

2 September 2009

Dear Mr. Kasunic:

Thank you for the opportunity to respond to your recent query regarding the issue of portion limits for excerpted DVD clips.

A central point made in our May 2009 testimony in Palo Alto concerned the DMCA's negative impact on fair use. The use of a limited number of short, judiciously chosen video clips in face-to-face classroom teaching has become almost universal practice in teaching across the disciplinary board. The DMCA's general prohibitions against circumventing DVD encryption for these purposes has seriously hampered both our work as teachers and the experience of students as learners. While we are heartened by the willingness of the Library of Congress and the Copyright office to seriously consider arguments for allowing academic institutions broader access to and use of CSS-protected DVDs for classroom teaching, the notion of prescribing specific quantities and lengths of clips is very troubling to us.

The current tests of fair use are intentionally broad and loose in defining the allowable extent, nature, and uses of copyrighted content. It is our strong sense that in the vast majority of instances, uses of video and DVD clips in the classroom comfortably pass these tests: such uses typically involve the reasonable, non-commercial use of a limited number of short clips in a specific classroom to highlight, illustrate, or reinforce key points made in lecture. As much as legal considerations, classroom logistics, limits on faculty time and resources, and, in some cases, technological considerations, are also common limiting factors in the number and duration of clips used. The suggestion that has been put forward that quantities and duration of clips should be specifically defined would, we feel, undermine the basic principles of fair use. Again, such conditions would represent a significant and unacceptable diminishment of the broad fair use rights enjoyed during the predominance of earlier video technologies, and before the passing of DMCA.

More practically, the proposal to quantify acceptable portions of excerpted clips would, we feel, create an unworkably baroque and confusing set of fair use "tiers" in which the current broad tests outlined in 17 U.S.C. § 107 exist side by side with more explicitly quantified rules and guidelines for specific media. It is also unclear how a specific quantity and duration proscriptions would apply. Would the 3-minute limit apply to an instructor? A course? The institution? Suppose an instructor uses a 2 minute clip from "The 400 Blows" in one class; would that preclude using a different 90-second clip from the same film in that same class? Could the second clip be used in a second class taught by the same instructor? What

if the media center at the institution created a 2-minute clip for one instructor; would that mean it could not create a second clip from that DVD for a second instructor?

A decade ago, the American Library Association and other notable academic and creative organizations firmly declined to support the Fair Use Guidelines for Educational Multimedia developed during the course of the CONFU process. Objections stemmed largely from the overly quantified nature of the guidelines, particularly sections of the document dealing with portion limitations. We strongly object to the current proposals for many of the same reasons and many of the same concerns for preserving as broad fair use rights as possible.

Please do not hesitate to contact us if further input is required or if we can clarify the above.

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