

[Proposed class or classes of copyrighted work(s) to be exempted]= Motion pictures and other audiovisual works in the form of Digital Versatile Discs (DVDs) that are not generally available commercially to the public in a DVD form not protected by Content Scramble System technology when a documentary filmmaker, who is a member of an organization of filmmakers, or is enrolled in a film program or film production course at a post-secondary educational institution, is accessing material for use in a specific documentary film for which substantial production has commenced, where the material is in the public domain or will be used in compliance with the doctrine of fair use as defined by federal case law and 17 U.S.C. § 107.

[Brief summary of the argument(s) in support of the exemption proposed above]= Documentary film has long been an important part of American culture. It is a compelling vehicle for historical story-telling, an essential educational tool, and a vital means by which to present cultural criticism and analysis. In the course of producing their films, documentary filmmakers often must make fair use of portions of creative works for criticism or analysis of the work itself, or to make social commentary generally. Fair use of these works is necessary to convey documentary films' messages fully and accurately. Filmmakers also rely on public domain materials such as government footage, old newsreels, or older films as valuable tools to shed light on a historical moment or otherwise convey their film's message.

Unfortunately, the Digital Millennium Copyright Act's ("DMCA") prohibition on the circumvention of technological protection measures ("TPM") is crippling filmmakers' abilities to make fair use of works and to use public domain materials. Digital Versatile Disc ("DVD") has become the default physical media distribution format of our time, and today a large number of audiovisual works are available only on DVD --but virtually all DVDs are encrypted using Content Scramble System technology ("CSS"). In addition, none of the analog alternatives to the circumvention of CSS are viable for documentary filmmaking; VHS is increasingly unavailable, and analog transfer methods result in video quality that is too degraded for public performance in theaters or via broadcast. This leaves filmmakers with an untenable choice: risk steep sanctions arising from the circumvention of CSS to obtain the needed material, or refrain from using the material at all. As a result, more and more documentary filmmakers are prevented from making certain points in their films or cannot make their films at all.

The effects of this problem extend far beyond documentary filmmakers. The DMCA is depriving the public at large of the socially productive uses that documentary films provide, which mirror the purposes identified in the DMCA that merit "special consideration." The vast catalogue of documentary films over the past 86 years proves that the documentary film medium relies on the use of motion pictures and other audiovisual works to achieve each of the purposes enumerated in 17 U.S.C. § 1201(a)(1)(C)(iii): criticism, comment, news reporting, teaching, scholarship and research. The availability of works for these purposes is at the heart of the issue here. Without a viable means to access the material needed to achieve these socially productive purposes in their films, documentary filmmakers cannot provide the public with the films that have become so integral to modern social discourse.

Kartemquin Educational Films and the International Documentary Association therefore request an exemption to the DMCA's prohibition on circumvention to remedy the adverse impact on fair uses of material and use of public domain works by documentary filmmakers. As copyright holders themselves, documentary filmmakers rely on and respect copyright, and thus seek only a very narrowly-tailored exemption that would balance the interests of copyright holders with the interest in preserving noninfringing uses in documentary film. Without an exemption to the DMCA that permits documentary filmmakers to use public domain works and make fair use of material on CSS-protected DVDs, documentary filmmaking and the integral purposes it serves will remain severely compromised. This problem will only worsen as DVD becomes even more dominant as the default form of media distribution for motion pictures and other audiovisual works.