

Before
The U.S. Copyright Office
Library of Congress

In the Matter of)
)
Exemption to Prohibition on) Docket No. RM 2008-8
Circumvention of Copyright Protection Systems)
For Access Control Technologies)

REPLY COMMENT IN SUPPORT OF CERTAIN REQUESTED EXEMPTIONS

SUBMITTED ON BEHALF OF
THE COPYRIGHT LICENSING OFFICE
BRIGHAM YOUNG UNIVERSITY

By Carl M. Johnson and Sean J. Holder

Class of Works

We are writing in support of proposed class 4B:

Audiovisual works used by instructors at accredited colleges or universities to create compilations of short portions of motion pictures for use in the course of face-to-face teaching activities.

Argument Summary

We support this class and affirm that 17 U.S.C. § 1201 has and will continue to have an adverse affect on college and university instructors in compiling short portions of motion pictures for use in the course of face-to-face teaching activities.

The purpose of this reply comment is to further clarify that Section 1201 adversely impacts more than film and media studies professors because they are no longer the only class of users whose pedagogical needs are inextricably tied to DVDs.

The Library of Congress and the Register of Copyrights (“LOC”) justified the current (2006) exemption for film and media studies professors because the physical medium of a DVD was itself pedagogically necessary. While other instructors also find it pedagogically necessary to teach using audiovisual works, they have not been adversely impacted in previous years because they could teach from alternative mediums, including VHS. The recent demise of VHS, however, has caused Section 1201 to adversely affect these instructors. Instructors other than film and media studies professors now face a substantially adverse impact because they cannot make non-infringing uses, i.e., making compilations of short excerpts from DVDs—the current medium of nearly all available audiovisual materials.

Legal Argument

17 U.S.C. § 1201 adversely impacts university and college instructors by restricting their ability to make non-infringing copies for use in their teaching. In 2006, the LOC reasoned that when an instructor’s pedagogical needs can only be satisfied through technologically protected media, such as DVDs, the LOC is justified in making an exemption to Section 1201 that allows instructors to circumvent such protection for educational purposes. Originally, this reasoning may have only applied to film studies instructors, but now, with the demise of other alternatives, instructors have become pedagogically dependent on a technologically protected medium (i.e. DVDs), which they are unable to access, thus preventing them from making non-infringing uses.

This reply comment will first analyze the justifications for the 2006 exemption and show they currently justify a broader class of instructors. Then, it will demonstrate that any potential market harms are outweighed by the adverse impact towards instructors’ need for non-infringing uses.

In 2006, the LOC permitted an exemption for film studies instructors because of a pedagogical need to teach audiovisual clips through high quality DVDs. This exemption reads as follows:

Audiovisual 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.

37 C.F.R § 201.40(b)(1) (2008). The LOC justified its exemption by reason of film and media studies professors' pedagogical necessity for having "*high quality content* in a reasonably efficient manner." Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68,472, 68,474 (Nov. 27, 2006) (codified as 37 C.F.R. pt. 201) (emphasis added). Additionally, the LOC stated, "The record did not reveal any alternative means to meet the pedagogical needs of the professor." *Id.* There was no alternative for film and media studies professors because "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." *Id.* The LOC further clarified its reasoning by illustration of the physical qualities of the medium—DVD's exclusive ability to "preserve color balance and aspect ratio." *Id.* Thus, the key justification was the connection between DVD as a physical medium and film and media studies professors' need to teach through the physical capabilities of that medium. This distinction explains why film and media studies professors were given the exemption—they were the only ones whose pedagogy was inextricably tied to the *high quality* of the medium.

Despite the LOC's reasoning in 2006, film and media studies professors are no longer the only instructors inextricably tied to the DVD for pedagogical purposes. Kevin Smith of Duke University, along with others, made a strong case for the pedagogical necessity of other instructors to use compiled film clips from DVDs. We would like to clarify those instructors outside of film and media studies, however, are adversely impacted because of a new pedagogical disadvantage—a lack of alternatives to DVDs in accessing and copying short excerpts of audiovisual works for teaching in the classroom.

Instructors outside of film and media studies have become adversely impacted because the demise of VHS now prevents them from making non-infringing uses, in support of teaching information critical to their area of expertise. University instructors have a pedagogical necessity to teach from audiovisual works—the abundance of evidence submitted on this point makes it absolutely clear. Instructors must teach from audiovisual works on DVDs because VHS tapes are no longer being produced. Comment by Renee Hobbs, fn. 42 (2009 Comment # 4C & 4D). Additionally, other potential sources such as YouTube are likely to provide a fairly narrow range, potentially non-authorized, or extremely low quality source of clips unfruitful for discussion at a university level. Since most DVD's are encrypted medium, Section 1201 prevents instructors from compiling film clips for non-infringing teaching purposes. Thus, the demise of VHS dissolves the distinction between film and media studies and other specific subject areas because the pedagogical need for audiovisual works has become inseparably connected to and only satisfied through use of technologically protected DVDs.

In the prior rulemaking (2006), the LOC acknowledges in an educational fair use context, the balance of harm is in favor of an exemption when there are no alternatives. Using

audiovisual works to teach in university classroom setting is clearly a non-infringing use. In justifying the 2006 exemptions, the LOC stated that using film clips in “face-to-face teaching activities...would generally constitute a non-infringing use.” Exemption to Prohibition on Circumvention, 71 Fed. Reg. at 68,474. The other possible factor mentioned by the LOC in defeating a fair use justification was the existence of alternatives. See Id. Since there are no other alternatives today, the compiling of DVD clips for teaching at the university level is an appropriate exemption. The LOC further indicated that, even in the case of alternatives, a strong educational purpose by itself can justify an exemption. Id. at 68,478 (rejecting an exemption for Linux users seeking DVD use for entertainment purposes but implying that even if there were alternatives, an exemption might be justified for criticism, scholarship, education or other fair use purposes). Thus, the LOC acknowledges that the type of use in question is appropriate for an exemption.

Allowing an exemption for university and college instructors will not have an adverse impact on any potential market for film clips. We re-iterate Mr. Smith’s comments, in which he stated, “no legitimate market for the original films would be harmed by the proposed exception.” Comment by Kevin L. Smith, Duke University, 4 (2009 Comment # 4B). It’s clear that instructors would be exercising a fair use right using clips from legally obtained DVDs. Any potential licensing market for non-infringing educational audiovisual compilations would not only undermine fair use doctrine, but it would decrease the market for DVDs. Instructors would not be willing to pay as much for a two-minute segment of a film than they would for an entire DVD. Furthermore, such a market does not now exist and will not likely exist. A possible alternative for companies to generate additional income from instructors would be to individually license each performance of the work, but, as Mr. Smith notes, the right of public performance in

this context is specifically enumerated as non-infringing by 17 U.S.C. § 110(1). Id. Thus, there is no potential market to harm, and any such creation of a market would undermine the core principles of the fair use doctrine.

Factual Argument

In addition to the examples submitted by Smith (4B), and what the other submitters (4A, 4C-H) have furnished, here are additional typical situations that occur at Brigham Young University.

Some of the law school faculty would like to use film clips to illustrate their teaching. For example, the "corset scene" from *The Titanic* can be used in an IP seminar to illustrate the discussion of *Egbert v. Lippmann* (1881) on the public use bar to patentability. One of our professors would like to be able to use clips from a documentary about the Korematsu case (Japanese internment) to enhance the discussion of due process in his *Structures of the Constitution* course. The professor teaching Immigration Law would like to use clips from a variety of sources to illustrate various aspects of immigration procedure covered in her lectures. Clips from a number of popular TV shows and movies (*To Kill a Mockingbird*, *Law and Order*, *My Cousin Vinny*, *Perry Mason*) can be used to illustrate the various aspects of criminal and civil procedure. Such use is explicitly authorized in Sections 110(1) and (2) of the Copyright Act. The BYU Law Library has purchased and will continue to purchase copies of desired items for classroom use.

Many faculty/staff from other campus academic disciplines experience similar difficulties and regularly seek clarification when describing the adverse affect on their teaching effectiveness by preventing non-infringing uses of film clips contained on protected DVD's.

Having the legal authority to by-pass copy protection technologies in order to extract the desired clips from one or more DVDs so that they can be shown in face-to-face teaching activities would significantly enhance the teaching and learning experience.

In conclusion, we support the exemption proposed by Mr. Kevin L. Smith (4B) and further recommend the LOC grant an exemption to instructors to prevent further adverse impact upon the exercise of their opportunity for the specific non-infringing use of creating compilations of short portions of motion pictures for use in the course of face-to-face teaching activities.

Respectfully Submitted,
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