



American Association of Law Libraries

MAXIMIZING THE POWER OF THE LAW LIBRARY COMMUNITY SINCE 1906

Statement of

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American Association of Law Libraries

On Behalf of the

American Association of Law Libraries
Medical Library Association
Special Libraries Association

BEFORE THE U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS
IN THE MATTER OF EXEMPTION
TO PROHIBITION ON CIRCUMVENTION OF
COPYRIGHT PROTECTION SYSTEMS
FOR ACCESS CONTROL TECHNOLOGIES

Docket No. RM 2008-8

May 6, 2009

American Association of Law Libraries
Government Relations Office
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**COMMENTS OF
THE AMERICAN ASSOCIATION OF LAW LIBRARIES,
THE MEDICAL LIBRARY ASSOCIATION, AND
THE SPECIAL LIBRARIES ASSOCIATION**

Pursuant to the Notice of Inquiry published by the U.S. Copyright Office on October 6, 2008 in the *Federal Register*, the American Association of Law Libraries, the Medical Library Association, and the Special Libraries Association submit the following comments on exemptions that should be granted pursuant to 17 U.S.C. § 1201 (a)(1)(C). Our three associations collectively represent more than 20,000 members in the United States and worldwide. Our associations work together to address copyright issues that affect our members, and we are particularly concerned today with the needs of faculty and students in the many educational institutions we serve.

Works, Exemption Requested, and Summary of Argument

Our request for an exemption is specifically aimed at literary and audiovisual works, usually commercially-produced, lawfully-acquired DVDs, when circumvention is used to make compilations of brief portions of the works for educational use by faculty members in a classroom setting.

Specifically, we request that the exemption granted to faculty in media and film studies programs after the 2006 rulemaking proceeding be broadened to faculty of law

and the health sciences, and that the exemption be extended to include lawfully-acquired copies from any source permitted by 17 U.S.C. § 110 (1).

Background

Section 1201 of the Copyright Act (Title 17 U.S. Code) prohibits circumvention of technological measures (access controls) employed by or on behalf of copyright owners to protect their works. To ensure that the public can engage in non-infringing uses of copyrighted works, the prohibition is limited. Non-infringing uses of any ‘particular class of works’ are exempt from the prohibition when users are currently or in the next three years are likely to be adversely affected in their ability to make non-infringing uses of that class of works.

Six classes were exempted when the final rule was published after the 2006 rulemaking proceeding. The first of these exemptions was for “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.” 71 Fed. Reg. 68472, 68473 (November 27, 2006). The final rule noted the concern of copyright owners that the proposed class be as narrow as possible to prevent an overbroad range of uses. We hope to show through our examples that the exception made for media and film studies faculty should also be broadened to include law and health sciences faculty.

Argument

Educational programs in law and the health sciences increasingly include role-playing and other ‘real life’ exercises that help students gain a better understanding of

professional practices (e.g., how to counsel clients, how to diagnose an illness, and how to ensure patient safety). The best way to prepare students for such exercises is to show short clips that include illustrations of the right and the wrong way to handle various situations that present themselves in the everyday practice of law and medicine. Such scenarios are present in a wide variety of films and television series that are concerned with the practice of law and medicine.

There are many examples of full-length law- and medicine-related motion pictures that are available for classroom use through the fair use and educational exceptions provided in Sections 107 and 110 of the Copyright Act (Title 17 U.S. Code). Unfortunately, there are no equivalent provisions available that cover situations when a faculty member in a law or medical program simply wants to compile a set of very brief clips from longer works to introduce role-playing exercises in an ethics or patient safety class, or to provide a spur to facilitated discussion about client services.

There also are many situations, particularly in intellectual property classes, where a faculty member may need to show examples of multiple works in order to clarify a point of law that no amount of verbal description can provide.

For purposes of argument, we assert that the encryption method known as the Content Scramble System (CSS), which is embedded within DVDs and prevents most manipulations of them, is an access control measure that prevents efficient use of portions of a work. For educators who want to use short clips from audiovisual works, if one cannot circumvent CSS one is left with the options of foregoing use of the clips in the classroom or creating poor replicas of the higher-quality originals from inferior versions of the films, if available. The CSS makes the contents of the DVD inaccessible to all

users, including those who would use a small portion for educational purposes. Without the ability to circumvent CSS, the small portion of the work needed requires a time-consuming set-up that actually works against the purpose of enhancing the students' educational experience.

One can argue that the fair use factors in Section 107 of the Copyright Act (17 U.S.C. § 107) are relevant to an argument favoring the educational use of short film clips. Fair use is determined by weighing 1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; 2) the nature of the work; 3) the amount and substantiality of the portion used in relation to the work as a whole; and 4) the effect of the use upon the potential market for or value of the copyrighted work.

We are seeking the exemption for literary and audiovisual works that are of importance to a program of study in which the work is used only for non-profit educational purposes, and only in a classroom setting, which mitigates against the potential harm caused by unauthorized commercial use or by widespread copying and distribution of a protected work. In the examples we have gathered, the portion to be clipped from a work is invariably short in relation to the work as a whole.

The works themselves are legally acquired. In most cases the DVD is in the collection of the educational institution's library, which exists to support the teaching program; occasionally, a work is owned by the faculty member who has purchased it for classroom use.

We hope that the following examples will help to illustrate both the importance of these clips to the educational experience and the lack of a suitable alternative absent the ability to take short clips from the films.

These film clips have been used in law school and health sciences classes to illustrate specific, focused topical discussions of often complex issues. In addition, we provide hypothetical uses that could be made if the exemption is granted. As we show, the curriculum of a law or health science class can be greatly enhanced by the inclusion of short clips together with traditional classroom materials. Our examples demonstrate that clips from popular media can be used to discuss legal battles over media usage, fictional portrayal of real-life issues, as well as matters relating to patient care, ethics, and professional practice in law and medicine.

Discussing Subject Matter of Real Legal Cases

Material included in television programs and films can often form the basis of legal battles in court. For law students to better understand the nature of these cases, there is no substitute for seeing the specific material that is under dispute. There have been several lawsuits in the area of trademark and copyright law, typically with a person suing the movie company over how a product or original work appears.

By illustration, an intellectual property professor at Georgetown Law Center has used clips from movies to show students divergent treatment courts give to seemingly incidental appearance of objects in specific scenes. For instance, in an episode from the HBO series *ROC*, a poster version of a folk art quilt appears in the background of a short scene. *Ringgold v. BET*, 126 F.3d 70, 44 U.S.P.Q.2d 1001 (2d Cir. 1997). The quilt creator objected to having her work of art appear in the episode, arguing that she was not

compensated for this use. The court held that this was not a de minimis use, which is a legal concept meaning that it was not trivial. Contrasting this, the professor plans to show a scene from the Mel Gibson movie *What Women Want* where a pinball machine appears in the background of a scene lasting less than five minutes. In this instance, the court held that the use was de minimis and was therefore not infringing. *Gottlieb Development LLC v. Paramount Pictures Corp.*, 590 F. Supp. 2d 625 (S.D.N.Y. 2008). By seeing the specific subject matter of two cases involving a nuanced legal issue, law students have a better basis for discussion. A written description of the facts in each case would be far less effective than allowing students to see the short clips together.

Following are additional films where material appearing in a short segment has been the basis of a real legal dispute:

- In the movie **12 Monkeys** (Universal Studios 1995), a distinctive chair appears in four separate segments. The chair was based on a drawing by the artist Lebbeus Woods. The District Court found that the movie studio's chair clearly infringed the artist's work. *Woods v. Universal City Studios*, 920 F. Supp. 62 (S.D.N.Y. 1996).
- The film **Batman Forever** (Warner Bros. 1995) features a building used by Warner Brothers in an agreement they had with the building owner. An artist had created part of the building's exterior decoration, and he sued the studio for unauthorized use. *Leicester v. Warner Bros.*, 1998 WL 34016724 (C.D.Cal.), 47 U.S.P.Q.2d 1501 (C.D. Cal 1995).
- In a segment of the film **The Devil's Advocate** (Warner Bros. 1997), a distinctive sculpture in the office of a lawyer played by Al Pacino comes to life, portraying the figures in the sculpture making provocative and erotic gestures. This sculpture was similar to something found on a fresco at the National Cathedral in Washington, D.C. Although no case was decided on this point, showing a clip from the movie together with a picture of the actual sculpture would be very effective.
- In **Seven** (New Line Cinema 1995), ten reproductions of copyrighted photographs appear in a scene lasting less than forty seconds. The photographer sued the studio and lost in a decision from the Second Circuit. *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215 (2d Cir. 1998).
- In the film **The Long Kiss Goodnight** (New Line Cinema 1996) a segment of The Three Stooges short film *Disorder in the Court* appears for less than 30 seconds. Owners of Three Stooges material sued the studio for trademark

infringement and they lost. The federal appeals court held that the film clip was not an enforceable trademark. *Comedy III Prods. v. New Line Cinema*, 200 F.3d 593 (9th Cir. 2000).

Clips Used to Facilitate Substantive Discussions

Another area where media clips have been used effectively in legal instruction is in the seminar "Law of 24" taught at Georgetown Law Center by a senior attorney in an intelligence division of the Department of Defense. This course provides a serious examination of United States domestic and international legal issues concerning counterterrorism in the context of the utilitarian and sometimes desperate responses to terrorism raised by the plot of the Fox Television drama 24. Integrated with a syllabus covering a broad range of complex issues, the professor played short clips from 24 as a catalyst for classroom discussion. Students were also assigned a traditional textbook, and each participant completed a twenty-five page paper for the course.

If the requested exemption is granted, instructors will be able to offer similar substantive courses, perhaps in the form of a medical ethics course based on the series *House* or a trial advocacy seminar based on the legal drama *Boston Legal*. By being permitted to extract specific, short clips to integrate with an otherwise traditional class format, a health science or law school professor could very effectively teach complex subject matter while keeping students engaged. Through the use of very specific clips, an instructor can keep classroom discussions focused and on-point. This also makes it possible to portray focused examples that may not be from the same season or movie. Absent this exemption, an instructor teaching this kind of class would risk having the class become more about entertaining than educating students.

Following are additional examples showing how law and health science faculty have used clips from films or television programs to spur substantive discussions:

- A professor at the University of North Carolina has used short clips from **The Verdict** and **Anatomy of a Murder** as examples in a course entitled Ethics for Litigators.
- At Elon University School of Law, an intellectual property professor showed a segment from **American Gangster** to emphasize a concept from trademark law. In the film, the main character is a heroin dealer who sells very high quality heroin under a specific brand. Other drug dealers begin using the same brand name with lower quality heroin and conflict ensues.
- A criminal law professor at the University of North Carolina uses several short clips from **The Simpsons**, **Pulp Fiction** and **Cape Fear** to illustrate elements of criminal law relating to concepts discussed in class.
- At Georgetown Law Center, an intellectual property professor shows a clip from the TV show **Homicide** where the Baltimore detectives discuss the difference between the Baltimore Colts and the Baltimore CFL Colts, illustrating an important concept from trademark law.
- In a first year property course at Elon University, a professor uses a clip from the film **Braveheart** to introduce the concept of feudal estates.

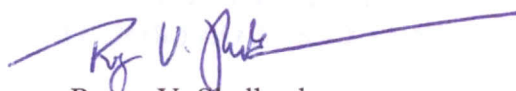
Additional examples from health science courses illustrate the range and usefulness of short film clips to illustrate various medical conditions:

- A clip of **Tom & Viv** (Miramax, 1994) is shown in a psychiatric nursing class to help illustrate the rights that Viv will lose as a result of being committed to an institution.
- A short segment of **Good Will Hunting** (Miramax, 1997) is used to illustrate the main character's coming to grips with the abuse he suffered as a child.
- A brief clip from **As Good As It Gets** (TriStar Pictures, 1997) shows a character with obsessive compulsive disorder.
- In **A Beautiful Mind** (Universal Pictures, 2001), the main character checks with others to determine whether the young girl he sees is a real person or a hallucination.

We have shown a range of examples where the use of brief film clips greatly enhances the educational experience of the students we serve, and we hope that this testimony has helped to shed light on the problem that access control devices cause in making film clips available for educational use.

Our associations are very grateful for this opportunity to testify at this rulemaking hearing, and appreciate the kind assistance of the Copyright Office staff.

Respectfully submitted,



Roger V. Skalbeck,
Vice-Chair Elect, Copyright Committee
American Association of Law Libraries

Exhibit One: Summary of clips in DVD submission (attached)

Exhibit Two: Description of and link to “The Law of 24” course syllabus

Exhibit One

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Summary of Clips in DVD Submission

12 Monkeys (Universal Studios 1995). Clip length: 1' 04"

The stylized chair featured in this scene is the subject of a copyright lawsuit.

Anatomy of a Murder (Colombia Pictures 1959). Clip length: 1' 25"

The characters in this clip are shown doing legal research.

The Devil's Advocate (Warner Bros. 1997). Clip length: 1' 19"

The sculpture that comes to life in this scene is the subject of a lawsuit due to the similarity of this sculpture and one found in Washington, D.C.'s National Cathedral.

House (Fox Broadcasting 2005). Clip length: 0' 51"

This clip shows interaction between two health sciences professionals to portray issues in performing efficient medical research.

The Long Kiss Goodnight (New Line Cinema 1996). Clip length: 0' 29"

The brief Three Stooges clip in this movie was the subject of a federal lawsuit.

The Pelican Brief (Warner Bros. 1993). Clip length: 3' 03"

This shows methods of doing legal research, and it touches on issues of privacy and ethics.

Seven (New Line Cinema 1995). Clip length: 1' 45"

The black and white photographs on the walls in this clip were the subject of a copyright lawsuit.

What Women Want (Paramount Pictures 2000). Clip length: 1' 31"

The pinball machine appearing behind Mel Gibson in this scene was the subject of a lawsuit.

Exhibit Two

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**Submission:
Syllabus for the law school course:**

THE LAW OF 24
Exploring U.S. Counterterrorism Efforts and the Rule of Law

WALTER GARY SHARP, SR.
Adjunct Professor of Law

SYLLABUS
Spring Semester 2008 – LAWG/J-853-08

This is a syllabus for a substantive law course held at Georgetown Law Center in Spring 2008. It is an example of a course that would benefit greatly from improved access to focused clips from television or movie content found on DVDs.

The full syllabus is available online at
<http://online.wsj.com/public/resources/documents/24syllabus.pdf>



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The American Association of Law Libraries (AALL) is a nonprofit educational organization with over 5,000 members nationwide who respond to the information needs of legislators, judges, and other public officials, corporations and small businesses, law professors and students, attorneys and members of the general public. AALL's mission is to promote and enhance the value of law libraries to the legal and public communities, to foster the profession of law librarianship, and to provide leadership in the field of legal information and information policy.

<http://www.aall.org/>

Contact: Mary Alice Baish (202-662-9200)



The Medical Library Association (MLA), a nonprofit, educational organization, is a leading advocate for health sciences information professionals with more than 4,000 members worldwide. Through its programs and services, MLA provides lifelong educational opportunities, supports a knowledgebase of health information research, and works with a global network of partners to promote the importance of quality information for improved health to the health care community and the public.

<http://www.mlanet.org/>

Contact: Mary M. Langman, (312-419-9094, ext. 27)



The Special Libraries Association (SLA) is a nonprofit global organization for innovative information professionals and their strategic partners. SLA serves more than 11,000 members in 75 countries in the information profession, including corporate, academic and government information specialists. SLA promotes and strengthens its members through learning, advocacy and networking initiatives.

<http://www.sla.org/>

Contact: Douglas Newcomb (703-647-4923)