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**VIA E-MAIL ONLY**

Robert Kasunic  
Principal Legal Advisor  
Office of General Counsel  
U.S. Copyright Office  
101 Independence Ave., S.E.  
Washington, D.C. 20240

**Re: Questions Relating to Documentary Filmmakers and Noncommercial Use Panels**

Dear Mr. Kasunic,

The Joint Creators and Copyright Owners<sup>1</sup> appreciate this opportunity to respond to the questions posed in your letter dated June 22, 2009 regarding proposed Exemptions 11A and 11B.

With respect to your first two questions regarding whether portions of motion pictures on DVDs can be decrypted and/or copied without decrypting and/or copying the entire motion pictures, we respectfully direct you to the response letter of the Motion Picture Association of America, which we support.

In your third and fourth questions, you ask:

Documentary filmmakers' proposed class of works limited the persons who would be eligible to invoke the exemption to a documentary filmmaker, who is a member of an organization of filmmakers, or is enrolled in a film program or film production course at a post-secondary educational institution. Is it appropriate to limit the persons who would be eligible to invoke the exemption? Why? If you believe it would be appropriate, what criteria could be used?

<sup>1</sup> This letter is filed on behalf of the Association of American Publishers ("AAP"), American Society of Media Photographers ("ASMP"), Alliance of Visual Artists ("AVA"), Business Software Alliance ("BSA"), the Entertainment Software Association ("ESA"), Motion Picture Association of America ("MPAA"), the Picture Archive Council of America ("PACA"), and Recording Industry Association of America ("RIAA").

Are there any other appropriate ways to properly tailor the scope of the exemption?

As discussed on pages 6-7 of our previously submitted comments, we are concerned that the new interpretation of the statutory phrase “particular classes of works” that the Register and the Librarian announced in 2006 creates a substantial risk that impermissible administrative exemptions that are primarily defined by the type of use and/or user involved will be recognized, a risk that is certainly present in the exemption as proposed. Thus, we continue to believe that the interpretation of this phrase applied in the first two triennial rulemakings was more consistent with the plain language of the statute as well as legislative intent. We also reiterate the reasons stated in our comments on pages 68-70, and presented at the hearing on May 7, 2009, why proponents of exemption 11B have failed to carry their statutory burden.

If, however, the Register nevertheless recommends an exemption to the Librarian based on proposal 11B, the exemption should be limited, in order to reduce the risk of abuse and to conform to the supporting evidence presented for it, in the ways discussed on page 70 of our comments, and as further elaborated upon during the May 7, 2009 hearing. For example, any such exemption should be limited to:

- acts of circumvention of the Content Scramble System (“CSS”) access control;<sup>2</sup>
- circumvention that is accomplished for the “sole purpose” of including portions of a work in a documentary film;<sup>3</sup>
- circumvention to obtain access to works that are not available in a digital version that is not protected by access control measures;
- circumvention that is “necessary” to obtain a digital copy of the portion of a film in question;
- circumvention by a person who (1) has first made a good faith effort to obtain authorized access to unencrypted content, and (2) contemporaneously submits to the Copyright Office or some other entity documentation of such a good faith effort; and
- where the person who engages in circumvention does not retain a complete copy of any motion picture or other work that the person gains access to as a result of circumvention.<sup>4</sup>

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<sup>2</sup> Mr. Jim Morrisette stated at the hearing that this limitation would be acceptable. *See* May 7 Transcript at page 0092.

<sup>3</sup> Mr. Gordon Quinn did not object to this limitation at the hearing. *See* May 7 Transcript at pages 0021-0022.

<sup>4</sup> Mr. Quinn and Mr. Morrisette appeared to concede this limitation at the hearing. *See* May 7 Transcript at pages 0082-0086.

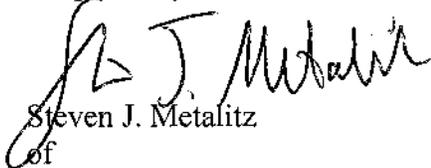
Furthermore, students who do not otherwise meet the criteria should not be authorized to carry out circumvention under such an exemption. As discussed in our previous submission on page 34, expansion of any exemption to students substantially increases the risk that the exemption would lead to piracy. The testimony at the hearing made clear that students enrolled in post-secondary film programs are not necessarily involved in film production. *See* Transcript of May 6 hearing at 247-48. It is hard to see any justification for allowing a student in such a program to benefit from the exemption for her extracurricular documentary film-making activity, which very likely would be entirely unsupervised.

Additionally, for the reasons stated in the previous comments and discussed at the hearing, the exemption should not address circumvention to gain access to works in the public domain, which is outside the scope of this proceeding.

Finally, we call your attention to the MPAA responses to these questions, which we also support.

Please let us know if you have any further questions.

Respectfully submitted,



Steven J. Metalitz

of

MITCHELL SILBERBERG & KNUPP LLP

cc: J. Matthew Williams  
Joint Creators and Copyright Owners