

Can You Legally Rip a DVD? Trial to Test 'Fair Use'

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Wednesday's trial pitting DVD jukebox maker Kaleidescape Systems versus the agency responsible for DVD copy protection is expected to test the boundaries of fair use.

On Wednesday, a key copyright trial began in San Jose, as Kaleidescape Systems and the DVD Content Control Association went to court in a case expected to test the concept of "fair use".

Kaleidescape manufactures the Kaleidescape System, essentially a DVD jukebox, connected via Ethernet to a separate player box. Users can insert a DVD and rip it to the installed hard drive, for later viewing upon a television screen.

To the DVD CCA, the suit is a simple breach of contract of the terms of the Content Scrambling System, the encryption method that secures the millions of standard-definition DVDs sold worldwide.

To Kaleidescape, however, the question to be settled is a simple, more profound one: can a consumer who has legally purchased a DVD "rip" or copy it to a hard drive, to do with it what he wishes? A significant portion of Kaleidescape's defense will be the concept of "fair use," the portion of the U.S. Title code that governs broadcasts and rebroadcasts of commercial content within the home, hotels, and other functions, according to Michael Malcolm, the chief executive of the company.

Ironically, the Kaleidescape servers, which cost thousands of dollars, are a hit with the upper-crust Hollywood crowd, including actors – the type of people agencies like the Motion Picture Association of America (MPAA) has claimed has been negatively affected by piracy, Malcolm said. The DVD CCA, however, is made up of equal representation from the consumer-electronics, PC, and content camps, according to a CCA spokesman.

Both parties agree that in Sept. 2002, Kaleidescape took a license to use the CSS. In 2003, the DVD CSS "became aware" of the Kaleidescape System, according to court filings, and asked the company to better secure its product. It later employed a consultant who also served as an ombudsman between the two parties.

In 2006, the agency agreed to drop any claims for monetary damages, although it is asking the Superior Court of Santa Clara, Calif. to levy a permanent injunction against sales of the Kaleidescape system. In a countersuit, Kaleidescape has asked for monetary damages as well as a ruling that its products are in compliance with the terms of the licensing agreement.

Ripping is what "CSS... is intended to prevent"

According to William Coats of White and Case LLP, who is trying the case for the CCA, the Kaleidescape System violates the 100-page CSS license in several ways. The complaint lists five: failing to prevent the creation of digital copies of DVD content; a refusal to meet its obligation to "frustrate attempts to defeat CSS" in its hardware; selling any product that thwarts the CSS protections; a requirement to have the DVD disc in the drive "during authentication and playback"; and violating a prohibition to copy confidential CSS data.

As to the question of the requirement that a DVD be inserted into the drive during authentication, Coats said that "you just can't insert a drive onto the server and let it sit".

"Once the DVD content is copied onto a first System by a user, the actual DVD disc could be sold or otherwise provided to additional users to be copied onto other Systems, but with the content copied onto the first System remaining playable. This functionality constitutes a breach of the CSS License," the CCA's complaint reads.

Moreover, the mere act of copying the DVD "is precisely that which the CSS License is intended to prevent," the complaint adds. Continued...

The right to rip?

Malcolm, meanwhile, said his company has made every effort to comply with not only the CCA but other rights holders, including DVD Format/Logo Licensing Corporation, Dolby, Macrovision, DVI Promoters, HDMI Licensing LLC, Digital Content Protection, LLC (HDCP), MPEG LA, LLC, Nissim Corporation, Koninklijke Philips Electronics N.V. (acting for three different patent pools), and Toshiba

Corporation (on behalf of the DVD Patent Licensing Group). The company will also argue that the CCA pulled out of the arbitration process before it ran its course.

Kaleidescape not only maintains the CSS protection as part of a bit-for-bit rip to the server, but also selectively applies 256-bit encryption to secure it further. An HDCP-equipped HDMI output jack is included on the back of the media player. "The content is safer in the Kaleidescape system than on the polycarbonate disc," Malcolm said.

Coats called that argument "irrelevant".

"We're completely in compliance with the terms of the - CSS - license," Malcolm said. "The thing that they would like to hang their hat is on is some wording that talks about 'authorized copies.' Clearly, their position is that there would be no authorized copies of DVD. In other words, the concept of 'fair use' does not apply to DVD."

The problem of "fair use"

The case has not received any amicus curiae briefs, typically filed if a case is seen by others as having broader applications that may affect their businesses. Malcolm said he has been in contact with the Electronic Frontier Foundation, a non-profit legal agency that monitors issues of privacy and digital freedoms.

Fair use falls under Title 17 of the U.S. Code, and the majority of the code governs the rebroadcasts of visual and audio works via cable, satellite, and radio. Accepted usages of copying of recorded works under the "fair use" statutes have typically included criticism, comment, news reporting, teaching, scholarship, and research, according to the Copyright Office. The Audio Home Recording Act of 1992 permits non-commercial home recording of analog audio content for personal use,

but says nothing about video.

When asked of whether he felt the case would have significant implications for fair use, Malcolm said he expected it would. "I think it very well could be," he said. "If we prevail, the case will certainly be a big step forward. If we lose, this case would be a big step backward and the studios would be a lot closer to establishing usage restrictions for DVDs."

The studios are even more worried about the implications for next-generation DVDs, whose copy protections include a "managed copy" provision, Malcolm said. With a good upscaling chip, a standard-definition DVD looks virtually identical to the high-definition content, he said.

Managed copy is a "model that they sell you the same content over and over for the rest of your life," Malcolm said. "HD DVD and Blu-ray's managed copies are simply a euphemism for charging you for every time you make a copy on the server."

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