

## New Copyright Rules Allow DRM Circumvention for Remix Videos

Written by Patrick McKay

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Well this is some of the best news I have heard in a long time! As described in [this press release](#) by the Electronic Frontier Foundation, the Librarian of Congress just issued his [new list of approved exceptions](#) to the anti-circumvention provision of the Digital Millennium Copyright Act (DMCA), which prohibits circumventing any type of digital copy protection even if the intended use is otherwise authorized by copyright law.

The statute directs the office of the Librarian of Congress to conduct a review of this provision every three years and authorizes it to make new exceptions to it as it sees fit. The new exceptions just announced today go much further than previous ones, and include broad exceptions for jailbreaking smart phones (a direct slap in the face to Apple), enabling read-aloud features on e-books, security research on copy protection mechanisms in video games, and the right to circumvent CSS copy protection on DVDs in order to use short clips from motion pictures to create new, transformative works for purposes of commentary or criticism.

While most news sites and blogs will no doubt focus on the ability to jailbreak iPhones and iPads (which really won't have that large an impact since that doesn't prevent Apple from trying to stop you or invalidating your warranty if you do it), I would like to focus on the exemption for DVD decrypting. The exact wording of this exception is as follows:

(1) 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 the use in the following instances:

(i) Educational uses by college and university professors and by college and university film and media studies students;

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(ii) Documentary filmmaking;

(iii) Noncommercial videos

The educational exception is only slightly expanded beyond what it previously covered, and the Librarian draws at least what in my mind is an utterly arbitrary and baseless distinction between university students and professors and students and teachers at the K-12 level. The Librarian gives absolutely no explanation for why students and teachers in a university setting deserve the ability to use high quality footage ripped from DVD, while elementary and high school students do not. All the ruling says is, *“proponents for educators failed to demonstrate that high quality resolution film clips are necessary for K12 teachers and students, or for college and university students other than film and media studies students.”*

The documentary exception, while important, is also of only limited utility since it applies to a very small class of people—documentary film makers.

The most important of these categories is the third, which encompasses most forms of non-commercial “remixing” of movies and TV shows that have become popular on user-generated video sites like YouTube. This exception allows anyone wanting to incorporate brief clips of movies and TV shows in a non-commercial (meaning not for profit) video such as an anime music video or film mashup, is now free to use a program such as [DVD Decrypter](#) to rip DVDs to their computer so they can use the footage in their video. Before the passage of this rule, even if the actual use of the footage in a video was fair use, an amateur video creator could still have faced potential liability for breaking the copy protection on the DVD in order to make their video.

In issuing this new exception, the Library of Congress finally recognized what the EFF and others have been saying for years:

What the record does demonstrate is that college and university educators, college and university film and media studies students, documentary filmmakers, and creators of noncommercial videos frequently make and use short film clips from motion pictures to engage in criticism or commentary about those motion pictures, and that in many cases it is necessary to be able to make and incorporate high quality

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film clips in order effectively to engage in such criticism or commentary. In such cases, it will be difficult or impossible to engage in the noninfringing use without circumventing CSS in order to make high quality copies of short portions of the motion pictures.

While that quote seems clear enough, the ruling does include some caveats which muddy the waters somewhat. In order to qualify for the exception, three conditions must be met:

- 1. The final video must use only short clips from the original motion picture, for purposes that already qualify as fair use such as commentary or criticism.**
- 2. The clips must be incorporated into a new work. In other words, the use must qualify as transformative under the existing fair use criteria.**
- 3. “The person engaging in the circumvention must reasonably believe that the circumvention is necessary in order to fulfill the purpose of the use.”**

The first two conditions are pretty straight forward and both tie in to the existing criteria for fair use, which favor uses that take only a small portion of the original use and use it in a transformative manner. Simply taking unedited clips of movies and TV shows, even if they are short, and posting them on YouTube doesn't qualify for the exception. However, the third condition is rather vague, since it remains unclear under what circumstances a person may reasonably believe circumvention is necessary. The ruling appears to make it an issue of video quality:

Because alternatives to circumvention such as video capture may suffice in many, and perhaps the vast majority of situations, users must make a reasonable determination that heightened quality is necessary to achieve the desired goal. The justification for designating this class of works is that some criticism and/or commentary requires the use of high quality portions of motion pictures in order to adequately present the speechrelated purpose of the use. Where alternatives to circumvention can be used to achieve the noninfringing purpose, such noncircumventing alternatives should be used.

Thus the idea seems to be that if another means of obtaining the desired footage (albeit in a lower quality) would suffice, you should do that, and breaking copy protection is only allowed when the use requires a higher quality than could be obtained through those other means. How exactly a court would decide when exactly that is, I have no idea. At least in my opinion as someone who makes these kinds of remix videos, I can't imagine a situation where I would be

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satisfied with methods like screen capturing (which the Librarian cites as an example) or cam-cording a TV screen (the MPAA's suggestion). Both of those methods produce horrible quality video far inferior to that which can be obtained by simply ripping the DVD to your hard drive and transcoding it to an easily edited AVI file. To require video creators on YouTube to use those kinds of methods instead of ripping would forever relegate them vastly inferior quality. Hopefully if the issue ever came up the courts would be satisfied by the video creator's subjective judgment that the quality obtained by ripping the DVD was preferable to the alternatives.

Another thing I have questions about is the scope of the rule. While the rule specifically mentions CSS protection on DVDs and appears on its face to be restricted to that, I wonder if courts might construe it to apply to other similar types of copy protection, such as the AACS copy protection used on Blu Ray discs or the copy protection used on digital movie downloads from iTunes or Amazon. Since HD video is rapidly increasing in popularity both in general and in user-generated content on sites like YouTube, it makes little sense to restrict this exception to one particular type of copy protection used only on lower quality standard definition recordings, when the principle behind the rule clearly applies to all types of video copy protection. It is also disappointing that the Librarian restricts the ruling to only apply to motion pictures, and specifically excludes other audio-visual works such as video games, even though in reality footage from video games is used in remix videos almost as often as films (my own [Final Fantasy music videos](#), for example).

Despite these limitations which make the new rule not as good as it could have been, it's an important first step in recognizing the fair use rights of internet users to make non-commercial remixes of popular video content. Remixing is a growing art form that is an important part of the new participatory media culture that is thriving online, and it's nice to see the government finally starting to recognize the legitimacy of that culture by protecting the right to rip DVD footage to produce these types of transformative works.