



ASSOCIATION OF
RESEARCH LIBRARIES



EXEMPTION TO THE PROHIBITION OF CIRCUMVENTION OF COPYRIGHT PROTECTION SYSTEMS FOR ACCESS CONTROL TECHNOLOGIES

REPLY COMMENTS OF THE LIBRARY COPYRIGHT ALLIANCE

In the comments filed by the Library Copyright Alliance (LCA) on November 30, 2011, LCA requested renewal of the existing exemption for the circumvention of the Content Scrambling System (CSS) on lawfully acquired DVDs for certain educational uses. The exemption proposed by LCA, now designated as 7F, applied to:

Motion pictures on DVDs that are lawfully made and acquired and that are protected by the Content Scrambling System when circumvention is accomplished solely in order to accomplish the incorporation of short portions of motion pictures into new works for the purpose of criticism or comment, and where the person engaging in circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of ... Educational uses by college and university professors and by college and university film and media studies students.

The Joint Comments filed by the Association of American Publishers, et al., state that “we would not oppose the proposal of LCA.” Joint Comments at 37 n. 56. In other words, the trade associations representing the major copyright owners, including the Motion Picture Association of America, do not oppose renewal of the existing DVD

exemption with respect to higher education.

Although they do not object to the exemption's renewal, the Joint Commenters believe that educators often misapply the exemption: "the LCA submitted a list of alleged uses of the exemption, many of which involved uses that demonstrated no special need for advanced quality." As an example, the Joint Commenters state that "circumvention is likely unnecessary to 'analyze images of women in popular culture,' as an instructor from Georgia State University apparently did." Joint Comments at 38.

Similarly, the DVD Content Control Association (DVD CCA) believes that the higher education exemption "should be revisited, refined, and limited to the only conduct that is clearly noninfringing and simultaneously requires high quality." The exemption proposed by DVD CCA would apply to "pedagogical and educational uses of clips of motion pictures on DVD by college and university faculty and students in disciplines that involve detailed analysis of visual images or sounds..." DVD CCA Comments at 17.¹

These views echo objections raised in the past concerning the need for instructors to use high quality clips. Indeed, the Register in her 2010 recommendation stated that:

the record demonstrates that while a number of noninfringing uses may reasonably require higher quality than is available from video capture software for the particular pedagogical purpose of the use, in some (probably a much greater) number of classroom situations, compilations created through the use of video capture software are sufficient to accomplish the intended purpose of the use.

2010 Recommendation of the Register of Copyrights at 63.

The Register's position is premised on the conclusion that video capture software

¹ We note that DVD CCA "does not object to including explicitly Librarians and Digital Media Staff as users authorized under [] this same exemption, when they are acting in support of the exempted users for the exempted use purposes..." DVD CCA Comments at 17-18.

does not violate section 1201. Yet, the Joint Commenters explicitly state that they “take no position generally on whether any specific screen capture technologies, or any particular use of those technologies, are lawful....” Joint Comments at 38 n. 59. At most, the Joint Commenters are willing to concede that “some screen capture technologies work by avoiding decryption and locating and recording media in unencrypted form,” and therefore presumably do not violate section 1201. Likewise, DVD CCA states that it “does not endorse video capture software generally nor any particular software program,” although it implies that the Replay Video Capture does not implicate section 1201. DVD CCA at 11. Moreover, one of the claims in *AIME v. UCLA* is that UCLA violated the DMCA by using the VideoFurnace technology, which copies the analog output of a DVD player after decryption has occurred.²

To be sure, the Register in her 2010 recommendation acknowledges “that the use of some types of video capture software is for purposes of Section 1201(a)(1), comparable to camcording the screen – a process that has been identified as a non-circumventing option for accomplishing noninfringing uses.” Recommendation at 61. But this statement provides little comfort to educators on college campuses. They’re not worried about being sued by the Copyright Office. They’re worried about being sued by the copyright owners and the members of the DVD CCA, who aren’t willing to clearly and unequivocally state what video capture technologies, if any, in their view pass section 1201 muster. And the *AIME* litigation indicates that copyright owners are willing to pursue section 1201 claims against the use of video capture technologies. In the face of this uncertainty, the exemption needs to be worded broadly enough to cover the use of

² The court dismissed the DMCA claim along with the other claims, but the plaintiffs have filed a second amended complaint which renews the DMCA claim.

video capture technologies that copyright owners might claim violate section 1201. The existing exemption does so.

Furthermore, we challenge the position that high quality clips are not necessary to achieve the purpose of many uses in the higher education context. Taking the example offered by the Joint Commenters, the depiction of women in popular culture, an instructor may need to demonstrate to students the subtleties of facial expression, makeup, hairstyle, clothing, figure, and body position, and the messages these elements convey. For a film professor, high-resolution images of a woman's face might provide the basis for a discussion of the psychological impact of the color and texture of makeup used in the famous makeover scene in Alfred Hitchcock's *Vertigo*. For an anthropologist, the careful details of facial tattoos and jewelry might reveal identification with a particular subculture. For a sociologist, high resolution allows demonstration of how the portrayal of women has changed with the introduction of computer generated imagery (CGI). And for a professor of marketing, an image of a woman's face in a television show or an advertisement might reveal the art of influencing consumers to purchase products.

High-quality images are not only important for subjects that place images under careful scrutiny; fidelity may also be important. If the image used in a film is of high quality, then using a lower quality image in the classroom by definition is teaching the students a different "text" from the original. The impact of the image on the viewer is different.³

³ The existing exemption has both a subjective and objective component: "believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of educational uses." It can be assumed that virtually every professor subjectively

There are Academy Awards for Best Cinematography, Best Makeup, Best Sound, Best Sound Editing, Best Film Editing, Best Visual Effects, Best Art Direction, and Best Costume Design. The Joint Commenters, the DVD CCA, and the Register in 2010 in essence take the view that none of these categories really matter. Their contribution to the message and impact of a film are so slight that they are not worthy of study outside of film classes.


Finally, the distinctions made by the Joint Commenters, the DVD CCA, and the Register in 2010 would be difficult to implement. A lawyer consulting with an engineer would need to determine whether a particular video capture program does not “circumvent” within the meaning of section 1201; an instructor would need to assess the importance of high quality resolution for each clip; and a technician would employ a different technology depending on the level of resolution required. This process is unnecessarily complicated; it would impose a heavy burden on educational institutions without providing a meaningful increase in protection for copyright owners. If the quality of the images produced by legal video capture software is as good as claimed by the Joint Commenters, the DVD CCA, and the Register in 2010, then CSS no longer provides effective protection for DVDs, and copyright owners should be indifferent to the technology used by institutions of higher education to incorporate film clips in

believes that the highest possible quality is necessary for fulfilling her educational purpose. The value of fidelity, met by showing the student the original text, itself satisfies the objective component by providing reasonable grounds for this belief. Just as the rules of evidence contain the Best Evidence Rule, *see* Federal Rules of Evidence Rules 1001-1008, so too do academic standards require the use of the truest possible representation of a work. The Second Circuit’s *dictum* in *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 459 (2d Cir. 2001) that fair use does not guarantee access to material in order to copy it in the format of the original has no bearing on academic standards in this area.

compilations and other new works.

The existing formulation – particularly the phrase “believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of educational uses” – provides sufficient flexibility for educators to use film clips effectively and efficiently. For this reason, the exemption should be renewed, without language in the Register’s recommendation calling into question educators’ judgment concerning the necessity of high quality clips.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'J. Band'.

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