

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 contended nobody could break the encryption used in those mediums to lock the content away.

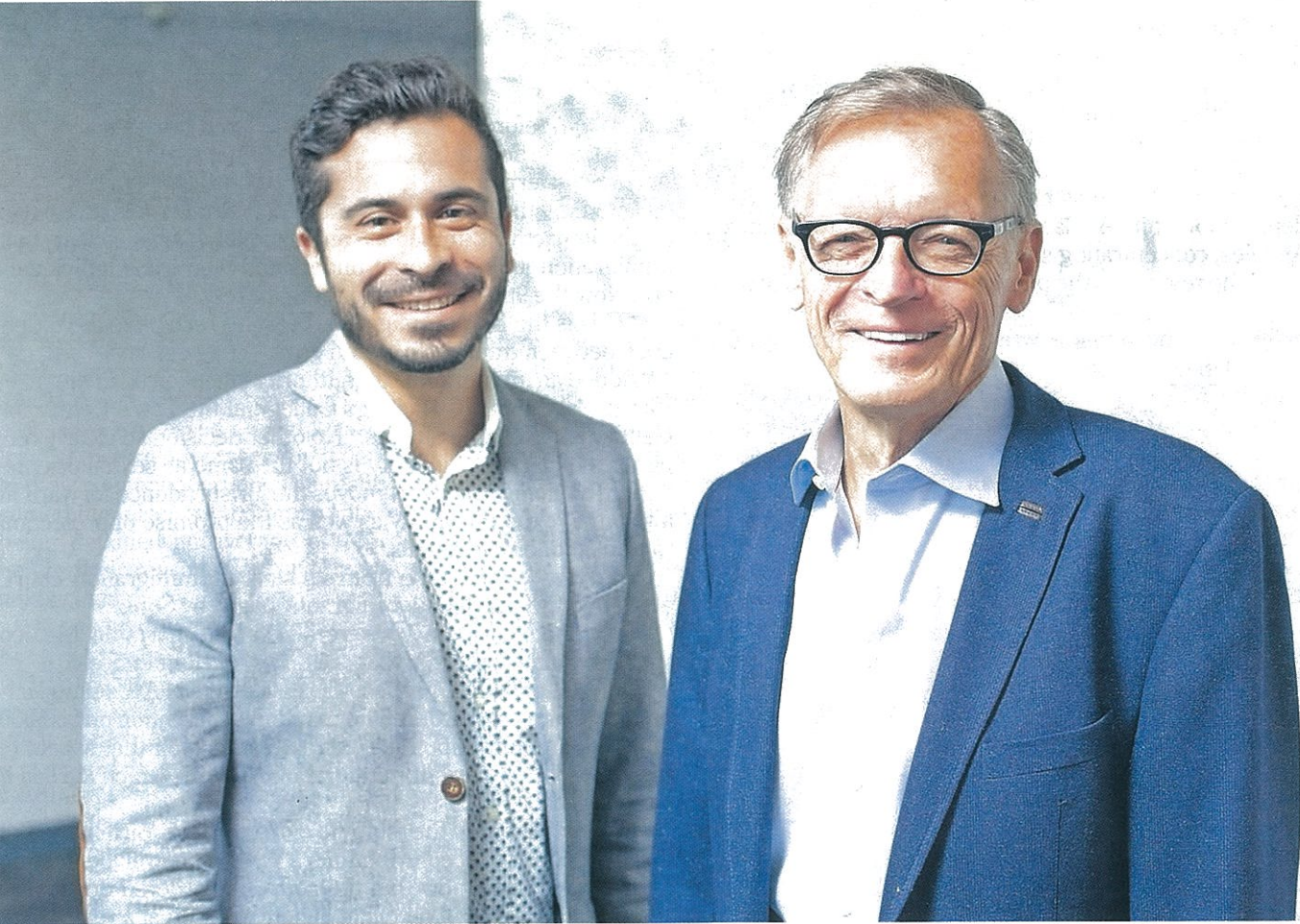
So copyright, fair use and clearance authority Michael C. Donaldson of the entertainment law firm Donaldson & Callif LLP and law and technology guru Jack I. Lerner of UC Irvine School of Law's intellectual property clinic set out to push aside that barrier.

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

With Donaldson and Lerner were Donaldson & Callif's Christopher L. Perez 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 documentaries," Lerner said. "You'll hear, 'I



Christopher L. Perez, Partner, and Michael C. Donaldson, Partner, Donaldson & Callif LLP

Photo by Alex Drecun | Special to the Daily Journal



Exception to Digital Millennium Copyright Act for authors and documentarians

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Jack I. Lerner, Director, Intellectual Property, Arts, and Technology Clinic, UC Irvine School of Law

know how to rip that material, but what if they come after me for an encryption violation? Well, now we have an exemption spelled out in the code of federal regulations."

For Lerner and his students, it was a full-court press for a year of interviewing documentarians and detailing their need for a way to get past legal barriers to their work.

The enterprise required a trip to the Library of Congress' U.S. Copyright Office to argue for the exemption.

First, there was the preparation of lengthy briefing, known as a comment in copyright parlance. Then came opposition papers from the MPAA. Finally, there was a hearing before the office's register of copyrights, its general counsel, the head of its policy division and two others.

"We had to show that the lack of an exemption was a hardship that impinges on documentary filmmakers' First Amendment rights and

keeps them from doing their reporting on important public issues of the day," Donaldson said.

"Also we had to show there were no good alternatives." Donaldson and Perez got a movie technical expert from Chicago who testified there was no other way. "You have to break the locks on DVDs to access the material," Donaldson said.

"The MPAA didn't like it, but they didn't have an example where breaking the encryption has harmed anyone," he added. "Documentary filmmakers are a careful bunch. They're not out there posting bootleg films on the Internet for commercial gain. They just need clips to make their point."

The technical expert was from respected documentary filmmaker Kartemquin Films, maker of "Hoops Dreams" and "The Interrupters." One of its founders, Gordon Quinn, also testified.

"It was one thing to hear from me about the legal angles," Perez said. "It was quite another to hear from someone in the industry telling what would happen to him and his colleagues if they didn't have this right."

Plenty of computer programs are available to allow filmmakers access to encrypted Blu-rays. "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 Congress, 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.

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— MICHAEL C. DONALDSON
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