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Office of the General Counsel
United States Copyright Office

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Re: Compilation extraction – length/percentage of work

1201 Rulemaking Witness:
Carleton Jackson
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Thanks for giving our group a further the chance to respond to the 1201 Rulemaking and your August 21, 2009 questions concerning any limitations of compilation portions and their relationship to Section 1201.

As I testified previously, the Film & Film Studies Initiative is a group of faculty and librarians who use media to teach *visual studies* in the broadest sense and *media literacy* in the narrowest, all within our various subject and interdisciplinary areas of expertise. Historical and contemporary visual content on video is our primary text from which teaching and learning tools are compiled. We recognize video and other visual media as the most powerful of teaching tools and capabilities available.

Most of our group were away for the summer, but via email, phone and webcam, they gave me very long descriptions of how they would answer your question. Each one did it by describing what they would use for their classes this fall semester and how a pre-determined time or percentage would affect their choices and uses of media. The running time for each visual excerpt they would chose is probably significantly shorter than what it took for the faculty member to actually describe it to me.

They asked questions of:

- How long should a Shakespeare soliloquy have to be for an English instructor? How many different scenes from the same performance, or from how many different performances can they compare the same soliloquy?
- Branagh uses a different folio in "Hamlet" than anyone else has used on video and the "to be or not to be" speech is almost 5 minutes longer than any other recorded performance? Does the instructor have to pick a shorter video version?
- How many intercultural interactions in "Crash" could an American studies instructor use, or how long could each clip be? How about comparing them to the intra-cultural examples in the same film?
- In "Mindwalk," where a physicist, a writer and a politician discuss social responsibility, could an economics instructor compile the opening arguments of all three discussants so as to open a class discussion? Could he then reveal the rest of the on-screen discussion later in the same class? How about the next class?
- "Mindwalk" also was filmed on location at Mont Saint Michel, France. Could an architectural history professor find enough different parts of the film to show the Abbey and visually show its physical relationship to the environment without using the dramatic parts, without also watching the clock?

- A business administration professor wants to do clips from documentary and narrative films illustrating issues of race, class and gender to kick-off a writing assignment on diversity training in organizations. Does she need to clip and edit to all the scenes to not go over some pre-determined amount, or can she show the perfect clips, ones that she has used before? Could she add some new ones to the pool?
- A cell biology teacher would like to clip various examples from “Nova” series and present them to her students without narration or sound as part of an exam. The students need to be able to talk about they have learned if they can identify what they are seeing. How many clips can be used on the exam?
- A French instructor wants to use scenes from different movies based on “The Talented Mr. Ripley” to illustrate how different authors and *auteurs* can create mood by the tools (words and/or images) available to them. There are four films based on Patricia Highsmith’s works; she would like to use the best scenes from all, more than one from some. What can she do?

As you might have already surmised, none of these are “film studies” and all are within the realm of the proposed classes for which we testified. The overlying theme to these questions is that my colleagues are talking about a *purpose* of compiling these portions of videos. These purposes do not relate or conform to any pre-defined numerical notion of percentage or duration. As you say in your letter, they do not seek the ability to decrypt or use an entire copyrighted work or even a relatively large percentage of the work. What they do want to do is use their professional judgment to determine “how much” of a work is pertinent to the content and purpose of what each professor needs to show.

From a teaching perspective there is not a limitation, either in terms of duration or percentage, and certainly not a combination, that could be incorporated into teaching definition of an exempted class of works.

There are many factors and conceits that my colleagues cited as examples of why a limit has not worked in the past and would not work now. While this may sound quite a bit like the “film studies” exemption, our group sees it as even more useful for teachers of culture, especially visual culture. We would not even suggest different maximum limitations for different kinds of uses whether broadly applied to narrative works or documentaries of art, architecture, engineering, etc.

If one is teaching a subject where understanding of the excerpted “piece” itself is required, then instructors have a responsibility to the filmmakers, authors and collaborators to present those portions of their works in a way which makes their filmic moments authentic. Each documentary and narrative filmmaker has already predetermined (or fought for) what duration and percentage of a portion is *right* for them in the editing room. The students need to see those scenes in an intellectually *complete* way. This might mean viewing the whole conversation, speech, soliloquy, dance, scene, demonstrated process or historical event as intended. But if an instructor’s teaching purpose requires some withholding of information or adapted presentation then it should be within that professor’s prerogative to do so.

It should also be within a professor’s prerogative to use videos in combination in such a way that the total improves on what could be only partially represented with one video. This is often the case with comparisons of representations of people, places, and historical times across video.

In reality video users want to do both: compilations long and short, sometimes using full scenes and sometimes excerpts of many for analysis. Neither method easily allows a pre-determination of exact content amount. But like art, the professor knows what they like and how to use it. With the previous testimony record in mind, our group cannot divine how any exemption could be tailored in terms of duration or percentage for all classes.

If it can't be done with numbers, it can be done in terms of the professionalism of the teachers. They request an exemption that allows them to be experts in what they teach. Otherwise, the benefits of compilation go back to what was testified before:

- The ability to compile would allow some flexibility in the class and s/he would not have to script out every media moment of the class presentation.
- The instructor would only need to use those excerpts that directly answer or demonstrate specific questions
- This increased interactivity between teacher and student can be passed on as "best practices" to new faculty and teaching assistants as needed.

The question of proportion and duration creates an inherent conflict in forcing us to pre-determine what might be "best" information. We want to show our students that visual element that is "best" to teach the point being made, or gives the student the enough intellectual and visual data to support the creation information. Which again brings us back to the question of why should our tools be *intellectually* and *visually* different when using a DVD than when using film and tape? DVD was created to make material access more available, more flexible and more audio-visually exact. If common practice allows us to show the video portions live, why not allow portions to be compiled that show exactly what needs to be shown.

As regulators you are of course inclined to believe that more specific limitations are advisable in order to predicting liability under section 1201(a)(1). You wish to provide sufficient guidance in the regulatory text.

It is understood that at times a complete use of a video is appropriate for teaching. If so as part of "fair use," maybe the practical guide to the question of amount can be connected by law to the same "fair use" factors. Certainly these two can be applied in a common sense way:

- *The purpose and character of the use* of the exemption can be considered as it applies to each "clip" for the teaching purposes of the instructors. All teachers can tell you exactly what works for what they need to do.
- *The amount and substantiality of the portion used in relation to the copyrighted work as a whole* can be used to when determining whether or not the entire film can be shown, why not a smaller section (or sections) of the film? If the entire film is permitted without duration limits, why would a part of the film need limits?

When the University of Maryland Film and Film Studies Initiative group was queried for this question, each of them expressed a love to talk to you directly about what they do and why there would not be a scenario for time and amount that could fit most of their uses. They already know exactly what they would like to do. When new to them films come to campus, it doesn't take them long to know what could be part of their curricula. If you were to contact me again, all of my colleagues are ready to

work with the Register to detail these answers or answer any follow-up questions in this area.

Until then, we look forward to a resolution that that will allow us to show less "in class" but still use details of our visual texts and, alternatively, create teaching tools compiled from those texts. Our students and universities require that we use the best technology to enable reasonable and precise content delivery with optimal student-teacher interactivity.

We support expansion of the circumvention exemptions and urge that there not be pre-determined percentages or duration limits. We believe a professional teacher can determine exactly what part of a video illustrates what s/he wants to teach in a particular learning moment. We believe that we can do our jobs better with this exemption. We are not trying to be filmmakers or mash-up artists or derivative distributors in this discussion. We are in a way, trying to actually use *less* video to create *more* time in class for teaching.

Thanks again for the opportunity to participate in this important process.

Carleton Jackson

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