Intellectual Property

Reconciling artist access with the fair use doctrine

Documentary filmmakers hit a roadblock when they sought to employ clips from DVDs, Blu-ray disks and digitally transmitted video under the fair use doctrine; the Motion Picture Association of America contend-ed nobody could break the encryption used in those mediums to lock the content away.

So copyright, fair use and clearance authority Michael C. Donaldson of the ent-ertainment law firm Donaldson & Calliff LLP and law and technology guru Jack I. Lerner of UC Irvine School of Law’s intellectual property clinic set out to push aside that barrier.

Together they won an exemption to the Digital Millennium Copyright Act that would extend documentarians’ First Amendment rights.

With Donaldson and Lerner were Donaldson & Calliff’s Christopher L. Peroz and Blake E. Reid of an intellectual property clinic at the University of Colorado School of Law.

The copyright act exemption process is an intensive, litigation-like rulemaking procedure in which proponents bear the evidentiary burden of proving their proposals are warranted.

“Talk to any editor or producer of doc-umentaries,” Lerner said. “You’ll hear, ‘I know how to rip that material, but what if they come after me for an encryption violation?’ Well, now we have an exemp-tion spelled out in the code of federal regulations.”

For Lerner and his stu-dents, it was a full-court push for a year of interviewing doc-umentarians and detailing their need for a way to get past legal barriers to their work.

The enterprise required a trip to the Library of Congres-s’s U.S. Copyright Office to argue for the exemption.

First, there was the prepara-tion of lengthy briefing, known as a comment in copy-right parlance. Then came opposition papers from the MPAA. Finally, there was a hearing before the office’s register of copyrights, its gen-eral counsel, the head of its policy division and two others.

“We had to show that the lack of an exemption was a hardship that infringed on documentary filmmakers’ First Amendment rights and keeps them from doing their reporting on important public issues of the day,” Donaldson said.

“If we didn’t have an exemption, we’d have broken our rule,” Pera said. “It was quite another to hear from someone in the industry telling us what would happen to him and his colleagues if they didn’t have this right.”

Plenty of computer pro-grams are available to allow filmmakers access to encrypt-ed DVDs. “The issue was to reconcile access with the fair use doctrine,” Perez said.

The copyright office held hearings at the UCLA School of Law and in Washington, D.C., at the Library of Congres-s, in May 2015. It issued follow-up questions and rendered its verdict in favor of the exemption last October. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 37 CFR Part 201.

Documentary filmmakers are a careful bunch. They’re not out there posting bootleg films on the Internet for commercial gain.

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Exception to Digital Millennium Copyright Act for authors and documentarians

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