



INTERNATIONAL DOCUMENTARY ASSOCIATION

February 17, 2012

RE: CANADIAN COPYRIGHT REFORM LEGISLATION

To Whom It May Concern:

It is our understanding that the 41st Parliament of Canada is currently considering copyright reform legislation that would prohibit the circumvention of technological protection measures that control access to copyrighted works. We write to share the experience of documentary filmmakers in the United States with a similar law, the Digital Millennium Copyright Act of 1998. At times the DMCA has affected documentary filmmaking profoundly, and if it were not for the DMCA's triennial exemption process, documentary filmmaking would look nothing like it does today.

The International Documentary Association is a non-profit organization that promotes nonfiction filmmaking and is dedicated to supporting documentary filmmakers everywhere. At IDA, we believe that the power and artistry of the documentary art form are vital to cultures and societies globally, and we exist to serve the needs of those who create this art form. For nearly thirty years we have helped protect and advance the rights of thousands of documentary filmmakers and the craft of documentary filmmaking through advocacy, filmmaker services, education, and public programs and events. As documentary filmmakers we are ourselves copyright owners; as such, we respect copyright and take infringement very seriously.

Like the doctrine of fair dealing in Canada, the United States doctrine of fair use is an integral part of copyright law and has been for over 150 years. Put simply, fair use is necessary to prevent private censorship; without it, rightsholders could simply refuse to license their works to anyone whose speech they do not like or who cannot afford the asking price. Naturally, fair use is essential to documentary filmmaking and other forms of journalism, and we depend on it every day in order to explore and examine our culture, public affairs, current events, and history. The problem is that in the digital age, more and more copyrighted material has become locked behind technological protection measures such as encryption – and, like Canada's Bill C-11, our Digital Millennium Copyright Act makes it illegal to circumvent such measures where they control access to a copyrighted work. The

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unfortunate and frequent result is that even where it is perfectly legal to use a particular piece of content, the DMCA makes it illegal to access that content.

By 2008, the prohibition on circumvention of TPMs had begun to affect documentary filmmaking profoundly, as countless filmmakers struggled with expensive workarounds and legal uncertainty or were forced to abandon their projects altogether. So IDA and a nationwide coalition of filmmakers and organizations requested an exemption for documentary filmmaking as part of a triennial rulemaking process set forth in the DMCA. In 2010, the Librarian of Congress granted our request. The Register of Copyrights, who conducted the rulemaking, found that we had “made a compelling case for the need to use portions of the digital versions of motion pictures that exist on CSS-protected DVDs for purposes of criticism and comment within a documentary,”¹ and we were granted a temporary exemption permitting us to do just that.

Technology and markets evolve rapidly. Our exemption only applies to DVD—but where just a few years ago DVD was the dominant distribution format, it is now hurtling towards obsolescence. A significant and ever-increasing amount of material is being released only on Blu-Ray, protected digital cable services, or encrypted and proprietary online services such as Hulu or Netflix. Just a few short years after our 2008 request, filmmakers now find themselves facing technological protection measures at every turn. In light of these marketplace changes, last year we returned to the Register of Copyrights to request an exemption covering not just DVDs, but Blu-Ray and digitally distributed video as well.² That rulemaking process is expected to conclude sometime this fall.

Our experience with the DMCA presents several important lessons for policymakers considering similar regulations.

First, it is clear that a robust exception is absolutely essential in order to preserve documentary filmmaking in the digital age. Documentary filmmakers depend on fair use and fair dealing in order to provide educational programming, cultural criticism and commentary, historical analysis, news reporting, and many other forms of expression. But in the new digital ecosystem, we face encryption and other technological locks at every turn. Put simply, without an exception, documentary filmmaking would look nothing like it does today.³

¹ The Register’s Recommendation is available at <http://www.copyright.gov/1201/2010/initial-ed-registers-recommendation-june-11-2010.pdf>.

² Our 2008 and 2011 Comments can be found at <http://www.copyright.gov/1201/2008/comments/kartemquin-ida.pdf> and http://www.copyright.gov/1201/2011/initial/IDA_Mark_Berger.pdf, respectively.

³ We explain at length in our 2008 and 2011 Comments why proposed alternatives to circumvention are not feasible for documentary filmmakers. Such workarounds are expensive, time-consuming, require obsolete equipment, and most importantly, they result in degraded material that is unsuitable for broadcast, HD, or theatrical distribution.



Second, the DMCA exemption for documentary filmmakers has not lead to piracy. As producers, we are also copyright holders; we respect copyright and depend on it for our own livelihoods, and as a result we take piracy very seriously. But we are aware of no evidence—or even an allegation—that any DVD-related DMCA exemption has contributed to piracy in any way, or even that such an exemption has led to infringement with commercial consequences. The first DVD-related exemption was granted in 2006 to film professors seeking to create clip compilations for in-class instruction. Neither that exemption, nor the documentary filmmakers’ exemption, nor an exemption for noncommercial video uses such as remixes, has led to increases in piracy. In fact, as the Register of Copyrights herself observed in 2010,

CSS-protected DVDs have continued to be the dominant format even though circumvention tools have long been widely available online. At this point in time, the suggestion that an exemption for certain noninfringing uses will cause the end of the digital distribution of motion pictures is without foundation....There is no credible support for the proposition that the digital distribution of motion pictures continues to depend on the integrity of the general “principle” that the circumvention of CSS is always unlawful.⁴

Third, an exception for documentary filmmaking is necessary in order to preserve competition and protect innovation. As documentary filmmakers we produce original content, and because we comment on, criticize, and explore the world around us, we also must necessarily work with materials from the world around us. The body of work we produce thus creates new value from existing content—but the market for that new value could not exist without fair use and fair dealing. This is because the film licensing process is a well-known example of market failure, rife with prohibitive transaction costs and restrictive licensing clauses.⁵ A rule prohibiting circumvention that does not also contain an exemption would resurrect this market failure; documentary filmmakers would be forced to forgo uses that rely on fair dealing, and instead limit themselves to uses that meet the approval of rightsholders—and the market for works that employ criticism and commentary would be reduced accordingly. Today’s digital production tools and internet distribution outlets have enabled countless new business models for film, tearing down barriers to markets that once existed. An anticircumvention rule without an exemption

⁴ The Recommendation of the Register, *supra* note 1, at 57. The Register also found that for the vast majority of fair uses by documentary filmmakers and others, the filmmaker actually uses relatively small portions of the underlying work. *Id.* at 51-55.

⁵ Such clauses are standard practice in the filmmaking industry. We have attached two examples of such clauses to this letter. For more information on problems with the licensing process, see Patricia Aufderheide & Peter Jaszi, *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers* (2004), http://www.centerforsocialmedia.org/sites/default/files/UNTOLDSTORIES_Report.pdf



would shift market power to established legacy players and the largest rightsholders, in effect bestowing them with undue influence over new business models.

Finally, while the DMCA's triennial rulemaking process offers the flexibility to respond to technological change, it comes at significant expense to the government and commenters alike. There have been four rounds thus far, and each rulemaking has taken between twelve and twenty-two months. For each rulemaking, there have been initial and responsive comment rounds;⁶ hearings in California and Washington, DC; letter correspondence between the commenters and the Copyright Office; and subsequent correspondence between various government agencies. In addition, for each round proponents must prove anew that the DMCA has had or will have an adverse effect on lawful uses that they wish to make. While this standard is understandably meant to account for the fact that marketplace conditions change rapidly, the downside is that it can be very burdensome for those requesting exemptions. As an alternative, a process for new exceptions could make exceptions indefinite in duration, to be overturned only if challenged.

The best option, however, would be a permanent exception for documentary filmmakers conducting criticism or commentary. After all, this problem is going to persist as long as technological protection measures are widely employed. As another alternative, policymakers might consider legislative language making it clear that the anticircumvention rules are limited to situations in which there is a nexus between circumvention and copyright infringement.

We hope that you find our experiences helpful as you work to reform the Canadian Copyright Act. We would be pleased to talk with policymakers or their staff upon request.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael Lumpkin", with a horizontal line extending to the right.

Michael Lumpkin
Executive Director, IDA

Enclosures

⁶ In addition, the current rulemaking has a third round during which reply comments will be submitted.



APPENDIX A:

**STATEMENT OF THE INTERNATIONAL DOCUMENTARY
ASSOCIATION**

**APPENDED TO COMMENT OF THE INTERNATIONAL DOCUMENTARY
ASSOCIATION ET AL., *IN THE MATTER OF EXEMPTION TO
PROHIBITION ON CIRCUMVENTION OF COPYRIGHT PROTECTION
SYSTEMS FOR ACCESS CONTROL TECHNOLOGIES*, UNITED STATES
COPYRIGHT OFFICE, NO. 2011-07 (DEC. 1, 2011)**

VI. APPENDIX

A. Statement of the International Documentary Association

Mission and Background

Founded in 1982, the International Documentary Association (IDA) is a non-profit 501(c)(3) organization that promotes nonfiction filmmaking, and is dedicated to increasing public awareness for the documentary genre. At IDA, we believe that the power and artistry of the documentary art form are vital to cultures and societies globally, and we exist to serve the needs of those who create this art form.

At IDA, we help advocate for, protect and advance the legal rights of documentary filmmakers. Our major program areas are: Advocacy, Filmmaker Services, Education, and Public Programs and Events. IDA also has a long history of protecting documentary filmmaking as a vital art form, and we continue to seek ways to ensure that the artists who make documentaries receive the funding that they deserve. For almost 30 years, IDA has worked to become the primary organization that people think of when they think of support for the documentary art form.

IDA's Documentary Filmmaker Membership

Since its founding in 1982, IDA has been the nation's leading arts organization dedicated solely to the art of the documentary form. In a challenging economic environment where many other arts non-profits have closed their doors, IDA has remained strong, perhaps stronger than ever, because of the unique and valuable service we provide to this growing community. Over three decades, we have worked on behalf of this community, and our history of filmmakers, members and collaborators has included the Who's Who of documentary filmmaking.

Currently, we reach over 28,000 individuals each month through our eNewsletter, emails, and website, and we actively carry out programs across the country that regularly receive the attention of the national media. In short, the IDA represents documentary, at its core.

Educational Programs

As educators, we run two major educational programs designed to nurture the documentary filmmakers of today and tomorrow. We educate young filmmakers to enhance their understanding and appreciation for the art form, and provide fair use education to all our members in order to promote responsible and ethical practice of the craft. Our educational programs include:

- Doc U, a series of hands-on educational seminars and workshops offered locally, online and around the country for aspiring and experienced documentary filmmakers, taught by artists and industry experts. Participants receive vital training and insight on various topics including fundraising; distribution; marketing; sound business management, legal rulings that affect our community and technique and craft. This program is supported by major grants, and is a core piece of IDA's work, reaching 2,000 in person and thousands online.

- Docs Rock is a two-semester program that introduces high school students to the world of documentary filmmaking. The first semester focuses on critical viewing and analyses of nonfiction films, and during the second semester the students apply their new knowledge and produce their very own documentary. With IDA's curriculum, the filmmakers of tomorrow inherit the fundamental knowledge to grow as non-fiction storytellers.
- IDA's Fiscal Sponsorship program helps documentary filmmakers apply and receive funding and grants, and includes a mentorship component where seasoned filmmaking experts on our Board of Directors, as well as our dedicated staff, provide feedback and input on projects in development and production.

Since 2010, when the DMCA exemption was granted to filmmakers, we have continued to educate our community about the responsible use of the exemption, as well as the doctrine of fair use, so that the community may use this vital exemption responsibly and legally.

In this time, we have noted that many members of the community were aware of the DMCA exemption, but still had concerns about how to use the exemption without incurring any liability, and had specific questions about many of the new digital formats. In speaking to many filmmakers for this 2011 rulemaking, we learned that there are still many in our community whose concerns about potential liability have caused them to abandon projects, and we have seen how these restrictions have had a chilling effect on filmmaker's ability to pursue their art.

An Exemption to the DMCA is Necessary for Documentary Filmmakers

Documentary Filmmaking is an Important Form of Journalism that is Essential to American Discourse

Documentary films are an important source of commentary and criticism in American society. They frequently address topics that are ignored or marginalized by mainstream media. Even when the topic is heavily addressed in the media, documentaries frequently provide an important new perspective that furthers or changes the public discussion. They are viewed in theaters, on television, on DVD, on Blu-Ray, and increasingly over the internet. At times, a documentary has been able to influence domestic or foreign policy.

Fair Use is Critical to Documentary Filmmaking

Documentary filmmakers tell stories through the combination of pictures, video, and sound. In order to effectively comment on the real world – past, present, and future – documentary filmmakers frequently need to incorporate small portions of pre-existing works that are still under copyright such as news broadcasts, feature films, television shows, and sound recordings. However, it is often not possible for a documentary filmmaker to license all of the clips for a variety of reasons, which may include inability to identify or contact the copyright holder; the copyright holder's insistence on an unreasonably high price; or the copyright holder's refusal to license the clip at all. As a result, many documentary filmmakers rely on fair use in order to comment on or comment with the copyrighted works.

In 2005, IDA worked with a number of film organizations and attorneys to develop the *Documentary Filmmakers' Statement of Best Practices in Fair Use*. The purpose of the statement

was to support documentary filmmakers ability to make fair use through a simple and clear explanation of the common implementations of fair use in a documentary filmmaking context. The Statement has been a renowned success, helping to spur media insurance companies to provide Errors & Omissions insurance for fair use to filmmakers, as it has become a common tool used by attorneys to draft opinion letters for E&O insurance.

The DMCA is Handicapping Documentary Filmmakers' Ability to Make Fair Use

Since the DVD exemption was granted for documentary filmmakers in July 2010, many of our members have utilized the exemption to incorporate clips from DVD that are essential to their documentaries. The need for and benefit of this exemption will only continue to grow as more documentary filmmakers become aware of the exemption and start production. However, for many of our members standard-definition (SD) materials from DVD is no longer enough. Many distributors have upgraded their technical requirements and now require films to be delivered in high-definition (HD). In addition, fewer and fewer materials are being distributed on DVD due to DVD's rapid decline in sales and the increased use of digital services such as iTunes, Netflix, and Verizon FiOS Pay-Per-View.

Under the current exemption, documentary filmmakers are not allowed to obtain HD materials or SD materials not on DVD if they are protected by technological protection measures, even when including the clips would be fair use, without the fear of liability. Because of the continuing decline of DVD and rise of alternative distribution formats, this means that many documentary filmmakers are prevented from utilizing important audiovisual materials in order to comment on real world stories.

B. Statement of Eddie Schmidt, President of the Board of Directors of IDA, on the “Death of DVD”

The death of the DVD format is on its way – next year or the year after – and while it may be perceived as only a slow demise to the general public, it seems like a much quicker nosedive from within the film industry’s own production and distribution ranks.

For smaller, independent films – and particularly documentaries – it is inevitably coming sooner, because these films are niche products, and this is a volume business. The costs involved with pressing, stocking and shipping physical product make less and less sense with smaller films. Particularly when the customers for independent and documentary films, as recognized by outlets like Netflix Instant, Amazon streaming and iTunes (where documentaries are plentiful and popular) are exponentially more likely to seek out smaller movies through digital means. It is perhaps not surprising that the taste for material on the cutting edge reflects a cutting edge way of consuming it.

In 2011, I personally orchestrated the distribution of an independent film, Harry Shearer’s *The Big Uneasy*. After a five-month DIY (do-it-yourself) theatrical run in 80 theaters with a box office cume of approximately \$175,000, in approximately six weeks, via cable video on demand and digital means, the film grossed approximately \$120,000. In that same time frame, the physical DVD of the film grossed approximately \$12,000. Literally, DVD accounted for one tenth of the digital gross.

This discrepancy is even more pronounced when considering that our sales agent and distributor, FilmBuff, let us know early on that its usual home video partner, MPI, was not interested in carrying the film on DVD at all. When ‘running the numbers’ (it’s all a numbers game, of units in and units out), they said it didn’t make sense. However, the filmmakers wanted the film available to the consumer in this format, so a deal was arranged with Amazon for a “press to order” release (the customer orders it, Amazon presses the disc – one disc at a time).

The notion that this film – from a famous personality known for pop cultural phenomena like *This Is Spinal Tap* and *The Simpsons*, and media breaks including *Real Time With Bill Maher* – could be available simultaneously in 50 million homes via digital means, yet our only option for DVD release was the hi-tech equivalent of the filmmaker burning a disc on his laptop and putting it in the mail, is profound.

The Big Uneasy is by no means an exception. In fact, the ‘exception’ in this case is our insistence on being available via DVD at all. Many of FilmBuff’s titles are digital only.

Truth be told, FilmBuff, and other companies like them – Gravitas Ventures is another – exist almost entirely to capitalize on a digital marketplace that larger organizations have been slow to figure out. DVD is a non-starter for them, in terms of their business plans.

The Sundance Film Festival, the premier U.S. launching pad for new independent films, also recently launched a distribution arm focusing on digital platforms.

Comment of International Documentary Association, et. al.

This should tell you where things are headed – and fast.

And so, as we look to the documentary filmmakers who employing fair use this year, next year and beyond, we see a group whose OWN films are less and less likely to appear on DVD. And as THEY look to the films of their peers documenting the culture with which to excerpt, they will more and more often be forced to obtain these clips through digital transmission or broadcast.

The current DMCA exemption is hugely necessary for filmmakers, but it is already outdated. In order to keep pace with a rapidly changing industry, the exemption must cover the media outlets that are actually available in order to keep fair use truly fair. So we ask that the exemption extend to Blu-Ray discs as well as to means of digital transmission (on-demand cable TV, streaming, download).



APPENDIX B:

EXAMPLES OF CLIP LICENSE STANDARD TERMS AND CONDITIONS
APPENDED TO COMMENT OF THE INTERNATIONAL DOCUMENTARY
ASSOCIATION ET AL., *IN THE MATTER OF EXEMPTION TO*
PROHIBITION ON CIRCUMVENTION OF COPYRIGHT PROTECTION
***SYSTEMS FOR ACCESS CONTROL TECHNOLOGIES*, UNITED STATES**
COPYRIGHT OFFICE, NO. 2011-07 (DEC. 1, 2011)

F. Exhibit #1 of a Studio Clip License Standard Terms and Conditions

STANDARD TERMS AND CONDITIONS

- 1) **GRANT OF LIMITED LICENSE:** Upon receipt by [redacted] of this Agreement, signed by Licensee, Licensee is granted by [redacted] without any representations or warranties of any kind, expressed or implied, a non-exclusive and non-transferable license to use the Footage pursuant to the terms hereof. The Footage shall only be used in and as part of the Picture, for exhibition in the Media, in the Territory, and for the Term. The Footage will not be used for any other purposes whatsoever. Licensee will not make any reproduction of or from the Footage whatsoever in whole or in part, except for use in and as part of the Picture. Unless otherwise set forth herein, Licensee may not use the Footage in connection with the main or end titles of the Picture nor shall the Footage be used in any manner such that it appears that artists appearing in the Footage have rendered services for the Picture or Licensee.
- 2) **LICENSE FEE:** If Licensee has not signed and returned this Agreement along with the License Fee to [redacted] within sixty days after Licensee's receipt of this Agreement, then this Agreement shall automatically terminate in its entirety and be deemed void *ab initio* and Licensee shall be in breach of its obligations herein.
- 3) **RELEASES:** Licensee shall not have the right to use the Footage without obtaining all required individual authorizations, releases, consents, clearances and licenses ("Releases") as may be necessary with respect to the use of the Footage including, without limitation, the Releases set forth below:
 - a) Written releases from all individuals appearing recognizably in the scene(s) contained in the Footage and from all stunt persons appearing in any stunt identifiable in the scene(s) contained in the Footage.
 - b) Written releases from any unions or guilds to the extent required under applicable collective bargaining agreements in connection with the use of the Footage.
 - c) If any music is included in the Footage, master use, synchronization and performing licenses must be obtained from the copyright proprietors of the applicable master recording(s) and composition(s) and such other persons, firms or associations, societies or corporations as may own or control the performing rights thereto.Licensee shall pay any fees and other payments required in connection with the Releases and furnish [redacted] with copies of all such Releases upon request.
- 4) **COSTS:** Licensee will pay all costs arising in connection with the license granted hereunder including screening, processing, laboratory, transfer and shipping charges attributable to the manufacture of any pre-print material and positive prints or tape of the Footage, the return of materials and the costs involved in replacing any lost or damaged materials delivered to Licensee.
- 5) **EDITING, DUBBING AND COLORIZING:** Licensee shall not edit, dub, colorize or otherwise alter the Footage, except to edit for time.
- 6) **NATURE OF PICTURE:** The Picture shall not be derogatory to or critical of the entertainment industry or of [redacted], or any officer, director, agent, employee, affiliate, parent or subsidiary of [redacted] or of any motion picture/television program produced or distributed by [redacted] and none of the Footage will be used in a manner which would be derogatory to or critical of the motion picture/television program from which the Footage was taken or to the persons involved with the making of the motion picture/television program from which the Footage was taken.
- 7) **RETURN OF MATERIALS:** Upon the completion of production of the Picture, Licensee shall promptly return all preprint material and positive prints or tape of the Footage to such location as [redacted] shall designate.
- 8) **ADVERTISING:** Licensee shall not use the Footage or the name of [redacted] for any purposes in connection with the advertising, publicizing or any other promotion of the Picture.
- 9) **COPYRIGHT:** Licensee represents, warrants and agrees that the incorporation of the Footage into the Picture shall in no way affect [redacted] continued and separate copyright ownership in the Footage and the motion picture/television program from which the Footage was taken and that the copyright ownership of [redacted] will not merge with the Picture nor deprive [redacted] of its copyright ownership. Licensee further represents, warrants and agrees that Licensee shall be the copyright proprietor of the Picture, that the Picture shall bear a copyright notice thereon and that if the Picture is exploited in the United States, it shall be registered for copyright in the United States Copyright Office and the Picture shall be registered for copyright protection, and all formalities shall be complied with, in all other countries where the Picture will be exploited.
- 10) **CONDITIONS OF USE:** The consent of [redacted] is conditioned upon Licensee's compliance with the provisions of the Universal Copyright Convention and of the laws of the United States to protect the copyrighted Footage. Licensee shall not have the right to use the Footage unless it complies with said laws.

G. Exhibit #2 of a Studio Clip License Standard Terms and Conditions

2. Licensee represents, warrants and agrees that in connection with Licensee's use of the clip, Licensee will obtain all other authorizations, consents and releases and pay all re-use fees and other compensation required by applicable collective bargaining or individual contracts or otherwise required by law. Without limiting the foregoing, if any music is included in the clip as exhibited, Licensee will obtain all necessary music synchronization and performance rights from the copyright proprietors of such music and such other persons or entities, including performing rights societies, as may own or control the rights thereto, and will obtain all necessary master recording licenses required in connection with any music included in the soundtrack of the clip, including without limitation master recordings owned or controlled by Licensor (other than incidental background score owned by Licensor, permission for which is included herein).

3. In addition to the above license fee, Licensee shall reimburse Licensor for all laboratory and shipping charges and all other direct costs and expenses incurred by Licensor in making the clip available, including, but not limited to, the cost of replacing any material that may be damaged in the process of making the clip available hereunder. Such reimbursement shall be made promptly on receipt of Licensor's invoice thereof.

4. Licensee represents, warrants and agrees that the production in which the clip is used shall not be derogatory to or critical of the entertainment industry or of Licensor or any officer, director, agent, employee, affiliate, parent or subsidiary of Licensor or of any motion picture produced or distributed by Licensor or of any characters owned or controlled by Licensor, and will not be used in a manner derogatory to or critical of the motion picture from which the clip was taken, any character owned or controlled by Licensor or any person involved with the production of said motion picture. This license shall be null and void in the event the MPA/CARA rating given to the production is more restrictive than "R".

5. Promptly upon the completion of the use permitted hereunder, Licensee shall at Licensee's expense return all preprint material and positive prints of the clip (including any video copies of the clip) to Licensor at the same address where Licensee obtained the clip material.

6. Licensee shall not use the name of Licensor for any purposes in connection with the distribution, advertising and publicizing of the production in which the clip is used without the prior written consent of Licensor.

7. Licensee acknowledges that its use of the clip will not affect the copyright proprietor's continued and separate copyright ownership of the clip or the motion picture from which the clip was taken and Licensee represents and warrants that its use of the clip will not adversely affect the copyright ownership of the clip or such motion picture. Licensee represents, warrants and agrees that it shall be the copyright proprietor of the production in which the clip is used, that said production will bear a valid copyright notice and be protected under applicable copyright laws (or, alternatively, the