

September 8, 2009

Mr. Robert Kasunic
Principal Legal Advisor
Office of the General Counsel
United States Copyright Office
101 Independence Ave., S.E.
Washington, D.C. 20559-6000

Re: August 21 Supplemental Questions to Panelists on DVD-related Hearing Panels

Dear Mr. Kasunic:

On behalf of the Organization for Transformative Works and Electronic Frontier Foundation, we join in the response submitted by the Joint Proponents on behalf of a number of the participants with regard to potential quantitative restrictions on DVD-related exemptions. We write separately to address some of the issues specific to noncommercial video remix creators.

Legal Considerations

As an initial matter, proposed class 11A already addresses the quantitative issues raised by your August 21 supplemental questions. The language of class 11A is expressly limited to uses that are noninfringing: “Audiovisual works released on DVD, where circumvention is undertaken solely for the purpose of extracting clips for inclusion in noncommercial videos *that do not infringe copyright.*” As your August 21 questions correctly note, many of these uses will involve consideration of the fair use doctrine. That doctrine expressly instructs courts to consider “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”¹ Rather than setting a limit in terms of duration or percentage, however, the fair use inquiry requires a qualitative and quantitative analysis. Accordingly, a duration or percentage approach will necessarily leave some otherwise noninfringing video remix artists subject to liability under Section 1201(a)(1), while allowing potentially infringing users to slip through.

Moreover, a bright line quantitative restriction is likely to be of limited assistance to noncommercial video remix artists. As discussed in our previous submissions, these creators generally lack access to sophisticated copyright counsel. As a result, they are unlikely to be aware of any Section 1201(a)(1) exemptions, including any quantitative restrictions, until they find themselves subject to some legal action (whether a cease & desist letter, DMCA takedown notice, or lawsuit). Perversely, to the extent noncommercial video remix creators do become aware of this

¹ 17 U.S.C. § 107(3).

proceeding, the existence of a bright line quantitative limit is likely to mislead them into believing that such limits state the limits of fair use. They will be justifiably surprised to discover that, having jumped the hurdle of Section 1201(a)(1) liability, they now face a different quantitative standard in defending against a copyright infringement claim.

Presenting noncommercial video remix creators with a unified standard (i.e., noninfringement) is not only more consistent with the goals of this rulemaking, but also will send a more consistent, readily understandable educational message to users. To the extent this community develops more awareness and sophistication regarding copyright law, it would be much easier for them to digest a unitary message that jibes with their existing informal practices: so long as DVD excerpts are used in a noncommercial remix, the central question is likely to be whether the remix is a fair use.²

Factual Considerations

A quantitative restriction is also likely to fail to mesh with the practices of noncommercial video remix creators.

Many video remix creators require access to substantial amounts of an underlying work in order to assemble their own works. For example, *RSG-BLACK-1 (Black Hawk Down)*, by the Radical Software Group, is a 22-minute edit of *Black Hawk Down*, a movie about Somalia, which includes all (and only) the parts of the film in which no white characters appear. The nonprofit media arts group Electronic Arts Intermix, a leading curator of multimedia art, has featured RSG-BLACK-1 as an important work, noting that “[t]he result is a 22-minute conceptual investigation of representation and ideology. A timely and chilling critique, the new narrative highlights the entertainment industry’s images of those it sees as ‘other.’”³ Vidders also use this technique, as demonstrated in *How Much Is That Geisha in the Window?*, the critique of Asian representation and erasure in *Firefly* discussed in our previous testimony and submissions.⁴ Creators of this kind of edit intended to bring background themes into the foreground obviously require *access* to the entirety of the material contained on a DVD, even if they do not require *use* of the entirety of the audiovisual works.

Other genres of remix creativity, however, may also require the *use* of the entirety, or near-entirety, of a film or television episode. Amateur video artists can already use masks and mattes to insert and remove portions of a digital film, as with internationally recognized artist Jillian McDonald’s

² While the fair use question can be a difficult one, that question is unavoidable where the remix in question would otherwise infringe copyright. Some other uses may be noninfringing for lack of substantial similarity or because they represent de minimis uses.

³ <http://www.eai.org/eai/webPage.htm?id=27>.

⁴ <http://lierdumoa.livejournal.com/310086.html>.

works *Me and Billy Bob*,⁵ *Screen Kiss*,⁶ and *To Vincent, With Love*,⁷ in which she digitally inserts herself into existing films in order to comment on celebrity, fantasy, and voyeurism. Another artist mashed up an earlier performance art video *I Am Making Art* with her own performance and with a hip-hop soundtrack, in some sense using the entirety of the original in order to make a completely new and different work, *I Am Making Art Too*.⁸ Addition to and subtraction from existing footage are increasingly common in vidding as well.⁹ As consumer-level editing technology improves, this type of fair use is likely to become even more prevalent: for example, an artist might reedit *Gone With the Wind* pervasively, digitally altering dialogue and inserting characters from *The Wind Done Gone* so that the new film makes exactly the same transformative use of the film as Alice Randall's novel did of the underlying Margaret Mitchell novel.¹⁰ This kind of editing has already been explored by a variety of avant-garde artists who "remove" the actors from pornography, including Naomi Uman's 1999 short film, *Removed*.¹¹ While in the past, the limits of technology have limited these efforts to stills and shorts, there is every reason to believe that whole-film edits will be easy to create during the next three years.¹²

Another group of fair users that require access to large portions of works on DVD are amateur film critics and commentators. The combination of annotation and voice-over techniques among amateur critics is inevitable in light of the capabilities of consumer-grade video editing technologies, a development that will unleash more sophisticated forms of creativity by amateur film commentators. Alternate voice-over commentaries are already commonplace. In 2002, *Chicago Sun-Times* film critic Roger Ebert postulated "a new kind of marriage between film criticism and the Web: do-it-yourself movie commentary tracks." In his words, "DVD and MP3 technologies make it simple. With a microphone hooked up to your computer, you can easily record your voice to an MP3 file. Just synchronize your track with the first frame of the studio logo and talk during the whole movie."¹³ Mr. Ebert's call inspired a vibrant community of creators of

⁵ <http://meandbillybob.com/>; further details at http://meandbillybob.com/press_meandbillybob.html.

⁶ <http://jillianmcdonald.net/projects/screenkissinfo.html>.

⁷ <http://jillianmcdonald.net/press/TorontoStarGoddard.html>.

⁸ http://www.nzherald.co.nz/lifestyle/news/article.cfm?c_id=6&objectid=10115424.

⁹ See, e.g., Lim, *This Is How It Works*, <http://transformativeworks.org/projects/vidtestsuite>; Lim, *Us* <http://blip.tv/file/2286307> (used as part of ethnographer Michael Wesch's Anthropological Introduction to YouTube, http://www.youtube.com/watch?v=TPAO-IZ4_hU, and exhibited at the California Museum of Photography); Laura Shapiro, *I Put You There*, <http://dotsub.com/view/343268fe-74c9-4421-a223-90c7b0e7d027> (inserting the video artist into the narrative of *Buffy the Vampire Slayer*).

¹⁰ *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

¹¹ <http://archive.sensesofcinema.com/contents/cteq/01/16/removed.html>. Other similar works include still photos drawn from pornography, edited to remove actors, such as John Haddock's *Internet Sex Photos* and Laura Carton's *Fictive Porn* series.

¹² Perhaps the most well-known example of this form of "whole-film edit" is Mike J. Nichols' *Star Wars Episode I: The Phantom Edit*, in which a Star Wars fan made edits to the original film in an effort to improve it. See http://en.wikipedia.org/wiki/The_Phantom_Edit.

¹³ Roger Ebert, *You Too Can Be A Movie Critic*, Yahoo Internet Life, Feb. 2002, available at

alternate “audio commentaries” for a variety of films and television series, intended to be played along with the DVD.¹⁴ More recently, video editing tools have made it easy to incorporate on-screen annotations into commentary. Unlike the voice-over commentaries, these techniques require access to and modification of the digital files themselves. These annotation tools have already been embraced by amateur film critics. For example, Matt Zoller Seitz’s *The Substance of Style, Pt. 5*, inserts on-screen annotations to explain the prologue to *The Royal Tenenbaums*.¹⁵ The confluence of these two techniques is a near-certainty in the coming three year period addressed by this rulemaking.

A close consideration of these examples, as well as those described in our previous testimony and written submissions, reveals a number of pitfalls with quantitative restrictions as applied to noncommercial video remix creators.

First, any quantitative restriction that evaluates duration or percentage on a “per work” basis, as opposed to a “per DVD” basis, would yield arbitrary results, because of the many different works that (copyright owners might argue) are present on DVDs, including special features, deleted/extended scenes, alternate endings, cast and crew interviews, and the like.¹⁶ Indeed, using a “per work” standard, a remix that included one minute from a two-hour movie, but has a portion of a 2-minute musical composition playing in the background in the clip, would arguably count as using 50% of a distinct copyrighted work.¹⁷ Moreover, as a conceptual matter, given that the proposed exemption relates to CSS-protected DVDs, not to particular works, the Copyright Office should evaluate the content of a CSS-protected DVD as a whole.

Second, there are substantial practical difficulties surrounding any percentage limitation. In such cases, where the remix only uses a portion of what’s shown on the screen (e.g., by cropping to

http://www.zarban.com/?page_id=1562; Adam Sternbergh, *The Year in Ideas: Do-It-Yourself DVD Commentary*, N.Y. Times, Dec. 15, 2002.

¹⁴ See, e.g., [RateThatCommentary.com](http://www.zarban.com), which rates hundreds of alternate fan-created audio commentaries. [Zarban.com](http://www.zarban.com) provides an index to more than 1600 alternate audio commentaries.

¹⁵ <http://www.movingimagesource.us/articles/the-substance-of-style-pt-5-20090413>.

¹⁶ For an extended critical analysis of the trend to recognize multiple overlapping but legally distinct copyrights in “microworks” and components of larger works, see Justin Hughes, *Size Counts (or Should) in Copyright Law*, 75 *FORDHAM L. REV.* 575 (2005). We are not asking the Copyright Office to reject or endorse any view with respect to substantive copyright law. Rather, we raise this point to make clear that a work-based percentage exemption would be extremely difficult to administer and even more difficult, verging on impossible, to predict, because of copyright owners’ ability to define “works” in varying ways. For a concrete example, consider the now-standard practice of including alternate endings in DVD releases, allowing a viewer to choose to watch the whole movie with the alternate ending, or to watch it separately. Is the alternate ending its own work, or is it a component of a larger work? This is not the kind of determination that exemption users can be expected to make, nor one that could be settled without litigation, making any promise of a bright-line rule illusory.

¹⁷ See also *Ringgold v. Black Entertainment Television*, 126 F.3d 70 (2d Cir. 1997). Under *Ringgold*, if a video clip contains a recognizable shot of a copyrighted painting, the copyright owner will be able to argue that 100% of that underlying painting has been used.

highlight one item or character), the percentage of the underlying DVD used in the remix will be lower than the time count would indicate. Likewise, in assessing percentages, any percentage-based rule for remix should take into account that remixes often use only the audio track,¹⁸ or only the video track,¹⁹ again decreasing the amount of the underlying DVD used. For example, how would a percentage be calculated for a highly edited and cropped work such as *How Much is That Geisha in the Window?*

These considerations would, of course, complicate the calculation of amount for remix artists, another reason that a percentage limit is deeply problematic for artists who generally do not have access to counsel. In fact, given that most amateur remixers find out about the DMCA only after they've sought legal help responding to a DMCA takedown or submitting a DMCA counter-notice based on fair use, a percentage limit would be useless to them. No line can be bright for people who cannot see it. A rule that tracks fair use, by contrast, provides flexibility and comports with what amateur artists expect. Even assuming counterfactually that amateurs would know about a special circumvention rule and manage to navigate the double jeopardy of flexible fair use and rigid exemption, remix artists could be expected regularly to overestimate the amount they are using. Overestimation would occur both because artists will often be using less than the entirety of the visual field/audio and because most commercial DVDs only give the running time of the main feature rather than the running time of the entirety of the DVD features. (DVDs containing several episodes of television shows, which is how television shows are generally released on DVD, rarely provide even the total length of the episodes per disc.²⁰)

Third, the examples above make it clear that any quantitative restriction that focuses on limiting *access* to a DVD, rather than the ultimate quantity *used* in the resulting remix, would pose a serious impediment to video remix creators, many of whom are not simply taking single short excerpts from a larger work, but rather are using many short excerpts (in the case of vidders, sometimes dozens) taken from throughout the source material. Examples of this technique include *RSG-BLACK-1 (Black Hawk Down)*, *How Much is that Geisha in the Window*, and *Vogue*.

¹⁸ See, e.g., *December 31, 2000*, which takes the soundtrack from *2001: A Space Odyssey* and runs it with a shot-for-shot remake featuring a woman in a domestic environment. See <http://csis.pace.edu/digitalgallery/valencia/>. The creators are feminist artists who take heavily masculine films such as *2001* and *Apocalypse Now* and make shot-for-shot remakes using women instead of men as actors, transforming the meanings of manhood, suffering, and other themes. See <http://www.bhyaer.com/biography/longer.html>; Janice Hladki, *Strategic Approximation: Independent Videographers Revise the Hollywood Classic*, 6 FEMINIST MEDIA STUDIES 47 (2006). The hundreds of *Brokeback [X]* parody trailers also use the audio from the trailer from *Brokeback Mountain* (not incidentally, something copyright owners are likely to claim involves using 100% of a distinct derivative work even though the trailer is only one short feature on the DVD).

¹⁹ See Test Suite of Fair Use Vids, <http://transformativeworks.org/projects/vidtestsuite>.

²⁰ Given that television shows make up a substantial percentage of the DVD market, see US DVD Sales Chart for Week Ending Aug 23, 2009, <http://www.the-numbers.com/dvd/charts/weekly/thisweek.php>, and a substantial percentage of works transformed in vids, the Office should not make a rule that assumes that there is a single "main feature" on each DVD.

Indeed, these and other complicating factors discussed in the Joint Proponents' response counsel against imposing any quantitative limitation on the record before the Copyright Office. Given that the exemptions will be reviewed again in three years, a better approach would be to grant the exemption as proposed and study its effects, giving all interested parties time to gather evidence and identify any relevant differences among works and uses. The prior exemption for film and media studies professors had no percentage limitation, and there has been no evidence submitted to the Copyright Office that such a limitation would improve the exemption either for the rightsholders or the users of the exemption.

In conclusion, we are opposed to any quantitative limitation. If the Copyright Office nonetheless determines that a quantitative restriction must be included, that restriction should take into account the inevitable uncertainty and overestimation any such calculation will entail, and thus build in breathing room for remix artists. Moreover, if any such restrictions are imposed, they should respect the wide variety of noncommercial remix creativity and the amateur, uncounseled status of remix artists. As a result, should the Office proceed with an exemption on this basis, it should allow circumvention for the purpose of making a noncommercial remix "...where any single excerpt used in a single video constitutes no more than 20 minutes or 50 percent, whichever is greater, of the entirety of the audiovisual works contained on the DVD..."

Respectfully submitted,

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