

September 8, 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: August 21, 2009 questions posed to DVD-related hearing witnesses in the § 1201 Rulemaking Proceeding

Dear Mr. Kasunic:

Thank you for your question of August 21, 2009. We have joined the response submitted by proponents of DVD-related exemptions,<sup>1</sup> and we write to express additional concerns raised by your question that are specific to documentary filmmakers.

We strongly object to any quantitative limitation on an exemption for documentary filmmakers who wish to make fair use of materials on CSS-protected DVDs. Such a limitation would not be practicable and would undermine the goal articulated in your letter of providing users with “guidance in the regulatory text.”

A quantitative restriction on the amount of a material that documentary filmmakers may use under the proposed exemption would in practice mean that many filmmakers could not utilize the exemption or would be forced to constrain their uses in order to fit into it. For example, a filmmaker who wishes to create a documentary about one episode of a television show, a particular director, or a particular motion picture might need to use a large portion of the work in question. As we have established in our earlier submissions, many filmmakers cannot make fair use of materials on DVD without an exemption because they cannot obtain the material from any other source and because alternative methods are impracticable, prohibitively expensive, or both.<sup>2</sup> Therefore, if a quantitative limitation were imposed, some filmmakers would be prevented from utilizing the exemption, or would have to curtail their use in order to qualify for the exemption. For these reasons and for the reasons set forth below, a quantitative limit on the amount of a work used in making a fair use is unworkable. If the Copyright Office is inclined to impose quantitative limits, then setting them at a sufficiently high percentage of the DVD in question could capture the uses made by a majority of filmmakers; we have no way of knowing what that percentage would be, but we understand that for many filmmakers a limit of at least fifty percent or higher would be sufficient. However, even in that

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<sup>1</sup> *Response of Joint Proponents to August 21 Supplemental Questions to DVD-Related Hearing Panelists* (September 8, 2009) (“Proponents’ Joint Response”).

<sup>2</sup> *Comment of Kartemquin Educational Films and the International Documentary Association*, 3, 5-7 (2008), <http://www.copyright.gov/1201/2008/comments/kartemquin-ida.pdf> (“Initial Comment”).

circumstance an unknown number of filmmakers would still not be able to use the exemption, despite having valid fair use claims. We therefore cannot suggest a practicable quantitative limitation for Proposed Class 11B.

We are also deeply concerned that if the proposed exemption were to contain a quantitative limit, it would not provide additional guidance for those who wish to utilize the exemption, but could instead create unintended consequences by undermining the principle that when making fair use, filmmakers must use only what they need and no more. There are, of course, no bright line or quantitative rules regarding the amount of material that may be used for fair use,<sup>3</sup> and when courts consider the “amount and substantiality” factor set forth at 17 U.S.C. § 107(3), they conduct both a quantitative and a qualitative analysis.<sup>4</sup> If the Copyright Office were now to impose a quantitative limitation on this proposed class, it could create the erroneous conception that quantitative benchmarks or ceilings exist that can be used to evaluate fair use claims. In that way, a quantitative restriction could undermine countless hours of seminars, training, and outreach designed to teach filmmakers that there is no bright line and that fair use is highly situational. While we respect the Register’s desire to craft an exemption that helps users “predict[] liability under section 1201(a)(1),” we urge the Register to do so in a way that does not muddy the waters for those seeking to make or evaluate fair use.

Furthermore, a quantitative limitation would have no effect on the § 1201(a)(1)(C) factors that the Librarian must examine such as “the effect of circumvention of technological measures on the market for or value of copyrighted works.”<sup>5</sup> The parties that have opposed our request for an exemption have argued that the proposed exemptions would harm the market for DVDs,<sup>6</sup> but they have not suggested that quantitative restrictions on the amount of decrypted material that may be used would remedy such alleged consequences. In any event, our proposed exemption poses no danger to the market for DVDs.

Although these parties sounded similar warnings in previous rulemaking proceedings,<sup>7</sup> there have been no allegations that the 2006 exemption for film and media studies

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<sup>3</sup> See Copyright Office – FAQ, <http://www.copyright.gov/help/faq/faq-fairuse.html#howmuch> (“there are no legal rules permitting the use of a specific number of words, a certain number of musical notes, or percentage of a work”); Copyright Office – Fair Use, <http://www.copyright.gov/fls/fl102.html> (“There is no specific number of words, lines, or notes that may safely be taken without permission.”).

<sup>4</sup> See, e.g., *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564-65 (1985) (rejecting fair use claim on the basis that material used was an insubstantial portion of the work but “essentially the heart of the book.”); *New Era Publ’n Int’l, ApS v. Carol Publ’g Group*, 904 F.2d 152, 158 (2d Cir. 1990) (“This factor has both a quantitative and a qualitative component”).

<sup>5</sup> 17 U.S.C. § 1201(a)(1)(C)(iv) (2008).

<sup>6</sup> See, e.g., *Reply Comment of Motion Picture Association of America*, 13 (2009), available at <http://www.copyright.gov/1201/2008/responses/mpaa-46.pdf>.

<sup>7</sup> *Reply Comment of Association of American Publishers, et al.*, 30 (2006), available at [http://www.copyright.gov/1201/2006/reply/11metalitz\\_AAP.pdf](http://www.copyright.gov/1201/2006/reply/11metalitz_AAP.pdf). See also *Public Hearing on Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies* 55-56 (April 3, 2006) (statement of Bruce Turnbull, representing the DVD Copy Control Association), available

professors has led to adverse consequences of any kind—even though that exemption does not contain any quantitative restrictions. As she did with that exemption, the Register should recommend that our proposed exemption be granted without such restrictions, and revisit the matter in three years.

We respectfully suggest that the optimal way to achieve predictability and minimize the risk of abuse is not through quantitative restrictions, but by implementing the following measures. First, the Register’s recommendation should simply remind the public that in many circumstances it is not necessary to use the entire work in order to make fair use. Second, the exemption should contain restrictions that focus on the decryption process rather than place arbitrary limits on permissible use. For example, the exemption could require that:

- Any decryption must be conducted solely for use in a documentary film;
- Upon completion of the filmmaking process, the filmmaker must delete all material obtained pursuant to the exemption that was not used in the documentary; and
- No portion of the material obtained from the DVD may be shared with parties who are not part of the production process for the documentary.

If the Register does decide to recommend a quantitative limitation on Proposed Class 11B, we urge it to adopt the suggestions set forth in the Proponents’ Joint Response, as well as the following additional suggestions:

- It is critically important that the final rule state clearly and prominently that any quantitative limits are offered solely for the purpose of predicting liability under § 1201, that such limits operate only in the context of exemptions granted pursuant to 17 U.S.C. § 1201(a)(1), and that such limits are not applicable to any determination of fair use.
- The final rule should also reiterate that the permissible amount of a copyrighted work that may be used under the fair use doctrine depends upon the specific facts in each case and on consideration of several different fair use factors. The final rule should further reiterate that there is no rule setting forth a certain percentage of a work or duration of a clip that may be used under the fair use doctrine.<sup>8</sup>

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at <http://www.copyright.gov/1201/2006/hearings/transcript-april03.pdf>; *Reply Comment of DVD Copy Control Association, Inc.*, 3 (2003), available at <http://www.copyright.gov/1201/2003/reply/028.pdf>.

<sup>8</sup> See Copyright Office – FAQ, <http://www.copyright.gov/help/faq/faq-fairuse.html#howmuch> (“[T]here are no legal rules permitting the use of a specific number of words, a certain number of musical notes, or percentage of a work”); Copyright Office – Fair Use, <http://www.copyright.gov/fls/fl102.html> (“There is no specific number of words, lines, or notes that may safely be taken without permission.”).

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- As suggested in the Proponents' Joint Response, any quantitative restriction must be measured against all of the audiovisual works contained on the DVD, and must treat any durational and percentage metrics disjunctively.

Thank you for providing us with the opportunity to respond to this question. Please let us know if you have any other questions.

Respectfully submitted,

Gordon Quinn and Jim Morrissette  
for Kartemquin Educational Films, Inc.

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)