

This is a Word document that allows users to type into the spaces below. The comment may be single-spaced, but should be in at least 12-point type. The italicized instructions on this template may be deleted.

UNITED STATES COPYRIGHT OFFICE



Long Comment Regarding a Proposed Exemption Under 17 U.S.C. § 1201

Please submit a separate comment for each proposed class.

NOTE: This form must be used in all three rounds of comments by all commenters not submitting short-form comments directly through regulations.gov, whether the commenter is supporting, opposing, or merely providing pertinent information about a proposed exemption.

When commenting on a proposed expansion to an existing exemption, you should focus your comments only on those issues relevant to the proposed expansion.

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

Commenters can provide relevant multimedia evidence to support their arguments. Please note that such evidence must be separately submitted in conformity with the Office's instructions for submitting multimedia evidence, available on the Copyright Office website at <https://www.copyright.gov/1201/2021>.

ITEM A. COMMENTER INFORMATION

Identify the commenter and provide a means to contact the commenter and/or the commenter's representatives, if any.

Tisha Turk, Organization for Transformative Works
tisha.turk@gmail.com

I direct the Writing, Reading, and Speaking Center at Grinnell College. I study writing and other composing processes, including multimedia composing. My expertise on vidding is both scholarly and practical: I have published several research articles on fan vids and fandom cultural practices, and I have been a vidder since 2001.

ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 1: Audiovisual Works - Criticism and Comment

ITEM C. OVERVIEW

Circumvention of DVD and Blu-ray access controls for the purpose of creating transformative works using short portions of the original works.

Privacy Act Advisory Statement: Required by the Privacy Act of 1974 (P.L. 93-579)

The authority for requesting this information is 17 U.S.C. §§ 1201(a)(1) and 705. Furnishing the requested information is voluntary. The principal use of the requested information is publication on the Copyright Office Web site and use by Copyright Office staff for purposes of the rulemaking proceeding conducted under 17 U.S.C. § 1201(a)(1). NOTE: No other advisory statement will be given in connection with this submission. Please keep this statement and refer to it if we communicate with you regarding this submission.

ITEM D. TECHNOLOGICAL PROTECTION MEASURE(S) AND METHOD(S) OF CIRCUMVENTION

DVDs are protected with CSS (content scramble system); Blu-ray discs are protected with AACS (advanced access control system). Both can be decrypted with available software or captured with screen capture software.

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

Visual quality

The MPA asserts that “There is no evidence that the performance of screen capture technologies has degraded during the last three years” (MPA). There is also no evidence that the performance of VHS tape has degraded during the last twenty-five years, and yet most people no longer own VCRs—not because the performance of VHS itself became worse, but because it became comparatively worse as better alternatives became available. It’s entirely possible that screen capture technology has improved over the past decade; whether it has kept pace with audience expectations about visual quality is a different question. My point is not that screen capture is always unacceptable. In some circumstances it may be acceptable or even necessary. My point is that it is not a complete or even adequate substitute for circumvention.

“High quality” is not a fixed feature intrinsic to a file; it is a moving goalpost. In 1995, commercially released VHS tapes were high-quality compared to tapes made by recording broadcast airings. In 2000, those same commercially released VHS tapes were perceptibly inferior in quality to DVD releases of the same material. And by 2010, DVD releases were perceptibly inferior in quality to Blu-ray and other HD releases. These differences in quality have to do with changes in frame size, pixels per image, scan type (progressive vs. interlaced), frame rate, media format and encoding of digital files. They also have to do with the size and resolution of the screen on which that file is viewed. What looks acceptable on a 27” TV with 720×480 display resolution or a 17” monitor with 1280×1024 resolution (both excellent options in 2004) looks much less so on a 65” screen with 4K Ultra HD (3840×2160) display resolution or, for that matter, an iPhone 12 with 2532×1170 resolution.

In my 2012 testimony, I pointed out that the level of quality a viewer considers “watchable” is contextual; we will put up with poor quality in some contexts (cat videos) and not in others (Marvel movies). In 2021, I’d argue, this is more true than ever. We will put up with bad lighting and unnatural color and poor video quality and glitchy audio on a Zoom call because those things are the norm for Zoom calls. But they are not the norm when watching commercial media. They are increasingly not even the norm for cat videos. More and more of us have become accustomed to seeing professionally encoded HD and Ultra HD visuals presented on large and/or high-resolution screens. Under these circumstances, it is inevitable that what we consider “watchable” will change. It is for precisely this reason that the MPA’s members are able to sell Blu-ray and HD or UHD digital versions of audiovisual entertainments that they have

previously released on DVD. Occasionally a distributor incentivizes the purchase with new special features, but frequently the upgrade in quality alone is assumed to be enough to justify a second purchase.

These changes in what audiences consider watchable affect not only commercial releases of movies and TV shows but also vids and other noncommercial remix videos based on those movies and TV shows. The quality of the video that I can obtain affects both what I can do with it and whether my potential audiences are willing to watch the results. If an audience has higher expectations for visual quality—if that is part of the rhetorical situation within which I must work, a situation created in no small part by the MPA and DVD CCA—it is unreasonable to prevent me from attempting to meet those expectations.

Artist practice

Insisting on screen capture makes little sense from the point of view of vidders and other remix creators for whom acquiring visual source material is merely one part of a much larger creative process. Opponents of this exemption depict remix artists' choice to circumvent encryption as if it is an end in itself. This is like saying that purchasing oil paints or colored pencils or quilting fabric or sock yarn is an end in itself. It is not. Rather, it is how we get the raw materials that we use to make new things.

The MPA argues that vidders should use screen capture rather than circumvention to obtain access to copyrighted works because “the user can capture only the short portion of the motion picture that the user actually needs to accomplish his or her purpose.” The assumption here appears to be that vidders always know in advance exactly which portions of the source we need and what we will need to do with them. This assumption is flattering but incorrect. Even quilters, who work from detailed patterns and fabric lists, routinely purchase extra fabric in case they need to modify the pattern in some way. And vids are not as predictable as quilts; they are not made according to a pattern. Vidders seldom, if ever, know in advance exactly what clips we will require or how we will need to manipulate those clips in order to make them serve our purposes. Insisting that we should only ever capture short portions of a work is like telling a painter that he cannot acquire a range of paint colors before beginning a painting but must instead obtain them individually as they become necessary.

Neither my research nor my fandom interactions have suggested any connection between accessing complete copies of works for creative purposes and distributing “unprotected, perfect, digital, in-the-clear” copies of those works. This is not surprising: circumventing access controls and distributing files are entirely different activities, and vidders distinguish between them. Opponents provide no evidence that the initial exemption from 2009, whose basic wording the OTW seeks to reinstate, led to any increase in distribution of full copies. Nor do they provide any evidence that the current exemption, which also allows for Blu-Ray ripping, has done so. In essence, the opponents want the Office to believe that (1) vidders should understand and comply with the provisions of the current exemption as lawyers would and be deterred from piracy by a distinction between screen capture and ripping, but (2) if the

exemption becomes more clearly worded to reflect the reality of how remix videos are actually made, vidders' compliance with the law will shift to piracy. Since neither of these things is true, the Office should craft the exemption based on evidence of how creative expression actually works.

DOCUMENTARY EVIDENCE

None submitted.