



Steven J. Metalitz  
A Professional Corporation  
(202) 355-7902 Phone  
(202) 355-7892 Fax  
met@msk.com

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VIA EMAIL & U.S. MAIL

David O. Carson, Esq.  
General Counsel  
U.S. Copyright Office  
Library of Congress  
P.O. Box 70400  
Washington, DC 20024  
1201@loc.gov

Dear David:

On behalf of the Joint Creators and Copyright Owners, I am pleased to respond to your letter of July 3, 2012 regarding Proposed Exemptions #7 and #8 in Docket No. RM 2011-7, Exemptions to Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works. This response will serve as the sole response of the Joint Creators and Copyright Owners, although the individual witnesses who testified on behalf of the Joint Creators and Copyright Owners (copied hereon) appreciated receiving your letter.

Your first question asked whether a person who uses any one of four specific screen capture products “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).” First, we must note that none of the proponents of classes #7 and #8 have requested an exemption that would allow circumvention for the purpose of copying entire motion pictures, so we do not see the relevance of that type of copying. Of course, copying entire motion pictures is unlikely to qualify as fair use in nearly all circumstances. Second, as we stated in the June 4 hearing (see page 110 of the transcript), using a product to capture images and sounds from a legitimately decrypted and otherwise unprotected signal is not prohibited by § 1201(a)(1)(A).<sup>1</sup> However, we have not tested the specific products you referenced in your letter, so we cannot comment on how they function. We understand that AACCS LA has tested some of the products, and we have no reason to dispute the results of that testing.

<sup>1</sup> We would also like to take this opportunity to correct the record as reflected by the transcript of the May 17 hearing. The transcript (at page 225) quotes me as follows: “Well, I think I did get a direct question, and I think I gave you a direct answer. The best answer I can give today is if it is recording unencrypted output, then I think it’s circumvention.” To the best of my recollection, that quotes should read: “Well, I think I did get a direct question, *but I don’t* think I gave you a direct answer. The best answer I can give today is if it is recording unencrypted output, then I *don’t* think it’s circumvention.” This is consistent with my statement on page 224 of the transcript: “Our view, as I think we’ve expressed, is we’re not going to opine on a particular technology, but when it records an unprotected output, an unencrypted output, we don’t see that that’s necessarily circumvention.”

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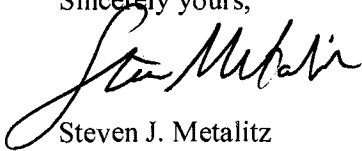
Your second question – in sub-part (c) – asked us to comment “on the effect and advisability of requiring, as a precondition for benefitting from an exemption for documentary filmmakers, that the documentary filmmaker must have a good faith intention to obtain errors and omissions insurance prior to 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.” As we have stated in our prior filings and testimony, we oppose the requested exemption for documentary filmmaking and do not believe that the proponents have met their burden of persuasion. The proponents have not established that documentary filmmaking is “in fact noninfringing.” However, assuming *arguendo* that an exemption will be recommended, our view is that imposing the described limitation on the exemption is advisable. Obtaining insurance after legal counseling does not ensure that all covered uses will qualify as lawful. But, it is reasonable to hypothesize that a filmmaker who begins and ends the creative process with that goal in mind is far less likely to infringe copyrights than a filmmaker who does not.

In sub-parts (a) and (b), your second question asked for information regarding whether documentary filmmakers “are generally required” to obtain errors and omissions insurance prior to distributing and publicly performing their films, including specifically via film festivals. We believe the answers to sub-parts (a) and (b) are in the affirmative, at least as to documentaries prepared for commercial distribution, but we recognize that proponents of this exemption may have broader first-hand knowledge of the facts.

Finally, your third question asked us whether we were able to use screen capture products to successfully create quality copies of specific scenes from Star Trek in a manner that would refute the claims of some proponents that such copying was not feasible. This question is apparently directed to witnesses who prepared demonstrative evidence using screen capture programs. Since the Joint Creators and Copyright Owners did not submit such evidence, we do not believe any response is required from us to this question.

Please let us know if you have any further questions.

Sincerely yours,



Steven J. Metalitz

cc: Ben Golant  
Clarissa Weirick  
Dan Mackechnie  
Mitch Singer