

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

**COMMENTS OF THE ADVANCED ACCESS CONTENT SYSTEM
LICENSING ADMINISTRATOR LLC (“AACSLA”) ON PROPOSED CLASS 6**

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

1. Commenter Information

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

2. Proposed Class Addressed

Proposed Class Addressed - Class 6: Audiovisual Works – Filmmaking Uses.

The Joint Filmmaker filing¹ proposes that the exemption be defined as follows²:

Audiovisual works that are lawfully made and acquired from DVDs protected by Content Scramble System, or, if the work is not reasonably available in sufficient audiovisual quality on DVD, then from Blu-ray discs protected by Advanced Access Content System, or, if the work is not reasonably available in sufficient audiovisual quality on DVD or Blu-Ray, then from digitally transmitted video protected by encryption measures, when the circumvention is accomplished solely in order to incorporate portions of motion pictures into new works for the purpose of fair use in filmmaking

Joint Filmmakers at 1.

3. Overview

AACS LA opposes the creation of an exemption for Proposed Class 6 that would permit the circumvention of AACS on Blu-ray discs. As discussed below – proponents offer no evidence that the desired exemption for what amounts to “all other fair uses” (i.e., not limited to “criticism or comment” or any other narrowly defined uses) will in fact be noninfringing uses. But even assuming that the activity is indeed noninfringing (either because it is fair use because there are short segments used for the purpose of comment or criticism or whatever use is made is otherwise deemed to be fair use), an exemption to permit circumvention of AACS applied to content on Blu-ray discs is still

¹ Comments of the Independent Documentary Association, Film Independent, Kartemquin Educational Uses, National Alliance for Media Arts+Culture, Indie Caucus, University Film and Video Association, Center for Independent Documentary, Women in Film and Video, and Women in Film (hereinafter referenced as “Joint Filmmakers”).

² Other comments were filed in support of a Class 6 exemption by New Media Rights, Free Software Foundation, and a number of others whose comments were bundled through the Digital Right to Repair website.

not warranted because fair use has never required that a user have access to the highest quality of images of a work such as the high definition found on Blu-ray discs.

Accordingly, filmmakers' use of any work will be satisfied either by the circumvention of DVDs pursuant to a renewal of the existing limited exemption for such circumvention or by the high quality images recorded by video capture software of DVD playback.

Blu-ray exclusive content is truly *de minimis*. Far more titles are available on DVDs than on Blu-ray discs. Furthermore any Blu-ray exclusive content is almost all in the form of special or anniversary editions that offer bonus features, and in no way suggests that the underlying work has not been released in the DVD format. There are alternatives to circumvention to make use of even Blu-ray exclusive content. For example, it can be recorded by a HD camera as it is played back on an HD display.

Finally, an exemption to circumvent Blu-ray discs would not be warranted because it would threaten the Blu-ray disc distribution model, which many consumers enjoy and potentially harm the market for the work across the various high definition platforms.

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

These comments specifically address the proposed circumvention of the Advanced Access Content System ("AACs") as licensed by AACs LA. AACs has been recognized as a TPM both in this proceeding previously, and by the courts. *See* Section 1201 Rulemaking: Fifth Triennial Proceeding, Recommendation of the Register of Copyrights at 126 (October 12, 2012) [hereinafter 2012 Recommendation]; *see also AACs LA v. Shen*, 14-CV-1112, Memorandum & Order at 10 (S.D.N.Y Mar. 16, 2015).

The Joint Filmmaker comments state that "it is [their] understanding that software exists which allows users to access digital files on AACs-protected Blu-ray." Joint

Filmmakers at 3. New Media Rights Center, the other proponent for an exemption covered by Class 6, has not offered any explanation for how they propose to circumvent AACS Technology.

5. Asserted Non-Infringing Uses

The proponents of the exemption allege that the uses covered by the exemption are “fair use.” See Joint Filmmakers at 5; New Media Rights Center at Section II.B. AACS LA addresses the allegedly noninfringing uses below.

I. Fair Use and Filmmaking

Filmmaking that appropriates short movie clips for the specific purpose of comment or criticism of the underlying work in the short movie clip may be able to claim fair use. *See* 2012 Recommendation at 128. Fair use permits limited use of protected material without a license or permission from the copyright owner. Courts determine fair use on a case-by-case basis using a four-factor analysis that includes 1) the purpose and character of the use; 2) the nature of the copyrighted work; 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and 4) the effect of the use upon the potential market for or value of the copyrighted work.

When considering whether the use of a first work’s material in a second work is fair use of the copyrighted content of the first work, courts have focused their inquiries on the first fair use factor to determine to what extent the use is “transformative.” Typically, a work that is found to be very transformative is more likely to succeed with a fair use defense than a work where the use is less transformative. Although “transformative work” is not defined in the statute, there is relevant case law interpreting that term and setting some boundaries as to what is considered sufficiently “transformative” to qualify as fair use.

In 1994, the Supreme Court clarified when an otherwise infringing work becomes transformative enough to warrant a fair use defense. *See Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994). In considering whether the music group 2 Live Crew made fair use of Roy Orbison’s classic “Oh, Pretty Woman,” the Court explained that whether or not the use of the first work is “transformative” is important to the first fair use factor,³ and found that the inquiry into the purpose and character of the use must focus, “on whether the new work merely supersedes the objects of the original creation, or whether and to what extent it is ‘transformative,’ altering the original with new expression, meaning, or message.” *See Campbell*, 510 U.S. at 579.

A. Documentary Films, Even Those that Involve Criticism and Comment, Do Not Qualify for Fair Use Unless They Are More Transformative than Providing Mere Factual or Historic References

The use of clips from other films, including in documentary filmmaking - which claims transformative purpose such as the dissemination of information and increase of public knowledge when making use of other works such as a clip - does not always constitute fair use. In *Iowa State University v. American Broadcasting*, 621 F. 2d 57 (2nd Cir. 1980), the court rejected the argument that “pursuit of disseminating the life history of an important public figure involved in an event of intense public interest” was sufficient to find in favor of fair use. In that case ABC News had during the airing of the 1974 Olympics made a feature on an American wrestler competing in the 1974 games. The allegedly infringing activity at issue was ABC’s use of two and a half minutes from a

³ Fair use advocates often mistakenly focus on the commercial nature of a work, when *Campbell* clearly illustrates that whether a work is commercial or noncommercial is only the beginning of a determination of its purpose and character.

28 minute film on the Olympian's life. When evaluating the first factor of the fair use analysis the court rejected the argument that the "development of historical and biographical works suitable for mass distribution" weighed in favor of fair use. The court explained that to the purpose

[Defendant] possessed an unfettered right to use any factual information revealed in [the 28 minute film] for the purpose of enlightening its audience, but it can claim no need to "bodily appropriate" [plaintiff]'s "expression" of that information by utilizing portions of the actual film, The public interest in the free flow of information is assured by the law's refusal to recognize a valid copyright in facts. The fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance.

Iowa State Univ., 621 F. 2d at 61 (quotations and citations omitted).

Documentary filmmaking which makes use of the work to engage in criticism and comment of the underlying work could avail themselves of the fair use defense provided they do not take too much, do not take the heart of the work, and are otherwise sufficiently transformative.⁴

B. Entertainment Film Uses of Clips from Other Films May Not Qualify for Fair Use

Even when a second work exhibits some transformative characteristics from the underlying work, the new work will infringe if it takes an unnecessary amount, slavishly copies from the original, or the purpose of the secondary work is no different than that of the original.

In *Castle Rock Entertainment v. Carol Publishing*, 150 F.3d 132 (2nd Cir. 1998), the creators of the *Seinfeld* television show sued the publisher of a trivia book for

⁴ See *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 544 (1985).

copyright infringement. Finding for the creators, the court stressed that any transformative purpose possessed by the trivia book was slight to non-existent. *Castle Rock*, 150 F.3d at 142. The court rejected defendant's arguments that the trivia book was a critique of the show, finding that the purpose of the book was to entertain the *Seinfeld* audience with a book about *Seinfeld*, and that this entertainment function was no different than that of the television show. *Id.* With no unique commentary or new purpose, the trivia book was simply not sufficiently transformative.

In 2007, J.K. Rowling, author of the Harry Potter series, brought suit against defendants for their work "The Harry Potter Lexicon," a reference book to the fictional Harry Potter universe. *See Warner Bros. Entertainment, Inc. and J.K. Rowling v. RDR Books*, 575 F. Supp.2d 513 (S.D.N.Y. 2008). Although literary reference guides and compendiums could be protected by the fair use doctrine, Rowling claimed the Lexicon planned to slavishly copy excerpts from her novels and stills from the films without offering sufficient transformative material to be considered a separate work. The court agreed that the Lexicon appropriated too much of Rowling's creative work and that the unnecessary verbatim copying of highly aesthetic expression diminished any finding of transformative fair use. *Warner Bros. Entertainment*, 575 F. Supp.2d at 544.

As these cases suggest, there is no basis to determine that use of even limited portions of copyrighted material from entertainment motion pictures in other entertainment contexts generally constitutes noninfringing activity.⁵ In the context of the

⁵ *See Wade Williams Distrib., Inc. v. AM Broad Co.*, 2005 WL 774275 (SDNY Apr. 5, 2005) (rejecting the proposition that there can be no fair use when copyrighted excerpts are used for entertainment); *Hofheinz v. Discovery Communications, Inc.*, 2001 U.S. Dist.

previous exemption proceeding, the Register refused to recommend an exemption that would include circumvention for clips to be used in films made for entertainment purposes on the ground that the proponents had failed to develop the record that a class of noninfringing activity had been denied fair use in the context of films made for entertainment purposes. Filmmakers did not “offer a full analysis of the proposed [other noninfringing] uses under the four fair use factors.” *See* 2012 Recommendation at 111. In particular, the Recommendation notes that there is no basis to assume that a fictional film’s use of a clip from another work would be primarily for the purpose of criticism and comment (a purpose that might suggest the possibility of fair use). “Rather, the purpose of a fictional film is typically entertainment.” *Id.* at 130. Moreover the proponents merely “describe[d] their desired uses and have not presented concrete examples – such as existing films that make use of preexisting material in a clearly transformative manner – that permit the Register to make a finding of fair use in this context.”⁶ *Id.*

Accordingly, the Recommendation concluded that it was impossible to determine the nature of the proposed use, the amount of the underlying work that would be used, and how such use would affect the market for the original work.

Lexis 14752 at *13 (SDNY 2001) (“Section 108 does not explicitly distinguish between entertaining and serious, plausible and implausible, or weighty or frivolous commentaries.”).

⁶ Interestingly, the Recommendation questioned where even some of the descriptions would constitute fair use. “The use of an earlier work to flesh out characters and motivations in a new work, or to develop a storyline, does not inherently serve the purpose of criticism or comment on the existing work. Indeed, the use of an earlier work or works as the basis for a new work could give rise to a concern that the new use might supplant the derivative market for the existing work.” *See* 2012 Recommendation at 130.

In this proceeding, the Joint Filmmaker comments seek to establish such a record, but their attempt fails for several reasons.⁷ While they cite a couple of instances where actual clips of copyrighted works were used and a court found the use to be fair use (such as the short clip from the Ed Sullivan Show that was used in the movie *Jersey Boys*), the remainder of their examples involve either (a) asserted fair use where no finding was made to that effect, or (b) use of something other than a clip of a prior film (such as the use of a puppet, works of art, a song, or a recreation of scenes that are depicted in the film). Proponents also identify a single filmmaker who wants to make a fictional work satirizing the representation of women in movies. However, there is no basis upon which to determine any part of the four fair use factors.

These limited efforts by the proponents should be found to be insufficient to enable the Register to recommend, or the Librarian to grant, an exemption covering the vast expanse of fictional filmmaking.

6. Asserted Adverse Effects

With respect to AACIS and Blu-ray disc content, the proponents allege that certain content is not available on Blu-ray disc and that certain uses require the high definition quality that is available on Blu-ray disc. These points are addressed below.

I. Blu-Ray Exclusive Content Is *De Minimis*

Content exclusive to Blu-ray discs is *de minimis*, especially when compared to material available on DVDs. Proponents' own evidence in Appendix K identifies only 17 titles with Blu-ray disc exclusive content. First, most of these titles constitute special or

⁷ As noted above, New Media Rights' comments relative to Class 6 speak only to the use of clips for documentary films.

anniversary editions and the Blu-ray exclusive content may only be bonus features such as deleted scenes. It does not mean that the work is not available on DVDs.

Filmmakers should have no problem finding sufficient content from the vast amount of works available on DVDs. DVD sales continue to far exceed Blu-ray sales and it is a trend that does not appear to be changing. (See <http://www.the-numbers.com/weekly-dvd-sales-chart> for up to date statistics on DVD and Blu-ray sales).

II. Fair Use Does Not Entitle Users to Optimum Image Quality or Access to the Work Itself

A. Optimum Images

Fair use does not entitle a user of the copyrighted work to high 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 (2nd Cir. 2001), the Second Circuit examined the bound of 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 being able 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.

Furthermore the court found the alternatives to circumvention were acceptable to achieve fair use. The court found that the alternatives to circumvention which resulted 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 alternatives, the court identified, 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.” *Corley*, 273 F.3d 459. The court concluded that the DMCA, like other laws, 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.” *Corley*, 273 F.3d at 459.

Other courts examining whether fair use warranted use of 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.” The court concluded that that even if the user could not “[cut and paste] from the existing digital media. . . . fair use is still available.” For that matter 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”).

B. Access to the Work

This jurisprudence for access to high quality images is consistent with the reality that fair use does not guarantee access to the work.

In the context of the request for an exemption to circumvent AACS for this particular Class, the access to high quality issue has another dimension. The uses proposed for this Class are essentially business uses and the issues involved in gaining access to the highest resolution content are either business-to-business and purely business economic issues. Those are issues external to the application of AACS, as a technological protection measure, to high definition content and even to the existence of Section 1201 of the DMCA. Indeed, these external issues would exist even if Section 1201 did not exist. Congress quite clearly understood that and counseled the Librarian to avoid granting exemptions in situations where the complaining party’s uses are subject to unrelated external forces. *See* H. Rept. 105-551 at 37 on the Digital Millennium Copyright Act (House Energy and Committee Report) (“Adverse impacts that flow from other sources or that are not clearly attributable to the implementation of technological protection measures are outside the scope of the rulemaking.”).

Ken Rabin, whose statements are proffered by the Joint Filmmakers in their comments, acknowledged that fair use has never guaranteed access to the work. Rabin states

Unfortunately for many, the fair use statute includes no provision or precedent for how a justified user of that right might obtain access to the physical materials (films, videotapes, digital files, lab elements, etc.) that are needed for the fair use expression itself. This is an issue that’s not unique to audiovisual storytelling, but it is especially troubling because of

the nature and technical needs of production in the audiovisual realm. My clients wonder what they can do when I explain that, . . .then licensing wouldn't be an issue

App. D at 3. What Rabin explains is that fair use does not compel a copyright holder to hand over a copy of the work so that fair use can be made.

III. Filmmakers' Alleged Harm Flows from Resource Constraints

Proponents' own evidence demonstrates that the cause of any adverse effect is not technological protection measures (in this case AAC3) but the resource constraints in the form of time and money. Schroeder states that the "alternatives to ripping are very inconvenient and inefficient." He does not suggest that the works are unavailable in an unprotected form. He, however, recites a common refrain in this proceeding from exemption proponents that obtaining a license can be difficult, time consuming and expensive.

When noting that his clip came from a DVD, Daniel McCable similarly explained "Within the constraints of the production there was probably no other viable way for me to get that content." Just as Schroeder did not, neither does McCable assert that the content was otherwise unavailable to him in an unprotected format. What he explicitly states is that the production had constraints, and he suggests that those constraints discouraged him from seeking the other ways to get the content (i.e., time and money, the biggest production constraints, did not make "other ways to get the content" *viable*).

The story behind Ken Rabin's claim that DVD clip footage was of insufficient quality reveals that it was not that DVD quality that stopped the filmmakers from making

use of the clip but that the decision was the result of a series of economic choices.⁸ After the rightsholder refused to license the clip for a second time – Rabin admits that he knew that a master of the clip from the first time it was licensed was available from WGBH’s edit room negatives. However, Rabin knew that “WGBH would have requested a usage fee as well as a fee for finding the shot and having the lab make [them] a duplicate master.” He explains, the “one other alternative would have been ripping the shot from the commercially-available home DVD of *Vietnam*, but in this case, the quality wasn’t sufficient for our needs and the producer simply decided it wasn’t worth the trouble and didn’t use the [footage].”

The trouble that Rabin refers to is upconverting from standard definition to high definition. Rabin immediately prior to the example explained the costs of upconverting and the choice that filmmakers may have to make. Upconverting

require[s] filmmakers to spend so much money doing needless technical improvements and alterations that not only would it deplete their budgets and wreak havoc with their production schedules, but at the end of the day, it would also yield a far inferior visual result than had they just worked from a Blu-ray or 2K or 4K scan to begin with – . . . All of these considerations would undoubtedly mean that producers would decide to forego exercising their fair use rights for many contemplated clips.

So not only did Rabin and his producer choose not to pay to acquire the master from WGBH but they also chose not to pay to convert the footage from standard definition to high definition. We know that Rabin and his producer did not want to pay for this

⁸ It is also worth noting that Rabin’s rendition of the story makes clear that the project did not stop because a particular clip was not available at a cost the filmmaker was willing to pay, merely that the filmmaker decided not to use that particular clip in the film.

postproduction work, because when explaining WGBH fees, he also states,

“Unfortunately, the documentary I was working on had a miniscule budget for lab work.”

There is no doubt that filmmaking takes time and costs money, including for licensing. Alan Rosenthal, an award-winning documentary filmmaker, in his *Succeeding as a Documentary Filmmaker: A Guide to the Professional World* at 108 (2011), explains that up until the mid-seventies, archival footage was fairly cheap and comments that, “Today, though, those film archives have turned into big business, demanding immense sums for archival clips.” He cautions that filmmakers should “build in a huge sum” of money in their budgets to cover archival rights if the film deals with historic events or personalities. While Rosenthal credits some of the participants of the proceeding for a “growing rebellion against the exorbitant costs being demanded for rights,” he identifies contacting and paying the copyright holder to be the “golden rule.”⁹

Leading articles on how a documentary filmmaker can obtain footage, whether archival or stock, do not readily suggest using Blu-ray discs or DVDs as a means to obtain needed footage, even in the context of the existing exemption specific to DVDs.¹⁰ The most commonly cited means include: commercial archives, news networks, internet sources, and government sources including the National Archives and Library of Congress.

⁹ He cautions, “to avoid trouble, obtain permission before use. I know that many people don’t. They pinch from everyone and pay nothing. It seems a stupid policy, one that ultimately works against the film and the director.”

¹⁰ In fact, the only places we could find that suggest DVDs to be a source for footage are on the proponents’ websites and even those suggestions involve their advocacy efforts in this proceeding.

The use of AACS or any other TPM, along with the DMCA, have not changed or caused this situation. Not even the proponents have suggested that. Those sources for content that were available to filmmakers prior to the passage of the DMCA remain equally available to filmmakers today. In fact more, rather than fewer, sources are available to filmmakers than there ever was before the DMCA, given the digitization of content available in various public archives. What TPMs, and more specifically the threat of DMCA liability, have done is make content widely available to the mass of the population, at affordable prices (whether rental or purchase) on affordable consumer devices for display on their own home “theaters.” Without TPMs like AACS, that benefit to society simply would not have happened. To undermine the system that brought about that benefit in order to address business issues for a comparatively small number of filmmakers is not what Congress intended when it set up this proceeding.

IV. The Marketplace Shows No Adverse Effects from TPMs

The proponents concede that, “this year’s eight Academy Awards Best Picture nominees, four are biopics telling true stories of historical and modern figures.”¹¹ This suggests that the industry, at least in regard to biopic films, is succeeding in the marketplace despite the alleged obstacles from AACS and other TPMs.

A. Dispute over *Selma* Does Not Concern TPMs

While proponents argue that producers of *Selma* had to license the archival footage from copyright holders due to TPMs, they fail to state what TPMs allegedly are employed to protect archival footage of the 1965 Voting Rights March from Selma to

¹¹ See International Documentary Association Comment at p. 17 (citing *Nominees – The 87th Academy Award Nominations for the 2015 Oscars*, Oscar.go.com/nominees).

Montgomery. This archival footage is clearly not TPM-protected and is, in fact, widely available from other sources than copyright holders. The significance of the march makes finding archival footage in any major broadcasters' archives almost a certainty. This is best evidenced by broadcasters' own practice. On March 9, 2015, Fox News most recently distributed a story discussing the plans to reenact the march 50 years later.¹² The story is filled with archival footage of the march. If Fox News has this archival footage, then it seems highly probably that every other network, including PBS, should have archival footage of the march so that they too can produce their own news stories. But a filmmaker would not have to search the networks' archives for this footage, as a mere Internet search shows that a search for video from the march produces hundreds of hits.

B. Broadcasters' and Distributors' Standards Do Not Insist on HD-Only

Film distributors – including PBS – and film festivals do not appear to have clear policies to exclude a film that is otherwise made in standard or high definition because it contains a clip that is not of the same quality of the overall film.¹³ In the case of PBS, the quality of the film is merely one factor used in determining whether to air a film and is

¹² See Celebrating 50th Anniversary of Selma Civil Rights Marches, available at http://video.foxnews.com/v/4097554852001/celebrating-50th-anniversary-of-selma-civil-rights-marches/?playlist_id=941536881001#sp=show-clips.

¹³ New York Independent Film Festival Regulations (requiring merely that a release form be signed for submission of film) (March 12, 2105).

not dispositive of the issue.¹⁴ This position is consistent with PBS' Editorial Standards and Policies,¹⁵ specifically with the Quality and Editorial Standards:

In selecting content, for any platform, PBS seeks the highest quality available. Selection decisions require professional judgments about many different aspects of content quality, including but not limited to excellence, creativity, artistry, accuracy, balance, fairness, timeliness, innovation, boldness, thoroughness, credibility, and technical virtuosity.¹⁶

The Editorial Standards further read:

Content evaluation is an art, not a science;...PBS's task, therefore, is to weigh the merits of the content it acquires or produces, submitted to it or produced by its own Digital staff and assure that, viewed in its entirety, the content it distributes strikes the best balance among these considerations. These Standards and Policies embody the goals of integrity and quality to which PBS aspires, recognizing that judgments about how these standards apply may differ depending on format or subject, and that not all content succeeds equally in satisfying all of these standards.¹⁷

It is evident that PBS' mission – as a broadcaster – is to strike the right balance between the value of the content against informational, aesthetic, and technical considerations. The harm is merely speculative considering that PBS may deny for various reasons making it difficult to pinpoint any harm in connection with the quality of a video. Even if an exemption was granted, there is no compelling proof that PBS would

¹⁴ Telephone Interview with David Field, Senior Director, Content Packaging, PBS (recognizing that the process whether to accept a film is a subject test and warrants many considerations consistent with PBS' Editorial Standards and Policies.) (March 12, 2015).

¹⁵ See PBS Editorial Standards & Policies, available at http://www-tc.pbs.org/about/media/about/cms_page_media/35/PBS%20Editorial%20Standards%20and%20Policies.pdf.

¹⁶ PBS Editorial Standards & Policies at 2.

¹⁷ PBS Editorial Standards & Policies at 5.

air the video anyways. In conclusion, proponent broadly overstates the need to circumvent CSS technology in order for filmmakers to distribute their films.

7. Alternatives to Circumvention

A number of alternatives to the circumvention of Blu-ray discs exist

I. Limited Exemption to Circumvent DVDs

AACS LA is aware that the DVD Copy Control Association does not oppose granting the same exemption as was granted in the 2012 proceeding. If the Librarian does, in fact, grant such an exemption, the limited authorized circumvention of DVDs would become a prime alternative to circumventing AACS protected Blu-ray discs as a source for short clips to be used for the purpose of comment or criticism in documentary filmmaking. As described above, access to the highest quality content is not necessary in order to satisfy fair use, and, in any event, most of the examples provided in the proponents' comments relate to DVD quality.

II. Video Capture of DVD Playback 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. The technology is constantly improving, making it a much more viable alternative to circumvention for filmmakers. We note that the proponents' comments almost exclusively cite the 2012 exemption proceeding or other sources from the same vintage. As demonstrated below, the improvements in screen capture software makes those references completely obsolete.

The rapid advance of technology has resulted in more effective, affordable, and accessible video/screen capture software. Programs like *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 allows for better resolution and recording. This unique high-speed capture technology enables perfect play back of even the most complex, full-motion videos. *See, e.g.*, <http://wmrecorder.com/products/wm-capture/> for description of advanced capture technology.

In the submitted clip of *Matrix Reloaded*, *WM Capture* software was 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 that exemption proponents have criticized in the past are simply no longer present. (This quality of images is available to filmmakers from a product 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 for the filmmakers want to make.

A. Affordability of Video Capture Software

The following table lists the cost of a variety of video/screen capture software.¹⁸

Product	Software Type	Price
Camtasia	Video Capture	\$299.00 (free trial)
Movavi	Video Capture	\$49.95
Snagit	Video Capture	\$44.95
WM Capture	Video Capture	\$39.95
EzVid, CamStudio, Jing	Video Capture	FREE

¹⁸ See <http://video-capture-software-review.toptenreviews.com/> for list of top rated software and their cost.

The recent shift in technology companies to offer their software on a free/open source basis has fostered the availability of professional grade video/screen capture and editing tools available to the public at little to no cost.

B. Ease of Use of Video Capture Software

Video capture software, such as *Camtasia*, outputs the same mpeg-2 and mpeg-4 formats found on Blu-ray discs. Thus, embedding an mpeg-2 or mpeg-4 file made from video capture software takes no more technical skill than the technical skills of embedding those files from a Blu-ray disc.

III. Cameras Can Record in HD Blu-Ray Playback on an HD Screen

Another alternative to circumvention is by using the recording capabilities of a professional cameras or a smartphone. Smartphone recording capabilities have consistently improved since the 2012 Ruling and continue to rival stand-alone cameras. Smartphone with 4K recording capabilities are now becoming prevalent in the marketplace. Professional cameras, which should be available to filmmakers, come in whatever resolution the filmmaker wishes to use. Even 4K cameras are now at prices that should be affordable for all filmmakers.

A filmmaker could be expected to use her own professional digital camera to record the Blu-ray disc playback from an HD display. This filming of the playback provides clear, high quality video that can easily be used as an alternative to hacking into a Blu-ray disc.

8. Statutory Factors

I. Factor (iv) - An Exemption Applicable to AACS Technology Would Threatens Harm to the Blu-ray disc Market and to AACS As Provider of Content Protection Technology for Blu-ray discs

An exemption is not warranted because any exemption will result in harm to the works distributed on Blu-ray discs. Any Blu-ray disc that has been circumvented results in that 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 perfect copy of the work is now in the clear it can be freely copied and redistributed perfectly. The more that 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 on Blu-ray discs.

The Blu-ray disc format’s growth, while very impressive, has not had the sustained success that the DVD format has seen. At the time DVDs were introduced, VHS and cable were the only competitive distribution models, and both were significantly lower quality. Unlike DVDs, Blu-ray discs have had to compete with not only its predecessor format (the DVD) but also a high definition distribution system that encompasses cable, satellite and various online distribution platforms. Blu-ray disc has done quite well as an additional option for consumers, and movie studios have found that the improved content protection offered by AACS (as compared with CSS for DVD) has been sufficient to maintain the incentive to release content using the Blu-ray disc format. However, in a competitive high definition environment, an authorized exemption to allow circumvention of AACS would undermine the confidence that copyright owners have had in the protection system and, hence, the Blu-ray disc format generally.

The protection system relies on the consistency of the law in protecting and preserving AACS technology. 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

An exemption to circumvent AACS on Blu-ray discs is unwarranted. The alternatives to circumvention – any exemption renewed to circumvent CSS on DVDs and video capture recordings of DVD playback – completely mitigate against any possible adverse effects resulting from the continued prohibition against the circumvention of AACS technology. Blu-ray exclusive content remains *de minimis*. DVD content is ubiquitous, and the number of titles distributed on DVDs far exceeds those titles released on Blu-ray discs. But e-book authors can take advantage of other alternatives to

circumvention, such as smartphone recordings, even to obtain the use of Blu-ray exclusive content.

Finally, an exemption is still not warranted even if the alternatives to circumvention do not mitigate completely against what must otherwise constitute a substantial adverse effect. The statutory analysis, namely the harm done to the work as distributed in high definition on Blu-ray discs and other distribution means, greatly outweigh the alleged harm that filmmakers may suffer because they cannot make use of the work in high definition. The legal precedent clearly states that a fair use is not harmed just because the user cannot obtain use of the work at their desired level of quality. Consequently, any request for an exemption to circumvent AACS technology on Blu-ray discs be premised on proposed class 6 must be denied.