

Questions to Panelists on DVD-related Hearing Panels:

The Copyright Office is still undergoing review and analysis of the record in the 2009 Anticircumvention Rulemaking and the Register has not yet reached any conclusions on proposals relating to CSS-protected DVDs. For purposes of the question below, please assume that the Register has decided to recommend an exemption to the prohibition for proposed classes 4A through 4H, 11A and 11B, or some portion thereof, relating to motion pictures on CSS-protected DVDs.

A number of the proposals for exemptions for DVDs included, within the descriptions of their proposed classes, a condition that the use be for the purpose of compiling *portions* of motion pictures. Moreover, in all of the evidence introduced, no proponent sought the ability to decrypt or use an entire copyrighted motion picture, or even a relatively large percentage of the work. The Register is therefore interested in obtaining information and your views on whether there is there some way to qualify or more clearly delineate how large a “portion” may be, at least in terms of its outer limits.

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?

In general, the proponents of the subject exemptions have argued that the uses for which they seek an exemption constitute fair use. While we understand 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 the other fair use factors, the record suggests that in the vast majority of cases, only a very small portion or percentage of the original work is needed in order to meet the needs of educators, documentary filmmakers, or noncommercial, transformative users. Moreover, based on the examples presented to us, it appears that in practice only relatively small portions of copyrighted works are used by such users. With the record in mind, how could the exemption be tailored in terms of duration or percentage for your respective classes?

We recognize that opponents of an exemption may strongly disagree with the premise of this hypothetical, and that proponents of an exemption may strongly object to any quantitative limits. If that is the case, you may of course present to us your arguments on those issues. However, in responding to this query you should assume that if the Register recommends any exemptions in this area, she will recommend that the exempted class(es) include a quantitative limitation on the amount of the original copyrighted work that may be included in the final product of the person taking advantage of the exemption. Such an limitation would probably be in the following form:

... the portions of any single work used shall be, collectively, no greater than x minutes in duration and represent no greater than y percent of the duration of that work....

You may suggest maximum limitations either across the board (*i.e.*, a single set of limitations for all types of uses) or, if you believe it is more appropriate, you may suggest different maximum limitations for different kinds of uses (*e.g.*, hypothetically the reasonable maximum for documentary filmmakers may differ from the reasonable maximum for classroom teachers). Your responses should take into account not only what you believe are reasonable amounts from the perspective of fair use, but also what you understand to be the general custom and practice among documentary filmmakers, classroom teachers, etc.

Again, we recognize that for purposes of fair use, what may be a reasonable duration in one case will not necessarily be a reasonable duration in another case, we are not proposing to codify the fair use doctrine in this rulemaking proceeding. However, this is a regulatory proceeding and for the purposes of promulgating a regulation governing exemptions from the prohibition on circumvention, we are inclined to believe that more specific limitations are advisable so that, at least for purposes of predicting liability under section 1201(a)(1), users will find sufficient guidance in the regulatory text.

Please submit your responses no later than September 8. Responses should be sent in the form of attachments to emails addressed to rkas@loc.gov.