

Before the
U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS

In the matter of Exemption to Prohibition on
Circumvention of Copyright Protection
Systems for Access Control Technologies
under 17 U.S.C. § 1201

Docket No. 2014-7

**JOINT COMMENTS OF THE DVD COPY CONTROL ASSOCIATION
("DVD CCA") AND THE ADVANCED ACCESS CONTENT SYSTEM
LICENSING ADMINISTRATOR LLC ("AACSLA") ON PROPOSED CLASS 3**

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

1. Commenter Information

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These comments are filed jointly by DVD Copy Control Association ("DVD CCA") and the Advanced Access Content System, Licensing Administrator, LLC ("AACSLA"). DVD CCA is a not-for-profit corporation with its principal office in Morgan Hill, California. DVD CCA licenses CSS for use to protect against unauthorized access to or use of prerecorded video content contained on DVD discs. 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.

AACS LA is a cross-industry limited liability company that developed and licenses the Advanced Access Content System technology (“AACS” or “AACS Technology”) for the protection of high definition audiovisual content on optical media, in particular Blu-ray Discs (“BDs”). The Founders of AACS LA are Warner Bros, Disney, Microsoft, Intel, Toshiba, Panasonic, Sony, and IBM.

2. Proposed Class Addressed

These comments address Class 3 – Audiovisual Works – Educational Uses – Massive Open Online Courses (“MOOCs”). Based on the Comment filed by Peter Decherney, Michael X. Delli Carpini, American Association of University Professors, College Art Association, International Communication Association, Library Copyright Alliance, and Society for Cinema and Media Studies (collectively, “Proponents”), the Class would be defined essentially as follows (taking their Class 1 definition and substituting MOOCs)

Audiovisual works embodied in physical media (such as DVDs and Blu-Ray Discs) or obtained online (such as through online distribution services and streaming media) that are lawfully made and acquired and that are protected by various technological protection measures, where the circumvention is accomplished by students or faculty (including teaching and research assistants) of a Massive Open Online Course for the purpose of criticism or comment.

See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 79 Fed. Reg. 73856, 73860 (2014).

3. Overview

DVD CCA and AACCS LA oppose the grant of any exemption for MOOCs on these grounds: (1) the uses proposed by proponents do infringe copyright by failing to comply with the TEACH Act and any exemption would be an unwarranted evasion of the TEACH Act requirements; (2) Proponents have further failed to demonstrate that the uses they propose are generally compliant with requirements of fair use, especially given the for-profit status of the major providers of MOOCs; (3) Proponents have failed to demonstrate that their current inability to circumvent AACCS and CSS technology has caused substantial adverse effects in making noninfringing uses of works; (4) Proponents have failed to show that alternatives such as video capture technology are insufficient for the purposes of making noninfringing uses given the recent advances in technology; and (5) any exemption granted would do significant harm to the use-facilitating business model and harm the markets for physical media, especially high definition formats.

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

These comments specifically address the proposed circumvention of the Content Scrambling System (“CSS”) as licensed by DVD CCA. CSS has long been recognized as a TPM by the courts and the earliest of the Triennial Rulemakings.¹ These comments also specifically address the proposed circumvention of the Advanced Access Content System Technology (“AACCS” or “AACCS Technology”), which has also been recognized as a TPM by the courts and in previous Triennial Rulemakings.²

¹ See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64556, 64568 (2000).

² See Section 1201 Rulemaking: Fifth Triennial Proceeding Recommendation of the Register of Copyrights at 126 (Oct. 2012) (“2012 Recommendation”).

The proponents did not state how they would accomplish circumvention.

5. Asserted Non-infringing Uses

A threshold question before determining whether any exemption is warranted is whether the proposed use is indeed noninfringing. An affirmative finding is of little consequence as all possible exemptions are premised on facilitating the allegedly noninfringing activity.

I. MOOCs Allegedly Noninfringing Use Fails to Comply with the TEACH Act

When considering the advent of online course offerings (often called “distance learning”), Congress carefully considered the benefits and risks involved with the use of copyrighted content in this context and enacted a law specifically directed at this situation, called the TEACH Act. 17 U.S.C. § 110(2). DVD CCA and AACS LA are aware that many educational groups and institutions have taken the position that the requirements of the TEACH Act are not applicable when an educator is able to determine that his or her use of a copyrighted work, or sections of such a work, is “fair use.” We discuss the fair use situation applicable to MOOCs below, but we also believe that it is important for the Register and Librarian to consider what Congress envisioned when it considered how distance learning should be carried out. The following discussion demonstrates that the activities of MOOCs would not satisfy the requirements of the TEACH Act in relation to the use of copyrighted content in the online course activity.

The public performance right of a copyrighted work is an exclusive right belonging to the copyright holder. *See* 17 U.S.C. § 106. Streaming a copyrighted work over a digital network invokes the public performance right. *See* 17 U.S.C. § 101. Section 110 of the Copyright Act limits the public performance right to specifically permit the performance of a copyrighted work “in the course of face-to-face teaching activities of a nonprofit educational institution.” The

TEACH Act expanded this limitation to allow the same educational activity to occur over digital networks (“distance learning”), but only under very limited circumstances.

In order to qualify for exemption under the TEACH Act, educational institutions engaging in distance learning must be nonprofit and accredited. 17 U.S.C. § 110(2)(C)(i). Proponents submissions do not specify whether the institutions offering MOOCs would satisfy this condition, but it appears from the available information that many, and perhaps most, MOOCs are offered by institutions that do not satisfy these requirements.³ Proponents concede that two of the largest MOOC providers, Coursera and Khan Academy, are for-profit entities. One of the for-profit entities, Coursera, by itself accounted for more than one-third of all MOOCs offered in 2014. According to the proponents, some of the providers are partnered with obviously accredited institutions such as Harvard, University of Maryland, or Duke. Any confusion about the “accredited” nature of the offering institution may be moot, however, because the “students” for MOOCs are clearly not officially enrolled in the accredited institutions. The proponents boast that these courses are intended to bring higher education to the masses (i.e., people who will otherwise never have the opportunity to participate in these programs designed by schools that they would never be able to attend). Thus, because the students are not enrolled in these accredited institutions, whatever partnerships that MOOC providers have with the accredited institutions is not sufficient for them to satisfy the accredited institution requirement of the TEACH Act.

The definition of student also provides a third basis – in itself - for why the MOOCs do not qualify for the TEACH Act exemption. The TEACH Act requires that distance learning

³ Institutions can be accredited either by an accrediting agency recognized by the Council on Higher Education Accreditation or by the United States Department of Education.

transmissions be available only for students “officially enrolled in the course for which the transmission is made.” The Senate Judiciary Committee Report to the TEACH Act explains that this requirement was made in consideration that benefits of Section 110 have historically only been available to educators and students in classrooms or similar places of instruction. Senate Report 107-31 at 11.

Further, the legislative history indicates that the TEACH Act was never meant to facilitate the use that the proponents claim to be noninfringing activity. The Senate Judiciary Report instructs that transmissions containing copyrighted works only be made to those identified persons authorized to receive them, either by password-protected website accounts or other technological means. *Id.* The proponents do not suggest that the open courses have any such requirement.

Finally, the allegedly noninfringing activity is at odds with the Congressional intent relative to the TEACH Act. The legislative history of the TEACH Act indicates that Congress deliberately placed these requirements on distance learning, because it realized that the Internet makes it possible for any entity to distribute educational materials, including copyrighted works, over the Internet. The non-profit and accredited institution requirements, as well as the official enrollment requirement serve as a safeguard against abuse. Senate Report 107-31 at 9.

In light of the foregoing, a determination that the allegedly noninfringing activity is indeed noninfringing would be impossible.

II. Educational Use is Not Fair Use *Per Se*

Even assuming that the TEACH Act is inapplicable to the conduct here, it is not necessarily the case that the uses would be considered to be “fair use.” The proponents of the exemption assert that the uses would be “fair uses” and, hence, noninfringing. While it is certainly the case that some educational uses are fair uses, the mere fact that a use is educational

in nature does not render it necessarily a fair use. The Copyright Office has produced a document containing source materials relevant to fair use in the education setting.⁴ The document illustrates that while there is a general principle that educational use may be fair use, especially when the particular use is undertaken by an individual (whether educator/teacher, librarian, or student), it remains true that a finding of fair use still requires compliance with certain limits. Put differently, the mere fact that a use is educational does not obviate the need for a full analysis of the four familiar fair-use factors.⁵ As noted previously, a proper fair use analysis is performed on a case-by-case basis in view of the facts of a particular circumstance. In the present request, Proponents treat a broad set of educational uses as *per se* fair by, for example, not limiting their request to short segments of works that they intend to copy. This begs the question of whether at least some of the uses in their request are fair uses, in fact and law. More importantly, however, even if any exemption were to be limited to ensure that the uses authorized are fair uses, there is no need for proponents to engage in circumvention in order to facilitate those uses, since as described below in greater detail, there are ample alternatives to circumvention to enable those uses.

The fact that the major providers of MOOCs are for-profit is important for the fair use analysis, at least insofar as the courses that those for-profit institutions offer as MOOCs. When considering the activities of commercial establishments, courts have found “no fair use” in a number of circumstances, including course-packs, *see e.g., Princeton University Press v.*

⁴ U.S. Copyright Office, *Reproduction of Copyrighted Works by Educators and Librarians*, Circular 21, August 2014.

⁵ *Id.* at 5-7; *see also Encyclopedia Britannica Educational Corp v. Crooks*, 542 F. Supp. 1156 (W.D.N.Y. 1982) (holding that the wholesale copying of educational broadcast programs for use in classrooms was not fair use).

Michigan Document Services, Inc., 99 F.3d 1381 (6th Cir. 1996) (holding that the copying of “course packs” was not protected fair use) and electronic reserves *Cambridge University Press v. Patton*, 1:2008cv01425 (11th Cir. Oct. 17, 2014). Hence, at least as to the for-profit MOOC providers, the issue of whether even in-class presentations of small portions of copyrighted works would be “fair use” is not at all clear, and is certainly not covered by the more generalized fair use analysis that might be available to the standard non-profit educational institution.

6. Asserted Adverse Effect

The proponents fail to demonstrate the requisite “substantial adverse effects”. The Copyright Office has made clear in prior recommendations that ‘substantial’ means such adverse effects cannot be *de minimis*, purely speculative, or supported only by anecdote and conjecture. See 2012 Report at 7-8. The Copyright Office has also stated that mere convenience is no justification for granting an exemption as long as there are viable alternatives. See *Id.* at 8.

I. Fair Use Does Not Entitle Users to Optimum Image Quality

Even where the use is a fair use, the user is not entitled to optimum quality images of the work. In fact, courts confronted with some of the same allegedly noninfringing activity have clearly stated that fair use is satisfied even when beneficiaries of the doctrine are not obtaining the quality of images that they desire.

In *Universal City Studios v. Corley*, 273 F.3d 429 (2d Cir. 2001), the Second Circuit examined the fair use claim premised on the user’s ability to make use of the work in its original DVD format. The defendants alleged that the prohibition against circumvention interfered with their ability to make fair use of the work on the DVD. While noting that all the examples proffered involved users’ ability to digitally manipulate the content on the DVD, the court specifically addressed the example of a student making use of DVD content to create a documentary film (i.e., the student wanted to insert the DVD images directly into the

documentary film). The court wrote, “We know of no authority for the proposition that fair use, as protected by the Copyright Act, much less the Constitution, guarantees copying by the optimum method or in the identical format of the original.” *Corley*, 273 F.3d at 459.

Further, the court found the alternatives to circumvention were acceptable to achieve fair use. The court found that the alternatives to circumvention resulting from the prohibition did not “impose even an arguable limitation on the opportunity to make a variety of traditional fair uses of DVD movies, [which the court-identified alternatives included] even recording portions of the video images and sounds on film or tape by pointing a camera, a camcorder, or a microphone at a monitor as it displays the DVD movie.” *Id.*

The court concluded that the DMCA, which may limit the ability to make use of a work in a preferred, even technologically superior, manner did not frustrate fair use. According to the court, “Fair use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user's preferred technique or in the format of the original.” *Id.*

Other courts examining whether fair use warranted use of the DVD content to make use of the work agreed with *Corley*. In *U.S. v. Elcom Ltd.*, 203 F. Supp. 2d 1111 (N.D. Ca 2002), the court recognized that fair use did not require the use to be “technologically convenient” as the court noted that those seeking to circumvent provided “no authority which guarantees a fair user the right to the most technologically convenient way to engage in fair use.” *See Elcom*, 203 F. Supp. at 1131. The court concluded that that even if the user could not “[cut and paste] from the existing digital media. . . fair use is still available.” *Id.* Furthermore, fair use does not even entitle those who would circumvent technological protection measures the right to make use of a digital copy at all. *See 321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085,

1102 (N.D. Ca. 2004) (“users can copy DVDs, including any of the material on them that is unavailable elsewhere, by non-digital means”).

A. The Idea That Students Demand High Quality Video are Overstated

Professors have had issues keeping their students engaged since the dawn of higher education and the extent to which the relative quality of the videos shown in a MOOC affects that degree of engagement should pale in comparison to the quality of instruction surrounding those clips. This kind of concern is not the kind of issue that rises to the level of a substantial adverse effect on the ability to make use of noninfringing video in MOOCs. Students and faculty are perfectly capable of making the clips they need for their pedagogical purposes using the video capture technology that exists.

II. MOOCs Have Grown Without the Benefit of an Exemption

The lack of an exemption has not hindered the growth of online education. Online Education, including MOOCs, has continued to grow over the past ten years, with over seventy percent of academic leaders citing online education as being critical to their long-term strategies. (<http://www.usnews.com/education/online-education/articles/2015/02/05/study-shows-sluggish-online-learning-growth-for-second-year>). While growth has slowed over the past few years, this has largely been attributed to other concerns about the long-term viability and sustainability of MOOCs as a pedagogical model with dropout rates over ninety percent and faculty questioning the ability of electronic instruction to serve as a replacement for in-person instruction. (<http://www.technologyreview.com/review/533406/what-are-moocs-good-for/>). Any assertion that the lack of an exemption allowing for the circumvention of DVD copy protections is a significant adverse effect on the use of noninfringing video in MOOCs is anecdotal speculation and not proper for consideration in this proceeding.

7. Alternatives to Circumvention

I. Video Capture Recording Is an Alternative to Circumvention

Video capture software has developed significantly over the past three years into an effective tool that allows users to appropriate high quality, broadly compatible, images and video from DVD playback which, as the Register stated in the 2012 Report, is suitable for all uses not requiring close analysis. The technology is constantly improving, making it easier than ever for anyone to create their own content.

The rapid advance of technology has resulted in more effective, affordable, and accessible video/screen capture software. The recent shift in technology companies to offer their software on a free/open source basis has fostered the availability of easy-to-use professional grade video/screen capture and editing tools available to the public at little to no cost. Video capture programs such as *Greenshot*, *VLC*, *Snagit* and *WM Capture* are specifically designed for high-speed video/screen capture that results in high quality video, and they are continually releasing upgraded versions that allow for better resolution and capture technology.

Example: The Matrix Reloaded

In the submitted clip of *The Matrix Reloaded*, *WM Capture* Software is used to record a frenzied fight sequence. The resulting high quality video captures all the details of the DVD, including a barrage of bullets and dizzying martial arts action. The choppy and pixilated images proponents have criticized in the past are simply no longer present. This quality of images is available to creators from software that retails at \$39.95. The clip is a testament to how far video capture software has come in the past three years, representing an entirely sufficient alternative to circumvention.

A. Video Capture Software Permits Users to Make Use of High Quality Images

Video capture technology has advanced significantly in the past few years, allowing for high quality reproductions of whatever the user sees on the screen. The pixilated and choppy images that proponents of 1201 exemptions complained of in past rulemakings are simply no longer an issue when using the advanced software. New versions of capture software use a unique high-speed capture technology to process video data faster than ever, and enable high-quality play back of even the most complex, full-motion videos. This results in videos that have very little to no blurring, pixilation, dropped frames, and should satisfy the vast majority of uses required for MOOCs.

Example: Birds of New Guinea

This clip uses video capture software to capture scenes from the DVD version of the BBC's *Planet Earth* series. The clip shows the mating dances of New Guinean Birds-of-paradise. The high level of detail in this video shows the first bird hanging upside down from a tree, shaking its bright blue, black, and gray plumage. Each bird shown in the clip makes its own unique display, whether it's a swoop of the head, a ruffling of feathers, or a display that makes the bird appear to change shape entirely, in an attempt to secure a mate. These are the details that professors utilize in order to make a description of animal behavior come to life for their students, and video capture software technology allows them to do that without circumvention, demonstrating that the lack of an exemption has no substantial adverse effects on the ability to make use of noninfringing video in MOOCs.

B. Video Capture Software Allows for Compilations

Video capture software permits educators to create a compilation of scenes. Video capture software records what is displayed on screen and can be started and stopped depending

on the needs of the compilation. Thus, an educator can prepare a compilation to have as many scenes as necessary to complete his lesson, and have them all in one convenient video, even without the use of separate editing software.

***Example: Compilation of Films Depicting
Shakespearean or Medieval Life***

The submitted compilation, made using video capture software, features clips from various motion pictures representing either medieval life or scenes from the work of Shakespeare. The first clip uses several scenes from the film *A Knight's Tale* showing the characters' preparations for a jousting tournament. The second clip shows various scenes from a 1999 version of Shakespeare's *A Midsummer Night's Dream* and demonstrates how an instructor can scroll through an entire movie in the course of making a compilation using video capture software, even without pausing the software, going back and forth as necessary. The final clip shows scenes from an adaptation of *Hamlet*. Again, the clips demonstrate that an educator can utilize video capture software with DVD playback in order to create an effective compilation.

II. Professional or Smartphone Camera Recording

MOOCs are necessarily video presentations of whatever is transmitted. Professional quality cameras are inevitably used to prepare the video even if it is just of the professor standing and talking. The creators of the MOOC course, hence, have available professional level video cameras that can be used to record content from high resolution video screens. A company presenting a MOOC could be expected to use its own professional digital camera to record the Blu-ray disc playback from an HD display.

Smart phone recording capabilities have consistently improved since the 2012 Ruling and continue to rival stand-alone cameras. Smart phones with 4K recording capabilities are now becoming prevalent in the marketplace. Professional cameras, which should be available for the

reasons noted above, come in whatever resolution the filmmaker wishes to use. This filming of the playback provides clear, high quality video that can easily be used as an alternative to circumventing either a DVD or a Blu-ray disc.

8. Statutory Factors

I. Factor (iv) - Any Exemption Broader than Past Narrowly Tailored Exemptions to Circumvent CSS Technology Would Harm the DVD and Blu-ray Disc Markets

Past exemptions recommended by the Register have been narrowly tailored to strike a balance between the noninfringing activity and the DVD format, which to date remains a successful digital distribution channel for motion pictures. Creating a new exemption for MOOCs' uses relative to either or both of the DVD or Blu-ray disc formats, which are clearly infringing under the Copyright Act, is not warranted, may not be justified as noninfringing, and would otherwise risk the DVD and Blu-ray distribution models.

Any DVD or Blu-ray disc that have been circumvented results in a perfect copy of the work being "in the clear" (i.e., free of any technical restrictions limiting copying or redistribution of the work). As that copy of the work is now in the clear it can be freely copied and redistributed - perfectly. The more perfect copies of the work are available for free from unknown third party sources or even from family and friends the less attraction there is for consumers to actually purchase a copy of the work in any other format or part of any offering of an online service.

The DVD format has remained widely popular notwithstanding the advent of high definition format offered on Blu-ray discs and the online services with standard and high definition offerings. Whether it remains available to consumers, particularly those slow to adopt to the more expensive high definition formats will depend upon copyright owners' confidence in the format, particularly as they examine their increasing opportunities in the high definition

market – and the more robust content protection technologies developed for that market. An overly broad exemption could hasten business decisions to abandon the DVD market sooner for the greater security of the high definition market.

In contrast to the lack of adverse effects from the lack of a circumvention exemption applicable to AACS and Blu-ray discs, the continued growth of the market for Blu-ray discs depends on the continued protection of AACS. In the absence of protection, physical media distribution of HD content will be undermined as a business model. As it stands today, Blu-ray disc competes for the high definition video market against an array of distribution models. Given the current market reality, any weakening of AACS could do great harm to the use-facilitating business model and damage efforts to bring further high definition physical media formats to market.

In fact, the District Court in the Southern District of New York acted to prevent this same harm. On March 4, 2014, the District Court issued a preliminary injunction to prevent the trafficking of DVDFab technology, which circumvented AACS technology. Most recently, the court expanded the injunction to cover products and services intended to evade the original injunction. In analyzing how AACS LA met the standard for injunctive relief (both as to the original injunction and the now expanded injunction), the court found:

There is no doubt that AACS is a technological measure designed to control access to copyright protected materials. (*Id.* at 10.) Nor is there any doubt that Defendants' primary, if not sole, business purpose is to decrypt these technological measures. (*Id.* at 10-11) Plaintiff made a clear showing that traditional legal remedies would be inadequate to compensate Plaintiff. (*Id.* at 13.) In this case, Plaintiff "lacks an adequate remedy at law, because its business model rests upon its being able to prevent the copying of copyrighted works. If it is unable to prevent the circumvention of its technology, its business goodwill will likely be eroded, and the damages flowing therefrom extremely difficult to quantify." *Macrovision v. Sima Products Corp.*, No. 05-CV-5587, 2006 WL 1063284, at *3 (S.D.N.Y. Apr. 20, 2006)

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

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

Conclusion

The uses identified in proposed class 3 are wholly inconsistent with Congress' intent with regard to the use of copyrighted content in distance learning, as reflected in the TEACH Act and that Act's legislative history. Congress approved the TEACH Act with specific requirements to curb against certain abuses that could result by anybody purporting to offer education materials over the Internet. MOOCs by their very nature, at least as described here by the proponents, cannot be reconciled with those requirements. Consequently, creating such an exemption would not only undermine Congress' clear direction but more importantly – and unnecessarily – undermine copyright owners' (1) confidence in the legal system, including this rulemaking, that supports the DVD and Blu-ray disc distribution and consequently (2) their continued investment in these same models. Finally, an exemption is further not warranted as the proposed uses do not require the highest quality video and can be satisfied by various alternatives to circumvention.