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US Anti-circumvention Rulemaking, Documentary Films and Canadian Copyright

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Last week's promulgation by the United States' Librarian of Congress of a rule which creates an exemption for certain classes of works from the prohibition (in the US Copyright Act, first introduced by the Digital Millennium Copyright Act, or DMCA) against circumventing technological measures that control access to copyrighted works - which is rather a mouthful (or eyeful) - is noteworthy for a number of reasons which are of immediate relevance to Canadian entertainment lawyers and copyright enthusiasts.

First, the background (hat tip to Barry Sookman for providing a number of the relevant links): the US Copyright Office announced that it had made certain recommendations (here is the full text of the June 11, 2010 recommendation) to the Librarian of Congress regarding the Librarian's rulemaking power under the US Copyright Act, which recommendations had been accepted. The DMCA modified the US Copyright Act to prohibit circumvention of certain technological measures employed by or on behalf of copyright owners to protect their works. In particular, Section 1201(a)(1)(A) of the US Copyright Act provides that “[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title.” However, the DMCA also created, in Section 1201(a)(1)(B), a mechanism which permits the Librarian to make rules which modify the application of the prohibition by identifying particular classes of work whose users would be "adversely affected" by the operation of the prohibition in their ability to make non-infringing uses of the works in question. In short, if the Librarian determines that the prohibition on breaking technological measures would unduly and negatively interfere with the ability of users to engage in non-infringing uses, then the prohibition could be circumscribed by a rule so as to eliminate that negative impact.

And that's precisely what the Librarian did last week (Statement of the Librarian; Determination of the Librarian and Text of the Regulation as set out in the US Federal Register). The Librarian determined that the fair use rights of documentary filmmakers were adversely affected by a strict prohibition on circumventing technological protection measures used on things like DVDs.

That determination resulted in the following class designation [emphasis added]:

"Motion pictures on DVDs that are lawfully made and acquired and that are protected by the Content Scrambling System [CSS] **when circumvention is accomplished solely in order to accomplish the incorporation of short portions of motion pictures into new works for the purpose of criticism or comment**, and where the person engaging in circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use in the following instances:

- **Educational uses by college and university professors and by college and university film and media studies students;**
- **Documentary filmmaking**;
- **Noncommercial videos**."

In short, when someone circumvents CSS protection on a lawfully-acquired DVD for the purposes of incorporating a short portion of a motion picture into a new documentary film (or other non-commercial video)

for the purpose of critiquing or offering commentary on that short portion, then that circumvention does not itself violate the US Copyright Act.

The explanatory notes of the Librarian in its Determination are of particular interest [emphasis added]:

"The justification for designating this class of works is that some criticism and/or commentary requires the use of high–quality portions of motion pictures in order to adequately present the speech–related purpose of the use. **Where alternatives to circumvention can be used to achieve the non-infringing purpose, such non–circumventing alternatives should be used**. Thus, this limitation seeks to avoid an overly broad class of works given the limited number of uses that may require circumvention to achieve the intended noninfringing end.

The class has also been limited to include only motion pictures rather than all audiovisual works. Because there was no evidence presented that addressed any audiovisual works other than motion pictures, there was no basis for including the somewhat broader class of audiovisual works (which includes not only motion pictures, but also works such as video games and slide presentations)."

Thus, only where the type of high quality image made possible by CSS circumvention is required can the exception be relied upon - for example, if using screen capture software to obtain a still image will suffice, then that must be used. It is also worth noting that **only** motion pictures are covered by the class designation - if a videogame or slide presentation is protected by CSS, then the class designation cannot be relied upon.

Of even more importance is how narrow the exception is - the Librarian's commentary makes it clear that the class designation is intended to permit circumvention only for criticism or commentary of the motion picture itself [emphasis added]:

"What the record does demonstrate is that college and university educators, college and university film and media studies students, documentary filmmakers, and creators of noncommercial videos frequently make and use short film clips from motion pictures **to engage in criticism or commentary about those motion pictures**, and that in many cases it is necessary to be able to make and incorporate high–quality film clips in order effectively **to engage in such criticism or commentary**. In such cases, it will be difficult or impossible to engage in the noninfringing use without circumventing CSS in order to make high–quality copies of short portions of the motion pictures."

So the class designation is not intended to allow circumvention for the purpose of using the clip for offering a broader social critique (eg taking a clip from *Avatar* to emphasize the need for environmentally conscious development policies), or for the purpose of trying to illustrate some kind of historical development (eg taking a clip from *Titanic* to show the maturation of ship-building technology).

The Librarian was particularly emphatic on these points:

"there was no evidence in the record to support the conclusion that anything more than incorporating relatively short portions of motion pictures into a new work for purposes of criticism or commentary would be a fair use."

The announcement of the class designation resulted in a flurry of commentary, some of it focusing on the impact for US documentary filmmakers (Finally, a DMCA Exception for Documentary Filmmaking by Dan

Nabel) and some focusing on the relevance of this change for Canadian copyright law (U.S. Move to Pick Digital Locks Leaves Canadians Locked Out by Michael Geist; Exit Strategy for Digital Locks Dilemma of Canada's Bill C-32 by Howard Knopf). I think there are a few aspects of the Librarian's decision which are of particular relevance to the Canadian context:

First, the enviable power and flexibility which is accorded by the triennial rulemaking power of the Librarian of Congress. That mechanism assists in keeping the US Copyright Act current, and thus not as susceptible to the ossification of the Canadian Copyright Act which only gets amended once every decade or so. Bill C-32 (the Copyright Modernization Act) keeps alive the concept of a quincennial (just a *great* word, by the way) review of the Act by a Parliamentary committee (also found in the current Section 92 of the Canadian Copyright Act) - but the political realities of legislative copyright reform mean that actual modification of the Act would likely, as it has in the past, take place only on a much more telescoped time frame. Fine tunings of copyright law may be better-served by a dedicated agency (such as the Copyright Board) rather than the blunt instrument of legislative committees.

Second, even in light of the Librarian of Congress' seemingly-far reaching powers, we should note just how incremental this type of change ends up being: what might at first blush seem like an expansive accommodation of documentary filmmakers' concerns is in fact a relatively narrowly-cast exception.

Finally, it will be interesting to see how the documentary filmmaking exception is interpreted by the US Courts - whether the *prima facie* breadth of the exception (ie covering all forms of commentary and criticism) will be "read down" in light of the Librarian's commentary (ie indicating that the exception is meant to address commentary and criticism of the motion picture being excerpted). This bears on the point made by others - namely that the fact of the class designation itself should inform an assessment of Bill C-32 - since it will indicate just how flexibly and broadly the US fair use device will be in addressing the wants/needs of documentary filmmakers.
