

*Before the*

**United States Copyright Office  
Library of Congress**

In the Matter of )  
)  
)  
Exemption to Prohibition on ) Docket No. RM 2011-07  
Circumvention of Copyright Protection )  
Systems for Access Control Technologies )  
)

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**REPLY COMMENTS OF  
INTERNATIONAL DOCUMENTARY ASSOCIATION,  
KARTEMQUIN EDUCATIONAL FILMS, INC., AND  
NATIONAL ALLIANCE FOR MEDIA ARTS AND CULTURE**

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**RE: PROPOSED CLASS OF WORKS 7D**

Motion pictures that are lawfully made and acquired from DVDs protected by the Content Scrambling System and Blu-Ray discs protected by Advanced Access Content System, or, if the motion picture is not reasonably available on DVD or Blu-Ray or not reasonably available in sufficient audiovisual quality on DVD or Blu-Ray, then from digitally transmitted video protected by an authentication protocol or by encryption, when circumvention is accomplished solely in order to incorporate short portions of motion pictures into new works for the purpose of fair use, and when the person engaging in circumvention reasonably believes that circumvention is necessary to obtain the motion picture in the following instances:

- (1) documentary filmmaking; OR
- (2) fictional filmmaking.

**I. INTRODUCTION**

As filmmakers, we are creators who rely on fair use to produce important works of commentary and criticism.<sup>1</sup> In an attempt to steer the discussion away from this fact, the parties who oppose this exemption have focused their comments on consumer-based distribution and piracy. But that approach ignores the purpose of this Rulemaking, which is to ensure that the DMCA does not interfere with noninfringing uses of copyrighted works.<sup>2</sup> Indeed, Congress set up this proceeding specifically in order to protect fair use in the digital age and to ensure that the DMCA does not create a “pay-per-use” regime.<sup>3</sup>

Our proposed exemption will not contribute to copyright infringement. The opponents allege generally that to grant this exemption would undermine consumer-oriented distribution models—but motion pictures have been and continue to be distributed in access-protected formats despite the wide availability of decryption software. Moreover, our proposed exemption is narrowly-tailored in several important ways that minimize the risk of infringement: it is limited to two groups that responsibly make fair use; it only authorizes the inclusion of short portions of motion pictures for the

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<sup>1</sup> See e.g., Appendix A, Statement of Gordon Quinn (“I want to stress that we at Kartemquin Films and Documentary filmmakers in general are now seeking this exemption as consumers. We are creators of art and culture.”).

<sup>2</sup> In drafting §1201(a) of the DMCA, Congress was particularly concerned that fair use would remain “firmly established in the law,” and emphasized the importance of fair use to American scholarship, education, industries and consumers. See Commerce Rep. at 21, 25-26. To protect fair use, the Committee on Commerce created this exemption rulemaking with the express goal of “maintain[ing] balance between the interests of content creators and information users.” See Commerce Rep. at 25-26, 85-86. The Committee emphasized that in evaluating the §1201(a)(1)(C) factors “the focus must remain on whether the implementation of the technology protection measures (such as encryption or scrambling) has caused adverse impact on the ability of users to make lawful uses.” See Commerce Rep. at 37. Indeed, the Register has acknowledged this purpose by stating at the outset of this round that this Rulemaking is a “fail-sale mechanism” for fair use. See 2011 NOI at 60,400.

<sup>3</sup> See Commerce Rep. at 26 (emphasis added). “The Committee on Commerce felt compelled to address ... the risk that enactment of the bill could establish the legal framework that would *inexorably create* a ‘pay-per-use’ society.”

purpose of fair use; and it creates an incremental approach to circumvention that limits the choices available to filmmakers who exercise the exemption. In any event, as producers of new motion pictures we actually increase the total number of copyrighted works distributed to the public.

Furthermore, nothing in the opponents' comments undermines our showing that the DMCA's prohibition is substantially harming filmmakers' ability to make fair use. No alternative to circumvention that the opponents propose comes close to meeting the technical requirements for distribution and broadcast, and while opponents make much of newer consumer-based services, such services are also protected by access controls that prevent noninfringing uses. Nor is licensing a remotely appropriate alternative. By suggesting otherwise, opponents seek to wield a veto over criticism and commentary, and to use §1201(a)(1) to monetize fair uses that others are making.

There is no credible argument that the proposed exemption will undermine consumer-oriented business models—but it is clear that without this exemption, many filmmakers will be prevented from distributing and broadcasting their films, and many films simply will never be made. We therefore urge the Register to recommend that the Librarian of Congress grant the proposed exemption covering Class 7D.

## **II. DOCUMENTARY AND FICTIONAL FILMMAKERS HAVE PROVIDED SUFFICIENT EVIDENCE TO GRANT THE REQUESTED EXEMPTION**

### **a. The Exemption Covers Quintessentially Noninfringing Uses**

The use of short portions of motion pictures for purposes of fair use is a hallmark example of the type of noninfringing use that Congress intended to protect with this Rulemaking.<sup>4</sup> In 2010, the Register affirmed this by saying that “[w]hen a motion picture is used for purposes of criticism or commentary, such use is a form of quotation ... which is at the core of fair use’s function as a free-speech safeguard.”<sup>5</sup>

The Joint Commenters<sup>6</sup> urge a misguided interpretation of the standard for noninfringing use in this Rulemaking. They misconstrue the phrase “in fact noninfringing” in the 2011 NOI to mean that all possible activities covered by a proposed class must be noninfringing based on case law or statutory authority that directly holds the specific activity to be noninfringing.<sup>7</sup> For example, the Joint Commenters assert that because “not all uses of portions of motion pictures in documentary films” qualify as fair use, our narrowly tailored class should not be considered to address a noninfringing use.<sup>8</sup>

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<sup>4</sup> See IDA at 4-6.

<sup>5</sup> See 2010 Rec. at 50.

<sup>6</sup> “Joint Commenters” refers to the comment filed on behalf Association of American Publishers, American Society of Media Photographers, Business Software Alliance, Entertainment Software Alliance, Motion Picture Association of America, Picture Archive Counsel of America, and Recording Industry Association of America. See *infra* Appendix C, Glossary of Terms.

<sup>7</sup> See Joint Commenters at 40-41.

<sup>8</sup> See Joint Commenters at 41.

This Rulemaking has never employed such a standard, and for good reason. Section 1201(a)(1) of the DMCA refers only to the “ability to make noninfringing uses.”<sup>9</sup> Congress clearly intended this rulemaking to protect a wide range of noninfringing uses, including fair use, not just the rare and limited situations in which a court has held that a particular set of facts constitute a fair use.<sup>10</sup> In the most recent rulemaking, the Register affirmed this Congressional intent, stating that the §1201(a)(1) standard for noninfringing use “requires a conclusion that the use is or *is likely* to be noninfringing.”<sup>11</sup> The Joint Commenters are attempting to modify this interpretation without having met their burden to make a “persuasive case ... [that] warrant[s] reconsideration of previous decisions regarding interpretation of section 1201.”<sup>12</sup>

Furthermore, the Joint Commenters’ interpretation—that the mere possibility that a covered use could be at some point in the future found by a court to be infringing bars a finding of noninfringing use—would lead to the absurd result of eliminating all fair use based exemptions, which runs directly counter to Congress’s intent to ensure that “fair use remains firmly established in the law.”<sup>13</sup> We urge the Register to reaffirm that the standard is whether the use “is or is likely to be noninfringing,” which fulfills Congress’ intent and has successfully enabled narrowly tailored exemptions that do not lead to infringing uses.

In any event, by any reasonable definition of noninfringing use, the uses at issue here clearly qualify. We have provided numerous examples in which filmmakers have or need to make fair use by including short portions of motion pictures in order use the work for commentary or criticism. In practice, the case for noninfringing use is strengthened further because filmmakers’ fair uses must comply with the *Documentary Filmmakers Best Practices in Fair Use*<sup>14</sup> and be evaluated by an independent attorney in order to obtain errors and omission insurance required for distribution.<sup>15</sup> Even the Joint Commenters concede that “many of the uses of the motion picture footage described in the [filmmaker] comments likely qualify as fair use.”<sup>16</sup>

The practice at issue here—incorporating short portions of motion pictures for the purpose of commentary and criticism—is exactly the type of noninfringing use that Congress wished to protect through this Rulemaking.

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<sup>9</sup> The phrase “in fact” is mentioned only in the 2011 NOI, but never with the meaning ascribed to it by the Joint Commenters. *See* 2011 NOI at 60,400 and 60,403.

<sup>10</sup> In drafting §1201(a) of the DMCA, Congress was particularly concerned that fair use remained “firmly established in the law,” and emphasized the importance of fair use to American scholarship, education, industries and consumers. *See* Commerce Rep. at 21, 25-26. To protect fair use, the Committee on Commerce created this exemption rulemaking with the express goal of “maintain[ing] balance between the interests of content creators and information users.” *See* Commerce Rep. at 26.

<sup>11</sup> *See* 2010 Rec. at 12 (emphasis added).

<sup>12</sup> *See* 2011 NOI at 60,402.

<sup>13</sup> *See* Commerce Rep. at 26.

<sup>14</sup> *See* IDA at 6.

<sup>15</sup> *See* IDA at 50-51 (Statement from Joanne Richardson, Hiscox USA on Errors & Omissions Insurance).

<sup>16</sup> *See* Joint Commenters at 41.

b. Access Controls on DVD and Blu-Ray Are Causing a Substantial Adverse Effect on Filmmakers.

We have demonstrated clearly and with specificity that access controls on DVD and Blu-Ray are causing a substantial adverse effect on filmmakers' ability to make fair use.<sup>17</sup> DVD CCA and AACS LA (collectively "Copy Control Associations") incorrectly allege that we have not shown a substantial adverse effect because we do not mention examples of copyrighted clips that have been incorporated into completed movies.<sup>18</sup> Of course, neither the statute nor the 2011 NOI require this standard because unless an exemption for the specific use and format is already in effect, the DMCA prohibits all circumvention of that access control. New proponents can therefore only introduce evidence of proposed future uses of short portions of motion pictures. That is why the appropriate test is whether an access control is having or *is likely to have* an adverse effect on noninfringing use<sup>19</sup> that is more than de minimis<sup>20</sup>.

We have provided more than enough evidence to show that each access control is or is likely to create a substantial adverse effect on noninfringing uses by filmmakers. We have described numerous proposed film projects for which this is the case, identifying the titles of films, specifying clips that will be used, and explaining why the clips are critical to the film's ability comment and critique. But the experiences of specific filmmakers are just the tip of the iceberg—organizations representing thousands of documentary and fictional filmmakers across the country confirm that the harm facing filmmakers is a nationwide problem.<sup>21</sup> In the responsive comment round, even more filmmakers and organizations have come forward to provide additional stories and support for the severity of the harms facing both documentary and fictional filmmakers from DVD and Blu-Ray.<sup>22</sup>

Furthermore, AACS LA's allegation that circumvention of AACS-protected Blu-Ray is "at best, purely a matter of convenience"<sup>23</sup> betrays a profound misunderstanding of

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<sup>17</sup> It is well known that virtually all commercially-distributed DVDs and Blu-Ray discs are sold with access controls (CSS and AACS respectively) covered by the DMCA prohibition on circumvention. When we mention the inability to access specific motion pictures that are commercially-distributed on DVD or Blu-Ray within sections directly referencing the access control technologies, we are referring to the harm created by the access controls on the two formats. *See e.g.*, IDA at 23 ("CSS Technology on DVDs Has a Substantial Adverse Effect on Fair Use in Filmmaking" and "AACS Technology on Blu-Ray Discs Has a Substantial Adverse Effect on Fair Use in Filmmaking").

<sup>18</sup> *See* AACS at 23 ("the proponents do not suggest that the filmmakers were unable to make use of the work or actually even encountered a problem obtaining the clip they claim to be necessary") (emphasis added).

<sup>19</sup> *See* 17 U.S.C. §1201(a)(1)(C) ("are, or are likely to be ... adversely affected by the prohibition ... in their ability to make noninfringing uses"); 2011 NOI at 60,403 ("the technological measure has had or is likely to have a substantial adverse effect on noninfringing uses").

<sup>20</sup> *See* 2011 NOI at 60,400 ("The 'substantial' adverse effect requirement has also been described as a requirement that the proponent of an exemption must demonstrate ... 'more than de minimis impacts'").

<sup>21</sup> For example, the International Documentary Association, National Alliance for Media Arts and Culture, and Independent Filmmaker Project. *See generally* IDA at 34-36, 58-59.

<sup>22</sup> *See* Comment of: Film Independent, Chicago Filmmakers, Kindling Group, Kirby Dick, Jeffrey Kusama-Hinte, J S Mayank, David Novack, and Laurence Thrush, [http://www.copyright.gov/1201/2012/comments/laurence\\_thrush.pdf](http://www.copyright.gov/1201/2012/comments/laurence_thrush.pdf).

<sup>23</sup> *See* AACS at 23.

the technical requirements facing filmmakers and the capabilities of the technologies.<sup>24</sup> Filmmakers face stringent technical standards for broadcast and distribution that cannot be met by using any of the proposed alternatives.<sup>25</sup>

The harms facing filmmakers making fair use are both significant and widespread, and clearly constitute a substantial adverse effect as evidenced by the experiences of countless filmmakers and film organizations.

c. An Analysis of the §1201(a)(1)(C) Factors Strongly Favors Granting the Exemption

All four §1201(a)(1)(C)<sup>26</sup> factors favor granting the exemption for documentary and fictional filmmakers. The opponents do not contest that factors (ii) and (iii) strongly favor granting the proposed exemption. Both factors speak to the important role that documentary and fictional filmmakers serve in American society. An evaluation of factor (ii)—the availability for use of works for educational uses and other uses—clearly reflects the importance of noninfringing uses to education, both inside and outside of academic institutions.<sup>27</sup> In addition, an assessment of factor (iii)—the impact that the prohibition has on criticism, comment, news reporting, teaching, scholarship, or research—recognizes that the DMCA’s prohibition on circumvention can harm many crucial forms of social discourse.<sup>28</sup>

Contrary to opponents’ assertions, factors (i), (iv), and (v) also favor granting the exemption. Factor (i) compares the harm the exemption would have on consumer-oriented business models with the harm the prohibition has on noninfringing uses.<sup>29</sup> This factor weighs in our favor because the proposed exemption poses no risk of harm to consumer-oriented distribution models, while the prohibition inhibits filmmakers from making fair use. Factor (iv) is focused on the effect the proposed exemption would have

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<sup>24</sup> See Appendix B, Statement of Jim Morrisette on Alternatives to Circumvention Proposed by Opponents.

<sup>25</sup> See IDA at 15-18. See also Appendix B, Statement of Jim Morrisette on Alternatives to Circumvention Proposed by Opponents.

<sup>26</sup> Section 1201(a)(1)(C) mandates that “the Librarian shall examine –

- (i) the availability for use of copyrighted works;
- (ii) the availability for use of works for nonprofit archival, preservation, and educational uses;
- (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;
- (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and
- (v) such other factors as the Librarian considers appropriate.”

<sup>27</sup> See IDA at 30-31.

<sup>28</sup> See IDA at 31-32.

<sup>29</sup> Congress intended Factor (i) to “consider the positive as well as the adverse effects of [access control] technologies on the availability of copyrighted materials.” See Manager’s Rep. at 6-7. Accordingly, in past Rulemakings the Register has analyzed factor (i) by asking: “(1) whether the availability of the work in protected format enhances and/or inhibits public use of particular works, (2) whether the work protected is also available in other formats (and whether those formats are protected by access controls), and (3) if alternative formats are available, whether such formats are sufficient to accommodate noninfringing uses.” See 2010 Rec. at 56.

on the market for and value of copyrighted works.<sup>30</sup> This factor also weighs in our favor because our noninfringing uses do not harm the value of existing copyrighted works, and as producers of new copyrighted works the proposed exemption would increase the total number of copyrighted works made available to the public. Factor (v) allows other factors deemed appropriate by the Librarian to be considered<sup>31</sup>, such as whether the technological measure merges access and use controls.<sup>32</sup>

- i. *Factor (i) favors the proposed exemption because our noninfringing uses do not harm consumer-oriented distribution models*

The Joint Commenters make a general claim that the proposed exemption may risk “encouraging unlawful circumvention,”<sup>33</sup> but they fail to explain how such a narrowly tailored exemption covering a noninfringing use by creators of new copyrighted works could encourage unlawful circumvention. By definition, the proposed exemption only permits circumvention for the noninfringing use of incorporating short portions of motion pictures for the purpose of fair use.<sup>34</sup> Filmmakers using the exemption will respect this requirement. In order to distribute a film, filmmakers must obtain errors and omission insurance that requires adherence to rigorous external constraints that substantially increase the likelihood that their use will be noninfringing.<sup>35</sup>

Furthermore, an exemption for filmmakers will neither encourage nor justify circumvention by the public at large, nor will it increase demand for trafficking devices. The proposed exemption is so narrowly tailored that it is not likely to affect the demand for circumvention devices particularly given that consumer-oriented business models have continued to thrive even in the face of existing circumvention devices. In 2010, the Register found that “CSS-protected DVDs have continued to be the dominant format even though circumvention tools have long been widely available online.”<sup>36</sup> The same finding applies to both Blu-Ray and digitally transmitted video, which have become dominant methods of distributing motion pictures despite the wide availability of circumvention tools online.<sup>37</sup>

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<sup>30</sup> See 17 U.S.C. §1201(a)(1)(C)(iv) (“the effect of circumvention of technological measures on the market for or value of copyrighted works”).

<sup>31</sup> See 17 U.S.C. §1201(a)(1)(C)(v) (“such other factors as the Librarian considers appropriate”).

<sup>32</sup> In the 2010 Rulemaking, the Register found that “the fact that a technological measure that controls access is being used predominantly for the purpose of preventing reproduction and other rights of the copyright owner is a relevant consideration in this case.” See 2010 Rec. at 71.

<sup>33</sup> See Joint Commenters at 7.

<sup>34</sup> See IDA at 1.

<sup>35</sup> See e.g., IDA at 6-7 (discussion of filmmaker best practices in fair use); IDA at 50-51 (statement from Joanne Richardson, Hiscox USA on Errors & Omissions Insurance).

<sup>36</sup> See 2010 Rec. at 57.

<sup>37</sup> For example, AACS on Blu-Ray was first broken in 2007. See Markoff, John. *Studio’s DVDs Face a Crack in Security*, New York Times (January 1, 2007), <http://www.nytimes.com/2007/01/01/technology/01hack.html>. However, this did not stop Blu-Ray from making \$2.3B in 2010 in Blu-Ray sales in the U.S. alone, a 53% year-over-year increase. See IDA at 9-10; Digital Entertainment Group Year-End 2010 Home Entertainment Report, [http://degonline.org/pressreleases/2011/f\\_Q410.pdf](http://degonline.org/pressreleases/2011/f_Q410.pdf) (last accessed November 13, 2011).

*ii. Factor (i) favors our exemption because the DMCA's prohibition of circumvention forecloses filmmakers' ability to make fair use*

In today's digital media environment, virtually all motion pictures are distributed with access controls, and all of opponents' proposed alternatives to circumvention are impracticable. By limiting opportunities for criticism and comment, the DMCA is currently harming the values of beneficial social use the rulemaking is meant to serve.

The Copy Control Associations wrongly allege that factor (i) disfavors our requested exemption because "marketplace offerings of alternatives for copying short portions of works have improved."<sup>38</sup> We have attached as Appendix B a statement from Jim Morrisette, the Technical Director at Kartemquin Educational Films, confirming that these alternatives cannot meet filmmakers' needs.

As one example, the Copy Control Associations' conclusion that a smartphone recording is "high quality" and can record a television with sufficient video and audio quality to be "broadcast quality,"<sup>39</sup> represents a fundamental misunderstanding of broadcast and distribution standards for filmmakers. Smartphones lack essential hardware and software required to capture video, and they lack manual focus, exposure, color balance controls, external audio input jacks, and built in tripod sockets—all of which lead to technically unacceptable distortions of the image and video quality.<sup>40</sup> The same is true for each of the other proposed alternatives that opponents identify. As Mr. Morrisette's statement makes clear, the alternatives proposed by the Copy Control Associations are simply not realistic.

Given the lack of viable alternatives to circumvention, without an exemption, documentary and fictional filmmakers will be foreclosed from distributing their films, and in many cases from making their films at all.

*iii. Factor (iv) favors granting our exemption because our noninfringing uses increase the value of and market for copyrighted works*

To be clear, our exemption actually increases the total number of and market for copyrighted works. It does so by allowing documentary and fictional filmmakers to continue to comment on and critique the real world. We have already highlighted that the 2010 exemption for documentary filmmakers allowed numerous films to be created that could not have been made otherwise.<sup>41</sup> As the Register recognized in 2010, "motion pictures are so central to modern American society and the lives of individual citizens

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<sup>38</sup> See DVD CCA at 8-15; AACS LA at 8-15.

<sup>39</sup> See DVD CCA at 10; AACS LA at 10.

<sup>40</sup> See *infra* Appendix B, Statement of Jim Morrisette on Alternatives to Circumvention Proposed by Opponents. For example, the lack of manual focus, exposure, or color balance controls would result in a video image that continuously changes as the smartphone's camera software attempts to adjust the video exposure and color. The lack of an external audio input jack would lead to the microphone picking up environmental distortions such as room echo and handling noises. The lack of a tripod would require handheld recording, which would introduce a noticeable and unacceptable shake to the image.

<sup>41</sup> See IDA at 8-15.

that the need to comment upon and criticize these works has become an important form of social discourse.”<sup>42</sup>

As rightsholders, we respect the exclusive rights of copyright and the limited boundaries of fair use as an exception. To ensure that our exemption does not lead to copying of a motion picture in its entirety, we have restricted the class to “circumvention ... solely in order to incorporate short portions of motion pictures into new works.”<sup>43</sup> Furthermore, we have tailored the class to documentary and fictional filmmaking and required that the use be “solely ... for the purpose of fair use”<sup>44</sup> to ensure that the limited copying complies with the doctrine of fair use. As the Register recognized in 2010, when a proposed class is properly limited in scope to “*portions* of motion pictures” and for the purposes of criticism and comment, it will not adversely affect the market for or value of these works.<sup>45</sup> This is exactly how our proposed class has been narrowly tailored.

Given that the proposed exemption only covers noninfringing uses that do not harm the market for existing works, and that granting the exemption would increase the number of new copyrighted works, there should be no question that factor (iv) favors granting the proposed exemption.

*iv. Factor (v) favors the proposed class because opponents seek to exploit access controls in order to control uses*

The Joint Commenters urge the Register to consider under factor (v) business models “that provide some predictability with respect to how works will be accessed.”<sup>46</sup> In practice, these business models leverage access controls in order to control uses of the work that the DMCA does not prohibit, such as copying for fair use. For example, when a filmmaker purchases a DVD protected by CSS or a Blu-Ray disc protected by AACS, he or she is granted initial access in order to view the content on the disc on a television or computer. However, CSS and AACS go further, also preventing the filmmaker from using the motion picture in other ways, including copying short portions for the purpose of fair use. Congress expressly declined to prohibit the circumvention of use controls<sup>47</sup> in order to address the possibility of, among other concerns, “the permanent encryption of all electronic copies [of copyrighted works].”<sup>48</sup> In fact, Congress emphasized that when evaluating the §1201(a)(1)(C) factors “the focus must remain on whether *the implementation* of the technology protection measures (such as encryption or scrambling) has caused adverse impact on the ability of users to make lawful uses.”<sup>49</sup>

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<sup>42</sup> See 2010 Rec. at 70-71.

<sup>43</sup> See IDA at 1.

<sup>44</sup> *Id.*

<sup>45</sup> See 2010 Rec. at 71 (“The proposed classes, if properly limited in scope to *portions* of motion pictures and for the *purposes* asserted by the proponents (commentary and criticism), would not adversely effect the market for or value of these works.”).

<sup>46</sup> Joint Commenters at 7.

<sup>47</sup> See Commerce Rep. at 39 (“subsection (a)...covers protections against unauthorized *initial* access”). See also Judiciary Report at 17 (The conduct that Congress sought to prohibit was obtaining unauthorized access through circumvention—“the electronic equivalent of breaking into a locked room in order to obtain a copy of a book”— not to obtain public domain material or to make uses of a work which fall within the statutory and case law schema of fair use).

<sup>48</sup> See Commerce Rep. at 36.

<sup>49</sup> See Commerce Rep. at 37 (emphasis added).

In the last Rulemaking, the Register correctly reasoned that the fact that CSS merges access controls with use controls favors granting the exemption CSS-protected DVDs for documentary filmmakers because “socially-beneficial noninfringing uses are being affected by the prohibition on circumvention in relation to [lawful] uses of certain portions of motion pictures on CSS-protected DVDs.”<sup>50</sup> The Register found CSS to be a merged access and use control because it is “being used predominately for the purpose of preventing reproduction and other rights of the copyright owner” and because “the effect of the access control is not to prevent unauthorized access but rather to restrict uses of motion pictures.”<sup>51</sup>

Just as in 2010, today both CSS on DVDs and AACS on Blu-Ray discs are used primarily to control use and not to prevent access, which is authorized on a number of licensed video players, televisions, and computers. Under factor (v) this merger of access and use controls favors granting the proposed exemption for documentary and fictional filmmakers.

### **III. TO INSTITUTE A LICENSING REQUIREMENT FOR FAIR USE WOULD LEAD TO PRIVATE CENSORSHIP AND CONTRAVENE THE PURPOSE OF THIS RULEMAKING**

The opponents’ suggestion that filmmakers should be required to obtain licenses in order to make fair use is totally inappropriate and would only exacerbate the harm that the prohibition on circumvention is causing. A licensing requirement would expand the reach of exclusive rights well beyond the scope of copyright, and in so doing would run directly counter to Congress’s clear intent that the DMCA not disturb the critical balance between exclusive rights and public access—a balance that the fair use doctrine has maintained for over 150 years.<sup>52</sup>

A licensing requirement is inappropriate in this Rulemaking because it would give rightsholders the opportunity to engage in private censorship by withholding permission at their discretion, or restraining criticism through licensing terms.<sup>53</sup> If given this power, rightsholders would likely withhold permission when they objected to the fair user’s identity, choice of content or viewpoint, or association with a particular group or firm. The Supreme Court has, of course, recognized the “unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions.”<sup>54</sup>

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<sup>50</sup> See 2010 Rec. at 71.

<sup>51</sup> *Id.*

<sup>52</sup> See Commerce Rep. at 26 (emphasis added). “The Committee on Commerce felt compelled to address ... the risk that enactment of the bill could establish the legal framework that would inexorably create a ‘pay-per-use’ society.” To protect fair use, the Committee on Commerce created this exemption rulemaking with the express goal of “maintain[ing] balance between the interests of content creators and information users.” See Commerce Rep. at 25-26, 85-86.

<sup>53</sup> See IDA at 52-53 (Exhibits #1 and #2 of a Studio Clip License Standard Terms and Conditions).

<sup>54</sup> Campbell at 594 (“The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.”).

This reality is borne out by the widespread use of restrictive clauses that broadly exclude any use of the clip that is critical of the work or rightsholder.<sup>55</sup>

Furthermore, a licensing requirement would allow rightsholders to inappropriately monetize the fair uses that others make.<sup>56</sup> In enacting §1201(a)(1), Congress clearly rejected a permission or licensing regime for fair use, citing a concern that such a regime would provide an opportunity for rightsholders to extract payment for fair use. The Commerce Committee noted that the 1201(a)(1) Rulemaking was created in order to redress the concern that the “computer revolution . . . creates opportunities for the holders of copyright to impose fees for, among other things . . . the use of excerpts from published works.”<sup>57</sup> In addition, a licensing regime for fair use would run contrary to the Supreme Court’s holding in Campbell v. Acuff-Rose Music, Inc. that rightsholders have no exclusive right to markets for commentary and criticism of their copyrighted works.<sup>58</sup>

Furthermore, licenses for access do not function as an alternative to circumvention because there is no guarantee that a license could prevent future DMCA liability. Opponents imply that a license from a film studio could protect against DMCA liability,<sup>59</sup> but this single entity license does not protect against lawsuits by other parties that could have standing under §1201(a).

Given the overwhelming risk of private censorship, the clear Congressional directive that this Rulemaking be employed to prevent a licensing regime, and the futility of licensing as a reasonable alternative to circumvention, the suggestion that licensing is a viable alternative is inappropriate and utterly infeasible. It should not be considered in this Rulemaking.

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<sup>55</sup> See IDA at 4-6. Furthermore, the Joint Commenters concede that such clauses can prevent critical uses. See Joint Commenters at 42.

<sup>56</sup> See e.g., Joint Commenters at 42; DVD CCA at 9; and AACS LA at 9.

<sup>57</sup> See Commerce Report at 25.

<sup>58</sup> Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 594 (1994). (“This distinction between potentially remediable displacement and unremediable disparagement is reflected in the rule that there is no protectable derivative market for criticism... the law recognizes no derivative market for critical works.”)

<sup>59</sup> See Joint Commenters at 42; DVD CCA at 9; and AACS LA at 9.

#### IV. APPENDIX

##### a. Statement of Gordon Quinn

Many of the comments in opposition to our request for an exemption to the DMCA (to make fair use) talk about meeting the needs of consumers. I want to stress that we at Kartemquin Films and documentary filmmakers in general are not seeking this exemption as consumers. We are creators of art and culture. We make new works like the recently broadcast *The Interrupters* on Frontline and *A Good Man* on American Masters, both of which included essential clips under fair use. Our films are released in theaters, DVD and across digital platforms. We are also rights holders. We need to be able to exercise Fair Use to comment on and critique our culture and society, to illustrate an argument, and to put a story in its historical context. We stay within the confines of *The Documentary Filmmakers Statement of Best Practice in Fair Use*.

To do this we need everything in the culture, not some subset that owners want to make available. If we are critiquing the real world, we need to be able to quote from any of the materials that are circulating in the world and we need to be able to select what is relevant to our critique or story. For example, in our film on a stem cell researcher we wanted to show how the controversy about cloning and stem research had permeated the culture, and we included a montage of clips raging from TV news stories and headlines to feature films.

Many of the comments opposing our request offered solutions that would not come close to addressing our needs for professional quality. I'll let others speak to the technical issues and broadcasting requirements. But I want to make a point about image quality from the artistic perspective. If I'm making a film about how women are portrayed in the culture in the 1950's, I need to be able to get as close to the original image's quality as possible. I need to show the Technicolor, the texture of the image, the fine detail that can reveal how the lighting and makeup was used. The point could be lost if we were forced to use a degraded image.

Our film, *On Beauty*, currently in production, is about the work of fashion photographer Rick Guidotti, who leaves the world of supermodels to take pictures of young people with genetic disabilities. He uses his skill at finding beauty to take pictures of these kids that reveal their physical beauty. In the film we use several images of the supermodels taken by Rick and other fashion photographers to show what is considered beauty by our culture. These are juxtaposed with his images of the kids, and one comes away with a new understanding of where beauty lies. It is essential that all of the images are of the quality that the public is used to in the portrayal of beauty in our culture.

b. Statement of Jim Morrisette on Alternatives to Circumvention Proposed by Opponents

As the Technical Director of Kartemquin Films, it is my job to make sure our productions meet the technical standards of broadcasters (e.g., PBS) and cable networks (e.g., ESPN, Discovery Channel, etc.). In order to meet these criteria, all of our programs must now be produced and released in High Definition video. From a technical and distribution perspective, professional filmmakers need high quality video sources, including high-definition when available, in order to satisfy the explicit requirements of broadcasters and distributors. Clips included in our documentaries from commercial films, television broadcasts, and Internet streaming sources must also meet these standards.

The most basic requirement is that the clips' frame rate match the frame rate of the program, which is 29.97 frames per second. One of the proposed "alternatives" to using files directly from DVD or Blu-Ray involve capturing video off a computer screen using screen capture software. *Replay Video Capture* by Applian, a PC-only product recommended by AACS LA, clearly states in its instructional video that to capture moving video off the computer the frame rate must be lowered to 20 frames per second or less to avoid stuttering. With this screen capture method, 10 frames per second are discarded, and 33% of the frames are lost forever.

Video "enhancement" software (such as *vReveal* by Motion DSP suggested by AACS LA) can never replace these lost frames. This program only "fixes" video contrast and color. It does NOT fix dropped frames or image size and resolution issues. These lost frames, like links in a chain, are forever broken and the file is not usable for broadcast productions.

Another suggestion was to shoot the computer screen with a smart phone in video mode. Since smart phones have no built-in tripod socket, the user would have to hand hold the phone. This would introduce unacceptable shake to the video image. In addition, smart phone cameras have very limited control of focus, exposure, and color balance. As a result, brightness and contrast of recorded video will keep changing as the camera tries to adjust exposure and proper color. Since smart phones have no external audio input when recording video, the user would have to rely on the built-in microphone which would pick up room echo and handling noise.

Finally, it was suggested that to obtain high definition video of archival film material from sources like the National Archives, filmmakers should request new transfers from the original 35mm film, much of which is over 75 years old. This would require a tremendous expense for archivist handling and specialized equipment for the transfer. The National Archives has only recently started a campaign to attract financial partners to explore this process. It is not an available option even with the high cost because filmmakers need access to HD video clips in a timely manner to meet the deadlines of production.

c. Glossary of Terms

- **2010 Rec.** – Recommendation of the Register of Copyrights in RM 2008-08; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (Jun. 11, 2010), <http://www.copyright.gov/1201/2010/initialed-registers-recommendation-june-11-2010.pdf>
- **2011 NPRM** – Exemption to Prohibition of Copyright Protection Systems for Access Control Technologies; Notice of Proposed Rulemaking, 76 F.R. 78,866 (Dec. 20, 2011), <http://www.copyright.gov/fedreg/2011/76fr78866.pdf>
- **2011 NOI** – Exemption to Prohibition of Copyright Protection Systems for Access Control Technologies; Notice of Inquiry and Request for Comments, 76 F.R. 60,398 (Sep. 29, 2011), <http://www.copyright.gov/fedreg/2011/76fr60398.pdf>
- **AACS LA**– Comments of the Advanced Access Content System Licensing Administrator LLC (“AACS LA”), RM 2011-7, [http://www.copyright.gov/1201/2012/comments/Bruce\\_H.\\_Turnbull.pdf](http://www.copyright.gov/1201/2012/comments/Bruce_H._Turnbull.pdf)
- **Commerce Rep.** – Report of House of Commerce Committee on H.R. 2881, the Digital Millennium Copyright Act, H.R. Rep. No. 105-551 Part 2 (July 22, 1998).
- **DVD CCA**– Comments of the DVD Copy Control Association (“DVD CCA”), RM 2011-7, <http://www.copyright.gov/1201/2012/comments/DVD%20CCA.pdf>
- **IDA** – Comment of International Documentary Association, Kartemquin Educational Films, Inc., National Alliance for Media Arts and Culture, and Independent Filmmaker Project (December 1, 2011), [http://www.copyright.gov/1201/2011/initial/IDA\\_Mark\\_Berger.pdf](http://www.copyright.gov/1201/2011/initial/IDA_Mark_Berger.pdf)
- **Joint Commenters** – Joint Comments of Association of American Publishers, American Society of Media Photographers, Business Software Alliance, Entertainment Software Alliance, Motion Picture Association of America, Picture Archive Counsel of America, and Recording Industry Association of America (February 10, 2012), [http://www.copyright.gov/1201/2012/comments/Steven\\_J.\\_Metalitz.pdf](http://www.copyright.gov/1201/2012/comments/Steven_J._Metalitz.pdf)
- **Judiciary Rep.** – Report from the Committee on the Judiciary on WIPO Copyright Treaties Implementation and Online Copyright Infringement Liability Limitation, H.R. Rep. No. 105-551 Part 1.
- **Managers Rep.** – Committee on the Judiciary, Section-by-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998.
- **Mark Berger** – Comment of Mark Berger, Bobette Buster, Barnett Kellman, and Gene Rosow (December 1, 2011), [http://www.copyright.gov/1201/2011/initial/IDA\\_Mark\\_Berger.pdf](http://www.copyright.gov/1201/2011/initial/IDA_Mark_Berger.pdf)