

**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 FACULTY IN
MASSIVE OPEN ONLINE COURSES (“MOOCs”)**

In light of the current Covid-19 pandemic and the shuttering of classrooms across the country, MOOCs may prove to serve a greater role than originally imagined; thus, DVD CCA and AACCS LA do not oppose the renewal of the exemption.¹ DVD CCA and AACCS LA, however, remain very concerned about the apparent failure of the proponents to adhere to the straightforward provision of the exemption that requires MOOC providers to employ technological measures preventing the transmission recipient from engaging in acts of retention and redistribution of the MOOC. At the hearing in the last proceeding, DVD CCA and AACCS LA demonstrated that edX and Professor Decherney did not employ any technological measures to prevent the retention and redistribution of the Professor’s offering by MOOC participants (transmission recipients). Notwithstanding a full vetting of the issue at the hearing and

¹ DVD CCA and AACCS LA do not believe, however, that the current Covid-19 pandemic is reason alone to expand the MOOC exemption beyond its current limitations.

Decherney's assurances,² the failure to employ technological measures persists today. The Copyright Office should find this unacceptable, because, at the same hearing, DVD CCA and AACCS LA were questioned as to why they did not object earlier to the renewal of the exemption.³ Even though proponents of the exemption: (i) clearly were made aware of this failure to employ technical measures during the last proceeding, and (ii) have had more than two years to address this problem and correct the shortcoming, they have failed to do so. Therefore, DVD CCA and AACCS raise the same issue now at the initial stage of consideration of renewal petitions and in light of the ongoing and blatant failure of the proponents to comply with the requirements of the exemption. If the Copyright Office renews the exemption in this streamlined process, then the Copyright Office must address the participants' ongoing failure to adhere to the exemption's requirements, and, consider with reasonable skepticism any forthcoming proposals to expand the exemption.

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

² Section 1201 Rulemaking Seventh Triennial Proceeding, Hrg. Tr. 282:13-16 (Apr. 11, 2018) ("Seventh Triennial Proceeding") (Decherney, "As far as I knew, downloading had been disabled; there's obviously a workaround, and I will send an email to edX immediately after this.").

³ *Id.*, Hrg. Tr. 280:25-281:1 (Smith, "We did not receive an opposition to renewing the current exemption for a MOOC, so [what] are we to make of your presentation?").

manufacturers of DVD players and DVD-ROM drives. DVD CCA has participated in this rulemaking since its inception.

AACS 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. AACS LA licenses the Advanced Access Content System (“AACS”) technology that it developed for the protection of high definition audiovisual content distributed on optical media, such as Blu-ray Discs (“BDs”). AACS LA also offers AACS2, 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. AACS LA has participated in this rulemaking since the Fourth Triennial Proceeding (2008 – 2009 cycle).

Examples Do Not Employ the Required Technological Measures

Claiming in their renewal petition that “there are dozens of MOOCs on film and media,”⁴ proponents only specifically identify Decherney’s MOOC, which is well known to this proceeding.⁵ As far as the other MOOCs proponents hinted at,⁶ DVD CCA and AACS LA could only review *Understanding Memory: Explaining the Psychology of Memory through Movies*

⁴ Decherney *et al*, Renewal Petition for MOOCs, Item C ¶ 4 (July 22, 2020) (“MOOC Renewal Petition”).

⁵ See Section 1201 Rulemaking Sixth Triennial Proceeding, Recommendation of the Register of Copyrights at 37 (October 2015) (“as well as an upcoming course titled The Hollywood Film Industry planned by Professor Decherney”) (“Sixth Triennial Proceeding”); Seventh Triennial Proceeding, Recommendation of the Acting Register at 71 – 72 (discussing the proposed expansion of the MOOC by reference to Professor Decherney’s work).

⁶ MOOC Renewal Petition, Item C ¶ 4 (“Other film and media studies MOOCs explore Hong Kong cinema, the psychology of memory and film, and marriage and the movies.”). DVD CCA and AACS LA believe those MOOCs to be the following. *Hong Kong Cinema through a Global Lens* is currently not available but is scheduled to begin on edX on September 7, 2020. *Marriage and the Movies: a History with Jeanine Basinger* apparently was at one time offered on Coursera but is no longer available. The two-minute introduction to the course is found however on a YouTube video embedded on Mooc-list.com.

taught by Jean Seamon and offered on Coursera.⁷ That particular MOOC, as further explained below, is even more troubling in terms of its lack of technical measures, and, indeed, its incorporation of features that actually encourage downloading and sharing on social media.

First, with respect to Decherney's MOOC, which was demonstrated in the last proceeding as lacking any of the required technological protection measures ("TPMs"), remains available on the edX platform – still without any TPMs. At the hearing, Decherney explained that he had asked edX to remove the download button feature. He explained, "But in order to comply with the last rulemaking, we instructed edX that downstream misuse was something to be careful about, and that downloading had to be prevented. So I'm actually a little surprised that it's possible."⁸

While removing the download button is certainly better than not removing it, such mere removal most certainly does not constitute a technological protection measure that prevents unauthorized retention and redistribution.⁹ In this case, removing the download button in no way restricts or limits the ability of the user to engage in copying or distribution. Even though the download button has been removed, the video remains available on the webpage and most certainly available for copying.¹⁰ The download button is nothing more than the MOOC platform provider's developed user interface, which makes downloading the video potentially

⁷ For the sake of this proceeding only, DVD CCA and AACCS LA currently assume that the MOOC was accomplished by availing itself of the exemption.

⁸ See Seventh Triennial Proceeding, Hrg. Tr. 283:1-5.

⁹ Downloading implicates the reproduction and/or distributions right. If Section 1201 is imputed to give meaning to Section 110(2) then these technical measures would be copy controls, which must in the "ordinary course of its operation prevents, restricts or otherwise limits the exercise of a [copyright owner's right.]" 17 U.S.C. § 1201(b)(2)(B).

¹⁰ See *id.*, Exhibit 1–D: DVD CCA and AACCS LA available at <https://www.copyright.gov/1201/2018/exhibits-043018/> (Hearing Exhibits page).

easier and more “user friendly” for even the least sophisticated user, but it does not actually restrict or even impact whether, in fact, the content may be downloaded. Consequently, the material distributed via the MOOC may be copied and is readily subject to distribution.

The legislative history of the TEACH Act even illuminates what a technological protection measure looks like. The MOOC exemption adopts the TEACH Act requirement that the MOOC provider applies “technological measures that reasonably prevent unauthorized further dissemination of a work in accessible form to others or retention of the work for longer than the course session by recipients of a transmission through the platform as contemplated by [provisions implementing the TEACH Act.]” 37 C.F.R. § 201.40(b)(1)(ii)(B) (citing 17 U.S.C. §110(2)). In explaining what “reasonably prevent” meant, lawmakers explained:

Examples of technological protection measures that exist today and would reasonably prevent retention and further dissemination, include measures used in connection with streaming to prevent the copying of streamed material, such as the Real Player “Secret Handshake/ Copy Switch” technology discussed in *Real Networks v. Streambox*, 2000 WL 127311 (Jan. 18, 2000) or digital rights management systems that limit access to or use of encrypted material downloaded onto a computer.

H.R. Conf. Rep. 107-685 at 233 (Sep. 25, 2002). Removing a download button as Decherney suggests in no way approximates even the twenty-year-old technology that lawmakers highlighted in the Report. Consequently, if removing the download button would not have sufficed when lawmakers approved the TEACH Act, removal of a download button today cannot suffice to satisfy the exemption requirements of this rulemaking.

Proponents’ other example of a MOOC, which DVD CCA and AACS LA believe to be the earlier identified MOOC offered by Jean Seamon, does not even remove the download feature. The toolbar immediately under the player offers the following buttons “Save”, “Note”, “Discuss” and “Download.” That download button indeed initiates the downloading of the video to the participant’s desktop, with no mechanism of any sort to prevent it from being retained

permanently or redistributed freely. The same toolbar under the player also has a share feature, which permits the user to invite others (or announce) on *Facebook, LinkedIn, Twitter, WhatsApp*, or via email to view the video on Coursera's platform. Thus, not only does this MOOC fail to employ, as required by the exemption, any technical measures to prevent reproduction and distribution, it actually facilitates and encourages such reproduction and distribution.

When the Copyright Office renewed the exemption in the last proceeding, even in light of Decherney's failure to adhere to the requirements for the exemption, it may have graciously done so in light of his surprise and assurances regarding the failure. But since the hearing, Decherney has done nothing to address the earlier identified failure, and, based on a review of proponents' evidence, no effort has been made to inform any other educators, that their MOOCs also require the employment of technological measures if they wish to take advantage of the exemption. In fact, the only other available example makes downloading even easier and encourages recipients to share the MOOC. When the Copyright Office asked Decherney, "is this going happen again? Is this going to be more prevalent by other professors,"¹¹ Decherney led the Copyright Office to believe that his MOOC would be corrected and other professors would do better.¹² Given the failure to live up to those commitments, the Copyright Office should give more fulsome and careful consideration to how the exemption may be streamlined renewed and at the same time ensure that the beneficiaries better adhere to the requirement that technological measures are employed to prevent retention and redistribution of the MOOC.

¹¹ Seventh Triennial Proceeding, Hrg. Tr. 283:12-13 (Chauvet).

¹² *Id.* 283:19-21 (Decherney, "we are still okay with limiting access to registered students and reasonable prevention of downstream misuse."). DVD CCA and AACCS LA believe that an "enrolled" MOOC participant should mean more than the student registering for the MOOC with only a social media account.

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Respectfully submitted,

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