

Mr. David O. Carson
General Counsel
U.S. Copyright Office
P.O. Box 70400
Washington, DC 20024

RE: Docket No. RM 2011-7
Exemption to Prohibition on Circumvention
of Copyright Protection Systems for Access
Control Technologies
Proposed Classes 7 and 8

Dear Mr. Carson:

On behalf of DVD CCA, please find below its responses to the questions posed in your letter dated July 3, 2012.

1.

(For all witnesses who testified relating to proposed Classes 7 and 8): 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).

RESPONSE

As stated at the June 4 hearing, DVD CCA endorses the comments of AACCS LA on this point, including the statements being filed today in response to this question, as follows:

As stated at the June 4 hearing, we concluded that the Replay Video Capture Software does not violate the DMCA because our testing revealed that the software does not decrypt or descramble the content but instead captures the images and audio only after the content has been decrypted, and because the maker of the software, on its website and otherwise to our knowledge, does not advertise or describe the product as being capable of, or designed for the purpose of, circumventing a technological measure. The research lab we used to examine the Replay software represented to us they extensively use Camtasia (the mac-

compatible video capture software), and, based on their use and independent testing, they conclude that Camtasia similarly captures the images and audio only after the content has been decrypted. We have not reviewed the other named products. We note that our written comments emphasized that our support for the use of video capture software as an alternative to circumvention is “limited to the context of this proceeding, where the use of any specific alternative is assumed to be for noninfringing purposes only.” (AACCS LA comments at 10.)

2.

While DVD CCA does not have direct knowledge of the documentary film business, including requirements for the filmmakers to obtain errors and omissions insurance for films prior to distributing or publicly performing them, we have conducted a review of readily available sources and have found information provided below in response to these questions.

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

RESPONSE

Our review suggests that errors and omissions insurance is required for theatrical and non-theatrical distribution, such as distribution deals with studios, television, cable networks, DVD and Internet sites.¹ Such insurance covers liability for copyright infringement, defamation, and other media risks.²

¹Peterson, Latoya. “How They Did It: The Center for Social Media’s Fair Use Guides,” available at <http://journalists.org/2012/01/25/how-they-did-it-the-center-for-social-medias-fair-use-guides/>; ; see also “Errors and Omissions and Rights, Oh My!” available at <http://www.momentousins.com/blog/?p=768>.

² See Center for Internet and Society, Stanford Law School, available at <http://cyberlaw.stanford.edu/projects/documentary-film-program/faq/> [<http://www.documentary.org/content/resolution-freedom-expression-and-information-documentaries>]

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

RESPONSE

Our research suggests that film festivals do not usually require documentary filmmakers to obtain errors and omissions insurance prior to exhibition, but that participating filmmakers are encouraged to obtain insurance coverage. First, top documentary festivals, such as Sundance and IDFA, attempt to shield themselves from liability by requiring participating filmmakers to indemnify them for any copyright, trademark, and libel/slander claims that may arise.³ Consequently, the indemnification provision is one more reminder that insurance coverage is fundamental to the filmmaker's business reality. Second, the film festival is often the means to "sell" the documentary to potential distributors. And distributors are more inclined to pick up a film if they can rely on the review and documentation of an errors and omissions insurer.⁴ (Even if filmmakers are not yet insured at the festival due to their inability to obtain affordable coverage, filmmakers are encouraged to have legal materials readily available at the festivals to facilitate their discussions with potential distributors.) Thus, it is our understanding that a filmmaker participating in a festival is well advised to obtain error and omissions coverage if the filmmaker wants to sell the film more easily.

3 Sundance Rules & Regulations 14-16, available at http://www.sundance.org/pdf/submissions/2013_Submissions_Rules.pdf; IDFA Rules & Regulations, available at http://www.idfa.nl/industry/Festival/film_entry/regulations.aspx.

4 WIPO, "From Script to Screen: The Importance of Copyright in the Distribution of Films" <http://www.scribd.com/doc/82942558/From-Script-to-Screen-The-Importance-of-Copyright-in-the-Distribution-of-Films>.

- (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 any 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?

RESPONSE

Such a requirement could have the beneficial effect of focusing the documentary filmmaker on the necessity to be certain of his/her use of clips from the beginning of the filmmaking process. As stated in our written comments, DVD CCA believes that the case for an exemption for documentary filmmakers is weak but that, if an exemption is granted, the exemption should be narrowly crafted, including to ensure that the clip being used is fair use or otherwise non-infringing. As such, we believe that the limitation stated above would be appropriate as a condition for qualifying for any exemption that may be granted as a result of this proceeding.

3.

(For witnesses opposing proposed Class 7): Proponents have argued that the use of screen capture software to capture segments of the 2009 Star Trek motion picture was insufficient because of pixelization, dropped frames and poor quality of zoomed in and cropped images, and offered examples of such shortcoming.¹

The Office requests that opponents of proposed Class 7 inform the Office whether they are able to use screen capture software² and any editing software to capture the same images from the 2009 Star Trek movie with results that are of sufficient quality for the requested uses. If you are able to do so, please describe the hardware and software products used and the specific steps taken to obtain the results, and submit a copy of the resulting images. Please also either provide copies to the other witnesses addressed in this letter or provide the Copyright Office with permission to provide copies to the other witnesses.

RESPONSE

We are currently working with Replay software to capture segments of the 2009 Star Trek motion picture and expect to provide a response by July 24, as requested in the July 3 letter.

Respectfully submitted,

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