



UNITED STATES COPYRIGHT OFFICE

**Long Comment Regarding a Proposed
Exemption Under 17 U.S.C. § 1201**

REPLY COMMENT
of
FILM INDEPENDENT
THE INTERNATIONAL DOCUMENTARY ASSOCIATION
KARTEMQUIN FILMS

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COMMENTER INFORMATION

Commenters:

Film Independent is an organization that helps filmmakers make their movies, build an audience for their projects, and diversify the film industry. Film Independent puts on over 250 annual screenings and events to unite like-minded artists. These events include the Film Independent Spirit Awards, which recognizes the finest achievements of American independent filmmakers and the LA Film Festival, which showcases select new works from emerging and established independent storytellers. Film Independent also offers an artist development program to foster the careers of talented filmmakers.

International Documentary Association is an organization that seeks to assist the growth and development of documentary films and the overall documentary culture. IDA provides educational programs and resources to documentary makers of various skill levels. IDA's grant programs help filmmakers attain the financing necessary to create documentary films. IDA also advocates for major issues that affect documentary filmmakers, including free speech and fair use.

Kartemquin Films is a not-for-profit media arts organization and collaborative center for documentary media makers who seek to foster a more engaged and empowered society. In 2016 Kartemquin celebrated 50 years of sparking democracy through documentary. A revered resource on issues of fair use, ethics, storytelling and civic discourse, Kartemquin is internationally recognized for crafting quality documentaries backed by innovative community engagement, and for its filmmaker development programs and media advocacy. The organization has won every major critical and journalistic prize, including multiple Emmy, Peabody, duPont-Columbia and Robert F. Kennedy journalism awards, Independent Spirit, IDA, PGA and DGA awards, and an Oscar nomination.

Contact:

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PROPOSED CLASS ADDRESSED

Filmmaker commenters propose the following Class 1 exemption:

Motion pictures (including television shows and videos), as defined in 17 U.S.C. 101, where circumvention is undertaken solely in order to make use of short portions of the motion pictures for the purpose of criticism or comment for use in filmmaking, where the motion picture is lawfully made and acquired on a DVD protected by the Content Scramble System, on a Blu-ray disc protected by the Advanced Access Control System, or via a digital transmission protected by a technological measure.

The proposed exemption is a modification of the exemption granted by the Librarian in the sixth triennial review and the exemption provisionally recommended for renewal in the 2017 Notice of Proposed Rulemaking (NPRM);¹ it proposes to remove the limitation restricting the exemption to documentary filmmakers, and to remove the screen-capture requirement.²

OVERVIEW

At the heart of this rulemaking, the crucial inquiries are whether a class of creators are making fair use, and whether § 1201's prohibitions are inhibiting those uses. In 2010, 2012, and again in 2015, the Librarian of Congress concluded that documentary filmmakers make fair use, have become educated enough to use it responsibly, and need an exemption in order to continue doing so. The same is now true for filmmakers who cannot reliably call themselves documentarians. Just as the independent filmmaking industry and fair use practices have rapidly evolved over the last several years, it follows that the filmmakers' exemption should also evolve as time passes.

While it is understandable that the Librarian of Congress would want to be very careful about modifying this exemption to apply to more than just documentary filmmakers, one cannot ignore the fact that many filmmakers who would likely not be considered documentarians need to make fair use, and are doing so responsibly with content that they *can* access: they are going to attorneys and getting insurance that covers fair use, entering into distribution deals, and having their films broadcast. This fact is uncontroverted; the entities opposing our proposed modification do not acknowledge this burgeoning practice at all, let alone present proof of any misuse or disputes arising out of it.

It is widely known that the purpose of § 1201 is to further the growth of the digital marketplace³; in practice, however, it puts a tangible limit on the growth of the marketplace. While some nondocumentary filmmakers are making fair use already, that opportunity stops when a filmmaker wants to make fair use in a way that involves a video clip. The result is that these

¹ Exemption to Permit Circumvention of Access Controls on Copyrighted Works, 82 Fed. Reg. 49,550, 49,559 (proposed Oct. 26, 2017) (to be codified at 37 C.F.R. pt. 201) ("2017 NPRM").

² *Id.*

³ U.S. COPYRIGHT OFFICE, A LEGAL OVERVIEW OF SECTION 1201, https://www.copyright.gov/1201/1201_background_slides.pdf (last visited Mar. 13, 2018).

filmmakers' works may be less inspiring, be viewed by substantially fewer people, and they are not able to express themselves fully. This issue can only be seen as an impediment to the growth of the digital marketplace.

We have demonstrated more than sufficient adverse effects to justify the proposed modification. At the same time, the proposed modifications present little or no risk of harm, and certainly not to any legitimate licensing market. We are creators and rightsholders ourselves, and we are deeply affected by copyright infringement. Thus, we also do not take lightly the responsibility of making fair use properly. Therefore, the modification, if permitted, will create a market effect driven by improper assertions of fair use.

Further, screen capture remains infeasible as an alternative to circumvention. The entities that oppose the modification wish to maintain that screen capture is a viable alternative, and they suggest methods they claim would make it work. The suggested methods will not work. In fact, because of the constant and rapid improvements in technology and motion picture quality, the proposed alternatives are even less workable now than they were three years ago. Filmmakers cannot use programs that gamers use, or that are designed for computer training. Those programs cannot capture sufficient data, and create defects such as stutters, distortions, and sound syncing problems. They cannot replicate HD or better quality film. Filmmakers cannot use screen capture if they want to be streamed on any reputable site, played in any theatre, or broadcast on any reputable television station. The current screen capture requirements are impracticable, unused, and a trap for the unwary; they should be removed.

The shortcomings of screen capture are only exacerbated by the ever-evolving nature of the technology at hand. As we mentioned above, screen capture is inadequate even when trying to capture HD, and in fact, HD is no longer the current standard any longer. Many if not most filmmakers now film in 4K; this is quickly becoming the standard, and 8K is beginning to be explored. We urge the Register to allow modifications that permit the § 1201 exemption to keep pace with technological development.

DISCUSSION

I. The proposed modification will have no adverse effect on the licensing market.

If the current exemption is modified to remove the limitation to “documentary” filmmakers, there will be no adverse effect on the licensing market. While it is true that if the exemption is granted some filmmakers may choose to make fair use rather than seek a license, licensors have no right to whatever business would be “lost” in such a scenario. Any such business being “lost” comes from filmmakers forced to *pay to make fair use* due to the restrictions of §1201.

In the eight years since the filmmakers' exemption was first granted, the entities that oppose the modification we seek have consistently warned of abuses that would undermine the market for clip licenses—yet they have never offered evidence that the exemption has affected that market in any way. Tellingly, they now do not oppose the renewal of the current exemption. There is simply no reason to think that the proposed modification will be any different.

Instead, the opposition appears to be arguing against removal of §1201's prohibitions based on the concern that filmmakers will use the newly accessible content to make false or erroneous assertions of fair use, thereby depriving the opposition of licensing revenue. There are two problems with this argument.

First, the remedy for the problem the opposition fears—erroneous claims of fair use—is not to deny an exemption that would help many and hurt no one; the appropriate remedy is a suit for copyright infringement. If a rightsholder has a problem with an assertion of fair use, that party can bring an action to enforce its copyright. When enacting the Digital Millennium Copyright Act, Congress made quite clear that neither §1201 nor this rulemaking should undermine Congress's long-standing commitment to the doctrine of fair use and its development in the courts.⁴ It is equally clear that, in enacting §1201, overzealous assertions of fair use were not on Congress's mind. The legislative history makes abundantly clear that the law was enacted to protect against piracy,⁵ not to police fair use. But the filmmakers' exemption has never led to piracy, and there is no reason to think that the proposed modification would. Instead of protecting a legitimate market, §1201 is being misused in the name of the phantom threat of overzealous fair use, while preventing countless filmmakers from actually making fair use appropriately.

The second problem with the opposition's licensing argument is that it has not and cannot dispute that—at least with respect to content not protected by TPMs—a healthy, responsible, and socially valuable fair use practice exists among filmmakers who do not consider their films documentaries. The opposition would have the Register ignore this burgeoning practice, even though it is critical to the inquiry here, and it has introduced no evidence that this practice has negatively affected the licensing market. This is because the market has no right to license clips that are fair use in the first place.⁶

In any event, as we have pointed out previously, many licenses will not be granted even if the filmmaker can pay for the license.⁷ In our Initial Comment, we discussed that in the 2015 film *Steve Jobs*, Universal Studios was unable to get permission to use the well-known “1984” Apple computer advertisement, which played a key role in the film.⁸ Here, of course, Universal Studios could have paid the licensing fee, whatever it may have been. However, the permission to license the clip was nonetheless denied because the Jobs family “hated” the direction that the film was taking.⁹ Because leaving this clip out was not an option for the filmmakers, Universal Studios exercised its right to fair use and used the commercial.¹⁰ If it was this difficult for one of the world's biggest motion picture studios to get access to a short clip, consider how much more

⁴ H.R.Rep. No. 105-551, p. 26 (1998). See also *See Harper & Row, Publishers, Inc. v. The Nation Enterprises*, 471 U.S. 539, 549 (1985) (§ 107 of the Copyright Act was “intended to restate the [pre-existing] judicial doctrine of fair use, not to change, narrow, or enlarge it in any way”) (citing H.R.Rep. No. 94-1476, p. 66 (1976)).

⁵ *Id.* at 23; S. REP. 105-190, 10-11 (1998).

⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994).

⁷ The Wrap, How ‘Steve Jobs’ Used Apple’s Super Bowl Ad without Permission, (Oct. 13, 2015), <http://m.startribune.com/variety/movies/332251172.html?section=/variety>.

⁸ UCI Intellectual Property, Arts, and Technology Clinic & Donaldson + Callif, LLP, Long Comment Regarding a Proposed Exemption Under 17 U.S.C. §1201 (Dec. 18, 2017), 11.

⁹ *Id.*

¹⁰ *Id.*

difficult it would be for any small filmmaker or production company. Of course, licenses are often prohibitively expensive for many filmmakers, negotiations can take a long time, and frequently rightsholders simply do not respond to licensing inquiries.¹¹

Another reason why licensing is not a reasonable alternative to filmmakers who wish to make fair use is because of the non-disparagement clauses that a filmmaker must often sign when licensing a clip from a big production company. The opposition calls non-disparagement clauses a “red herring,”¹² but it is these clauses that allow studios to feel comfortable granting license to other filmmakers at all. The studio can safely grant the license because they can be certain that the use will

not be derogatory to or *critical* of LICENSOR, or any officer, director, agent, employee, affiliate, parent or subsidiary of LICENSOR or of any MATERIAL owned, produced or distributed by LICENSOR. The LICENSED MATERIAL will not be used in a manner derogatory to or critical of the MOTION PICTURE from which the LICENSED MATERIAL was/were taken or the persons involved in the production or distribution of the MOTION PICTURE from which the LICENSED MATERIAL was taken” (emphasis added).¹³

This licensing agreement used by Miramax Media Group prohibits the licensee, after having paid exorbitant fees, from being critical of anything surrounding the clip, or in other words, from making fair use. Even with a lawfully licensed clip, there are extreme limitations to what a filmmaker can do with the content. Just as the current exemption prohibits many filmmakers from making fair use, so do many non-disparagement clauses within licensing agreements.

We respectfully urge the Register to reject the opposition’s implication that enabling more filmmakers to access encrypted material would cause filmmakers—who are rightsholders themselves—to forget their education on fair use, abandon their respect for copyright law, and wrongfully claim fair use. Such a scenario is simply not realistic. What is more likely to happen if the modification is granted is that well-informed filmmakers, who are trying to do the right thing, with the advice of counsel and after review by media liability insurance underwriters, will be able to make fair use. We urge the Register to recommend that they be permitted to do so.

II. Fair use claims must be evaluated on a case by case basis and irrespective of a work’s genre or presumed “purpose.”

The opposition argues that nondocumentary filmmakers should not be exempt from the DMCA because their respective films are created for different purposes. But the overall purpose of a film genre is not determinative of a filmmaker’s ability to comment and critique, and fair use must be evaluated on a case-by-case basis. The primary purpose of a film, whether it be to entertain or to spark social commentary, is irrelevant for purposes of fair use and an inappropriate inquiry in

¹¹ Elaine Dutka, *No Free Samples for Documentaries: Seeking Film Clips With the Fair-Use Doctrine*, N.Y. TIMES (May 28, 2006), <http://www.nytimes.com/2006/05/28/movies/28dutkan.html>.

¹² Mitchell Silberberg & Knupp, LLP, Joint Creators Opposition to Long Comment Regarding a Proposed Exemption Under 17 U.S.C. §1201, 12 (Feb. 12, 2018).

¹³ See 2017 Comment, Proposed Class 1, at Appendix T, non-disparagement clause Miramax Studio.

this rulemaking. Rather, the relevant inquiry is whether “more than a *de minimis*” amount of nondocumentary film projects that seek to make fair use will be adversely affected by § 1201’s prohibition on circumvention.¹⁴

The answer to that inquiry is a resounding yes, and we have presented myriad examples to support this conclusion. The opposition claims that various narrative filmmakers who have offered stories of their need to make fair use actually should not be granted the ability to make fair use for various clips, and that instead these clips should be licensed.¹⁵ However, each of these criticisms mischaracterize the statements and intended uses of these filmmakers.

Any of the examples we have submitted present strong arguments for fair use, using §107’s four-factor analysis. The non-exclusive factors to be considered are: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. These works are clearly transformative because these films are making a specific comment that is not made in the earlier film. None of these filmmakers plan to use large amounts of the original work in their film. Additionally, none of these will affect the market for the original work.

- The opposition claims that James Carman’s aim to use footage of space for use in a science fiction film, *HyperParanØid*, is a way to “avoid paying” for these clips.¹⁶ This statement is both misleading and dismissive of Mr. Carman’s statement and is a gross oversimplification of his goals for this project. Mr. Carman seeks to use this footage in order to make a pointed comment on current environmental, economic, and geopolitical issues by showing how they will be treated in the future. The footage he seeks is not just arbitrary filler for his proposed work, but will demonstrate the impact of today’s issues and policies in the formation of a dystopian future, where our world’s leaders are isolated from the world and society as a whole amid rampant environmental degradation, overpopulation, and pollution. Where the primary purpose of the underlying footage Mr. Carman seeks to use is arguably to show space as we view it in contemporary times, Mr. Carman’s purpose in using the footage in this project would be to draw a comparison between today’s world and the dystopian future that may await us as a result of our current social, environmental and political problems. In other words, Mr. Carman seeks to make a quintessential transformative use. Mr. Carman has relied on fair use for his films in the past and understands that there are limits on the amount that can be used in order to illustrate the point that he is making. Moreover, even if the footage of space could be considered “creative” under the second factor of the fair use analysis, the case law is clear that there is no market for highly transformative uses.¹⁷ Mr. Carman has a legitimate fair use in mind and how his film is classified, and whether it happens to be entertaining, are irrelevant to the fair use inquiry.

¹⁴ See 2015 Recommendation at 16.

¹⁵ Joint Creators Opposition to Long Comment Regarding a Proposed Exemption Under 17 U.S.C. §1201, 12.

¹⁶ *Id.* at 11.

¹⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590-592 (1994).

- The opposition claims that Jon Katzman wants to circumvent to access footage of the first Super Bowl to “avoid licensing clips” in his pursuit of creating a scripted film about the first Super Bowl.¹⁸ As with Mr. Carman’s statement, this critique ignores the bulk of Mr. Katzman’s statement. Mr. Katzman is not simply looking to use clips from the first Super Bowl in order to avoid licensing the clips. The primary purpose of Mr. Katzman’s use would be to portray accurately the first Super Bowl in the context of a true story about the genesis of an event that has come to embody and reflect popular American culture. It is well established that works based on a true story can make fair use.¹⁹ Mr. Katzman’s contemplated use is transformative because it is being used to illuminate and comment on an actual event—the events of the first Super Bowl—using historical material, and to compare that with the modern view of the Super Bowl. While the original purpose of the footage would be to show viewers what occurred on the field during the first Super Bowl, Mr. Katzman’s purpose would be to draw a sharp distinction between the environments of the first championship game in NFL history and the current iteration of the Super Bowl, which is now as much of an American rite as almost any other social, political or religious event in our culture. Mr. Katzman plans to use only short excerpts of the game that represent a small percentage of the total game footage produced from the first broadcast because, again, the primary purpose of Mr. Katzman’s use is not to show each play on the field but to accurately convey the stark difference between the first Super Bowl and today’s version. This kind of use will not have any negative impact on the potential market for the underlying work because the value of the market for viewers who wish to watch the underlying work for the sake of watching the entire game itself will be preserved. In fact, Mr. Katzman’s proposed use would only serve to promote more interest in watching the original game footage in its entirety.
- The opposition describes Matthew Miller’s intention to access footage of Adolf Hitler as a “prop” in a scene for a film about time travel. Mr. Miller’s use is far more than a use as a “prop,” as both the purpose and visual presentation of the underlying work are likely to be transformed. The primary purpose of Mr. Miller’s use is to comment on the historical world as it is perceived by a person living in contemporary times. Mr. Miller’s film would examine how integral changes to historical events could potentially lead to lasting effects on the current state of the world. The film will inevitably ask what the world would look like if Hitler did not rule Germany into the 1940s. Would there still have been a war on the scale of World War II, and would there have been a genocide of unprecedented proportions? Moreover, as with Mr. Miller’s use of archival footage in his previous projects, the footage is likely to be physically transformed in various way, including by inserting real-life characters into archival footage. Mr. Miller’s use of the footage, then, would likely introduce significant elements that are original to Mr. Miller’s production. Many, if not most, licensors bar the ability to transform, manipulate or

¹⁸ Joint Creators Opposition to Long Comment Regarding a Proposed Exemption Under 17 U.S.C. §1201, 11 (Feb. 12, 2018).

¹⁹ *SOFA Entm’t, Inc. v. Dodger Prods., Inc.*, 709 F.3d 1273, 1276 (9th Cir. 2013); *Arrow Productions, Ltd. v. Weinstein Co., LLC*, 44 F. Supp. 3d 359 (S.D.N.Y. 2014).

otherwise change their material, making a use similar to this impossible in many cases.²⁰ This is a reasonable and well-established form of fair use, and bears similarities to the film *Midnight in Paris*, in which the main character travels back in time to meet various famous figures throughout history, including Ernest Hemingway and Pablo Picasso.²¹ Mr. Miller has the experience of having relied on the fair use doctrine on previous projects and understands its limitations.

The difficult-to-define line between narrative filmmaking and documentary filmmaking should not prevent filmmakers from making fair use. Filmmaking cannot be reduced to mere entertainment, and further, the entertainment quality of a film should not define its ability to qualify as a legal and profitable film.

III. Screen capture is still not an acceptable alternative to circumvention and should be removed from the current exemption.

In every triennial rulemaking since 2008, we have presented copious evidence that screen capture is not a viable alternative to circumvention. Because broadcast networks, distributors, and theatres continue to impose increasingly high standards that screen capture cannot meet, filmmakers who attempt to use screen capture to make their film will be forced to either make their film and be unable to show an audience or scrap their film all together.

In 2012, Gordon Quinn of Kartemquin Films testified that as rightsholders who are also rights users, “[w]e are really asking to be able to continue the status quo” and to “update[e] the exemption to be able to deal with the new technical standards that are coming from [or] have arrived from broadcasters and theatrical presenters.”²² Today, we make the same basic request. In 2018, broadcast and distribution standards are stricter than what they were in 2015 and will continue to require higher and higher fidelity from filmmakers.²³ Many providers, such as Netflix, iTunes, and Amazon, currently stream in 4K, and due to the rapidly changing nature of the industry, over the next three years more streaming sites and broadcasting companies will likely require 4K as standards for original content production. In fact, industry leaders are already diving deep into the exploration of 8K and all of its beauty.²⁴ We are only asking to keep up with the rapid pace of the improvements in technology.

Aside from the issue of low quality resolution, screen capture also causes dropped frames, video defects, and audio issues. Further, despite what the opposition purports, these issues cannot be fixed by the use of film editing software. Missing frames are particularly problematic; they cannot be recovered and are often grounds for automatic disqualification when submitting

²⁰ See e.g. Comment of Joint Filmmakers, Docket No. 2017-10, Appendix T, NBC Studios licensing agreement. (Provided, however, that if NBC’s “bug” or other watermark appears in the Content, the “bug” or watermark must not be altered and must be visible in the Content unless NBC approves otherwise...)”)

²¹ MIDNIGHT IN PARIS (Sony Pictures Classics 2011); Faulkner Literary Rights, LLC v. Sony Pictures Classics Inc., 953 F.Supp.2d 701 (N.D. Miss. 2013).

²² Tr. at 156: 3-9 (June 4, 2012).

²³ Letter from Jim Morrisette, Kartemquin Films (Nov. 27, 2017), Appendix B.

²⁴ The Beauty of 8K Large Format Presented by Panavision, SXSW 2018 Schedule, <https://schedule.sxsw.com/2018/events/PP99978> (last visited Mar 12, 2018).

films.²⁵ In 2015, we predicted the rise of HD, UHD, and 4K; that has now come to pass. Further, it is clear that over the next three to four years, UHD, 4K, and even 8K will become the standard.²⁶ As fidelity standards increase, screen capture becomes less and less viable. A lack of access to the quality that is standard at any given time causes a chilling effect on creators' ability to exercise fair use through commentary and criticism.

The opposition touts OBS Studio as “the best free screen recorder” technology available and used for game recording.²⁷ However, like other screen capture programs, it still cannot capture all the frames being displayed at HD or 4K.²⁸ The fact that a screen capture product can capture a videogame display to the satisfaction of gaming consumers does not mean that it can be trusted to produce feature film-quality footage. Images created by using screen capture on an HD or 4K stream result in missing half tones and shades of greys, framerate flicker, extreme picture moiré, and audio issues.²⁹ As with dropped frames, picture moiré and other defects cannot be fixed by editing software.³⁰ Three years ago, we showed that screen capture did not suffice for HD.³¹ As 4K becomes the new standard, screen capture will be even less suitable.

While the opposition suggests free trial programs for independent filmmakers lacking funds, creating a feature film on a free trial program is not feasible and certainly not a viable alternative to circumvention. Free trials have time limits and a filmmaker cannot be constrained to make their feature film within a time limit as short as thirty days. Users of Mac computers, a popular brand among filmmakers, are often additionally disadvantaged because the majority of screen capture programs are built for PCs.

The opposition also suggests that “screencasting” is a viable alternative to circumvention. Screencasting is a practice similar to screen capture in which one records one's computer screen, sometimes with audio, often for teaching purposes.³² However, filmmakers need better quality than in a training setting. Training videos do not need to capture footage at the same high fidelity or frames per second as film. Further, glitches present no problems to someone training employees; the cursor can freeze and the drop-down menu can glitch, with little or no value taken from the training. But filmmakers, creating feature films in the hopes of showing them to

²⁵ See e.g. *Festival Rules*, <http://www.z-fest.com/rules/> (last visited March 14, 2018) (“Films that are turned in with the wrong dimensions, codec, frame rate, etc are subject to disqualification from competition); *Submitting to the 2017 Sundance Film Festival*, http://www.sundance.org/pdf/submissions/2017_Submissions_FAQ.pdf (last visited March 14, 2018) (“It is of the utmost importance that you ensure that your submission plays all the way through regardless of which format you select!”).

²⁶ Letter from Jim Morrisette, Kartemquin Films (Feb. 4, 2015), Appendix B; Letter from Jim Morrisette, Kartemquin Films (Nov. 27, 2017), Appendix B.

²⁷ Joint Creators Opposition to Long Comment Regarding a Proposed Exemption Under 17 U.S.C. §1201, 38 (Feb. 12, 2018).

²⁸ See Cat Ellis, *The Best Free Screen Recorder 2018*, TechRadar, available at <http://www.techradar.com/news/the-best-free-screen-recorder> (last visited March 12, 2018).

²⁹ Rebecca Tushnet, *I Put You There: User-Generated Content and AntiCircumvention*, 12 Vand. J. Ent. & Tech. L. 889, 936 (2010).

³⁰ *Id.*

³¹ Register of Copyrights, § 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights at 12 (Oct. 2015).

³² David Patton, *What is Screencasting?*, TechSmith, <https://www.techsmith.com/blog/what-is-screencasting/> (last visited Mar 12, 2018).

large audiences, cannot work with the varying frame rates, unpredictability, and inconsistency that screen capture technologies suffer from.

Screen capture methods remain ineffective for filmmakers and do not allow filmmakers to make films that meet the industry's increasing standards. Since screen capture is not a viable alternative, it should be removed as a requirement from the current exemption.

IV. Nondocumentary films are equally as deserving of a § 1201 exemption as documentary films.

As we discuss in our Initial Comment, the definition of documentary film has always been difficult to nail down.³³ Although some films are clearly documentary while others are clearly not, countless films lie in a murky zone between the two categories, such as docudramas, mockumentaries, and biopics. The entities that oppose the proposed modification have mischaracterized our position. We do not contend that there is no difference between documentary and narrative films; our position is simply that the definition of documentary does not have clear boundaries, and as a result many filmmakers do not know whether they are permitted to use the current exemption.

According to Patricia Aufderheide, a scholar and expert on fair use in media creation, some nondocumentary films “are firmly anchored in real-life experience”³⁴ or incorporate real-life elements, inevitably leaning on fair use in their creation. An example of this is the 2014 fictional film *Kumiko, the Treasure Hunter*, which is based on an urban legend in which a Japanese woman believed that the film *Fargo* was real and that there was indeed money buried in the snow of Minnesota, as portrayed in *Fargo*.³⁵ This film is a classic example of the incorporation of realistic elements into a fictional film, and presents a strong argument for fair use.

More importantly, the formal grammar and language of film create a unitary form of film, regardless of whether the film is classified as documentary, fiction, or a hybrid of both. Both documentary and nondocumentary films use the same aesthetic grammar, representational techniques, and narrative structures. In light of these similarities, it should come as no surprise that when someone making a narrative film employs fair use, she uses virtually the same logical process as fiction filmmakers.³⁶

As another example, cinéma vérité has become a popular style of filmmaking, which is characterized as a simple form of filmmaking that has realistic and documentary elements.³⁷ *The Blair Witch Project* is one of many films that adopted this style. And reenactment, or the staging

³³ Joint Opposition to Long Comment Regarding a Proposed Exemption Under 17 U.S.C. §1201, pgs. 4-9.

³⁴ Patricia Aufderheide, *Fair Use in Filmmaking at SXSW: Beyond Documentary*, <http://cmsimpact.org/fair-use-blog/fair-use-in-filmmaking-at-sxsw-beyond-documentary/> (last visited Mar. 12, 2018).

³⁵ Brian Ashcraft, *The Real Story Behind 'Kumiko: The Treasure Hunter'*, <https://kotaku.com/the-real-story-behind-kumiko-the-treasure-hunter-1694010461> (last visited Mar. 12, 2018).

³⁶ Donaldson, Michael, *Refuge from the Storm: A Fair Use Safe Harbor for Non-Fiction Works* (2012). *Journal of the Copyright Society of the USA*, Vol. 59, No. 3 (Spring 2012): 477-625. Available at SSRN: <https://ssrn.com/abstract=2232284>.

³⁷ Sean Axmaker, *Cinema Verite: The Movement of Truth*, <http://www.pbs.org/independentlens/blog/cinema-verite-the-movement-of-truth/> (last visited Mar. 12, 2018).

of a past scene in the present, is often used in documentaries, such as in the 2014 film *1971*, a documentary film about a notorious FBI office burglary.³⁸

It is also important to point out that the Register has already recognized fictional content in motion pictures for an exemption. In the previous Triennial Rulemaking, the Register recognized that creative works engaging in fair use involving remixing are entitled to this exemption.³⁹ These individuals are known in the remix community as “vidders,” and create noncommercial videos, which often includes fictional content.⁴⁰ The Register found that these individuals frequently make noninfringing uses of short motion picture clips for criticism or comment.⁴¹ This exemption allows for uses of media to be used to illustrate or convey a certain point. Similarly, narrative filmmakers want to use motion picture clips to make their works transformative.

Despite attempts by the opposition to argue otherwise,⁴² nondocumentary films are created for far more reasons than entertainment. Like any form of storytelling, film is a way for filmmakers and artists to express their personal beliefs, as well as depict landmark historical moments, in a way that elicits a response from the viewing public and makes widespread change in society. The 2015 film *Spotlight* was the Best Picture winner at the 2016 Academy Awards and portrays the actions of *Boston Globe* investigative journalists in pursuit of exposing the Catholic clergy abuse.⁴³ This film helped to elevate the visibility of sexual abuse in the Catholic Church, and also created more awareness around the importance of investigative journalism. In fact, numerous church leaders spoke out in the form of public statements after release of the film.⁴⁴

Another recent film that is both entertaining and focuses the audience on a pressing social issue is Sean Baker's critically acclaimed narrative feature *The Florida Project*.⁴⁵ The film tells the story of families living in poverty in the shadow of Disney World in Florida. Shot in an actual budget motel in Kissimmee, Florida, the film stars a mix of professional actors, up-and-coming actors, and actual residents of the motel who had no previous acting experience. Not only is the film a moving and entertaining look into the lives of people living in these circumstances, but it is also an informative piece that educates the viewer on the realities of poverty in America today. Baker's intentions in making the film clearly go beyond merely entertaining the viewer, and aim to educate and lead to social change: “We’re trying to get this film not only in front of the public but also in front of policy makers and people who do actually have influence and have discussions in academia and in politics as well,” he said in an interview with *MarketWatch*,

³⁸ Jason Bailey, *The Case for Reenactment in Documentary Cinema*, <http://www.pbs.org/independentlens/blog/cinema-verite-the-movement-of-truth/> (last visited Mar. 12, 2018).

³⁹ 2015 Final Rule, 80 Fed. Reg. at 65, 459.

⁴⁰ See 2015 Recommendation at 52.

⁴¹ U.S. Copyright Office, *Recommendation of the Register of Copyrights in RM 2008-8; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, 50 (June 11, 2010) [hereinafter *2010 Recommendation*].

⁴² Joint Opposition to Long Comment Regarding a Proposed Exemption Under 17 U.S.C. §1201, 11.

⁴³ Michelle Boorstein, ‘*Spotlight*’ portrayal of sex abuse scandal is making the Catholic Church uncomfortable all over again, https://www.washingtonpost.com/news/acts-of-faith/wp/2015/11/09/spotlight-portrayal-of-sex-abuse-scandal-is-making-the-catholic-church-uncomfortable-all-over-again/?utm_term=.349577208134 (last visited Mar. 12, 2018).

⁴⁴ *Id.*

⁴⁵ THE FLORIDA PROJECT (A24 2017).

adding, “My other goal is to specifically help the Kissimmee area. We want the agency that we worked with, the Community Hope Center, to be able to develop an affordable housing complex on their property.”⁴⁶ Currently, he said, the center receives scant regional government and central government assistance.⁴⁷ The film recently screened in New York for UN-Habitat, the United Nations agency for human settlements and sustainable urban development.⁴⁸ As a result, a film like *The Florida Project* has the potential to make a societal impact and change the viewpoint of individuals living below the poverty line.

As yet another example, the 1977 miniseries *Roots* is yet another example of a series that spawned critical discussion about once-taboo issues. Millions of viewers viewed the first episode of *Roots*, and the series immediately began having a widespread cultural impact.⁴⁹ The series began a national conversation between black and white Americans about the depiction and impact of slavery.⁵⁰ The impact of this series was undeniable, and thus could not be diminished to a series simply created for entertainment.

Finally, the 1993 film *Philadelphia*, while entertaining, also sparked an important nationwide discussion about the impact of AIDS. The film follows the journey of a young lawyer with AIDS, played by Tom Hanks.⁵¹ In the 1980s, individuals with AIDS were treated poorly and discriminated against. *Philadelphia* helped spark conversations about the reality of living with AIDS, rather than misconceptions spread by word throughout the 1980s.⁵² Ultimately, the film helped to start important conversations that led to increased destigmatization of the debilitating disease.

It is clear that both documentary and nondocumentary films spark social change, ignite conversation about important topics, and educate the public about issues and events that affect us all—and they have done so since the form’s inception. If nondocumentary filmmaking is to continue to play this role, the proposed modification must be approved.

There is precedent for the modification we seek. A § 1201 exemption has been given to a class of non-commercial video makers, the vast majority whom exercise fair use on projects involving fictional content.⁵³ More specifically, the Register recommended an exemption in 2010 and 2015

⁴⁶ Tom Teodorczuk, ‘*The Florida Project*’ gives a unique look at the underground economy, <https://www.marketwatch.com/story/the-florida-project-gives-a-unique-look-at-the-underground-economy-2017-11-02> (last visited Mar. 13, 2018).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Meredith Blake, *For the original cast of ‘Roots,’ it was a mind-blowing series*, <http://www.latimes.com/entertainment/tv/la-et-st-original-roots-cast-discusses-classic-miniseries-summer-preview-20160529-snap-story.html> (last visited Mar. 12, 2018).

⁵⁰ *Roots: A Cultural Force That Changed the Nation*, <https://paidpost.nytimes.com/history/roots-a-cultural-force-that-changed-the-nation.html> (last visited Mar. 13, 2018).

⁵¹ Janet Maslin, *Review/Film: Philadelphia: Tom Hanks as an AIDS Victim Who Fights the Establishment*, <https://www.nytimes.com/1993/12/22/movies/review-film-philadelphia-tom-hanks-aids-victim-who-fights-establishment.html> (last visited Mar. 13, 2018).

⁵² Michael Walker, *Philadelphia: Is it a Milestone or an Escaped TV Movie?*, http://articles.latimes.com/1993-12-19/entertainment/ca-3537_1_aids-movie (last visited Mar. 13, 2018).

⁵³ See 2015 Recommendation at 52.

that allowed incorporation of short motion picture clips into works that engage in criticism and commentary within:

- (1) Educational use by professors and students;
- (2) Documentary filmmaking; and
- (3) Noncommercial videos.⁵⁴

As we have discussed throughout this comment, narrative filmmakers need this exemption to make fair use on fictional content, just as documentary filmmakers do. As a result, the Register should grant this exemption to include narrative filmmakers.

CONCLUSION

For the reasons set forth above, we respectfully request that the Register recommend our proposed modification.

⁵⁴ 2010 Final Rule, 75 Fed. Reg. at 43,828.