

**BEFORE THE COPYRIGHT OFFICE
LIBRARY OF CONGRESS**

**IN THE MATTER OF
EXEMPTION TO THE PROHIBITION OF CIRCUMVENTION OF
COPYRIGHT PROTECTION SYSTEMS FOR ACCESS CONTROL
TECHNOLOGIES**

Docket No. RM 2008-8

**COMMENTS OF THE LIBRARY COPYRIGHT ALLIANCE AND
THE MUSIC LIBRARY ASSOCIATION**

Pursuant to the Notice of Inquiry (NOI) published by the Copyright Office in the *Federal Register* on October 6, 2008, the Library Copyright Alliance (LCA) and the Music Library Association (MLA) submit the following comments on exemptions that the Library of Congress should grant pursuant to 17 U.S.C. § 1201(a)(1)(C). The LCA consists of five major library associations—the American Association of Law Libraries, the American Library Association, the Association of Research Libraries, the Medical Library Association, and the Special Libraries Association. These five associations collectively represent over 139,000 libraries in the United States employing 350,000 librarians and other personnel. These five associations cooperate in the LCA to address copyright issues that have a significant effect on the information services libraries provide to their users. The LCA’s mission is to foster global access to information for creative, research, and educational uses. The MLA is the professional association for music libraries and librarianship in the United States. The MLA’s purpose is to promote the establishment, growth, and use of music libraries; to encourage the collection of music and music literature in libraries; to increase efficiency in music library service and administration; and to promote the profession of music librarianship.

I. Class of Works

Audiovisual works included in a library of a college or university, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by professors.

II. Summary of Argument

In the previous Section 1201 rulemaking, the Library of Congress granted an exemption for “[a]udiovisual works included in the educational library of a college or university’s film or media studies department, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by media studies or film professors.” This exemption should now be broadened in two important related ways. First, it should apply to audiovisual works included in any college or university library, not just the library of the media studies department. Second, the exemption should apply to classroom uses by instructors in all subjects, not just media studies or film professors.

III. Argument

In the final rule issued by the Copyright Office in the 2006 rulemaking, the Office concluded that the proponents of the clip compilation exemption had

demonstrated that the reproduction and public performance of short portions of motion pictures or other audiovisual works in the course of face-to-face teaching activities of a film or media studies course would generally constitute a noninfringing use. Moreover, the record did not reveal any alternative means to meet the pedagogical needs of the professors. The professors demonstrated that the encrypted DVD versions of motion pictures often are of higher quality than copies in other available formats and contain attributes that are extremely important to teaching about film for a number of reasons. For example, the DVD version of a motion picture can preserve the original color balance and aspect ratio of older motion pictures when other available alternatives fail to do so.

71 Fed. Reg. 68472 (November 27, 2006).

These findings apply with equal force to the use of film clips in other courses of study. The reproduction and public performance of short portions of motion pictures or other audiovisual works during the face-to-face teaching activities of a college course would generally constitute a noninfringing use under 17 U.S.C. §§ 107 and 110(1). As discussed below in much greater detail, film clips can meet significant pedagogical objectives in a wide variety of classes. The films from which instructors derive these clips are available only on DVDs using CSS (Content Scrambling System), and CSS prevents the efficient use of the DVDs in the classroom. If a professor wants to show clips of several different motion pictures in one class, she would need to advance each film manually to the precise location she wishes to display, wasting valuable class time. Moreover, many DVDs contain navigation restrictions that force viewers to watch advertisements or copyright warnings, consuming more class time. Additionally, the teacher cannot show any part of a foreign film protected by regional coding.

Furthermore, high quality clips enabled by the circumvention of CSS – rather than low quality clips made by camcording -- are necessary outside of the media studies context. Sound quality, for example, is critical in language classes to ensure that students can understand the dialogue and detect dialectal differences. Music and theatre classes need high sound quality to reflect correctly the tone of musical instruments or the inflection of the human voice. High image quality enables students to see the nuances of facial expressions and hand gestures. These subtle non-verbal forms of communication may convey the essential point of a clip used in psychology, sociology, or literature classes.

The existing exemption's application only to audiovisual works in a university's media studies department library is unduly narrow. Some universities do not have media studies departments, and some media studies departments do not have their own libraries. And even if a university has a media studies department and the department has a library, that library's collection might not include a needed film that another library on campus possesses. This limitation to media studies department libraries will become even more problematic if the exemption is broadened to apply to classroom use in all subjects. Thus, the exemption should apply to audiovisual works in all of a university's libraries.

Although it is unlawful, DeCSS, a program that decrypts CSS without the authorization of the CSS consortium, is widely available and anyone who wants to make unlawful copies of protected DVDs can do so with little trouble. Nonetheless, CSS places enough of a technical barrier to prevent the vast majority of consumers from copying the DVDs they purchase or rent from the video store. The existing exemption for film clip compilations has not removed this technical barrier, nor will the modest expansion proposed here. It will not make DeCSS any more prevalent, nor will it encourage more consumers to use DeCSS. Instead, the proposed exemption will simply permit college professors to prepare lawfully the clip compilations necessary for them to teach effectively.

IV. Facts

We requested that librarians around the country collect examples of the kinds of classroom uses of film clips that faculty would make if the Library of Congress expanded the existing exemption. We set forth below excerpts of some of the responses we

received. The DMCA currently, and for the next three years, will adversely affect the following non-infringing uses:

Examples from Dr. Mark Kaiser, Associate Director, Berkeley Language Center, U.C. Berkeley

Film has long been an important source material for the teaching of foreign languages. While film is in itself a cultural artifact and is studied as such in foreign language classes, it also is a representation, expressed through language, of the culture and the social issues facing society at any given time. The ability to model language use, display cultural artifacts, and portray social values makes film an invaluable tool for teaching foreign languages and foreign cultures.

For years instructors have brought VHS tape, queued to a specific scene, into the classroom for instructional purposes. Now, VHS tape is often no longer available and is not produced for the most recent films. With the advent of DVDs, the showing of clips has been reduced dramatically, as instructors must deal with scratched DVDs, regional encoding on DVDs mismatched to players, and lost class time due to queuing of DVDs to a specific scene.

The ability of instructors to create their own clips from films, on the other hand, would greatly enhance language teaching. Consider these examples:

- A Turkish instructor would take a clip from a film where the Turkish school pledge is recited by school children. This would lead to a discussion of the pledge, the values expressed, and why they pledge to Ataturk (founder of the secular Turkish state). The role of the pledge in fostering social cohesion would be discussed.

- French students would be shown a clip from a film where a number of French proverbs are given, one after the other, with one character starting the proverb and another character ending it. The clip would be played again, with pauses, and the students would be asked to finish each proverb during the pauses. The class continues to discuss the role of proverbs in language and popular culture.
- A Russian instructor would have his students create the subtitles in Russian and in English for a short piece of dialog. The exercise would require good listening skills to pick out the Russian words, and a good knowledge of grammar to create the text. When the students create their English subtitles, they would discuss the numerous difficulties encountered: capturing the humor, the puns, the cultural values. They then would compare their subtitles with the ones created for the film. Finally, students would play the roles of actors and act out the scene.
- Students in a Persian class would watch a clip from a film in which a group of girls dresses as boys in order to attend a soccer game. This would lead to a class discussion of gender roles in contemporary Iranian society.
- Students in an Italian class watch a clip depicting lower socio-economic classes and discuss how the language used by the characters reflects the class status and educational background.

What these examples share, is the use of film to engage students in an exploration of the ways in which individuals make meaning through language and to compare and contrast the values of foreign cultures with those of our own. Any text can be used to this end, but film has the advantage of engaging both audio and visual modes of meaning-making.

Examples from Gary Handman, Director, Media Resources Center, Moffitt Library, U.C. Berkeley

Professor V.R. wants to use clips from the documentaries *Race: The Power of An Illusion* and *The Return of Sara Baartman* to discuss changing views and notions about race in his sociology class.

Professor R.H. wants to use clips from Abel Gance's film *Napoleon* in his Western European history class to kick off discussions about Napoleonic politics and cultural change.

Professor J.S. wants to use clips from 1940s war movies and post-Vietnam war movies in his Peace and Conflict Studies classes to discuss how Hollywood has shaped the mythology of war.

Professor H.L. wants to use clips from documentaries such as *The Thin Blue Line* and feature films such as *The Verdict* in her Law School classes to show how both fictional and now fictional representations of the legal system shape popular conceptions of jurisprudence and the law.

Professor J.J. wants to use clips from commercially produced dance performance DVDs in her Dance History courses to highlight the work of notable choreographers and dancers.

Professor A.W. wants to use clips of commercially distributed avant-garde performance works on DVD in her Art Practice courses.

Professor V.R. wants to use clips from Hollywood films about scientists in his Environmental Science, Policy, and Management classes to show the changing popular conceptions of science and scientists.

Professor D.S. in the French Department wants to use clips from French films of the 1940s and 1950s and from documentary works in her course on France and the Occupation.

Professor B.W. wants to use segments of ethnographic films along with fiction films that feature ethnic music in her ethnomusicology courses.

Example from Lisa Little, Lecturer, Department of Slavic Languages and Literatures, U.C. Berkeley

Two-to-three minute clips can be used in a language class to illustrate cultural and grammatical topics, speech acts, and gestures. A very short clip from *Burnt by the Sun*, for example, could be used to prompt a discussion of about fairy tale conventions in Russian. In the clip, Mitya starts telling Nadia a "fairy tale" (actually the story about himself and her mother), and once he starts, she knows exactly what is to come and begins finishing many of his sentences for him. This gives the students a much different feel for these phrases than when they just read them.

Examples from Erin Murphy, Assistant Professor of Law, U.C. Berkeley School of Law (Boalt Hall)

Clips are helpful in the teaching of criminal law and crime and technology:

- A clip from the beginning of the movie *Magnolia*, which shows an unlikely sequence of events in which a suicide turns into a homicide, in order to teach the doctrine of "causation" in criminal law. It would be a very good way to get the students to think about unpacking events moment by moment and asking causation questions, which is very hard with just the written word.
- A clip from a DVD of the show *Sex and the City*, which helps complicate the discussion of force and consent when the subject of Rape is taught (it is a clip in

which the female protagonist repeatedly rejects the male hero, but he pushes himself on her -- and it is meant to be romantic). Rape is a terribly hard topic to teach, and in which the discussion can easily just fall into simplistic "no means no" type statements that do not really appreciate the subtle range of human behavior (especially in the date rape context). It is much easier for the students to talk about the issues having seen a clip that very realistically depicts a "romantic moment," that far exceeds a "no means no" standard, than it is to contemplate it in the abstract.

- Clips from DVDs of shows like *CSI* could illustrate points about how images of crime and technology are depicted in society, and issues around the "CSI effect."
- Clips of a police officer solving a problem creatively, rather than by-the-book, could be used to show how criminal procedure rules can constrain the exercise of officer discretion in a way that may not always be desirable. It could help spur a more nuanced conversation about these issues.

Clips are increasingly indispensable to effective teaching. They have a way of immediately engaging students, which makes discussion more interesting. But equally as important, they have a way of bringing "real life" and its complications back into the classroom -- so that rather than discuss law and the desirability of certain rules in a vacuum in which we assume everyone is perfect, the reality of how fuzzy and conflicted humans can be comes back in.

Examples from Dr. Michael O'Hare, Professor of Public Policy, Goldman School of Public Policy, U.C. Berkeley

Film clips can be used in courses in arts and cultural policy, public management, and quantitative methods for policy analysis. Clips from film versions of Wagner's *Die*

Meistersinger offer both an implicit theory of the relationship between the arts and society and examples of different kinds of leadership. The opening coin tossing scene from *Rosencrantz and Guildenstern are Dead* provides an introduction to probability. In the arts policy course, an interview with Dizzy Gillespie in *Routes of Rhythm* can be used in a unit on intercultural exchange, and as well as scenes from various other works.

Examples from Dr. Richard Luce, Vice Provost & Director of Libraries, Emory University

A faculty member in English wants to produce a clip compilation to illustrate differences in performance and staging between 12 film and stage versions of the same scene from Shakespeare's *Hamlet*. Almost all of these clips come from commercial, encrypted DVDs. The current restrictions present the following problems:

- For each DVD he shows in class, he must wait for the forced FBI warnings to pass and then navigate to the correct scene.
- Unlike VHS tapes, DVDs cannot be easily cued up beforehand as a time-saving measure. This cuts into valuable instruction time.
- Many films are on DVD only, or are offered in their original aspect ratio only on DVD. The VHS version may not preserve all the visual information within a scene, especially if a film was shot in Cinemascope and presented full frame on VHS. Thus a VHS tape is not an adequate substitute for DVD in terms of making clips.

A faculty member in Physics would like to produce a clip compilation from DVDs in the library to illustrate several laws of physics. Almost all of the clips come from DVDs with TPM.

Examples from Judy Shoaf, Director, University of Florida Language Learning Center

In a language lab class, it would be possible to present a short excerpt for listening/viewing in such a way that each student, seated at a computer, can play and replay the clip to listen to the audio while obtaining from it visual cues as to what is being said. The exercise involved may be transcription (or a fill-in-the-blanks for more elementary students), or trying to write subtitles in a course on translation.

A history or literature course has one or two classes that are devoted to presenting briefly the way popular culture interprets a period, character, or author being discussed. The instructor has located particular bits of several films which provide a good contrast with each other and which make a particular point. (How is Frankenstein's predicament interpreted by various film-makers? Why do scriptwriters think Jane Eyre will not agree to be Rochester's mistress in the 1950s, the 1970s, the 1990s? Who are the people King Arthur is supposed to have ruled, and what did he hope to accomplish, according to Hollywood in different eras, British TV in the 1970s, and French TV last year? What did science fiction set designers believe urban transportation would look like in the 1920s and 1930s? What did Asian protagonists/antagonists look like and act like according to film-makers of a particular period?) Such clip compilations serve a similar purpose to those used in film studies, though they direct the attention to different aspects of the varied films. The compilation is necessary unless the professor is going to lecture while groping among discs and cassettes and equipment in the dark. Otherwise she is confined to one DVD cued up before class.

Examples from Susan Albrecht, Acquisitions Manager, Lilly Library, Wabash College, Crawfordsville, IN

A theater or English professor teaches a class on a particular Shakespearean play -
- *MacBeth* or *Hamlet*, for example – for which having clips of the same scene from a
number of productions is highly useful. Similarly, a professor teaching a Freshman
Tutorial on Dickens’s *Great Expectations* would want to show clips from a variety of
film interpretations of that story. In music courses, the instructor might want to compare
and contrast versions of the performance of an aria in an opera.

Respectfully submitted,

American Association of Law Libraries
American Library Association
Association of Research Libraries
Medical Library Association
Music Library Association
Special Libraries Association

Jonathan Band
Jonathan Band PLLC
21 Dupont Circle NW
8th Floor
Washington, D.C., 20036
Counsel to the Library Copyright Alliance

December 2, 2008