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VIA ELECTRONIC MAIL AND U.S. MAIL

**RE: Docket No. RM 2011-07**
**Exemptions to Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works (Copyright Office § 1201 Rulemaking)**
**Proposed Classes 7 and 8**

Dear David,

We write in response to your office's letter of July 3, 2012, posing questions to witnesses who testified in support of proposed Classes 7D and 7E in the § 1201 Rulemaking. We respond on behalf of Michael Donaldson (7D), Jim Morrissette (7D), Gordon Quinn (7D), Laurence Thrush (7D), Peter Brantley (7E), and Bobette Buster (7E).

**Question 1:**

**The screen capture products "Replay Video Capture" offered by Applian, as well as "Jing," "Camtasia," and "Snagit" offered by Techsmith, have been referred to in the record as potentially viable alternatives to circumvention which diminish or remove the need for several of the requested exemptions. Please state and explain your position as to whether and why (or why not) one who uses the current version of any of the above named screen capture products in order to copy all or part of a copyrighted motion picture "circumvent[s] a technological measure that effectively controls access to a work protected by this title" in violation of 17 U.S.C. § 1201(a)(1)(A).**

A. Filmmakers and authors cannot be certain that the use of screen capture complies with § 1201 because the software cannot be closely inspected, and the statute and case law provide insufficient guidance.

Even if one presumes that the screen capture programs in question access the audiovisual signal after it has been decrypted, § 1201 and the case law interpreting it do not provide sufficient guidance as to whether using such applications would violate § 1201's prohibition on circumvention. In addition, we do not know exactly how these programs operate. As a result, filmmakers and multimedia e-book authors face substantial uncertainty as to whether they may use these products without fear of liability or legal attack. If the Librarian of Congress were to reject the requested exemption based on the premise that screen capture is a viable alternative, he would place filmmakers and e-book authors in the precarious position of having to use a screen capture software that is technically unacceptable and does not definitively provide immunity from DMCA liability. The result would be a severe chilling effect on the creations of filmmakers and multimedia e-book authors—many, in fact, will be forced to do without fair use entirely.

To the extent these programs access an audiovisual signal from an unencrypted source after it has been decrypted or authenticated, then we believe they do not violate § 1201(a)(1)(A), because at that point in the process no "technological measure" protects the content in question. The programs do not decrypt or descramble an encrypted work, nor do they "avoid, bypass, remove, deactivate, or impair a technological measure"[1]. In addition, to the extent CSS, AACS, and authentication protocols send signals to unencrypted sources such as component video cables or video cards that do not themselves contain TPMs, then there is a strong argument that such protocols do not "in the ordinary course of [their] operation" effectively control access to the signal.[2] Indeed, in 2010 the Register of Copyrights determined that "the use of some types of video capture software," i.e. those that "reproduce[] motion picture content after it has been lawfully decrypted," constitute "a process that has been identified as a non-circumventing option for accomplishing noninfringing uses."[3]

Despite our conclusion, however, filmmakers and authors face real uncertainty as to whether the use of screen capture programs such as these would lead to litigation or

[1] 17 U.S.C. § 1201(a)(3)(A).
[2] 17 U.S.C. § 1201(a)(3)(B). As we discuss infra, however, separate TPMs exist where there are digital outputs and in the Mac environment. In such situations, the screen capture software cannot be used without circumventing a TPM.
[3] Recommendation of the Register of Copyrights June 11, 2010 at 60-1. The Register of Copyrights also found that many of these alternative software were not suitable for a substantial number of non-infringing uses (such as filmmaking), and that a significant number of non-infringing uses and users would be adversely affected if limited to non-circumventing alternatives. *Id.* As we discuss *infra*, that remains unequivocally true today as regards these screen capture products.

liability because no court has clearly ruled that screen capture programs are lawful.[4] Moreover, while rightsholder associations opposing classes 7D and 7E apparently concur that the use of screen capture programs is permitted under § 1201,[5] whatever representations they make in this proceeding don't bind others who might have enough of a claim to litigate this issue.

Furthermore, for the vast majority of filmmakers and authors, it is extremely difficult to determine how a given program works and whether it decrypts an encrypted signal or bypasses an authentication protocol. Screen capture is fundamentally different than camera recording, analog capture (or "analog hole") and other analog alternatives that have previously been considered by the Register as alternatives to circumvention for filmmaking exemptions. For instance, the physical separation of the camera from the video display forecloses the possibility that camcorder screen capture decrypts a technology protection measure, unlike screen capture programs that operate within the same computing environment as the TPM. In addition, other TPMs are often present in the computing environment, such as HDMI encryption or Mac Lion OS DVD screen capture suppression. Finally, even if one can determine how the program operates at a given point in time, many programs can be automatically updated to operate in a materially different way without effective notice to the user.

B. Screen capture is not an acceptable solution for filmmakers and multimedia e-book authors.

To be clear, whether or not screen capture methods are lawful under the DMCA, they are technically unacceptable both for filmmaking and for multimedia e-book authorship. As we demonstrated in our December 1, 2012 comment (IDA Comment) and in the testimony of Jim Morrissette on May 11 and June 4,[6] screen capture programs create so many image quality problems, and are so difficult to use, that they are entirely unsuitable for filmmaking. The screen capture programs we have reviewed, including those identified above, cause myriad problems that create insurmountable barriers to broadcast or widespread distribution. These were present in the opponents' demonstrations as well as our own tests. These problems include:

- Dropped frames and stuttering
- Aliasing (aka Moire or "window screen" effect)

[4] Indeed, as several commentators have observed, the language of § 1201 is vexingly indeterminate as to how it applies to "merged" access and use controls. *See e.g.*, 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). *See also* IDA Comment at 18 n.95.

[5] Transcript of June 4 Hearing on Exemption to Prohibition on Circumvention of Copyright Protected Systems for Access Control Technologies at 48, 60, 110.

[6] *See e.g.*, IDA Comment at 15 (discussion of screen capture as impracticable alternative to circumvention). *See also* Transcript of June 4, 2012 Hearing on Exemption to Prohibition on Circumvention of Copyright Protected Systems for Access Control Technologies at 146-47; IDA Comment, Appendix B: *Statement of Jim Morrissete on Alternatives to Circumvention Proposed by Opponents*.

- Lack of fidelity with regard to black levels, color balance, and audio-visual syncing[7]

With respect to the particular software screen capture options suggested in your question, these programs do not meet the technical or practical needs of filmmakers or multimedia e-book authors.

"Replay Video Capture" is only available for PCs and therefore is not an option for a significant segment of the filmmaking community that works in the Mac environment.[8] In any event, the captured video would not meet broadcast standards because of problems such as dropped frames, aliasing, black lines, audio-visual sync issues, and so on.

"Jing", "Camtasia", and "Snagit" offered by Techsmith (available in both PC and Mac versions) are neither sold as nor intended to be DVD video screen capture products. Their websites describe them quite differently:

- "Jing can record *up to 5 minutes* of onscreen video."[9]
- "Camtasia is screen-recording (screencasting) software for Mac users who want to create training, presentations, educational, and sales and marketing videos".[10]
- "Snagit allows users to take photos of your computer screen, including long webpages."[11]

These qualities may be useful for a variety of purposes, but they fall well short of what documentary filmmakers need—the ability to access important material in standard definition and high definition without a reasonable fear of DMCA liability.

In addition, as Jim Morrissette demonstrated at the May 11, 2012 and June 4, 2012 hearings, these software products are not available for Mac users because the Lion operating system disables capture of any DVD playback or iTunes video playback.[12] For these reasons, the Techsmith products cannot be used for DVD video screen capture.

For similar reasons, screen capture is not a realistic alternative for multimedia e-book authors.[13] Today's e-book technology has led consumers to expect high-quality video in multimedia e-books because e-book readers now come in extremely high

[7] *See* id.
[8] *See* IDA Comment at 45. *See also* Video tape: May 11, 2012 Washington, DC Tech Hearing, held by Copyright Office (May 11, 2012) (on file with author); Transcript of June 4, 2012 Hearing at 146.
[9] "Jing." TechSmith. <http://www.techsmith.com/jing.html>
[10] "Camtasia Relay." TechSmith. <http://www.techsmith.com/camtasia-relay.html>.
[11] "Snagit." TechSmith. <http://www.techsmith.com/snagit.html>
[12] Transcript of June 4, 2012 Hearing on Exemption to Prohibition on Circumvention of Copyright Protected Systems for Access Control Technologies at 147.
[13] *See* Berger Comment at 10.

resolution and will improve substantially over the next three years.[14] Mr. Brantley's uncontroverted testimony showed that without an exemption allowing e-book authors to access the highest quality footage possible, independent multimedia e-book authors will suffer from a severe competitive disadvantage given consumer expectations and the available technology. The practical result would be a substantial adverse effect on this form of authorship.

To the witnesses who testified in favor of classes 7D and 7E—and for thousands of filmmakers and authors across the country struggling to make fair use in the digital environment—the question of whether screen capture violates § 1201 is purely academic. If the Copyright Office were to rule that the proponents may not circumvent CSS on DVDs and AACS on Blu-Ray due to the availability of screen capture programs, the practical effect would be to prevent thousands of filmmakers and multimedia e-book authors from making fair use.

**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?**

Nearly all national broadcasters and major commercial distributors require that a filmmaker obtain errors and omissions insurance before the film can be broadcast or distributed. In many other circumstances, such as local screenings and film festivals, errors and omissions insurance is not required.

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

We know of no film festivals that require that documentary filmmakers obtain errors and omissions insurance for their films prior to screening. At some more prominent film festivals such as Sundance, a significant number of films that screen will have obtained coverage. However, for many other festivals, the majority of filmmakers do not have errors and omissions coverage at the time of screening.

**(C) What would be the effect and advisability of requiring, as a precondition for benefitting from an exemption for documentary filmmakers, that the**

[14] *See* Berger Comment, Appendix B: *Statement of Peter Brantley on Multimedia E-Books.*

**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?**

We urge the Register in the strongest possible terms not to recommend that such a requirement be imposed on documentary filmmakers. Such a requirement would be severely disruptive to current practice because it would require filmmakers (a) in effect, to purchase a bond, and (b) to retain an attorney, before they are permitted to make fair use. That, in turn, would cause hundreds of filmmakers across the country to shelve their projects, recut their films, face long delays, or miss time-sensitive opportunities to have their works seen. The law has never required such hurdles, and there is not a shred of evidence in the record that such an imposition is necessary now.

The proposed requirement would actually work to prevent some filmmakers from exercising fair use. From time to time, insurers decline to insure or radically increase the premium when a project is controversial or has raised the ire of a powerful institution. The doctrine of fair use was developed to protect speech in precisely this type of situation[15]—but by tying the exemption to insurance, the proposed requirement would actually make doing so impossible.[16]

Just as important, the requirement would suppress or delay all but the most successful films that employ fair use, because fair use endorsements require the opinion of experienced copyright counsel, and such counsel is expensive and can be difficult to find outside of New York and Los Angeles.[17] For filmmakers that are successful enough to obtain a national broadcast or distribution deal, errors and omissions insurance is a natural step and a perfectly justifiable expense. But for countless others, such an outlay can be justified only once they have a deal—and in order to get a deal, filmmakers must be able to show their work.

The fact is that documentary filmmakers can and regularly do make fair use decisions without having to consult an attorney. *The Documentary Filmmakers Statement of Best Practices in Fair Use* and extensive educational outreach have empowered filmmakers to do so. As scholars such as Pat Aufderheide and Peter Jaszi

[15] *Eldred v. Ashcroft*, 537 U.S. 186, 219-20 (2003) ("copyright law contains built-in First Amendment accommodations . . . the 'fair use' defense allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances.")
[16] Along similar lines, while we have no indication that major insurers will slow or stop issuing fair use endorsements, there is no guarantee that the current price structure, underwriting practices, or other aspects of the E&O process will remain the same.
[17] Fair use endorsements require opinion letters from attorneys with substantial experience in copyright or clearance.

have shown,[18] in many contexts the doctrine of fair use can no longer be criticized as nothing more than "the right to hire a lawyer."[19] Ironically, the proposed rule would *require* that filmmakers do just that in order to make fair use.

To the extent you are suggesting this requirement in an effort to make the probability of fair use in the filmmaking context more certain, such an effort is unwarranted. The limitations already built into Proposed Class 7D, the well-established nature of this type of fair use, the educational outreach programs in place, and the evidentiary record establish that our proposed fair use easily meets the standard set forth in the 2010 Rulemaking: the use contemplated here "is or is likely to be non-infringing."[20] Given that there has not been one report, nor even an allegation, of any misuse of the 2010 exemption, the proposed requirement is simply unnecessary.

If the Register nevertheless wishes to establish additional safeguards in an effort to ensure that uses made under the exemption are not infringing, we respectfully submit that it would be more appropriate merely to urge filmmakers to adhere to the Statement of Best Practices. The Statement is heavily taken into account in the insurance underwriting process, and it is accessible to and regularly used by lay persons. This approach would provide additional protection without creating the severe disruption of an Errors & Omissions requirement.

Given that fictional filmmakers do not have a statement of best practices in fair use, in the context of fictional filmmaking we better understand the desire to institute additional safeguards. But an E&O requirement for fictional filmmakers would cause even greater disruption, and have a greater chilling effect, than it would for documentary filmmakers. This is so because the great majority of independent fictional films receive no or limited distribution. Typically, no E&O insurance is even considered until it is required by a distributor. If the Register nevertheless insists on additional requirements, we propose that fictional filmmakers be permitted to exercise the exemption as long as one of the following requirements is met:

- The filmmaker has previously obtained a fair use endorsement on errors and omissions insurance. In such instances, the filmmaker will have already gone through the underwriting process and will be aware of what needs to be done.

  **OR**

- The filmmaker has met with counsel for a minimum of one hour dedicated exclusively to fair use advice on his or her specific project.

  **OR**

[18] Pat Aufderheide & Peter Jaszi, RECLAIMING FAIR USE, Chap. 3 (Univ. of Chicago Press, 2011). *See also* Michael C. Donaldson, *Refuge from the Storm: A Fair Use Safe Harbor for Non-Fiction Works*, ___ J. COPYRIGHT SOC'Y ___ (forthcoming, 2012).
[19] Lawrence Lessig, FREE CULTURE Chap. 12 (Penguin Books 2005).
[20] IDA Reply Comment at 3.

- The filmmaker has participated in a two-hour seminar being developed by the proponent filmmaker organizations. The seminar will be devoted to fair use in the fictional filmmaking context, will conclude with an exam, and will be made available online or in person at no cost by a national filmmaker organization.

We trust that the Register will make her recommendation based on the evidence submitted in this rulemaking. The evidentiary showing in support of Classes 7D and 7E is overwhelming, and one-sided. The proponents have demonstrated that § 1201's prohibition on circumvention is causing a substantial adverse effect to filmmaking and to multimedia authorship; we have shown that the exemption now in place has enabled fair use that otherwise would not have been possible; and, critically, there has not been a shred of evidence, nor even an allegation, of problems with this exemption. Given the evidence on record, we urge the Register not to impose this unnecessary and burdensome requirement on documentary filmmakers, fictional filmmakers, and e-book authors.

Thank you for the opportunity to respond to these questions. We welcome the opportunity to address any additional questions you may have.

Very truly yours,

Jack Lerner

Michael C. Donaldson