

**LIBRARY OF CONGRESS  
COPYRIGHT OFFICE**

In the Matter of

Exemptions to Permit  
Circumvention of Access Controls  
on Copyrighted Works

Docket No. 2020 – 0011

**COMMENTS OF THE DVD COPY CONTROL ASSOCIATION (“DVD CCA”) AND  
THE ADVANCED ACCESS CONTENT SYSTEM LICENSING ADMINISTRATOR  
(“AACCS LA”) ON THE PETITION FOR RENEWAL OF THE EXEMPTION FOR  
EDUCATIONAL PURPOSES BY COLLEGE AND UNIVERSITY OR  
K-12 FACULTY AND STUDENTS**

In light of the current Covid-19 pandemic, DVD CCA and AACCS LA do not object to the streamlined renewal of the exemption for education purposes, which may be utilized by some educators and students for the purpose of making qualifying uses of excerpts of motion pictures in their classes through distance learning.<sup>1</sup> For this vital, and, hopefully, short-lived reason, DVD CCA and AACCS LA choose to not object to the streamlined renewal of this exemption in its entirety, so that the current beneficiaries may continue to avail themselves of the exemption in these difficult times. Notwithstanding the foregoing, the deficiencies of the renewal petitions

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<sup>1</sup> As the Copyright Office has repeatedly stated, it is the limitation to excerpts of the motion pictures (*i.e.*, short portions of the work) that makes a finding of noninfringing use possible in the context of uses of motion pictures. *See* Section 1201 Rulemaking: Seventh Triennial Proceeding, Recommendation of the Register of Copyrights at 52 (October 2018) (“The Register has previously found the “short portions” limitation to be “critical” in recommending exemptions for audiovisual works”); Section 1201 Rulemaking: Sixth Triennial Proceeding, Recommendation of the Register of Copyrights at 30 (October 2015); Section 1201 Rulemaking: Fifth Triennial Proceeding, Recommendation of the Register of Copyrights at 138-39 (October 2012).

raise sufficient concerns that DVD CCA and AACCS LA are asking the Copyright Office to address the deficiencies in the course of providing streamlined renewal of the exemption. First, there was no request filed for or on behalf of K-12 educators, nor was there any evidence that K-12 students are, in fact, using the current exemption. Second, none of the proffered uses readily appear to require DVD or Blu-ray quality for the particular use identified by the proponents. Thus, the proponents should have had to explain why none of the users of the exemptions took the required first step, which is to determine whether an alternative to circumvention, such as the use of screen capture technology, would be sufficient for their particular use. While these deficiencies would ordinarily provide multiple bases to object to streamlined renewal of the exemption, DVD CCA and AACCS LA would support an approach in which the Copyright Office nevertheless approves streamlined renewal of the exemption under the current extraordinary circumstances, but that future proceedings will again require all necessary showings for streamlined renewal.

#### **DVD CCA and AACCS LA**

DVD CCA, a not-for-profit corporation with its principal office in Morgan Hill, California, licenses the Content Scramble System (“CSS”) for use in the protection of prerecorded audiovisual content on DVD discs against unauthorized access or copying. Its licensees include the owners of such content and the related authoring and disc-replicating companies; producers of encryption engines, hardware, and software decrypters; and manufacturers of DVD players and DVD-ROM drives. DVD CCA has participated in this rulemaking since its inception.

AACCS LA, with its principal offices in Beaverton, Oregon is a cross-industry entity founded by Warner Bros., Disney, Microsoft, Intel, Toshiba, Panasonic, Sony, and IBM. AACCS

LA licenses the Advanced Access Content System (“AACSS”) technology that it developed for the protection of high definition audiovisual content distributed on optical media, such as Blu-ray Discs (“BDs”). AACSS LA also offers AACSS2, which is a separate technology employed to protect audiovisual content distributed on Ultra HD Blu-ray discs, and that technology is not subject to this exemption. AACSS LA has participated in this rulemaking since the Fourth Triennial Proceeding (2008 – 2009 cycle).

### **Exemption for K-12 Educators and Students**

Neither the petition filed by the group of professors led by Peter Decherney nor the petition filed by Brigham Young University and Brigham Young University – Idaho (collectively, “BYU”)<sup>2</sup> provide any examples of actual use of the exemption by K-12 educators or students. The proponents are not K-12 educators, nor do they purport to represent K-12 educators or students. In fact, the discussion in both renewal petitions explicitly references only higher education. The beginning of the Decherney-led petition claims that “without this exemption, many aspects of higher education in the United States would not have been able to flourish.” Peter Decherney et al., Petition for Renewal, Item C ¶ 1 (July 22, 2020). After providing examples of alleged uses in universities, and even law schools, the petition again

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<sup>2</sup> DVD CCA and AACSS LA observe BYU’s proposal acknowledges that the exemption is permitted for excerpts of motion pictures. The exemption does not permit circumvention for use of the entire motion picture nor for librarying as BYU had previously sought. Notwithstanding the rejection of such uses, BYU has nevertheless built such a system. A previous review of BYU website revealed that BYU had a central server, as it apparently offers to the BYU community “Content Streams from media (VHS, dvd, blu-ray, etc) to viewing areas – HBLL Library.” See *Audio and Video Distribution*, BYU Office of IT Support Portal available at [https://it.byu.edu/it?id=kb\\_article&sys\\_id=26c43cacdbdbff40eb8d2f625b9619e5](https://it.byu.edu/it?id=kb_article&sys_id=26c43cacdbdbff40eb8d2f625b9619e5) (last visited July 29, 2020). On August 31, 2020, a review of the BYU website shows that the page had been removed. A cached page showing the relevant statement is still available. The statement on the page is troubling, and its subsequent removal raises questions as to the actual status of this offering.

speaks to “higher education in the twenty-first century.” *Id.* ¶ 5. And it concludes, “Without the renewal of these exemptions, college and university students and faculty will face adverse effects negatively impacting the educational experience.” *Id.* ¶ 7. The BYU petition refers only to the exemption as serving higher education.

Petitioners have relied on the exemption for motion picture excerpts used for educational purposes by college and university faculty and students . . . .

. . . Thus, the exemption for motion picture excerpts used for educational purposes by college and university faculty and students should, at a minimum, be renewed.

Brigham Young University et al., Renewal Petition, Item C ¶¶ 2-3 (July 22, 2020).

Absent the decision not to oppose the renewal of the exemption in its entirety, the failure of any proponent to provide any example of use by K-12 students should result in the Copyright Office finding in this streamlined renewal process that the exemption may not be renewed as to such uses. The Notice of Inquiry provided that the streamlined renewal process is available only upon a “conclusion this evidence remains reliable to support granting an exemption in the current proceeding.”<sup>3</sup> Without any evidence of any uses by K-12 students, the required reliability of evidence is lacking and, there simply would not be any basis for the Copyright Office to streamline renew the exemption for that class of beneficiaries. Moreover, the higher education examples cannot stand in for the missing evidence of use by K-12 educators and students. Multiple proceedings now have treated these K-12 users as distinct from higher education users. Even the current exemption has different terms of use for K-12 students than for college and university students, as K-12 students are permitted to circumvent only “under the direction supervision of an educator[.]” 37 C.F.R. § 201.40(b)(1)(ii)(A). Notably this required condition was used by the Copyright Office to expand the exemption to K-12 students for the first time. Consequently, the

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<sup>3</sup> Notification of Inquiry and Request for Petitions, Exemptions to Permit Circumvention of Access Controls on Copyrighted Works 85 Fed. Reg. 37399, 37401 (June 22, 2020).

Copyright Office would in ordinary circumstances have a greater interest in the evidence of such use by K-12 students under the appropriately required condition of educator supervision to ensure that the exemption is not being abused or, worse, contributing to a culture that cavalierly disregards the important legitimacy of technical protection measures employed to protect copyrights.

### **Close Analysis Requirement**

The evidence put forward to support the renewal of this and other exemptions reveals the proponents' failure to recognize or adhere to the limitations that are an integral aspect of the exemptions. In the instant exemption, proponents' examples of uses are actually not illustrative of proper application of the exemption. The proponents identify a few titles distributed on DVD that have allegedly been used in college level courses. The purposes include “demonstrating different kinds of sexual depictions in media . . . [to] set up the content analysis of sexual content on television”, discuss media violence by counting the number of violent acts in a particular scene, and segments “to demonstrate an appreciation of the complexity and diversity of cultures through film.” Decherney, Item C ¶ 2. Other examples involve video essays analyzing media such as comparing Disney characters to feminist media criticism or fan criticism such as compressing the history of dance. See *id.* ¶ 3.

While these examples - at first glance – may certainly seem to present admirable educational activities, a careful reading of the exemption reveals that these examples do not comport with the threshold requirement of the exemption, and, therefore, do not meet even the modest evidentiary requirements for the streamlined renewal process. At the outset, before an otherwise eligible user may engage in circumvention, the user must consider whether an

alternative to circumvention would suffice.<sup>4</sup> See 37 C.F.R. § 201.40(b)(1) (permitting circumvention when “the person engaging in circumvention . . . reasonably believes that non-circumventing alternatives are unable to produce the required level of high-quality content”). Over the course of multiple proceedings, this rulemaking has established – that while fair use advocates prefer circumvention to screen capture technology – screen capture technology would in fact suffice for all of the examples of uses provided by renewal proponents.<sup>5</sup> In fact, the only time when screen capture technology was not sufficient for this class of users is when the user had a need for close analysis.<sup>6</sup> While the Copyright Office eliminated the close analysis requirement, it did not eliminate the requirement for a reasonable belief that non-circumventing alternative are inadequate. Accordingly, without some explanation why screen capture technology could not suffice to capture and show the same clips, then these uses do not actually comply with the granted exemption.

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<sup>4</sup> The Copyright Office affirmed this threshold requirement in the last proceeding. See 2018 Recommendation at 84-85 (“a requirement that users consider whether it is really necessary to engage in circumvention before doing so is consistent with the aims of the rulemaking.”).

<sup>5</sup> See, e.g., 2018 Recommendation at 43 (circumvention not warranted to “illustrate bank robbery techniques, as well as other courtroom uses of fictional film clips.”); *id.* 84 n.534 (repeating “screen capture may be an alternative to circumvention for educational purposes in the *Alone in the Wilderness* project). The claim that pedagogy only tolerates high quality content is refuted daily by young people’s viewership of lower resolution and poorly made footage widely distributed on *YouTube*, *Facebook*, *Twitter* and *TikTok*.

<sup>6</sup> See Section 1201 Rulemaking: Fifth Triennial Proceeding, Recommendation of the Register of Copyrights at 134 (October 2012). The Copyright Office found,

educational uses that depend upon close analysis of film or media images may be adversely impacted if students are unable to apprehend the subtle detail or emotional impact of the images they are analyzing, such as the full brilliance of a diamond or the glint of an eye. Again, however, where precise detail is not required for the particular use in question – for example, where a clip is presented simply to illustrate a historical event – lower-quality screen capture images may be fully adequate to fulfill the noninfringing use.

*Id.* (citation omitted).

In light of the evidence in the proponents' own petition which shows that the users ignore the threshold requirement to consider alternatives to circumvention, the regulatory language should return the close analysis requirement to provide a more clearly stated and additional reminder for users to consider whether circumvention is really required in any particular case. Rather than greenlighting circumvention as the current language seems to have done, reintroducing the close analysis requirement would serve to foster a culture of respecting the boundaries established by copyright law and better align the exemption with the aims of the rulemaking. For these reasons, DVD CCA and AACCS LA respectfully request that any renewal of this exemption observe the well-established safeguard of permitting circumvention only when close analysis of a work is required.

Finally, DVD CCA and AACCS LA reiterate that their lack of opposition to the streamlined renewal of the entire exemption is the appropriate and reasonable response to assist schools wrestling with implementing distance learning as they deal with the Covid-19 pandemic, and DVD CCA and AACCS LA do not believe that this choice should constitute any form of precedent for copyright policy beyond the current crisis.

Date: September 8, 2020

Respectfully submitted,

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