

Comments from:

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Comments in support of Kartemquin Educational Films, Inc. and the International Documentary Association, which seeks as a proposed class or classes of copyrighted work(s) to be exempted (#11B): "Motion pictures and other audiovisual works in the form of Digital Versatile Discs (DVDs) that are not generally available commercially to the public in a DVD form not protected by Content Scramble System technology when a documentary filmmaker, who is a member of an organization of filmmakers, or is enrolled in a film program or film production course at a post-secondary educational institution, is accessing material for use in a specific documentary film for which substantial production has commenced, where the material is in the public domain or will be used in compliance with the doctrine of fair use as defined by federal case law and 17 U.S.C. § 107. specifically."

Kartemquin Educational Films, Inc. and the International Documentary Association has argued for the right to circumvent CSS technology when extracting public domain material from DVDs. I agree this should be permitted, provided that the right is not abused.

It is argued that when a work is in the public domain and it can be obtained on a DVD that has CSS encryption, it should be legal for creators of derivative works to decrypt the CSS encryption to attain raw video that can be edited and manipulated. I agree. Under the copyright rules understood to have been in place prior to the Digital Millennium Copyright Act going into effect in 1998, it was understood that copyright protects originality rather than mechanical minutia introduced in reproduction. Digital encryption does not introduce originality. When a public domain work is encrypted by a scrambling technology, the resulting disc does not manifest any new *creative* effort. Scrambling is merely a means of manipulating the ones and zeros of digital media to thwart copying. Where it is legal to copy the creative work, the presence of technical obstructions shouldn't be a legal barrier.

(Parenthetical clarification regarding the above: when I write "legal to copy," it is owing to (a) lapsed copyright, (b) the work being that of that role employees done as part of their employment, or (c) other legal reasons.) (To substantiate the premise that American copyright law prior to 1998 accorded respect of copyright based upon originality, see the United States Supreme Court ruling in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991) .))

Here is an example that makes as best an argument as I believe possible for Kartemquin. The resignation on television of Richard M. Nixon as the 37th President of the United States on August 8, 1974, is unquestionably an event which will long remain a milestone in American history. The resignation speech cannot be protected by copyright, owing to it being the work of a Federal employee performed as part of his job. (17 USC §105). (The television personnel who worked the camera and equipment apparently were also Federal employees performing their jobs, so there does not seem to be a question of private entities having co-created the broadcast

and master tape.) (Parenthetical note regarding the camera used by the White House for the resignation of President Nixon: if (contrary to apparent fact) the television networks used their own cameras, set up and operated by their own personnel, each would own its own distinctively-different version, much as C-Span owns copyright on its coverage of hearings when they bring their own cameras to the Congressional office buildings rather than merely transmit from the cameras controlled by Congress, as they do from the House and Senate chambers.)

Incredibly, the Nixon resignation is not available as online video, neither for streaming nor for download, as discovered in a standard search of online video on legitimate sites as search November 2008. However, the full-length video of the Nixon resignation has been issued as a supplement on the DVD of the feature-length dramatic film *Secret Honor* (1984), issued by Criterion. The feature film (a drama in which Nixon is portrayed by an actor) is protected by copyright, but this specific supplement is not. (Other supplements on the disc, all of which is historic video of the real Nixon, are possibly also not covered by copyright, depending upon who photographed him, whether he was acting as a Federal employee rather than a member of his political party, and whether Criterion exercised creativity in altering the footage by editing or other amendments.)

The Nixon resignation — presented on the Criterion DVD of *Secret Honor* from beginning to end, without editing, without apparently alterations such as cropping, changes in color, and with the image presented free of superimposed text comments — should be legal to copy from DVD by circumvention of CSS. The Criterion company cannot claim copyright in this particular part of their discs. However, Criterion should have legal recourse against any person or organization which decrypts portions of their disc containing the copyrighted dramatic feature film. Any change in the U.S. Copyright Act which is written to permit circumvention for the purposes of extracting public-domain works should also be written to retain the protections accorded copyright holders where unauthorized persons or entities circumvent CSS technology and thereafter decrypt copyrighted material.

(Likewise, another movie — *The Rocky Horror Picture Show* (1975) — is copyrighted and the copyright owners have a legitimate right to expect that illegal copies not be made of it. However, incorporated in the movie is an audio excerpt from Richard Nixon's resignation speech. Again, the 37th President's resignation speech cannot be protected by copyright, owing to it being the work of a Federal employee performed as part of his job. However, a student living in a home with a DVD of *Rocky Horror Picture Show* and very few academic resources should not be impeded from extracting the Nixon resignation from the DVD, being careful not to copy any copyrighted material, for use in a school project.)

In a limited sense, I contend that the proposed class delimited by Kartemquin Educational Films, Inc. and the International Documentary Association is too constricting, because the proposal states that even for public domain material, the exemption is limited to “when a documentary filmmaker, who is a member of an organization of filmmakers, or is enrolled in a film program or film production course at a post-secondary educational institution, is accessing material for use in a specific documentary film for which substantial production has commenced”. If material is in the public domain and assuming that the publisher of the DVD has not creatively altered the material, decryption should be permitted to anyone. I do contend that Kartemquin

Educational Films, Inc. and the International Documentary Association are wise to delimit the class of potential users when the decrypted material “will be used in compliance with the doctrine of fair use as defined by federal case law and 17 U.S.C. § 107.specifically”, inasmuch as there is too great a potential for abuse when any member of the public can determine for himself what is “fair use.” (I have more to say on the latter point in my comments against an exemption proposed by Fred von Lohmann and Jennifer Granick of the Electronic Frontier Foundation; see that document.)
