

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**

Docket No. 2014-07

**Petition of Electronic Frontier Foundation and Organization for Transformative
Works**

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The Electronic Frontier Foundation and Organization for Transformative Works respectfully petition the Librarian of Congress to exempt the following class of works from 17 U.S.C. § 1201(a)(1)'s prohibition on the circumvention of access control technologies for 2015-2018:

Audiovisual works on DVDs and Blu-Ray discs that are lawfully made and acquired and that are protected by Digital Rights Management schemes, where circumvention is undertaken for the sole purpose of extracting clips for inclusion in noncommercial videos that do not infringe copyright.¹

I. The Commenting Parties

The Electronic Frontier Foundation (EFF) is a member-supported, nonprofit public interest organization devoted to maintaining the traditional balance that copyright law strikes between the interests of copyright owners and the interests of the public. Founded in 1990, EFF represents thousands of dues-paying members, including consumers, hobbyists, computer programmers, entrepreneurs, students, teachers, and researchers, who are united in their reliance on a balanced copyright system that ensures adequate protection for copyright owners while facilitating innovation and broad access to information in the digital age.

The Organization for Transformative Works (OTW) is a nonprofit organization established in 2007 to protect and defend noncommercial fanworks from commercial exploitation and legal challenge. "Fanworks" are new creative works based on existing media; outside media fandom, the term "remix" is often used. The OTW provides services to fans who need assistance when

¹ Petitioners expect to further develop the proposed exemption consistent with the principles identified in this petition and the record developed in the course of this proceeding.

faced with related legal issues or media attention. Our nonprofit website hosting transformative noncommercial works, the Archive of Our Own, has over 400,000 registered users and receives over 4.8 million unique visits per month.

In filing this petition, EFF and OTW represent the interests of the tens of thousands of noncommercial remix video creators who have or would like to include clips from audiovisual works in their own creations.

II. Proposed Class: Circumvention Necessary to Extract Clips From DVD and Blu-Ray Discs For Use in Remix Videos

A. Overview

Every day, thousands of Americans create and share original, primarily noncommercial videos that include clips taken from works released on DVD and Blu-Ray. We explained in previous rulemakings that the practice of creating these works has grown from a niche hobby into a mainstream activity. Its popularity has grown exponentially over the past two years and will doubtlessly continue to do so as remix culture and creation of user-generated content becomes even more widespread.² The Register acknowledged in her 2010 and 2012 Recommendations that many of these videos are protected by the fair use doctrine and do not infringe copyright.³

If the previously granted exemption for noncommercial videos is not extended once again, the DMCA's anti-circumvention provisions will once again threaten these lawful uses. Rightsholders will claim that once a creator circumvents a technological protection measure to obtain clips from a lawfully obtained DVD, that creator cannot invoke the fair use doctrine in her defense against a claim brought under § 1201(a)(1). This risk of circumvention liability will chill creators' ability to resist DMCA "takedown" notices, which can discourage the sharing of lawful remix videos on the Internet. In contrast, remixers report that the current exemption enables them to counter-notify when they believe they have a valid fair use defense, as contemplated by the drafters of the DMCA.

Thus, an exemption to § 1201(a)(1) is still necessary for remix video creators to meaningfully engage in noninfringing creativity without unintentionally transgressing the prohibitions of the law. In addition, the exemption should logically extend to circumvention of access controls on Blu-ray discs. Such discs are an increasingly important source for remix artists, in part because there is some content that is only available in that format.

B. Copyrighted Works to Be Accessed

The copyrighted works to be accessed are audiovisual works distributed via DVDs or Blu-Ray discs.

C. The Technological Protection Measures on DVDs and Blu-Ray Discs

The vast majority of mainstream commercial works released on DVD use the Content Scrambling System (CSS) to encrypt the audiovisual work stored on the DVD. The Copyright

² *AccuStream Research: UGC Video Views Amp up 146.9% in 2010, Pre Roll Ad Spend at \$426 Mil.*, PR Newswire (March 3, 2011) <http://www.prnewswire.com/news-releases/accustream-research-ugc-video-views-amp-up-1469-in-2010-pre-roll-ad-spend-at-426-mil-117318388.html>.

³ 2010 Recommendation, at 59; 2012 Recommendation, at 126-30.

Office and the courts have concluded that CSS is an “access control” protected by § 1201(a)(1).⁴ Blu-ray discs are locked down by a combination of measures, principally the Advanced Access Content System process, which allows vendors to revoke compromised keys and distribute new keys through new discs. Blu Ray discs may also contain another layer of protection, called BD+. Numerous tools exist to circumvent such protection.⁵

D. Many Short-form Videos that Use Clips from Audiovisual Works are Noninfringing

1. The Proposed Exemption is Tailored to Supporting Remix Creativity

The targeted practice of the proposed exemption—the creation of videos that include clips taken from lawfully obtained DVDs and Blu-Ray discs—is well-established and highly likely to continue over the next three years.

The creative practice of “remixing” existing video content to create original expression is a time-honored tradition stretching back to 1918 when Lev Kuleshov began splicing and assembling film fragments to tell new stories.⁶ Today, the ability to remix and share existing video content has been democratized to an unprecedented degree, thanks to the combination of inexpensive video editing tools and free, easy-to-use video hosting services such as YouTube.

A number of popular genres of short-form videos frequently depend on clips drawn from film or television sources. These genres include everything from movie trailer remixes to fanvids to supercuts.⁷ One popular video genre is “political remix videos.” PRVs are a powerful and persuasive way to raise public awareness on a variety of issues. For example, one popular video combines selected clips from the TLC show “Toddlers and Tiaras” to create a re-imagined reality show called “Moms and Tiaras” that comments on the behavior of the parents of beauty pageant contestants. All of these forms of remix are valuable not only in themselves, but also because they help create the next generation of artists, who can gain skills and exposure otherwise unavailable to them.

These remix creators frequently rely on source material extracted from DVDs and, increasingly, Blu-Ray discs. As one remix artist noted:

Very often, studios will release special extras, including behind the scenes footage and deleted scenes, only on blu ray - which can be critical for vidding, because it expands my options. This is particularly important for vids based on movie sources, where the total amount of footage is limited. Extras or deleted scenes might be necessary to round out the story I'm trying to tell.⁸

⁴ See, e.g., *Realnetworks, Inc. v. DVD Copy Control Ass'n*, 641 F. Supp. 2d 913 (N.D. Cal. 2009).

⁵ See, e.g., <http://support.newagepcs.com/archive/index.php/t-27082.html>; <http://www.dvd-guides.com/guides/blu-ray-rip/256-remux-blu-ray-to-mkv>

⁶ Lev Kuleshov, *Kuleshov on Film* (1974).

⁷ For example, please see, e.g. <http://screencrave.com/2010-08-04/the-10-best-youtube-trailer-remixes-ever/>; <http://transformativeworks.org/projects/vidtestsuite>; <http://supercut.org>

⁸ Communication from Gianduja Kiss, Sept. 14, 2014.

Another reason these sources are important is that remix artists care deeply about high-quality source material. Low quality detracts from the message and makes it hard to reach audiences. As one vidder noted:

I've used Blu-ray source on four of my vids the past couple years. I think it was most important from a technical standpoint in my James Bond vid . . . because I did some cropping and zooming for certain sections where the quality loss would have been more noticeable if I had used anything less than HD source.⁹

Further, remix often requires multiple rounds of editing. Each edit degrades the quality of the video, so unless the creator starts with high-quality source, the output may be unwatchable or artistically insufficient.

2. The Proposed Uses Are Likely to be Non-Infringing

Many video remixes are lawful. With respect to the first factor—the purpose and character of the use—two characteristics of remix videos will generally favor a fair use finding. First, remix videos are inherently transformative in nature. Second, the exemption sought here for remix videos is limited to remix videos created for primarily noncommercial purposes—*i.e.*, that are not intended primarily to propose a commercial transaction, but rather to comment, criticize or educate. Such activities have historically been favored under the first fair use factor.¹⁰

The second fair use factor—the nature of the work—grants greater protection to creative works than to factual ones. Nevertheless, courts have recognized that this factor is likely to be of little importance in fair use cases involving the creation of transformative, original works.¹¹ Moreover, in the case of PRVs, the source work will often be highly factual, such as news footage.¹²

The third fair use factor—the amount taken—also tips in favor of remix video creators. The excerpts taken from films or television programs will generally comprise only a small fraction of the original work. Existing fair use precedents make it clear that where only small excerpts are taken, a fair use determination is favored.¹³

The fourth fair use factor—the effect of the use on the potential market for the work—also supports remix video creators. These videos are transformative works that do not substitute for the original works.¹⁴ Moreover, to the extent that any particular remix video is a parody of the original, or criticizes or associates the original work with any political message or controversial subjects, it is unlikely that the copyright owner would license the remix. Courts have found that a fair use finding is appropriate where these considerations make licensing unlikely or

⁹ Communication with Rhobaot Sept. 8, 2014.

¹⁰ *See, e.g., Id.* at 579 (transformative works “lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright”).

¹¹ *See, e.g., Campbell*, 510 U.S. at 598 (concluding that the second factor “adds little to the first” when the use is transformative); *Blanch v. Koons*, 467 F.3d 244, 256 (2d Cir. 2006).

¹² *Harper & Row*, 471 U.S. at 563.

¹³ *See, e.g. Arrow Productions, LTD. v. Weinstein Co. LLC*, -- F. Supp. 2d – (S.D.N.Y. Aug. 25, 2014) (use of three scenes totalling 4 minutes from 61-minute movie favored fair use).

¹⁴ 2010 Recommendation, *supra*, note 2, at 39-40; 2012 Recommendation, at 127-28.

impossible.¹⁵ Quite separately, remixers who work from authorized sources support the market for the original rather than harm it.¹⁶

E. Adverse Effects

Section 1201(a)(1)'s prohibition on circumvention has adversely affected the noninfringing activities of remix video creators, and will do so again if the proposed exemption is not granted. Most obviously, to the extent the provision prohibits ripping DVDs to extract clips, the law puts remix video creators back into legal jeopardy when they engage in authorship that would otherwise be protected by fair use. Major entertainment companies have repeatedly shown a willingness to file lawsuits against those who circumvent CSS or traffic in CSS circumvention tools.¹⁷ Legal threats against purveyors of tools to circumvent Blu-ray encryption have driven some companies out of the market altogether.¹⁸ Against this background, remix creators legitimately fear that using such tools, even for lawful purposes, runs the risk of civil liability under § 1201(a)(1).

Without an exemption, that fear will inhibit even obvious fair uses. Moreover, there is another, more subtle, way in which § 1201(a)(1) would adversely affect the non-infringing activities of video remix creators absent a continuing and expanded exemption: by undermining their ability to use the DMCA counter-notice process. Remix video creators continue to find themselves mistakenly caught in the takedown notice driftnet. If they insist on their right to counter-notice pursuant to 17 U.S.C. § 512(g) to have their videos restored, they expose themselves to a potential circumvention claim from the copyright owner who sent the DMCA takedown demand.

III. **Conclusion**

EFF and OTW urge the Librarian to renew the exemption for circumventing access controls on audiovisual works on DVDs in order to extract video clips for noncommercial videos, and expand the exemption to Blu-Ray discs.

¹⁵ *Campbell*, 510 U.S. at 592-93.

¹⁶ *See Authors Guild, Inc. v. Google Inc.*, 954 F.Supp.2d 282, 293 (S.D.N.Y. 2013) (noting that transformative uses enhance discovery and sales of original works).

¹⁷ *See, e.g., Universal v. Corley*, 273 F.3d 429 (2d Cir. 2001); *321 Studios v. Metro-Goldwyn-Myer Studios*, 307 F. Supp. 2d 1085 (N.D. Cal. 2004).

¹⁸ *See* <https://torrentfreak.com/companies-withdraw-blu-ray-rippers-following-dvdfab-lawsuit-140314/>