

Before the

**United States Copyright Office
Library of Congress**

In the Matter of)
)
)
Exemption to Prohibition on) Docket No. RM 2008-08
Circumvention of Copyright Protection Systems)
For Access Control Technologies)
)

**COMMENTS OF
KARTEMQUIN EDUCATIONAL FILMS, INC.
AND
THE INTERNATIONAL DOCUMENTARY ASSOCIATION**

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I. REQUESTED CLASS

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.

II. SUMMARY

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 sanctions¹ 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."² The vast catalogue of documentary films over the past 86 years³ proves that the documentary film medium relies on the use of motion pictures and other audiovisual works to achieve each of the

¹ See 17 U.S.C. §§ 1203, 1204.

² Recommendation of the Register of Copyrights, 22-23 (2006), http://www.copyright.gov/1201/docs/1201_recommendation.pdf.

³ Robert Flaherty's *Nanook of the North*, which is generally regarded as the first documentary, was released in 1922.

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.

III. FACTUAL BACKGROUND

A. Documentary Filmmakers Rely on Fair Use and Public Domain Materials

Both fair use of copyrighted works and the use of public domain works are essential components of many documentary films. In addition to the fact that public domain works form the raw material for creation, because many public domain works are relatively old they are often needed by creators of historical documentaries to provide support for a particular assertion or simply to demonstrate what happened at a particular moment in history. For example, the highly acclaimed 1982 film *Atomic Café* demonstrated the important role that American propaganda played during the beginning of the nuclear warfare era. The documentary made use of many films issued by the United States government, all of which are in the public domain.

Fair use is also critically important to documentary film. Many rely on the doctrine to create their films, particularly films used to comment on current or historical events, for artistic or literary criticism, or for educational purposes. For example, in the award-winning documentary *Killing Us Softly 3*, director Jean Kilbourne made fair use of advertising images to illustrate the effects of media and popular culture on a women's body image.⁴ Likewise, the 2000 film *It Conquered the World! A Story of American International Pictures*, which addressed the history and development of the horror film genre, made fair use of clips from horror films to show, *inter alia*, the political context of "alien visitation films."⁵ There are many more examples of documentary films that utilize fair use, far too many to cover exhaustively here.

⁴ Killing Us Softly – Videos – Center for Social Media, http://www.centerforsocialmedia.org/videos/killing_us_softly/ (last visited Nov. 29, 2008).

⁵ Hofheinz v. Discovery Communications, Inc., 2001 WL 1111970, *4 (S.D.N.Y. 2001).

In light of clearance practices that have developed over the last ten to fifteen years, fair use is more important now than ever before. Although documentary filmmakers theoretically could seek licenses from copyright owners when their use of copyrighted material qualifies as fair use, the clearance process has become so prohibitively expensive, time-consuming, and complex that the vast majority of documentary filmmakers, many who operate on very limited production budgets, must rely on fair use where it applies.⁶ Furthermore, holders of the original source materials may have little interest in giving documentary filmmakers access, especially if the filmmaker needs the material for criticism or less-than-positive commentary. In such cases, documentary filmmakers have to rely on fair use.

As another indication of the growing importance of fair use in this field, in 2005 several documentary filmmaking organizations created the *Documentary Filmmakers' Statement of Best Practices in Fair Use* ("Statement"),⁷ which has become an important tool for filmmakers who wish to make fair use. The Statement is now widely used by documentary filmmakers and has found broad acceptance among insurers, distributors, and others.⁸

Documentary filmmakers, who rely on fair use to question, explore, criticize and preserve, are the kind of creators who are at the heart of the fair use doctrine. They depend on fair use and public domain works to craft their films and fulfill their important cultural role. Yet documentary filmmaking is being suppressed by the DMCA's prohibition on circumvention.

B. CSS-Protected DVDs Have Become the Dominant Distribution Format for Materials That Filmmakers Need for Fair Use and for Public Domain Materials

Documentary filmmakers depend on the use of DVDs in order to make fair use or use public domain works because the DVD has become the default distribution format for audiovisual works, particularly motion pictures. The VHS format is obsolete, and VHS copies are increasingly difficult to obtain. Best Buy and Circuit City stopped selling VHS in their stores in 2005,⁹ and Blockbuster Video stopped renting VHS cassettes in 2004.¹⁰ The vast majority of motion pictures released in the last few years were released exclusively on DVD; in fact, the last major studio film to be released on VHS tape was the 2005 film *A History of Violence*.¹¹ The

⁶ See generally PATRICIA AUFDERHEIDE & PETER JASZI, *UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS* (2004), http://www.centerforsocialmedia.org/rock/backgrounddocs/printable_rightsreport.pdf. UNTOLD STORIES makes clear that licensing fair uses is often not a viable option for documentary filmmakers because many copyright owners generally have little or no incentive to allow documentary filmmakers to comment on or criticize their works and as a result seek steep licensing fees, and copyright owners are usually more sophisticated and have more resources than documentary filmmakers.

⁷ DOCUMENTARY FILMMAKER'S STATEMENT OF BEST PRACTICES IN FAIR USE (2005), http://www.centerforsocialmedia.org/resources/publications/statement_of_best_practices_in_fair_use/.

⁸ See Patricia Aufderheide & Peter Jaszi, *Fair Use and Best Practices: Surprising Success*, INTELLECTUAL PROPERTY TODAY, Oct. 2007, <http://www.centerforsocialmedia.org/files/pdf/IPTodaySuccess.pdf>.

⁹ Mark Chediak, *As DVD Sales Fast-Forward, Retailers Reduce VHS Stock*, WASHINGTON POST, June 15, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/14/AR2005061401794.html>.

¹⁰ *Blockbuster ditches DVD in favour of VHS*, April 4, 2004, <http://www.allbusiness.com/retail/retailers-miscellaneous-store-retailers-video/7522936-1.html>.

¹¹ Dennis Lim, *Instant Nostalgia? Let's Go to the Videotape*, N.Y. TIMES, Jan. 27, 2008, <http://www.nytimes.com/2008/01/27/movies/27lim.html?pagewanted=all>.

disappearance of the VHS format is not limited to movies; the hit television series *Seinfeld*, which started being released on DVD in 2004, has never been available on VHS tape.¹² A search on Amazon.com reveals that the online retailer carries only seven titles released in 2008 on VHS, and only one title has been announced for 2009. However, over 1950 titles are slated for release on DVD in 2009.¹³ Even public domain works on VHS are becoming increasingly scarce. While several years ago public domain works may have been readily available on VHS as an alternative to CSS-protected DVDs, they are less available now.¹⁴ As VHS tapes become ever more scarce, DVDs with CSS will only become more ubiquitous.

C. The Technological Measure at Issue

Virtually all DVDs commercially produced today are protected by CSS.¹⁵ On a CSS-encrypted DVD, certain keys that decode the encryption are located in a "hidden area" on the disc that cannot be copied, and as a result any one-to-one copy of the disc will lack the keys necessary to decode the content for playback.¹⁶ Documentary filmmakers, then, are not able to obtain the digital material on these DVDs for fair use in their films without circumventing CSS. They are also unable to obtain public domain works on DVDs without circumventing CSS, because these works are bundled with copyrighted materials—such as titles, commentary, or music—on DVDs with CSS protection.

Although there is some debate as to whether CSS constitutes an access control measure, a use-control measure, or both,¹⁷ CSS has previously been characterized as an access control measure under Section 1201 of the DMCA.¹⁸ The Commenters therefore request this exemption under the assumption that CSS will be considered an access control measure, at least in part.

¹² Amazon.com: *Seinfeld* season 1, http://www.amazon.com/s/ref=nb_ss_gw?url=search-alias%3Daps&field-keywords=seinfeld+season+1&x=0&y=0 (last visited Nov. 29, 2009).

¹³ See VHS, AMAZON.COM, http://www.amazon.com/s/qid=1228212504/ref=sr_st?rs=404272&page=1&rh=n%3A404272&sort=-releasedate (last visited Dec. 1, 2008); DVD, AMAZON.COM, http://www.amazon.com/s/qid=1228212581/ref=sr_st?keywords=dvd&rs=130&page=1&rh=n%3A130%2Ck%3Adv&sort=-releasedate (last visited Dec. 1, 2008).

¹⁴ For example, in the 2003 Rulemaking the Electronic Frontier Foundation and Public Knowledge requested an exemption for public domain works on DVD and listed several examples of public domain works on DVD. *Comments of The Electronic Frontier Foundation and Public Knowledge*, 33 f.101 (2003). However, the Register found that public domain works were alternatively available in VHS format based on a reply comment noting that those works were available from Amazon.com on VHS. *Joint Reply Comments of AFMA et al.*, 22 n.22 (2003); Recommendation of the Register of Copyrights, 101-02 (2003), <http://www.copyright.gov/1201/docs/registers-recommendation.pdf>. Due to the phasing out of VHS, these works are no longer sold on Amazon.com, and can only be found in used VHS format from third parties.

¹⁵ See Gary Gentile, *Studios approve movie-copying technology*, Jan. 3, 2007, <http://www.msnbc.msn.com/id/16459551/>.

¹⁶ Jeffrey A. Bloom et al., *Copy Protection for DVD Video*, PROCEEDINGS OF THE IEEE, VOL. 87, NO. 7, July 1999, <http://www.dvd-copy.com/reference/IEEE-doc-copyproc.pdf>.

¹⁷ See R. Anthony Reese, *Will Merging Access Controls and Rights Controls Undermine the Structure of Anticircumvention Law?*, 18 BERKELEY TECH. L.J. 619, 643-47 (2003).

¹⁸ See, e.g., *Universal City Studios, Inc. v. Reimerdes*, 111 F.Supp.2d 294, 317-18 (S.D.N.Y., 2000); Recommendation of the Register of Copyrights, 65 Fed. Reg. 64555, 64568 & n.14 (2000), <http://www.copyright.gov/fedreg/2000/65fr64555.pdf>.

As a result, documentary filmmakers cannot circumvent CSS to obtain material for their films from the public domain or for fair use purposes without fear of incurring liability under the DMCA. In *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294, 323-24 (S.D.N.Y. 2000), aff'd, *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 459 (2d Cir. 2001), the court held that the DMCA does not permit circumvention in order to accomplish fair uses. Since that ruling, the Federal Circuit held in *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 381 F.3d 1178, 1202-04 (Fed. Cir. 2004), that access control circumvention devices do not violate the DMCA when there is no nexus between the circumvention and infringement. It is not yet clear, however, how *Skylink* and a line of subsequent cases following its holding¹⁹ will be applied where fair uses are prevented by CSS; nor is it clear whether additional courts will adopt the *Skylink* holding. Without further guidance, documentary filmmakers legitimately fear liability under the DMCA should they circumvent CSS, and are thereby prevented from doing so.

D. Analog Alternatives to Circumvention Are Not Practicable

For documentary filmmakers, there is no practicable alternative to circumvention of CSS on DVDs in order to obtain material that is in the public domain or for fair use purposes. First, as discussed above, DVD is the default distribution format for source material and continues to become more and more dominant. Analog sources, when they are available at all, are increasingly scarce. Second, analog methods of obtaining material from the DVDs result in such low quality that the material is unsuitable for broadcast on television, theatrical screening, or higher-definition formats.

When documentary filmmakers are forced to use low-quality, degraded material, they are effectively foreclosed from showing their work to most audiences. Broadcasting organizations such as PBS impose strict standards for image quality,²⁰ and if a documentary filmmaker cannot meet such standards—which is often the case with material obtained via analog transfer methods—he or she must either delete the material that violates the standards or face the fact that the film cannot be shown. Television broadcast is one of the primary avenues by which documentary filmmakers exhibit their work and by which the public is able to see documentaries; if documentary filmmakers cannot circumvent CSS for fair use or to obtain public domain works, this important avenue will largely be unavailable.

Almost all documentary filmmakers submit their films to film festivals where, if selected, the films are played in theaters. Such festivals are a critical component of the documentary film distribution system. However, the degraded material that results from the analog alternatives of obtaining material is of such poor quality that, at best, viewers find the material distracting; such images are virtually unwatchable on a big screen or in a theater. As a result, documentary filmmakers using an analog method run the unfortunate risk that film festivals may reject their films because of their degraded image quality instead of any substantive basis. Additionally, even though many documentary filmmakers never get their films distributed for theatrical

¹⁹ See *Storage Tech. Corp., v. Custom Hardware Eng.*, 421 F.3d 1307, 1318 (Fed. Cir. 2005); *Lexmark Intern. Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 547 (6th Cir. 2004); *Nordstrom Consulting Inc. v. M&S Tech., Inc.*, 2008 WL 623660, *8 (N.D.Ill. 2008).

²⁰ See, e.g., PBS Technical Operating Specifications: Submission 4-5 (2007), <http://www.pbs.org/producers/>. See also Statement of Jim Morrissette, attached hereto as Appendix A.

release, those who do obtain theater distribution also must confront the issue of degraded quality that comes with analog alternatives.

There are three primary analog alternatives to circumvention of CSS, but all result in severely degraded material. First, although VHS has become virtually obsolete, where a specific copyrighted work is available in VHS format, the material can be obtained directly from the VHS tape. If a filmmaker is forced to make use of VHS material, he or she must do so by playing a VHS copy of the material, using the VHS analog outputs to transfer the material to a computer, bypassing Macrovision copy controls with special equipment, and then digitizing that material for use in a project. This process results in a severely degraded image and audio.²¹

The second potential, but ultimately impracticable, alternative is known to filmmakers as the “scan conversion” method, and involves setting up a camcorder in front of a television or projector screen on which the DVD is playing, recording the screen image, and transferring the content from the camcorder onto a computer. The scan conversion method is not an effective means for capturing DVD content for use in documentary films for several reasons: first, it may not be possible to capture a full, consistent image playing on the screen onto a computer because of inconsistent dimensional formats.²² Second, a screen image capture will include all the physical and environmental imperfections that come between the screen and the camcorder, such as glare, screen curvature, and poor audio. Finally, the transfer of material from a camcorder to a computer results in a severely degraded pixel resolution that is generally of such low quality it is unsuitable for playback on a big screen.

The last alternative to circumvention is the so-called “analog transfer”²³ method wherein the analog output of a DVD player is connected to a videocassette recorder (“VCR”), a camcorder via the line-in input, or a personal computer.

Uses of the analog transfer method that employ a VCR present the same problems that obtaining material directly from VHS presents because in both cases, a documentary filmmaker must take degraded material from a VHS tape for use in a film. These uses are not viable because the VHS format results in material that, as discussed above, is virtually useless to a documentary filmmaker due to very poor video quality. Uses of the analog transfer that involve connecting the analog output of a DVD player to a camcorder or a personal computer are just as problematic. With these methods, material can be transferred from the analog output of a DVD player to the analog input of a Mini-DV deck, Mini-DV camcorder, or personal computer, then transferred to a digital storage device using a computer’s film editing program. The analog output can also be connected directly to a personal computer. However, while these methods do not result in the same loss of resolution as the scan conversion method, they still result in a degraded image because the material’s frame structure does not stay intact during the transfer process. The sharp decrease in visual quality is noticeable on a small screen but even more

²¹ Video from a DVD has a maximum of 540 lines of horizontal resolution per picture height on a standard television, while video from a VHS has about 240 lines of horizontal resolution. JIM TAYLOR ET AL., DVD DEMYSTIFIED, 9-36 (2005).

²² For instance, a widescreen television may be playing a DVD in 1.85:1 format, while the camcorder may be recording in a 16:9 format.

²³ The analog transfer method is sometimes referred to as use of the so-called “analog hole.”

pronounced when the film is viewed on a big screen television, with a projector, or in a theater.²⁴ The analog transfer alternative, like the scan conversion method and use of VHS material, drastically degrades the DVD material, making it effectively unusable for documentary filmmaking purposes.

Another major problem with the analog transfer method is that it requires that documentary filmmakers bypass Macrovision's Analog Copy Protection ("ACP") technology, which comes standard on all DVDs.²⁵ In order to employ any of the analog transfer methods discussed above, the analog signal must be run through a visual stabilizer or a digital time base corrector, which removes ACP from the signal sent by the DVD player. These devices are not widely available, and all but one manufacturer have stopped producing them.²⁶ Where a documentary filmmaker employs the DVD-to-MiniDV analog transfer method using a higher end camcorder, he or she can sometimes bypass the Macrovision problems encountered by most consumer camcorders; even in those cases, however, the filmmaker still encounters problems maintaining audio sync and frame rate between the DVD player and the recording device.²⁷

It is not just that analog transfer methods produce material unsuitable for use in documentary films; the technical challenges of the process and circumvention of the Macrovision technology also require significant expertise and time. These burdens prevent a significant portion of filmmakers from being able to use the analog transfer method.

Because CSS-encrypted DVDs have become the default format for physical media distribution and the possible alternatives to circumventing the CSS are not practicable, the DMCA's prohibition on circumvention effectively prevents documentary filmmakers from using public domain material and engaging in fair use—two essential noninfringing uses.

IV. ARGUMENT

As described above, CSS-protected DVDs are an essential source for documentary filmmakers to obtain public domain or fair use material because DVDs are the default media distribution format and analog alternatives are unacceptable. However, documentary filmmakers' inability to circumvent CSS prevents them from making being able to obtain the material from these DVDs. As such, an exemption for the limited purposes covered by the requested exemption is necessary to remedy its adverse effects.

²⁴ Statement of Jim Morrisette, attached hereto as Appendix A.

²⁵ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies: Final Rule, 65 Fed Reg. 64555, 64568 (2000), <http://www.copyright.gov/fedreg/2000/65fr64555.pdf>. See also Hearing on Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 252 (May 19, 2000), <http://www.copyright.gov/1201/hearings/1201-519.pdf>; Analog Copy Protection (ACP) – Analog Protection System – Macrovision, http://www.macrovision.com/products/content_publishers/acp.htm.

²⁶ Statement of Jim Morrisette, attached hereto as Appendix A.

²⁷ *Id.*

A. CSS Technology on DVDs Has a Substantial Adverse Effect on the Use of Public Domain Works and Fair Use in Documentary Filmmaking

When documentary filmmakers cannot circumvent CSS technology in order to obtain material on DVDs there is a substantial adverse effect on two noninfringing uses that are critical to documentary filmmaking: fair use and the use of public domain materials. The inability to circumvent CSS prevents documentary filmmakers from these uses by preventing them from obtaining public domain works and material for fair use. As a result, filmmakers are prevented from explaining or making a certain point, have to leave out an integral part of the film, or are prevented from making the film altogether.

For example, Caitlin Manning, a documentary filmmaker and professor of film and video at California State University, Monterey Bay, is making a documentary about her late grandfather, Al Capp, one of America's first great cartoonists and creator of the satirical American comic strip *Li'l Abner*. Her film requires old footage of television broadcasts of her grandfather to illustrate his role in and impact on society at that time. However, because some of this material is only available on DVDs with CSS, Manning is planning to forego use of the material because of her concerns about the legality of circumvention.

Where, as an alternative to leaving out material, a filmmaker wishes to use an analog copy of the DVD material, the copy is severely degraded and unsuitable for theatrical distribution or other types of distribution, as discussed in Part III(D). For example, Bob Hercules, co-owner of Media Process Group, is working on a documentary about Michael Pfleger, a priest who was heavily criticized in the media after making controversial remarks about Hilary Clinton during the 2008 Democratic Primary nomination. Because of his concerns regarding circumvention, Hercules is being forced to use degraded news footage that will severely compromise the documentary when it comes time to broadcast or screen this film.

Of course, it is not just the individual documentary filmmaker who is suffering as a result of the technological measure at issue here; ultimately the public is suffering when it does not receive the benefits of these documentaries, many of which are for the purposes of criticism, comment, news reporting, teaching, scholarship or research. Professor Manning's documentary, for example, presents and comments on the historical importance of Al Capp and his cartoons. Additionally, Gordon Quinn's *The New Americans*, a PBS documentary series following several immigrants before and after they come to the United States, sought to educate the public about immigration issues. One of the subjects of the documentary series mentioned the movie *Coming to America*, a comedy about an African prince immigrating to the United States. Quinn wanted to use a clip from this movie to show what the subject was referring to and to "provide a counterpoint to [the subject's] own immigration story." Quinn ultimately had to eliminate this piece of the documentary because he did not want to circumvent the CSS on a DVD copy of *Coming to America*.

Stories such as those of Professor Manning, Mr. Hercules, and Mr. Quinn are common—and the resulting harm to the purposes enumerated in Section 1201(a)(1)(C) is real and far-reaching. Their stories clearly demonstrate that documentary filmmakers need an exemption

from the prohibition on circumvention in order to reduce this harm and the substantial adverse effect on their use of public domain works and fair uses.

B. The Proposed Class of Works Is Narrowly Tailored to Address the Harm

We are proposing a narrowly tailored exemption that would address the above concerns, while leaving Section 1201's fundamental protections for copyright holders in place. The proposed class of works meets the standards set forth by the Register of Copyrights in its 2006 Recommendation to the Librarian of Congress²⁸ and the October 6, 2008, Notice of Inquiry²⁹. The proposed class is a focused subset of "motion pictures and other audiovisual works," a category enumerated in 17 U.S.C. § 102(a)(6), and is further refined by limiting both covered users and covered uses, to ensure that the requested exemption is narrowly tailored to remedy the harm and to limit adverse consequences. As copyright holders themselves, documentary filmmakers appreciate the value of copyright protection and thus seek a narrowly tailored exemption that respects the balance of interests between rightsholders and the public.

(i) Motion Pictures and other audiovisual works in the form of Digital Versatile Discs (DVDs) not generally available commercially to the public in a DVD form not protected by Content Scramble System technology...

The proposed class of works that would be eligible for the requested exemption is a focused subset of a category of works enumerated in Section 102(a)(6), namely "motion pictures and other audiovisual works."³⁰ The proposed class includes only those audiovisual works that are in DVD form, and of that subset, only those that are protected by CSS technology. Audiovisual works in other digital formats, such as works streamed over the internet or broadcast, would not be eligible; nor would works protected by technological measures other than CSS.

The class is further restricted to works that are "not generally available commercially to the public in a DVD form not protected by CSS." For purposes of this class, an unprotected DVD should be considered generally available commercially to the public if the average consumer employing reasonable efforts is able to locate and purchase it at a physical or online retailer. Any works not generally commercially available—for example, in a studio's vault—would be essentially inaccessible or prohibitively expensive.

(ii) ...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...

We have further narrowed the requested exemption by refining the class of works according to user in order to minimize any harm to rightsholders. The requested exemption would be limited to documentary filmmakers who are part of an organization of filmmakers, and

²⁸ Recommendation of the Register of Copyrights, 16-17 (2006), http://www.copyright.gov/1201/docs/1201_recommendation.pdf.

²⁹ Notice of Inquiry, 73 Fed. Reg. 194, 58073-79 (Oct. 6, 2008), <http://www.copyright.gov/fedreg/2008/73fr58073.pdf>.

³⁰ 17 U.S.C. § 102(a)(6).

documentary filmmakers who are enrolled in a film program or a film production course at a post-secondary educational institution. This refinement ensures that the exemption will be targeted to a discrete and identifiable group of users who are directly affected by the technological measure and who need this exemption because they rely on specific noninfringing uses. As an added benefit, this group is relatively likely to be well-informed about how to make fair use of copyrighted materials and how to identify public domain works.³¹

(iii) ...is accessing material for use in a specific documentary film for which substantial production has commenced...

In order to address specifically the demonstrated harm and to further limit any adverse consequences of creating the exempted class, the requested exemption is refined and significantly limited by restricting the use to:

- (1) a specific documentary film;
- (2) for which substantial production has commenced.

The exemption is thus specifically designed for a defined subset of motion pictures: documentary films. For purposes of this comment, a “documentary film” is any creative visual expression primarily composed of nonfiction material that purports to tell the truth or document reality. This definition of documentary film is derived from several leading sources,³² and limits the exemption to the types of non-fiction films that rely most heavily on fair use and public domain works and fulfill the purposes set forth at Section 1201(a)(1)(C)(iii). Thus the use of DVD material in a “biopic,” a film that uses actors, scripts and other nonfiction material to create a fictionalized account of the life of an actual person or people, is excluded from the proposed class because this type of film does not have the same critical role in society; a “biopic” is made for entertainment purposes while documentary films are made for purposes of comment, criticism, news reporting, teaching, scholarship and research.

The proposed exemption is further tailored to cover only those cases in which the producer clearly has defined a specific documentary project and has undertaken substantial steps

³¹ Filmmaker organizations such as the International Documentary Association educate their members about fair use and public domain work through magazines, newsletters, listservs, seminars, and other resources. Kartemquin Educational Films’ Artistic Director and founding member, Gordon Quinn, has appeared at many conferences that bring together its members, attorneys, and others to teach about fair use in documentary film. In the past two years, Mr. Quinn has made presentations on fair use at Media in Transition 5 (April 2007), Remix Institute (July 2007), Morelia Lab (October 2008), the Chicago Humanities Festival (November 2008), and the Cal Bar Intellectual Property Institute (November 2008). Mr. Quinn also plans to make presentations at Mexican Film Institute (February 2009) and the Mashup Conference (March 2009). Similarly, many documentary filmmakers enrolled in a film program or a film production course at a post-secondary educational institution are likely to be educated about fair use and the use of public domain works through their courses of study. Many film educators teach their students about clearance, fair use, and other copyright issues. Additionally, the University Film and Video Association, to which many of these educational institutions belong, hosts copyright-related events at its summer meetings and makes various resources available to its members about fair use. *See, e.g., Syllabus Language Developed by the Fair Use Working Group*, UNIVERSITY FILM & VIDEO ASSOCIATION, http://ufva.org/content.php?type_id=7&article_id=174.

³² *See e.g.* BARRY HAMPE, MAKING DOCUMENTARY FILMS AND VIDEOS: A PRACTICAL GUIDE TO PLANNING, FILMING, AND EDITING DOCUMENTARIES, 10-13 (2d ed. 2007); PAUL ROTH, DOCUMENTARY FILM (1936).

to develop that project, by requiring “substantial production” to have commenced before circumvention can occur. For purposes of the requested exemption, the term “substantial production” refers not to any particular stage of filmmaking (such as “pre-production” or “post-production”), but to the overall amount of work that has gone into creating the documentary. Only films that are well on their way to completion, for which filmmakers have taken significant steps toward creation other than simply obtaining material from DVDs, would be eligible. Because the exemption would be limited to documentaries for which substantial production has already taken place, the exemption would not be available to filmmakers who wish to archive or stockpile footage for some later project. This restriction thus limits the potential for abuse of the exemption by making it available only when a documentary filmmaker has determined that it is absolutely necessary to include CSS-protected material in a specific film.

(iv) ...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.

Finally, the class of works is refined by two uses that are clearly noninfringing: use of material in the public domain, and use in compliance with the doctrine of fair use as defined by federal case law and statute. This refinement ensures that the requested exemption only applies to noninfringing uses and further limits any adverse consequences that recognition of an exempted class might cause.

Works in the public domain are not protected by copyright, and it is well established that fair use is a noninfringing use.³³ As discussed above in Part III(A), the ability to use public domain material and make fair use of copyrighted material is essential to documentary film. When documentary filmmakers cannot obtain this material for fear of liability under the DMCA, the resulting substantial adverse effect not only affects documentary filmmakers but also robs the public of the many benefits of documentary films.

With this and other refinements the proposed class of works is narrowly tailored to address the demonstrated harm because it only applies to specific, well-established noninfringing uses that are critically important to documentary film.

C. An Analysis Under the Section 1201(a)(1)(C) Factors Favors Granting the Requested Exemption

The Copyright Office must consider the factors set forth at 17 U.S.C. § 1201(a)(1)(C)(iii) before granting an exemption. The proposed class of works favors granting an exemption under all of the factors.

(i) The availability for use of copyrighted works

In light of filmmakers’ inability to obtain material on CSS-protected DVDs that is in the public domain or for fair use purposes, the prevalence of CSS protection on DVDs means that a substantial amount of material is unavailable for use by documentary filmmakers. A critical

³³ See, e.g., *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 550 (1985); 17 U.S.C. § 107.

mass of material has been removed from the set of works that documentary filmmakers need in order to make their films.

The Register has indicated that this inquiry requires “the examination of the entire landscape of availability of ‘works’ for ‘use.’”³⁴ As described above in Part III(B), DVD has become the default distribution format for audiovisual works, particularly motion pictures – and virtually all commercially available DVDs are encrypted with CSS. Therefore, documentary filmmakers that wish to use public domain audiovisual works or to make fair use of audiovisual works in their films are, in many instances, effectively limited to doing so with CSS-protected DVDs.

The Register has further indicated that the inquiry must explore whether there are alternative formats in which the works are available for use.³⁵ As described above in Part III(D), although there are sometimes alternative methods by which documentary filmmakers can obtain material, analog sources are becoming ever more scarce. Further, methods that do not involve circumvention generally produce material too visually degraded to constitute practical alternatives for the purposes of documentary filmmaking.

This inquiry also requires consideration of whether the requested exemption would affect the availability of this particular class of works. With respect to CSS-protected DVDs, copyright owners have argued that if this prohibition did not exist, they would be disincentivized from making DVDs available to the purchasing public out of fear that rampant copying would destroy the market for protected DVDs.³⁶ However, as copyright holders themselves, documentary filmmakers are sensitive to concerns about piracy and have a unique perspective of, and respect for, the balance of interests between rightsholders and the public. As such, we propose an exemption that allows documentary filmmakers to obtain material for certain noninfringing uses, under limited conditions, that narrow the class of works to a specific set of uses that do not include archiving or stockpiling footage. Therefore, copyright owners need not be concerned that the uses of certain documentary filmmakers would result in the widespread circulation of unprotected copies of their works, or otherwise reduce the overall availability of copyrighted works.

(ii) The availability for use of works for nonprofit archival, preservation, and educational purposes

Documentary films are intrinsically educational in that they purport to tell the truth or document reality, and of course, many documentary films are made specifically for use in the classroom setting. Additionally, documentary films are used as teaching tools at all educational levels for a variety of purposes.³⁷ For example, documentary films dealing with current or past events and figures act as visual learning aids that help convey the material to students. Also, historical footage is often best conveyed through the critical lens of a documentary film, which

³⁴ Recommendation of the Register of Copyrights, 21 (2006), http://www.copyright.gov/1201/docs/1201_recommendation.pdf.

³⁵ *Id.* at 21-22.

³⁶ *Id.* at 19.

³⁷ See TIM CRESSWELL & DEBORAH DIXON, ENGAGING FILM, 209-225 (2002).

can provide educational background on a particular historical subject. Ultimately, documentary films need to use public domain materials and make fair use of copyrighted works in order to produce films for educational use; the DMCA's prohibition on circumvention suppresses the availability of works for this purpose.

(iii) The impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research

As demonstrated throughout this Comment, documentary film plays an indispensable role in conveying subject matter to society for these enumerated purposes. Films such as Jean Kilbourne's *Killing Us Softly 3*, which criticizes and comments on the media for its negative effect on women's body image, and Gordon Quinn's *The New Americans*, which seeks to educate its viewers about immigration issues, demonstrate that the documentary film medium fulfills these purposes through social criticism and analysis, historical story-telling or investigation, education, and much more. Furthermore, when documentary filmmakers use public domain material or make fair use of material, they quite often do so specifically for these purposes.³⁸ Without the ability to circumvent CSS, documentary films made for these socially productive purposes are severely compromised, and as a result the purposes enumerated by the Copyright Office in Section 1201(a)(1)(C)(iii) are substantially subverted.

(iv) The effect of circumvention of technological measures on the market for or value of copyrighted works

The requested exemption would not have a negative impact on the market for or value of the audiovisual works at issue here. The requested exemption only applies to noninfringing uses. The purveyor of a DVD containing public domain works, of course, has no copyright interest in the public domain works at all. Similarly, copyright holders are not entitled to an exclusive market for fair uses of their material, as such a result would subvert the foundational purposes of the fair use doctrine.³⁹

Nor would the requested exemption harm the overall market for or value of copyrighted works on DVD. As discussed above in Part IV(C)(i), only a carefully defined set of users would be able to obtain the materials for these noninfringing uses. If anything, the fair use of

³⁸ See, e.g., *Hofheinz v. AMC Prods, Inc.*, 147 F. Supp. 2d 127, 137-38 (E.D.N.Y. 2001) (finding that a documentary film's use of copyrighted works was fair use in part because it "... aims to educate the the viewing public of the impact that [the subjects of the film] had on the movie industry") (emphasis added). See also *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310, 322 (S.D.N.Y. 2008) (finding that the documentary film *EXPULSED* made fair use of a 15-second clip of the John Lennon song "Imagine" in part because "... the movie incorporates an excerpt of 'Imagine' for purposes of comment and criticism") (emphasis added).

³⁹ See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985) ("The copyright owner's rights...are subject to certain statutory exceptions....among these 107 which codifies the traditional privilege of other authors to make "fair use" of an earlier author's work"); *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569, 599 (1994) (finding that the new creative work based on the copyrighted work could compete for the same market as the original work, "... even if their appeal is overlapping"). See also *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 611 (2d Cir. 2006) ("[C]opyright owners may not preempt exploitation of transformative markets") (quoting *Castle Rock Entm't, Inc. v. Carol Pub. Group, Inc.*, 150 F.3d 132, 146 n.11 (2d Cir. 1998)).

copyrighted materials for the demonstrated uses by documentary filmmakers would increase the market for copyrighted works on DVDs protected by CSS by exposing filmgoers to a portion of the work.

(v) Such Other Factors as the Librarian Considers Appropriate

We urge the Register to consider how the fact that CSS prevents useful access to public domain material and material for fair use undermines the goals of the copyright system. The use of public domain materials and fair use of copyrighted works are at the heart of documentary film. Without these uses, documentary film is not only compromised; it is imperiled. More broadly, CSS and other technological measures deprive the public of works that should be readily accessible, and severely restrict the public from engaging in fair uses to which it is entitled. As a result, the viability of this important medium—and the copyright system as a whole—are at stake.

V. CONCLUSION

For the reasons set forth above, Kartemquin Educational Films and the International Documentary Association respectfully request that the proposed exemption be approved for the 2009-2012 period.

APPENDIX A

Statement of Jim Morrisette, Kartemquin Educational Films

My name is Jim Morrisette. I am the Technical Director at Kartemquin Educational Films, and I have worked for over thirty years as both a professional videographer and a technical consultant in documentary film. I have been the director of photography on numerous highly acclaimed productions, including the award-winning PBS documentary *A Small Still Voice* and *Shadow Over Tibet*, and have been an associate at Kartemquin Educational Films for the past 18 years.

To the best of my knowledge, there are several methods by which to obtain material from DVDs without circumventing Content Scramble System technology. All result in severe degradation in the quality of the image and audio, require considerable time and expertise to implement, and, worst of all, severely hamper documentary filmmakers' ability to have their films shown.

The alternative to circumvention that results in the least amount of degradation is the analog transfer method, sometimes referred to as use of the so-called "analog hole," wherein the analog output of a DVD player is connected to a DV camcorder via the line-in input or to a personal computer. Compared to the process of obtaining material directly from a DVD, analog transfer methods require additional hardware and a substantial amount of time and technical expertise—and they still result in unacceptably degraded image and audio.

For example, the "analog transfer" method requires the use of special equipment to remove Macrovision's Analog Copy Protection ("ACP") copy control from the analog video signal; this process must be undertaken because virtually all computers and consumer camcorders recognize ACP and will not copy the material. To remove ACP, the analog video signal must be run through a time base corrector or visual stabilizer, which removes the ACP from the video signal sent by a DVD player. To my knowledge, only one firm still manufactures time base correctors.

The resolution, or sharpness, of video transferred using an analog process is *always* far worse than that which is taken from a DVD. One of the main sources of degradation results from problems synchronizing frame rates, the rates at which imaging devices produce unique consecutive images, between the two formats. The analog transfer method often causes a "flicker" effect in video, which is a result of the inherent difficulty in synchronizing the frames of the DVD source video with the frames of the new recording medium. This problem is exacerbated during analog transfer when the material must be obtained from a DVD with a frame rate of 24 frames per second. In such cases, the DVD player must convert the 24 FPS signal into an analog signal with a 29.97 FPS rate. Some DVD players, however, do not perform this conversion well, causing yet more degradation and flicker.

The vast difference in visual quality between the two methods is plainly evident from a visual comparison of images. The two Figures included in this statement are stills taken from *Mapping Stem Cell Research: Terra Incognita*, a Kartemquin-produced film that aired on PBS in January 2008. Figure 1 shows an image that was obtained using the analog transfer method. The DVD was played, the analog signal was run through a time base corrector, and the signal was then recorded to DV tape. The DV tape was then captured with a computer's film editing software. The still in Figure 1 was pulled from that capture file.

Note that along with the loss of resolution resulting from the analog transfer, there is a wider black line on the left of the frame in Figure 1. A broadcasting system such as PBS can reject footage on this basis alone. The only solution to the "black line" problem is to "blow up" the material in order to remove the black line from view. However, this solution only degrades the material even further because it has been magnified.

Figure 2 was taken directly from a DVD of *Mapping Stem Cell Research: Terra Incognita* without copy protection. The material was removed from the DVD with the HandBrake software, which was then converted into a DV video file using DVDxDV software. Not only is the image quality on Figure 2 vastly superior to that of Figure 1, but the "black line" along the left edge of the image is barely noticeable.

The difference in image quality is clearly evident in these small images; when the film is screened in a theater or on a large television screen, of course, the disparity is far more pronounced.

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Figure 1:
Still from *Mapping Stem Cell Research: Terra Incognita*
obtained using analog transfer method



Figure 2:
Still from *Mapping Stem Cell Research: Terra Incognita*
obtained directly from DVD

Analog transfer also negatively affects the material's audio quality. Where a direct digital transfer of material has no loss of quality, analog processes degrade the audio, picking up hums and buzzes. Worse yet, the audio itself is sometimes distorted. Additionally, the audio will often un-synchronize from the video during the conversion process, which causes, among other things, a person's audio dialogue to occur before or after the visual image of their lips moving. This problem can be ameliorated by a savvy technician or editor, but not without significant time and effort.

Visual and audio degradation problems such as these can have severe consequences for filmmakers who wish to share their films with the public. For example, a documentary film that has used analog transfer to obtain material from a DVD may not be accepted under the strict standards of many broadcasting systems. The Public Broadcasting System ("PBS"), an important broadcasting avenue for documentary filmmakers, requires *digital* video for all submissions. Even filmmakers who convert analog material into digital form, however, will have difficulty meeting PBS's standards. For example, PBS requires a black level of zero for all digital submissions. "Black level" is a measurement of the degree to which the black displayed on screen is true to the black information in the video signal, and operates on a scale of zero to 100; true black is zero, and true white is 100. The default black level setting for analog video is 7.5 units, while digital video's black level defaults to zero units. Where material is taken from a DVD via analog transfer, the video requires additional processing in the editing room to restore the digital footage's black level back to zero. As a result, documentary filmmakers using the analog transfer method permanently lose about 7.5% of the color range in their videos during the transition from 7.5 units to zero units.

Ultimately, where a filmmaker must obtain video from a DVD via analog methods, the resulting degradation of the visual and audio quality of footage is so severe that even when an experienced and technically savvy filmmaker or editor performs the transfer, the footage will often be unusable in several contexts that are critical to documentary filmmaking. In particular, broadcasting systems such as PBS may reject the video, and the film will not be suitable for viewing in theaters or on large-screen televisions.

APPENDIX B

About the Commenters

Kartemquin Educational Films, Inc.

Kartemquin Educational Films is a nonprofit organization of documentary filmmakers located in Chicago. Since its first film in 1966, *Home For Life*, a powerful chronicle of two elderly people entering a home for the aged, Kartemquin has been making documentaries that examine and critique society through the stories of real people. With a record number of films currently in development and production, Kartemquin is poised to continue this legacy for years to come. Kartemquin was recently honored to receive one of eight international 2007 MacArthur Awards for Creative and Effective Institutions.

Kartemquin's best known film, *Hoop Dreams*, won every major critics prize and journalism award in 1995 and was named on over 150 "ten best" lists. The film examines the complex role basketball plays in the lives of two inner-city high school players. After garnering the Audience Award at the Sundance Film Festival, *Hoop Dreams* was released theatrically by Fine Line Features and became the highest grossing documentary at that time and one of highest-rated documentaries broadcast on PBS.

Kartemquin's most recent documentary, *In the Family*, premiered at SILVERDOCS in 2008 and was recently broadcast nationally on PBS's P.O.V. Just prior to that, *At the Death House Door* premiered at the 2008 SXSW film festival, with an extensive festival run and national broadcast on the Independent Film Channel following. *Mapping Stem Cell Research: Terra Incognita* put a human face on stem cell research and was broadcast internationally on PBS, the CBC, and SBS Australia.

International Documentary Association

International Documentary Association (IDA) was founded in 1982 as a nonprofit membership organization dedicated to supporting the efforts of nonfiction film and video makers throughout the United States and the world; promoting the documentary form; and expanding opportunities for the production, distribution, and exhibition of documentary.

Over the past twenty-six years IDA has served as a forum and voice for documentarians around the world. IDA currently serves over 2,800 members in over 50 countries, offering programs, seminars, lectures, workshops, and screenings for those members and the general public. Among its many activities, IDA publishes a quarterly magazine, *Documentary*, devoted exclusively to nonfiction media, hosts an annual documentary film festival, "Docufest," and serves as a fiscal sponsor for more than 300 nonfiction projects each year.