

Second Response to U.S. Copyright Office Post-Hearing Questions

Submitted by

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Thank you for the opportunity to respond to your question dated August 21, 2009. In summary, that question is: "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 addition to supporting the response submitted by joint proponents of the DVD-related exemption, I wish to emphasize the following points.

1. If the copyright office decides to limit an exemption based on quantities of use such as time and/or percentage limits, as a matter of policy it will point users in the wrong direction. Instead of learning and understanding fair use, users will be encouraged to focus on numbers and may unjustifiably feel "legally" safe in doing so. Users will be less motivated to gain knowledge and understanding of fair use under section 107 than they might otherwise.
2. There is no precedent in either Title 17 or case law for an explicitly stated quantity-based limitation (i.e. a numeral) on a use of copyrighted materials in the context of fair use under section 107. To the contrary, both the statute and case law point in the opposite direction, to an assessment of fair use based on a context-based approach rather than an approach involving counting. If the copyright office decides to bring in a numerical measure to the assessment of use as legal or illegal, the copyright office will subsequently be in disharmony with the spirit of both case law and the statute.
3. If the copyright office is compelled to limit an exemption further than by category of users (teachers/students/educators) and type of media (CSS encrypted DVDs), it might consider doing so by requiring a good faith effort to teach, understand, and/or be within the requirements of fair use under section 107. Such a condition emphasizes provisions already in the statute as well as the validity of existing case law wherein analysis under the four factors is regularly conducted via the judicial opinion (See *Bill Graham Archives v. Dorling Kindersley Limited, et al.* 2006, USCA, 2nd Cir. for a recent example of a context-based four factor fair use analysis). A quick search of Title 17 shows that "good faith" appears approximately 24 times in the statute, and several times in the DMCA itself. A further precedent within Title 17 for limiting the exemption with a more context-based approach rather than a numerical approach is this statutory language with respect to assessing damages: "The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords"(Section 503[C][2]). Notice that this section of the statute limiting statutory damages uses a context-based assessment not a numerical one. It **does not** say: "The court shall remit statutory damages in any case where an infringer used 10% or less of a copyrighted work." Such a provision would make user intent as well as user knowledge of fair use completely irrelevant and would be in direct conflict with the spirit of Title 17.
4. I want to emphasize that the statute provides precedent for extending the exemption to students as well as teachers, i.e. "work by instructors or pupils" (Section 110[1]).

Thank you for reviewing my response.