

July 10, 2009

Mr. Robert Kasunic
Principal Legal Advisor
Office of the General Counsel
United States Copyright Office
101 Independence Ave., S.E.
Washington, D.C. 20559-6000

Re: June 22, 2009 questions posed to documentary filmmakers

Dear Mr. Kasunic:

Thank you for the opportunity to speak at the hearings on May 7, 2009, and to provide additional information regarding our request for an exemption. We write in response to the questions you sent on June 22, 2009.

Question:

The first two questions envision a scenario where a user intends to reproduce a small portion of a motion picture or audiovisual work on a CSS-encrypted DVD for a particular use, such as the use of a portion in a documentary film.

- 1. Can a portion of a motion picture on a DVD protected by CSS be decrypted, leaving the remainder of the motion picture encrypted by CSS?*
- 2. Is it necessary to make a copy of the entire motion picture as a first step in order to make a copy of only a portion of the motion picture?*

Response:

Introduction

It is not necessary to make a copy of an entire motion picture as a first step in order to make a copy of only a portion of the motion picture. Numerous consumer software products allow users to select the exact portion of the motion picture they would like to use without extracting the entire motion picture. The end result of the process is that only the desired clip is stored on a hard drive. Indeed, documentary filmmakers customarily obtain and save only specified clips, and not the entire motion picture.

Furthermore, it is our understanding that on some DVDs protected by CSS, portions of a motion picture can be decrypted, leaving the remainder encrypted. DVDs contain one or more encrypted titles, each of which includes its own “title key” that is used to decrypt the contents of that particular title. The contents are separated into sectors, which we understand can be individually decrypted. Thus, portions of a title, and ultimately a portion of a motion picture, can be decrypted separately.

Discussion

With respect to Question 1, please note that as documentary filmmakers we are not in a position to describe with any authority how Content Scramble System (CSS) technology works on DVDs. Moreover, we have not reverse engineered the CSS encryption technology in preparing our response. Our response is based only on publicly available scholarship about CSS encryption.

It is our understanding, however, that on some DVDs protected by CSS, portions of a motion picture can be decrypted, leaving the remainder encrypted. DVD players include technology that decrypts video data stored on a DVD before the video data is decoded and displayed on a television or monitor.¹ Each DVD contains an encrypted disk key and one or more title keys, which are used in the decryption process.² The number of title keys depends on the number of titles in the DVD, and each title key is used to decrypt video data in the respective title. Titles can comprise an entire motion picture, other content such as special features, or any portions of content that the DVD manufacturer specifies.³ However, just because one has access to a title key does not mean one must decrypt all of the video data in the particular title. Our understanding is that the video data in a title is separated into sectors and that the title key may be used to decrypt sectors individually.⁴ Accordingly, a portion of a title can be decrypted, leaving the remainder of the title, and hence the remainder of the motion picture, encrypted.

With respect to Question 2, in our experience as documentary filmmakers, it is not necessary to make a copy of the entire motion picture as a first step in order to extract only a portion of the motion picture, and documentary filmmakers customarily extract and store only the clip needed. Most consumer software products that permit users to obtain content directly from DVDs allow just a portion of the content to be extracted.⁵ For example, Cinematize 2 and HandBrake allow a user to extract a specific clip between

¹ JIM TAYLOR, EVERYTHING YOU EVER WANTED TO KNOW ABOUT DVD 22-23 (2004).

² MATT BISHOP, COMPUTER SECURITY: ART AND SCIENCE 347 (2002).

³ See JIM TAYLOR, DVD DEMYSTIFIED 9-6 (3d ed. 2005).

⁴ See *id.* at 5-7 to 5-9.

⁵ See, e.g., Handbrake Documentation, <http://trac.handbrake.fr/wiki/TitlesAndChapters> (last visited July 10, 2009).

specified times, regardless of title or chapter, and only the specific excerpt selected by the documentary filmmaker is saved permanently to the hard drive.⁶

Furthermore, the widespread and well-established practice among documentary filmmakers with respect to this type of use is to obtain and store only the clip necessary for use. As Jim Morrisette indicated in his testimony before the Copyright Office,⁷ documentary filmmakers do not want to store large amounts of data if it can be avoided because they are concerned with efficiency, space, and time. Moreover, under the proposed exemption, documentary filmmakers would only be able to obtain material from a DVD after substantial production has commenced on a specific documentary film. This means that by the time the filmmaker is able to exercise the exemption, he or she knows what clips are needed, will likely be paying an editor or production facility by the hour, and will likely be facing enhanced time constraints and budgetary pressures that increase as the filmmaking process advances. Under such conditions, filmmakers are not likely to undertake the extra time and expense necessary to extract and store an entire motion picture rather than just the specific clip needed.

It is important to keep in mind that a DVD remains encrypted once any extraction is complete. If a user wished to extract content from the DVD at a later time, the DVD would have to be decrypted again.

Question:

3. Documentary filmmakers' proposed class of works limited the persons who would be eligible to invoke the exemption to a documentary filmmaker, who is a member of an organization of filmmakers, or is enrolled in a film program or film production course at a post-secondary educational institution. Is it appropriate to limit the persons who would be eligible to invoke the exemption? Why? If you believe it would be appropriate, what criteria could be used?

4. Are there any other appropriate ways to properly tailor the scope of the exemption?

Response:

Introduction

The Register made clear in its October 2008 Notice of Inquiry that, in some cases, it is appropriate to tailor a class of exempted works so that it is neither too narrow nor too broad by limiting the class to a particular set of uses or users.⁸ We proposed the

⁶ See, e.g., Cinematize 2 Features, <http://www.miraizon.com/products/cine2features.html> (last visited July 10, 2009).

⁷ Transcript of May 7 hearing, page 82: ln. 21-22; page 83: ln. 1-4.

⁸ Notice of Inquiry, 73 Fed. Reg. 194, 58073-79 (Oct. 6, 2008).

limitation set forth above with this instruction in mind. If the Register were to determine that Proposed Class 11B must be limited by user, we respectfully submit that our proposed limitation is optimal because it targets the exemption toward a discrete and identifiable group of users who are directly affected by anti-circumvention provisions and who are regularly exposed to information about how to make fair use of copyrighted materials responsibly and how to identify public domain works. If the Register were to determine that the user-based limitation should be further narrowed, we suggest that it be narrowed to apply only to film students and to members of the filmmaker organizations that have proposed this exemption. At the same time, we would also be comfortable if the Register were to determine that the further limitation “who is a member of an organization of filmmakers, or is enrolled in a film program or film production course at a post-secondary educational institution” is not necessary. Even without this language, the class of works is still very narrowly tailored and is limited in several other important ways.

Discussion

The proposed user-based limitation was included in the proposed class set forth in our Initial Comment in December 2008⁹ in order to comport with the criteria set forth by the Register in the October 2008 Notice of Inquiry. The Register directed that while a class must begin with reference to one of the categories of authorship enumerated in § 1201 of the Copyright Act, that class should be further tailored to address the harm caused by § 1201’s anticircumvention prohibitions.¹⁰ The Register further indicated that in some cases, the only appropriate way to further tailor the class is to limit it by reference to particular uses or users, thereby fashioning an exemption that is neither too narrow nor too broad to address the present harm.¹¹

To the extent the Register determines that Proposed Class 11B must be limited by user beyond the term “documentary filmmaker,” we respectfully submit that the proposed limitation is appropriate because it further tailors the class to lessen the burden on fair use and the use of public domain works in documentary film, while leaving the statutory prohibition on circumvention intact for this class in other, non-exempt contexts, as discussed in the 2008 Notice of Inquiry.¹²

By refining the exemption to apply only to documentary filmmakers who are part of an organization of filmmakers or enrolled in a film program or film production course at a post-secondary educational institution, the exemption targets a discrete and identifiable group of users engaged in certain noninfringing uses, namely fair use and the use of public domain works. Our class closely tracks the long-standing community of

⁹ *Comment of Kartemquin Educational Films and the International Documentary Association*, 1 (2008), <http://www.copyright.gov/1201/2008/comments/kartemquin-ida.pdf> (“Initial Comment”).

¹⁰ Notice of Inquiry, 73 Fed. Reg. 194, 58076-77 (Oct. 6, 2008).

¹¹ *Id.*

¹² *Id.*

filmmakers that is being burdened by § 1201; most documentary filmmakers are paying members of established organizations like the International Documentary Association (IDA) and the other proponent organizations identified in our Supplemental Comment.¹³ These groups are the quintessential organizations whose members will use this exemption.

As an added benefit, the limitation identifies a group that has regular access to information about how to make fair use of copyrighted materials and how to identify public domain works. The proponent organizations regularly engage in informational outreach, conduct panels, and develop resources designed to educate documentary filmmakers about how to practice fair use responsibly.¹⁴ In addition, IDA, Independent Feature Project, and the National Alliance for Media Arts and Culture were authoring organizations for the *Documentary Filmmakers' Statement of Best Practices in Fair Use*, which has become a very important and widely used tool for documentary filmmakers seeking to make fair use responsibly.¹⁵

All of the filmmaker organizations that have proposed this exemption are serious about fair use and the use of public domain work. Consequently, if the Register were to determine that the user-based limitation should be further narrowed, we respectfully suggest that it be narrowed to apply only to students enrolled in a film program or film production course at a post-secondary educational institution and to members of the filmmaker organizations that have proposed this exemption. An exemption that has been narrowed in this way would lead to an even more discrete group of eligible users.

At the same time, if the Register were to determine that further limitations on the proposed class according to organization membership or enrollment in a film program are not necessary, we would be comfortable with a class that does not contain those limitations. Without the additional limitations, more filmmakers could utilize the exemption, but little to no risk of increased infringement would result because the exemption's other criteria narrow the class sufficiently. Because Proposed Class 11B requires "substantial production" to have commenced before the exemption can apply, it would cover only those cases in which the filmmaker has defined a specific documentary project and has undertaken substantial steps to develop that project. Furthermore, only filmmakers that make fair use of material or use public domain material in a documentary film will benefit from the exemption. Finally, if a filmmaker, or anyone else for that matter, circumvents the CSS on a DVD for use other than in a documentary film for which substantial production has commenced, or does not make fair use or use a public

¹³ *Responsive Comment of Kartemquin Educational Films, et al.*, 2-3, A1-2, C1-3 (2009), <http://www.copyright.gov/1201/2008/responses/usc-ip-technology-law-clinic-43.pdf> ("Supplemental Comment").

¹⁴ Initial Comment at 10 n.31.

¹⁵ DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES IN FAIR USE (2005), available at http://www.centerforsocialmedia.org/files/pdf/fair_use_final.pdf; Pat Aufderheide & Peter Jaszi, *Fair Use and Best Practices: Surprising Success*, INTELL. PROP. TODAY, October, 2007, at A, available at <http://www.centerforsocialmedia.org/files/pdf/IPTodaySuccess.pdf>.

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domain work, then the rightsholder still has the full range of copyright remedies available.

Please let us know if you have any other questions.

Respectfully submitted,

Gordon Quinn and Jim Morrissette

For

KARTEMQUIN EDUCATIONAL FILMS, INC.
INTERNATIONAL DOCUMENTARY ASSOCIATION
FILM INDEPENDENT
INDEPENDENT FEATURE PROJECT
UNIVERSITY FILM AND VIDEO ASSOCIATION