

Oral Testimony of Jonathan Band on Behalf of ALA, ACRL, and ARL on Renewal and Expansion of the Film Clip Compilation Exemption to the DMCA Section 1201 Prohibition on Circumvention of Access Control Technologies

May 6, 2009

I am testifying today on behalf of the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries.

The MPAA and the Joint Commenters, in their reply comments, concede that they have no objection to the substance of the existing film clip exemption. They also concede that they do not object to the exemption's application to DVDs found in any library on a campus, not just the film studies library. So the only remaining question is whether the exemption can be used just for film and media studies classes, or all classes at an institution of higher education.

The rightsholders' primary objection to extending the exemption to all classes is the assertion that only film classes need the high quality that results from a digital copy made after circumventing the CSS encryption. In making this assertion, the rightsholders' completely ignore the submission of the Library Copyright Alliance that

"Sound quality ... is critical in language classes to ensure that students can understand the dialogue and detect dialectal differences. Music and theatre classes need high sound quality to reflect correctly the tone of musical instruments or the inflection of the human voice. High image quality enables students to see the nuances of facial expressions and hand gestures. These subtle non-verbal forms of communication may convey the essential point of a clip used in psychology, sociology, or literature classes."

Further underscoring the importance of high quality images is the following statement from Paul Clarke, who teaches criminal justice classes at the Northcentral Technical College in Wausau, Wisconsin.

"Police officers must develop a variety of skills, including observing behavior, correctly interpreting it and recognizing its significance in order to make appropriate decisions about actions they take. There are a variety of ways to conduct this type of training, but using professionally developed video (Hollywood feature films) yields a cost and time effective way to provide groups of students with the same audio and visual stimulus as they practice observation and interpretation.

Take the film Tombstone for example. The scene leading up to the shootout at the OK Corral is overflowing with body-language and emotion. One exercise I have students work on in class is to watch the scene for the purpose of observing the facial expressions and body language of the characters in order to determine the underlying emotion. They then decipher what specific mannerisms lead them to the conclusions they've drawn.

It's not enough for a police officer to simply report that a suspect was nervous...he or she needs to describe the specific behaviors observed as

the basis for the conclusion. Most of us are unconsciously competent at making these judgments, but an officer must be able to describe the observations that give rise to the belief if they are going to use that belief as a basis for proper police action. Because top actors are excellent at accurately portraying the nonverbal elements of communication, feature films are an excellent tool for these exercises.”

In sum, high quality sound and images are important for classes in all disciplines, not just film classes.

The rightsholders contend that instructors can create high quality clips through camcording. This argument proves too much. If camcording can produce high quality copies, why does the motion picture industry bother using CSS? Why does the industry support the DMCA, and why are we in this hearing? We should all go across the street together and ask Congress to repeal the DMCA because it is completely irrelevant.

It has also been suggested that screen capture technologies such as SnagIt can provide an alternative to circumvention. Here too, the quality is not comparable to DVD ripping. Also, I am informed that Microsoft’s new operating system Vista prevents the operation of SnagIt software. Thus, screen capture technologies do not provide a long-term solution.

Time Warner stated in its comments that it will give instructors permission to use film clips. However, its permission letters state that the permission is contingent on the instructor getting publicity rights approval from the Screen Actors Guild. Thus, the Time Warner permissions by themselves are of little value.

Finally, putting aside the question of quality and alternatives, we have to ask ourselves why the rightsholders are opposing the modest expansion we seek. Why are they so reflexively confrontational? They know that the uses we seek will not harm their market in any way. They know that whether the exemption is granted or rejected will have absolutely no impact on the level of infringement. They should welcome our use of their content in our classrooms. They should make our legal use as easy as possible. We shouldn’t even have to apply for the exemption. They should proactively declare that they won’t bring DMCA actions against high ed institutions for assembling film compilations. Instead, they insult us by treating us as potential infringers who can’t be trusted to use a technology any 12-year old can download from the Internet. The Librarian of Congress should disregard the frivolous arguments raised by the rightsholders and allow circumvention for film clip compilations for high ed class classes in all disciplines.