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Defending Fair Use in the Age of the Digital Millennium Copyright Act

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This article describes the efforts of the authors to challenge the limits placed on Fair Use by the anti-circumvention provision of the Digital Millennium Copyright Act (DMCA). Increasing DMCA-backed corporate control over the use of digital media has limited educators' ability to teach effectively. The DMCA allows for a triennial challenge to the restrictions on copying media, an elaborate process which the authors successfully negotiated in order to secure an exemption. Communication, film studies, and media studies professors may now circumvent encryption on DVDs and other digital media in their departmental libraries for use in teaching. Narrow as this exemption may be, it nevertheless joins efforts of educators and filmmakers to protect fair use.

Defending Fair Use in the Age of the Digital Millennium Copyright Act

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Abstract

This article describes the efforts of the authors to challenge the limits placed on Fair Use by the anti-circumvention provision of the Digital Millennium Copyright Act (DMCA). Increasing DMCA-backed corporate control over the use of digital media has limited educators' ability to teach effectively. The DMCA allows for a triennial challenge to the restrictions on copying media, an elaborate process which the authors successfully negotiated in order to secure an exemption. Communication, film studies, and media studies professors may now circumvent encryption on DVDs and other digital media in their departmental libraries for use in teaching. Narrow as this exemption may be, it nevertheless joins efforts of educators and filmmakers to protect fair use.

In the fall of 2005, Peter Decherney invited film scholars and media industry leaders to a conference at the University of Pennsylvania. Among the attendees was Warren Lieberfarb who, as former president of Warner Home Video, had shepherded the adoption of an industry-wide standard for DVDs in the 1990s. Another attendee, Annenberg professor Katherine Sender, was in the midst of producing a documentary video for the educational market that uses many media clips under the fair use provision of the Copyright Act (Sender, 2006). Sender asked Lieberfarb about DVD encryption that had been bothering her: If fair use covers the reproduction of clips of copyrighted media for educational and critical purposes, and if at the same time, the Digital Millennium Copyright Act (DMCA, 1998) prohibits the copying of media on encrypted DVDs, doesn't the DMCA render the fair use provision moot? The ensuing conversation between Lieberfarb, Decherney, Sender, and others gathered at the table precipitated the exemption to the DMCA awarded by the Copyright Office in November 2006 that allows educators—though, significantly, not filmmakers (yet)—to legally crack encryption on DVDs and other forms of digital media. The exemption, filed by Decherney, Sender, and Michael X. Delli Carpini, dean of the Annenberg School for Communication at the University of Pennsylvania with the assistance of the American University Intellectual Property Law Clinic, allows for the de-encryption of

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.¹

This exemption is in effect from Nov. 27, 2006 – Oct. 27, 2009. As it currently stands, the exemption is both modest—limited to a narrow group of educators with access to sufficient resources to purchase an extensive media library—and temporary, requiring a reapplication in 2009. It does not cover professors of sociology or chemistry, for example, who might usefully illuminate a point through judicious use of popular media, nor does it protect filmmakers who use clips in documentaries for comment or criticism. It does, however, represent a step forward for educators in an increasingly uncertain environment for the exercise and preservation of fair use.

The fair use provision of the Copyright Act allows that the reproduction of copyrighted media for the purpose of “criticism, comment, news reporting, teaching ... scholarship, and research is not an infringement of copyright”² in a number of circumstances. Even in instances where the use is clearly non-infringing—showing clips to students in media studies classes, for example—the DMCA prevented users from copying encrypted clips from DVDs. How this contradiction played out in educational institutions was highly variable: some professors knowingly broke the law (including the authors); others were only vaguely aware of the restrictions and broke the law somewhat unknowingly; others still were aware of the law and worried that they or their institution would be prosecuted, so they taught with outmoded, poor quality media (e.g. videotapes) or suffered with their students the time-consuming practice of cuing DVDs on the fly during class.

We wanted to clarify this situation by taking advantage of the triennial rulemaking mandated by the DMCA that allows people to challenge its limit on decryption—a provision included in the law precisely because its writers were concerned about harm to fair use. With the help of law professor Peter Jaszi and the Intellectual Property Clinic of American University’s Washington College of Law, we filed a request for an exemption with the Copyright Office in January 2006.³ This is a laborious process that took almost a year to complete, and we knew that any exemptions granted would need to be reargued every three years if we were lucky enough to get an exemption. Moreover, the odds of being granted an exemption were and remain very limited. At the time we filed, only four exemptions had been granted. That number grew to six after the 2006 rulemaking.⁴ Our request was a small intervention in both the legislative process and the history of fair use, but the responses from academics, the Copyright Office, media corporations, and technology manufacturers suggest the intense investments each group has in debates about the

¹ See <http://www.asc.upenn.edu/dmca/> for the details of the comment filed for the exemption, the exemption itself, and related documents. Thanks to Mandy Fleisher for constructing this webpage.

² Section 107 of the Copyright Act (<<http://www.copyright.gov/title17/92chap1.html#107>>).

³ We had expert legal counsel from Daniel Rubin and Raquel Ronisky, students of the Glushko-Samuelsan Intellectual Property Law Clinic, Washington College of Law, American University. They were supervised by Professors Peter Jaszi, Victoria Phillips, and Joshua Sarnoff. All documents relating to the rulemaking are available on the U.S. Copyright Office Web site (<http://www.copyright.gov/1201/>).

⁴ The current exemptions can be found at <http://www.copyright.gov/1201/>.

continuing power of fair use when rapidly transforming technologies are available to distribute media content.

The DMCA represents a significant transformation in the interpretation of copyright law. It signals a shift away from the principle of fair use as a user's right to the doling out of exemptions, which effectively affirms copyright owners' exclusive rights to give permission for all reproduction or use. Further, this transition to a permission culture has become pervasive. New U.S. legislation, for example, seeks to extend strategies of exemption to analog and broadcast technologies. In another telling example, the Australian government recently reviewed U.S. digital copyright law during a reassessment of its own copyright policies; they decided in favor of cataloging exemptions rather than adopting principles of fair use. Increasingly, both risk-averse gatekeepers (publishers, Internet service providers, university general counsels, etc.) and the public are becoming accustomed to licensing, contracts, and exemptions where fair use once existed. When in October 2005 *Wall Street Journal* technology columnist Walter Mossberg decried the state of technological restrictions on the personal use of digital media, he argued for a new, broad exemption to be written into the copyright law. Mossberg did not mention that the uses he advocated had been covered by fair use before the DMCA in 1998. Fair use rights are in danger of rapidly becoming a distant memory.⁵

The stakes of academic fair use, in particular, are higher than ever. Media professors continue to venture into uncharted fair use territory, using digital multimedia works in their teaching, research, and publications. New academic uses of digital media frequently clash with the visions of Hollywood and technology manufacturers, who are in the process of determining how they will make money from the next wave of digital distribution. Not only are the stakes high, the timing is crucial. Fair use is the product of norms as well as laws, and the norms that are established now will determine the future of fair use. Moving toward the end of its first decade, the DMCA has already had time to change the way consumers and educators as well as Hollywood and policymakers think about digital media.

The DMCA and Fair Use

Originally proposed as an anti-piracy measure, the anti-circumvention provision of the DMCA has done little to deter piracy—a fact acknowledged even by its proponents. In a *Wall Street Journal* debate about encryption (frequently referred to as Digital Rights Management or DRM), Motion Picture Association of America Executive Vice President Fritz Attaway made this point plainly, "DRM is not intended to prevent commercial piracy" (Attaway & Seltzer, 2006). In another venue, Bill Gates simply repeated the accepted wisdom about DRM when he told an interviewer that, "DRM is just like a speed bump that reminds you whether you're staying within the scope of rights that you have or you don't" (Gizmodo.com, 2006). In the hearing to discuss our proposed DMCA exemption for media professors, a Time Warner representative expanded on Gates's position, "The intent in developing these technical protection measures is not to build

⁵ The legislation to place technological protection measures on analog technology and broadcast media are known commonly as the "analog hole" and "broadcast flag." They have both been discussed and proposed several times. On the new Australia policies see a statement by Philip Ruddock, Australian Attorney General (Ruddock, 2005).

the best mousetrap, not to build the best DRM technology known to man, but rather to create something which draws the line for a consumer to say, this is where the service that you've purchased ends." ⁶ A reminder for consumers is a long way from piracy protection, and DRM is not much of a deterrent to real pirates (von Lohmann, 2004). Even more troubling, is the fact that content owners frequently use DRM to place limits on use that are far inside of the otherwise legal boundaries. Because DRM is created with consumers in mind, it has a chilling effect on noncommercial uses of digital media, such as those for teaching, research, and criticism, which have a much broader and clearer mandate to make non-infringing uses.

We were not only philosophically worried about the ways the DMCA limits fair use; we were also concerned about the quality of our teaching materials and the consequences that staying on the right side of the law would have on our teaching methods. DVDs had become the standard issue for media educators. Yet prior to the exemption, one of the best legal means of showing clips in classrooms involved compiling clips from videotapes, with the inferior image and sound quality that this entails. In addition, using videotape makes the detailed analysis of clips nearly impossible, because of compromised aspect ratios, contrast, color, and sound. In many scenes, characters are simply written out by ruthless "pan and scan" transfer techniques. If digital quality media is the current professional standard, this is what we should teach. Another legal option was to screen clips directly from DVDs, with about a 30-second or greater delay between inserting a disk into a computer or DVD player, cuing the clip, and pressing "play." In the media-saturated and high-paced world of most undergraduates, this time delay made maintaining students' interest in the flow of the lecture challenging indeed. So the only available options were to transgress the law or sacrifice the quality of the educational experience.

The Exemption Process

Feeling secure in our claims to fair use, if doubtful about the copyright policy climate, we looked to the DMCA's exemption process that instructs the members of the Copyright Office to consider, "the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research"—in other words, the impact on fair use.⁷ If the DMCA clearly interfered with research and teaching, then it seemed logical that the Copyright Office should grant an exemption allowing the copying of clips for educational purposes. However, the DMCA states that exemptions can only be granted for *classes* of works, not their use. This posed a problem for media professors, since we might find reason to use *any* DVD for teaching purposes, making the "class of works" all DVDs. The Copyright Office cannot exempt all DVD copying, because that

⁶ Sandra Aistars' (Time Warner), Testimony before the Copyright Office of the United States in the Triennial Rulemaking Proceedings of the Digital Millennium Copyright Act (April 3, 2006), 40 < <http://www.copyright.gov/1201/2006/hearings/transcript-april03.pdf> >.

⁷ Section 1201(a)(1) title 17, United States Code, www.copyright.gov/1201.

class would apply to any use or user, and it would essentially nullify the DMCA's protection of DVD encryption.⁸

We thus constructed an exemption proposal that reworked fair use to a class-based category of DVDs: those in a library owned by a media, cinema, or film studies department. Such libraries—where they exist—limit access to university-affiliated educators and students engaged in academic uses. We also proposed a second exemption for encrypted works in the public domain. In the latter case, neither copyright law nor the DMCA protects the public domain content, but because this content is usually bundled with other clips or original music that are not in the public domain and because the DVDs are protected in their entirety by CSS encryption, the DMCA makes it illegal to make digital copies of them.

We were encouraged by the broad support we received, not only from individual scholars and teachers but from leading professional organizations such as the Society for Cinema and Media Studies and the International Communication Association (especially because it is unusual for such associations to engage in this kind of lobbying). Comments in support of the exemption were also filed by individual academics and filmmakers, by the Electronic Frontier Foundation, and by a variety of library associations that are active in this area. Even Copyright Office General Counsel David Carson told the *Washington Internet Daily* that, "Academicians have made a stronger showing this year of their need in teaching for access to clips from DVDs protected by CSS" (Washington Internet Daily, 2006). This response affirmed that the limits on fair use that the DMCA creates are of serious concern to a broad range of scholars.

Committed to preventing any exemptions, no matter how fair, the big media corporations and technology manufacturers were clearly worried that we might succeed in our efforts. We were surprised to encounter at our hearing not only the lawyer usually hired to argue for the joint opposition of 14 organizations and businesses (including software manufacturers, technology companies, artists' organizations, and media conglomerates), but also representatives from the Motion Picture Association of America (MPAA), Time Warner, Pioneer, and the DVD Copy Control Association.

No one at the hearing contested the claim that using clips for educational purposes is a fair use; all of the arguments hinged on philosophical differences about how fair use should be managed in the digital age. The options the corporate representatives suggested went from the impractical (such as applying for a license for every clip used in class) to laughably inadequate (such as making video recordings of DVD clips from a TV screen, compared to which VHS tapes look pretty good). The representative from Pioneer demonstrated a DVD "jukebox" supposed to enable users to program and rapidly switch between DVDs—a device that didn't work well even in the hearing and has since been discontinued.

To our surprise and delight, Thanksgiving 2006 brought the good news that the exemption for film and media professors had been granted, along with five others. Media and film professors can now

⁸ The class-based terms of the exemption process has caused many groups, most notably the active and influential consumer advocacy organization the Electronic Frontier Foundation, to boycott the exemption process entirely (Electronic Frontier Foundation, 2005).

legally copy clips from DVDs held in departmental libraries to include in classroom presentations. We recognize that the exemption has its limits. It only allows media and film professors to copy media in their own departmental libraries, leaving out large numbers of academics who might usefully employ digital media to make pedagogic points, and excluding those professors who work in departments so strapped for cash that owning a media library can only be a fantasy. However modest, we believed that the exemption represented a successful push back against the pro-corporation, anti-fair use tide that has characterized recent legislation on media ownership and use.

Further, we believe that the current exemption is just the thin edge of the wedge. The results of the 2006 rulemaking have changed the rules of the exemption process and increased the possibility that DMCA exemptions can be crafted to be more in line with fair use. During the rulemaking, the Copyright Office rethought its interpretation of the "class of works" category. All of the exemptions granted in 2006 are for classes of works that are further modified by the use and users who will take advantage of them. This has the temporary effect of limiting some of the classes even further than the class of works designation. The exemption we proposed, for example, is limited not just by the placement of DVDs in departmental libraries but also by its users (professors) and its uses (teaching). This new conception of classes of works, however, opens up the possibility of more refined and useful classes being exempted in the future, classes more in line with fair use. When we argue for a renewal of the exemption in 2009, it may be possible to redefine it so that the exemption is useful to a larger category of educators.

In another development, all of the current exemptions may be codified under the terms of a new bill in the House of Representatives. Among other things, H.R. 1201, "the fair use act," would write the six current exemptions into law, expanded somewhat. The newly won rights for film and media professors would be broadened to all classroom teachers. If H.R. 1201 passes into law, our exemption wouldn't need to be renewed.

Other changes within professional practice also suggest a more assertive stance from academics, filmmakers, and others who hold stakes in the continuing power of fair use. American University's Center for Social Media has issued a *Documentary Filmmakers' Statement of Best Practices in Fair Use* (2005) that has been increasingly adopted as an industry standard (Center for Social Media, 2006). And the Society for Cinema and Media Studies is currently drafting a *Best Practices in Fair Use* statement that lays out what professors can and cannot do with media in the classroom. Other professional academic organizations from art historians to media literacy experts have been drafting similar statements.

While these efforts cannot undo the effects of the DMCA's ban on copying media beyond the current exemptions, they are nonetheless evidence of organized efforts to clarify fair use and encourage scholars and filmmakers to enjoy the protection that the fair use provision affords. Fair use is flexible in part to accommodate agreed upon professional standards. If scholars and filmmakers are to continue to benefit from its freedoms, we must continue to use it to the full extent that it allows, to resist the chilling effects of media corporations' legal intimidation, to question the timidity of gatekeepers such as libraries or film distribution insurance companies, and to fight the limits the DMCA places on the digital age.

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LINK TO ANOTHER *IJoC* FEATURE ON FAIR USE:

"How Documentary Filmmakers Overcame their Fear of Quoting and Learned to Employ Fair Use:
A Tale of Scholarship in Action"
<http://ijoc.org/ojs/index.php/ijoc/article/view/10/26>