encoded anamorphically, there is even less variation in typical resolution for editing; 1920x1080 is the standard for both display and editing. As with DVD, video captured at a different resolution or frame size will need to be resized for editing. However, because Blu-ray resolution is so much higher than DVD resolution and the frame size is accordingly much larger, many computers will struggle to capture Blu-ray effectively. The sheer amount of data involved—2,073,600 pixels per Blu-Ray frame compared to 345,600 pixels per DVD frame—means that screen captured software is likely to discard some visual data and/or to drop frames altogether to keep up with video playback.

2. Blu-ray Frame Rate

Blu-ray's native display is 24 frames per second; it should be edited at that frame rate. Video captured at a different frame rate will have exactly the same problems seen in OTW Reply Exh. 9 and 11.

C. Conclusions

The Opponents' screen capture video asks the Office to assume that their video will retain all its current properties after being edited. It will not. Opponents have not performed standard editing operations on their captured footage, including the most basic preliminary step of resizing for editing. Nor have they demonstrated the effects of other standard remix operations, such as adding new cuts, changing the speed of clips, altering color, adjusting contrast and light levels, cropping clips to focus on particular elements, or zooming in to create a sense of movement; such editing not only further degrades the appearance of their captured footage but renders the footage unexportable and therefore unusable. For remix purposes, what a casual observer doesn't see matters: a glass of cranberry juice and a glass of water with red food coloring may appear similar, but in a mixed drink the differences would be obvious—and unappealing.

It is also worth noting that the Opponents' discussion of video encoding reveals their failure to grasp basic information relevant to working with video files. For example, the Opponents claim that "Codec refers to a type of file, such as FLAC, MP3, or FLV."⁷ In fact, video file types are *containers*; container formats "describes how different elements of data and metadata coexist in a computer file."⁸ As noted in the Adobe Premiere Pro help page cited by Opponents, "Container files can contain data encoded using various compression and encoding schemes."⁹ AVI and

⁷ DVD-CCA Comments at 13.

⁸ http://en.wikipedia.org/wiki/Digital_container_format

⁹ DVD-CCA Comments at 13; <https://helpx.adobe.com/premiere-pro/using/supported-file-formats.html>

FLV containers, for example, support multiple codecs.¹⁰ Saying that a codec refers to a type of file is like confusing a lunchbox with the lunch inside it. Opponents' mistaken claims stem from their misunderstanding of video editing and editing technology. They have not presented useful evidence to support their claims about how artists can or should use the materials they work with.

¹⁰ http://en.wikipedia.org/wiki/Comparison_of_container_formats