

D O N A L D S O N  C A L L I F

July 18, 2012

VIA U. S.MAIL AND E-MAIL

David O. Carson – General Counsel
United States Copyright Office
101 Independence Avenue SE
Washington, DC 20559-6000

**RE: Docket No. RM 2011-7
Exemptions to Prohibition on Circumvention of Technological Measures that
Control Access to Copyright Works
Proposed Classes 7 and 8**

Dear David:

I am writing this letter in my capacity as a witness. I and the USC Intellectual Property and Technology Law Clinic are submitting a response on behalf of the proponents under separate cover, which includes my answer to question #1.

With regard to all your questions contained in paragraph 2, my answers apply equally to documentary filmmakers and to the makers of fictional films (an area which continues to grow within our practice, even since the testimony that Laurence Thrush and I presented in Los Angeles on May 17th).

I better understand the possible need for answers to your questions with regard to fictional works than for documentary films because the access to and use by filmmakers of fair use in fictional films is an emerging practice. For documentary filmmakers, it is an established practice with much published information, seminars, and assistance.

Since there has not been even the rumor of one single problem with the exemption previously granted to documentary filmmakers, there seems to be no need for any additional conditions for that category of filmmakers – none – not one! The lack of a need for additional conditions on the documentary filmmaker request for exemption is highlighted by the lack of opposition to the exemption by the manufacturer of the very DVD systems that would be circumvented. As the transcript reflects, Bruce Turnbull of the DVD Copy Control Association said, “DVD CCA does not object to the renewal of the documentary film exemption”. The MPAA position in opposition to the documentary filmmaker exemption was only backed up by

their general opposition to any exemption of any kind to the DMCA, as set forth by Steve Metalitz. He argued that filmmakers have not met their burden in proving that there is a need for any exemption.

The response of the proponents to your first question establishes that the various alternative techniques of obtaining material, such as screen capture, simply do not meet the requirements imposed upon documentary filmmakers by broadcasters around the world. Broadcasters remain the prime market for documentaries. Congress specifically provided for exemptions, the Copyright Office has rigorously pursued an impartial hearing process, and the results of the exemption granted to documentary filmmakers have not altered the piracy landscape one iota. Personally, I have actively supported and continue to support the MPAA's legitimate anti-piracy efforts. This just happens not to be one of them.

Regarding the expansion of the exemption to Blu-Ray media, Dean Marks, on behalf of AACS LA, unintentionally provided evidence which supports our position. The rapidly growing market for Blu-Ray players emphasizes that access to these materials will become increasingly vital in the coming years. As more and more materials are embodied in this medium, it will be even more important that filmmakers have the right to access these materials in order to achieve their valid fair use purposes. To do otherwise would place an unreasonable, arbitrary burden on free expression. Furthermore, Marks read from an article by one of my clients who had to license materials, which they knew could be properly used under fair use, solely because circumvention was not possible and they needed the higher quality version. As Jack Lerner pointed out, this means that filmmakers who cannot circumvent protection measures on Blu-Ray media must seek permission and pay for something that they have every right to use for free pursuant to fair use. This is an unacceptable burden on the right of fair use.

ON TO QUESTION #2.

Question 2(A): Are documentary filmmakers generally required to obtain errors and omissions insurance for their films prior to distributing and/or publicly performing them?

2(A) Absolutely, across the board: No broadcaster, no cable operator, and no major distributor will handle an uninsured film. It does not happen. The requirement is non-negotiable conceptually or with regard to specific details. They all require AT LEAST a three year term, \$1M per incident/\$3M total, and a deductible of \$10K (although they will allow \$25K if the underwriters will not reduce that amount – an increasingly common situation). There are a couple of smaller distribution companies who will take a film without E&O insurance. Primarily, these distribution companies deal with very small films, and sometimes only book theaters on behalf of filmmakers, or do one-night event screenings.

Question 2(B): Are documentary filmmakers generally required to obtain errors and omissions insurance for their films prior to exhibiting them at a film festival?

2(B) Generally, filmmakers are not required by festivals to obtain E&O insurance. There are no published statistics of the percentage of films in prominent festivals that carry such insurance, but my guess is that films that premier at b-level festivals seldom have such insurance,

while a healthy percentage of films premiering at festivals such as Sundance, Cannes or Berlin do have such coverage. Many films going into “A” festivals actually have a distributor lined up before the festival begins, even though the announcement of the sale is held back until it can be made at the festival. In preparing this response, I checked with other practitioners, all of whom advised me that their perception was the same as mine on this issue.

Question 2(C): What would be the effect and advisability of requiring, as a precondition for benefitting from an exemption for documentary filmmakers, that the documentary filmmaker must have a good faith intention to obtain errors and omissions insurance prior to distribution and/or public performance of the film and that, prior to any distribution to the public or any public performance of a film, the documentary filmmaker must have obtained errors and omissions insurance?

2(C) I read into your questions as a desire to be sure that filmmakers who are granted this exemption be guided by their choices so that the interests of owners are not trampled upon. My testimony was intended to convey my own passionate commitment to this notion. MPAA recognized this when Steve Metalitz commented that a lawyer’s opinion letter stating that a use is fair gives him “a high level of confidence” that the use is non-infringing.

Assuming that I have correctly read your questions, I applaud the effort. Virtually all of my clients and the members of the organizations that I represent own or hope to own copyrights in various works, so it is important to be sure no one infringes their rights under the banner of these exceptions. However, I would suggest a slightly different approach which increases the protection to the owners of assets used by filmmakers while not increasing the burden to filmmakers beyond your implied suggestion. This suggestion for fictional filmmakers ONLY is contained in our joint response of proponents. Documentarians do not need it.

REASONS FOR NOT IMPOSING THE E&O REQUIREMENT:

1. E&O insurance is not available for reasons that have nothing to do with fair use. We recently reviewed a film being acquired by one of our distributor clients. Because it dealt with theories concerning death of Princess Diana that were adverse to the views of the crown, no coverage was available from any carrier for the United Kingdom. The fair use of materials was minimal and easily insurable. The film as a whole was not, so the distributor did not complete the transaction. This is the most recent, but far from the only, example of problems obtaining E&O insurance that nothing to do with the fair uses made in a film.

2. Sometimes an E&O policy will be issued, but a specific item will be excluded from coverage or – as in the case of the use of the song *Imagine* in the film *EXPELLED* – the retention can be substantially increased because of the risk of suit rather than as a judgment about fair use. In the *EXPELLED* example, everyone involved predicted the law suit by Yoko Ono.

3. A good faith intention is easy to declare and impossible to challenge.

4. The requirement of actually purchasing insurance is an added cost which strapped indie filmmakers would be hard pressed to afford without the firm knowledge that they would receive distribution. While virtually all of the documentaries passing through our office eventually obtain insurance, only a percentage of the independent fictional films receive distribution. In checking with other practitioners serving the independent film community, one thought I was understating the distribution potential of fictional films, the other two agreed with me. All agree with my experience in documentary films.

5. The requirement to seek E&O insurance is essentially imposing a financial requirement that a filmmaker purchase a bond in order to make fair use. This is dangerous and unacceptable to a filmmaker's right to use materials pursuant to fair use. This would not be unlike requiring the permission of the rights holder before accessing fair use. Both would be a significant chill on free speech.

CONCLUSION:

It would be very upsetting to the documentary community to have their entirely proper use of the exemption granted to them in the last round of hearings be rewarded by restrictions that are burdensome and unnecessary, especially given the non-opposition by the manufacturers of the system and the vacuous opposition by the MPAA. It is not in the legitimate interests of anyone to impose any additional restrictions on the documentary community.

Furthermore, because fictional filmmakers are just beginning to access fair use, the proponents are offering some methods that will increase the protection to copyright holders by ensuring that use of materials is performed pursuant to the Copyright Act. These are contained in the joint document being submitted contemporaneously with this letter.

Regards,



MICHAEL C. DONALDSON

MCD/jmm