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Documentary and Noncommercial Filmmakers Can Now Bypass Copy Protection Devices to Use Short Clips of Copyrighted Motion Pictures

By Andrew L. Goldstein

The Copyright Office recently announced new exemptions to the Digital Millennium Copyright Act (DMCA). The DMCA generally prohibits the circumvention of copy protection devices on copyrighted works but provides certain exemptions from these prohibitions. One of these exemptions was expanded to specifically allow documentary and noncommercial filmmakers to make certain uses of short portions of copy-protected motion pictures.

The DMCA generally prohibits the circumvention of access-control technologies used by copyright owners to protect their works. The DMCA, however, provides that the Register of Copyrights can establish exemptions to allow users of certain types of copyrighted works to circumvent copy-protection controls to make noninfringing uses of the works.

The Register of Copyrights recently announced six exemptions, one of which allows documentary and noncommercial filmmakers, as well as university film and media studies students, to defeat Content Scrambling Systems to incorporate short portions of motion pictures into new works for the purpose of criticism or comment, if the filmmaker has reasonable grounds for believing it is necessary for the criticism or comment. Previously, this exemption was limited to professors making compilations of film clips for classroom instruction.

There are, therefore, several elements to this exemption. First, the clip used by the filmmaker must be short. Unfortunately, the Register of Copyrights did not provide much guidance as to how short a clip must be to come under the exemption. The Register of Copyrights stated that it would be difficult and imprudent to quantify what constitutes a "short portion," but stated that it would not be a fair use to use anything more than a relatively short portion of the copyrighted motion picture.

Second, the filmmaker's use of the clip must be for purposes of criticism or comment, and the filmmaker must have reasonable grounds to believe that it is necessary to circumvent the copy-protection devices to use a high-quality clip of the motion picture. This new exemption is an extension of the "classic" fair use purposes of criticism or comment which allow a filmmaker to use a clip of a motion picture to engage in criticism or commentary about the motion picture. Not all such uses, however, would require a filmmaker to circumvent copy-protection devices to use a high-quality clip of a motion picture. The Register of Copyrights stated that "because alternatives to circumvention such as video capture may suffice in many, and perhaps the vast majority of situations," filmmakers must make a reasonable determination that use of a high-quality clip is necessary to achieve the desired goal. The Register of Copyrights provided that an example of a use that would require a high-quality clip was when it was necessary to "present the speech-related purpose of the use."

The third requirement is that the filmmaker must use the clip to create a new work. A new work could be, for example, a documentary or video incorporating a clip or clips from a copyrighted motion picture, or a compilation of clips.

Finally, the exemption only applies to motion pictures. The Register of Copyrights declined to extend the exemption to other audiovisual works, such as video games and slide presentations.

If you would like to discuss this further, or if you have any questions regarding the application of the DMCA or the uses a filmmaker can make of copyrighted works, please contact:

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