

Before the
United States Copyright Office, Library of Congress
Washington, District of Columbia

In the Matter of)
Exemption to Prohibition on)
Circumvention of Copyright Protection) Docket No. 2014-07
Systems for Access Control)
Technologies)

Petition for Exemption
by
International Documentary Association
Film Independent
Kartemquin Educational Films, Inc.
National Alliance for Media Arts and Culture

1. Submitter and Contact Information

The International Documentary Association, Film Independent, Kartemquin Educational Films, Inc., and National Alliance for Media Arts and Culture, through their authorized representatives the UCI Intellectual Property, Arts, and Technology Clinic and Donaldson + Callif, LLP, respectfully request that the Copyright Office recommend an exemption to Section 1201 of the Digital Millennium Copyright Act (“DMCA”) that would permit filmmakers to access motion pictures obtained from lawfully acquired DVDs, Blu-Ray discs, and digitally transmitted video.

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2. Brief Overview of Proposed Exemption

Filmmakers contribute substantially to society by creating new works of authorship that illuminate the human condition; encourage social debate and the exchange of ideas; and give voice to myriad downtrodden, persecuted, and marginalized members of society. To enable them to do so, filmmakers require the ability to access copyrighted motion pictures in order to make fair use in their films.¹

The anti-circumvention provisions of the DMCA continue to severely constrain filmmakers' right to make fair use of copyrighted motion pictures.² We therefore propose an exemption to facilitate access to copyrighted motion pictures protected by the following TPMs:

- Content Scramble System ("CSS") on DVD
- Advanced Access Content System ("AACS") on Blu-Ray discs
- Encryption mechanisms and authentication protocols on digitally transmitted video
- Other TPMs we may identify in our full comment after further research.

We further propose that the exemption be narrowly tailored to the following classes of users and noninfringing uses:

- Filmmakers
- who seek to make fair use in their filmmaking
- of copyrighted motion pictures protected by TPMs on DVDs, Blu-Ray discs, and digitally transmitted video.

3. Copyrighted Works Sought to be Accessed

We propose an exemption that would allow filmmakers to access motion pictures, a subset of the class of audiovisual works enumerated in Section 102 of the Copyright Act.³ This proposed class of copyrighted material should be narrowly tailored to include only copyrighted material obtained from the following lawfully acquired sources: DVDs; Blu-Ray discs; and

¹ See Comment of Int'l Documentary Ass'n, et al., Section III(B)(i) (2011), http://www.copyright.gov/1201/2011/initial/IDA_Mark_Berger.pdf (last accessed on October 27, 2014) (discussing filmmakers' responsible exercise of fair use by implementing the 2005 *Documentary Filmmakers' Statement of Best Practices in Fair Use* and by obtaining Errors & Omissions insurance for their films) [hereinafter "2011 Comment for IDA, et al."].

² 17 U.S.C. § 1201(a)(1)(A) (2012).

³ 17 U.S.C. § 102(a)(6) (2012).

digitally transmitted video, such as streaming video, digital downloads, or transmissions captured on digital video recorders.

4. Technological Protection Measures

We propose an exemption that permits circumvention, in certain circumstances, of CSS on DVDs and AACS on Blu-Ray discs. These systems use encryption and authentication protocols either to restrict access or to restrict both access and use.

The proposed exemption will also cover technologies that restrict access to digitally transmitted video. While the exact mechanisms that digital video delivery systems use vary, they generally function to prevent unauthorized access to media content by encrypting the content and implementing authentication protocols. Systems that use these measures are extremely diverse, vary across platforms, and are in constant flux.⁴

5. Noninfringing Uses

We seek an exemption that permits filmmakers to make fair use of excerpts of motion pictures in films they create. The fair uses we seek to facilitate with this exemption include criticism and commentary (including parody), as well as illustration, demonstration, or exploration of points made in films. Such uses are well established as quintessential fair uses.⁵

Our proposed exemption will be narrowly tailored to the following noninfringing uses and class of users:

- Filmmakers
- who seek to make fair use in their filmmaking
- of copyrighted motion pictures protected by TPMs on DVDs, Blu-Ray discs, and digitally transmitted video.

6. Adverse Effects

Without an appropriate exemption for the 2015–2018 period, the DMCA’s prohibition on circumvention will continue to severely constrain filmmakers’ ability to make fair use of copyrighted motion picture material in their film projects.

⁴ For this reason, the proposed exemption will define TPMs on digitally transmitted video by their function and not by a static list of technologies. *See* 37 C.F.R. § 201.40(b)(5) (2012) (establishing exemption for “[m]otion pictures . . . that are protected by various technological protection measures . . .”).

⁵ 17 U.S.C. § 107 (2012); *see also* 2011 Comment for IDA, et al. at Section III(B)(i); Letter to Maria Pallante, Nat’l Telecomm. and Info. Adm., at 23 (Sept. 21, 2012) (“Documentary films [make] paradigmatic fair use of copyrighted works and provide beneficial commentary on important issues.”).

Today, nearly all motion picture materials that filmmakers need in order to make fair use remain locked away behind some form of TPM. Alternatives to circumvention remain rare, expensive, and difficult to utilize, making them impractical if not impossible to use for the vast majority of filmmakers. These alternatives also produce inferior video quality that is unacceptable to distributors and viewers alike. The DMCA’s anti-circumvention provisions thus prevent filmmakers from commenting on or criticizing current events, history, and popular culture—depriving filmmakers of their long-held right to make fair use and preventing them from telling the stories they have a right to tell.

Without the exemption we propose, the ability of the entire filmmaking community to make fair use will likely continue to face substantial adverse effects that are far “more than [de minimis]”⁶ and will be felt throughout the marketplace.⁷ Only an exemption to the DMCA that includes DVD, Blu-Ray, and digitally transmitted video will suffice to prevent these adverse effects and preserve the filmmaking community’s right to make fair use.

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⁶ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies; Notice of Inquiry and Request for Petitions, 79 Fed. Reg. 55687, 55690 (Sept. 17, 2014).

⁷ *See id.*