

September 8, 2009

Rob Kasunic  
Principal Legal Advisor  
Office of the General Counsel  
United States Copyright Office  
BY EMAIL to rkas@loc.gov

Re: August 21 Supplemental Questions to DVD-Related Hearing Panelists

Dear Mr. Kasunic:

The undersigned (“Joint Proponents”) respond to your August 21, 2009 questions concerning the proposed DVD-related exemptions (proposed classes 4A through 4H, 11A and 11B) to Section 1201(a)(1). In addition to this joint response, some of the undersigned may also submit separate responses.

You asked:

“From your unique perspectives, is there a limitation, either in terms of duration or percentage (or both), which could be incorporated into the definition of an exempted class of works?”

As your August 21 questions anticipated, the Joint Proponents “strongly object to any quantitative limits” because, as you correctly noted, “the permissible amount of a copyrighted work that may be used under the fair use doctrine depends on the specific facts in each case.” Courts have repeatedly recognized that, in appropriate cases, fair use permits the use of even an entire work.<sup>1</sup>

In the context of the proposed DVD-exemptions, adding a quantitative restriction would disserve the purpose of this rule-making for several reasons:

- First, while some of the beneficiaries of the proposed exemptions may need only a small portion of a motion picture, others will require access to, and the ability to reuse, larger portions. For example, film and media studies professors may want to teach an entire course on a single important film, showing the entire film over the course of a semester.<sup>2</sup> Similarly, amateur film critics already employ voice-overs and on-screen annotations in order to comment on films, sometimes providing an alternate “DVD commentary” or entirely original audio track for the entire film.<sup>3</sup>

---

<sup>1</sup> See, e.g., *Sony Corp. of Amer. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006); *Nunez v. Caribbean Intern. News Corp.*, 235 F.3d 18 (1st Cir. 2000); *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992).

<sup>2</sup> An informal survey of film professors reveals that at least four courses focusing on a single film have been taught recently: Stanford University (Prof. George Stoney, *Pather Panchali*), Northwestern University (Prof. Peter Wollen, *Citizen Kane*), University of Notre Dame (Prof. Pamela Wojcik, *The Wizard of Oz*), and New York University (Prof. Richard Allen, *Vertigo*).

<sup>3</sup> See, e.g., Matt Zoller Seitz, *The Substance of Style, Pt. 5*, <<http://www.movingimagesource.us/articles/the-substance-of-style-pt-5-20090413>> (visually

- Second, exemptions that include quantitative restrictions, rather than providing “sufficient guidance in the regulatory text,” are likely to foster misunderstanding among users. Already, there are too many myths tying fair use to arbitrary “bright line” quantitative rules (e.g., “seven second rule” or “three lines rule”). The inclusion of a quantitative limit here would send precisely the wrong message to the user community, many of whom do not have access to sophisticated copyright counsel. Faced with an arbitrary, but “bright line” rule in a promulgated Section 1201(a)(1) exemption, the user community is likely to focus on that rule, rather than the more important question of whether the use in question violates copyright law. These users will be justifiably surprised when they discover (likely only after receiving a cease & desist letter, a DMCA takedown, or a file-stamped complaint) that the quantitative guidance provided in the exemption does not constitute a defense to an infringement action.
- Third, the addition of quantitative restrictions to the proposed DVD-related exemptions will provide no marginal protection for CSS or the rightsholders who use it. The opponents of the proposed DVD exemptions have repeatedly argued that the ability to decrypt a portion of a CSS-encrypted DVD necessarily permits the decryption of the entire DVD.<sup>4</sup> If this is true, then “the effect of circumvention of the technological protection measures on the market for or value of copyrighted works,” 17 U.S.C. § 1201(a)(1)(C)(iv), would be unaffected by an exemption that permits decryption of CSS-protected DVDs for the noninfringing purposes set forth in the proposed exemptions, as compared to exemptions modified to include quantitative restrictions.
- Fourth, those who would use any promulgated Section 1201(a)(1) to take too much of a DVD continue to face the prospect of copyright infringement litigation. Congress has instructed courts to evaluate the amount and substantiality of the portion used in considering whether a use comes within the fair use doctrine. 17 U.S.C. § 107(3). Rather than employing a “bright line” test, courts consider both quantitative and qualitative factors. Consequently, any “bright line” quantitative restriction on the proposed exemptions will necessarily be under-inclusive, penalizing some noninfringing users while letting other infringing users slip through. No regulator can, *ex ante*, imagine all the creative fair uses that might develop in the future, and thus no exemption limited to “bright line” quantitative

---

annotated version of the prologue of *The Royal Tenenbaums*); Bill Werde, [Hijacking Harry Potter. . . Quidditch Broom and All](#), N.Y. TIMES, June 7, 2004 (reviewing *Wizard People, Dear Reader*, which applies a new audio track to *Harry Potter and the Prisoner of Azkaban*); Zarban.com, The House of Commentaries, <<http://www.zarban.com>> (indexing more than 1600 alternate audio commentaries).

<sup>4</sup> See Responses of the Motion Picture Association of America to Copyright Office Questions in § 1201 Rulemaking Proceeding, July 10, 2009, at 5 (“Moreover, once an action of circumvention is sanctioned, we are unaware of any effective means to determine how much of a motion picture protected by technical measures was actually decrypted.”); Reply Comments of the DVD Copy Control Association, Inc., Feb. 2, 2009, at 21 (“Once the technology is legally circumvented, the ability to limit the scope of the use of the circumvention may well be impossible, thereby undermining the whole system.”)

limits will adequately shelter such uses from circumvention liability under Section 1201(a)(1).<sup>5</sup>

- Fifth, there is no evidence that the 2006 film and media studies exemption, which does not include any quantitative restriction, has resulted in abuses. Accordingly, there is no reason to assume that the lack of quantitative limitations will result in abuses of the proposed exemptions.

If the Copyright Office is concerned that the proposed exemptions not be permitted to sweep beyond the scope of the fair use doctrine, a superior solution would be to incorporate into each exemption a requirement that the use in question be noninfringing, as proposed Classes 11A, 11B have already done. The traditional fair use evaluation of the amount used could then be applied to concrete factual circumstances by the courts, yielding further jurisprudence to guide future lawyers and users.

If the Copyright Office nevertheless is inclined to engraft a quantitative limit on the proposed DVD-related exemptions, the Joint Proponents urge it to consider the following suggestions in crafting the regulatory language:

- Any quantitative restriction must focus on the portion of the DVD that is *used*, rather than the portion *whose protection is circumvented*. Fair use by educators, documentarians, and noncommercial, transformative users may require the extraction of many small clips from a single DVD.<sup>6</sup> As has been addressed in detail in previous filings, it can be difficult for users to determine or control how much of a DVD is decrypted “under the hood” when a DVD-decryption tool extracts a clip from a DVD. Moreover, the recent ruling in *Real Networks v. DVD Copy Control Ass’n*,<sup>7</sup> demonstrates that copyright owners believe that CSS is comprised of “multiple layers” of protection in addition to encryption; users may need to circumvent one of these additional “layers” in its entirety in order to extract a short clip.
- Any quantitative restriction must apply on a *per use* basis, rather than a *per DVD* basis. For example, an educator who is teaching a semester-long course on a single film may need to show the entire DVD over the course of multiple class sessions. In order to zoom, crop, annotate, and otherwise manipulate the video in the course of instruction, the educator may need to rip and edit the clips, rather than simply playing it from a DVD player. In this case, it would be critical that any quantitative limitation expressly apply on a class-by-class

---

<sup>5</sup> Consider Douglas Gordon’s work, *24 Hour Psycho* (1993), which was featured by the Hirschhorn Museum in Washington, D.C. in 2004. The piece presents Alfred Hitchcock’s classic 1960 film slowed down to play over a period of 24 hours. See National Public Radio, *Museum Hosts “24 Hour Psycho”*—*Literally*, Feb. 29, 2004, <<http://www.npr.org/templates/story/story.php?storyId=1724372>>.

<sup>6</sup> See, e.g., *Vogue*, <<http://www.youtube.com/watch?v=QNRjzUB7Afo>> (using multiple clips from *300* in order to comment on the objectification of men and violence); *How Much is that Geisha in the Window?*, <[http://www.youtube.com/watch?v=fZr9wsZz\\_bk](http://www.youtube.com/watch?v=fZr9wsZz_bk)> (using short clips from many episodes of *Firefly* in order to show the appropriation of Asian culture by the show, comparing it to hagiography of the Confederacy).

<sup>7</sup> *Realnetworks, Inc. v. DVD Copy Control Ass’n*, 2009 WL 2475338, at \*20 (N.D. Cal. filed Aug. 11, 2009).

(rather than whole course, or whole career) basis. Similarly, a vidder may, over the course of creating dozens of vids, end up using a large portion of the material contained on a particular DVD. The vidder will have no way of knowing how many minutes or what percentage of a DVD she may have already used in previous vids.

- Any quantitative restriction must treat the durational and percentage metrics disjunctively, permitting excerpts that are “less than  $x$  minutes in duration *or* represent less than  $y$  percent of the duration, *whichever is greater*.” This takes into account the fact that percentage limits can disfavor fair uses of short works, while durational limits can disfavor fair uses of lengthy works. For example, a percentage limit that seems roomy to the fair user of a 3-hour motion picture is likely to feel like a straightjacket to the fair user of a 5-minute music video or 10-minute “DVD extras” interview with a film’s director. A durational limit, in contrast, has the opposite problem. A disjunctive “whichever is greater” approach is the only one that resolves this mathematical conundrum.
- Any quantitative restriction must be measured against the collective entirety of the audiovisual works contained on the DVD, rather than on a work-by-work basis. Put differently, the DVD as a whole should be unit of measure against which any percentage limit should be measured. DVDs can contain a wide variety of different kinds of audiovisual works, of widely varying lengths, including alternate endings, deleted scenes, mini-documentaries, interviews with cast members, trailers, and music videos. In the vast majority of cases, the technological protection measure used on CSS-encrypted DVDs restricts access to all the works contained therein.
- Any quantitative restriction must take into account the distinct nature of the audio and video portions of the audiovisual works distributed on DVD. For example, if a fair use requires taking the entirety of the video program contained on a DVD, but none of the accompanying audio program, the use should count as no more than 50% of the work.

While we appreciate the efforts of the Copyright Office, in light of the foregoing concerns, the Joint Proponents cannot endorse the proposed formulation set out in your Aug. 21 questions: “... the portions of any single work shall be, collectively, no greater than  $x$  minutes in duration and represent no greater than  $y$  percent of the duration of that work...”

In the alternative, and only if the Copyright Office concludes over the objections explained herein that a quantitative restriction is necessary, we suggest the following:

“...where any single excerpt used [in a single classroom session, in a single documentary, in a single video] from the DVD constitutes no more than  $x$  minutes or  $y$  percent, whichever is greater, of the entirety of the audiovisual works contained on the DVD...”

Thank you for the opportunity to address your questions in this matter.

[signatories appear on the following pages]

Mary Alice Baish  
American Association of Law Libraries (AALL)

Jonathan Band  
American Library Ass'n (ALA), Ass'n of Research Libraries (ARL), and Ass'n of College and  
Research Libraries (ACRL).

Francesca Coppa  
Director of Film Studies, Muhlenberg College  
Board, Organization For Transformative Works

Peter Decherney  
Stephen M. Gorn Assistant Professor of Cinema Studies and English  
University of Pennsylvania

Michael Donaldson  
General Counsel, Film Independent (FIND) and University Film and Video Ass'n (UFVA), and on  
behalf of International Documentary Association (IDA), and Independent Feature Project (IFP)

Carla Funk  
Medical Library Association

Renee Hobbs  
Professor, School of Communications and Theater, Temple University

Douglas Newcomb  
Special Libraries Association

Gordon Quinn and Jim Morrisette  
Kartemquin Educational Films, Inc.

Martine Courant Rife, JD, PhD  
Writing in Digital Environments Research Center Affiliate Researcher,  
Michigan State University  
Professor, Lansing Community College

Tisha Turk  
Assistant Professor of English, University of Minnesota, Morris  
Organization For Transformative Works

Rebecca Tushnet  
Professor, Georgetown Law and Organization for Transformative Works  
Organization For Transformative Works

Fred von Lohmann  
Senior Staff Attorney, Electronic Frontier Foundation