



UNITED STATES COPYRIGHT OFFICE

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

Although we will not be providing multimedia evidence in connection with this comment, we provide in-text hyperlinks throughout the comment (represented as blue, underlined words) that link to documentary evidence and/or some cited documents.

ITEM A. COMMENTER INFORMATION

These comments are submitted on behalf of the Motion Picture Association of America, Inc. (“MPAA”), the Entertainment Software Association (“ESA”), the Recording Industry Association of America (“RIAA”), and the Association of American Publishers (“AAP”). They are collectively referred to herein as the “Joint Creators and Copyright Owners.” They may be contacted through their counsel at Mitchell Silberberg & Knupp LLP, J. Matthew Williams, 202-355-7904, mxw@msk.com, 1818 N. Street, NW, 8th Floor, Washington, D.C. 20036.

The Motion Picture Association of America, Inc. (“MPAA”) is a trade association representing some of the world’s largest producers and distributors of motion pictures and other audiovisual entertainment material for viewing in theaters, on prerecorded media, over broadcast TV, cable and satellite services, and on the internet. The MPAA’s members are: Paramount Pictures Corp., Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corp., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc.

The Entertainment Software Association (“ESA”) is the United States trade association serving companies that publish computer and video games for video game consoles, handheld video game devices, personal computers, and the internet. It represents nearly all of the major video game publishers and major video game platform providers in the United States.

The Recording Industry Association of America (“RIAA”) is the trade organization that supports and promotes the creative and financial vitality of the major music companies. Its members are the music labels that comprise the most vibrant record industry in the world. RIAA members create, manufacture and/or distribute approximately 85% of all recorded music produced in the United States.

The Association of American Publishers (“AAP”) represents the leading book, journal, and education publishers in the United States on matters of law and policy, advocating for outcomes that incentivize the publication of creative expression, professional content, and learning solutions. As essential participants in local markets and the global economy, our members invest in and inspire the exchange of ideas, transforming the world we live in one word at a time.

The Joint Creators and Copyright Owners all rely on technological protection measures to offer innovative products and licensed access to consumers. Access controls make it possible (i) for consumers to enjoy recorded music through subscription services like SiriusXM, Spotify, Amazon Music Unlimited, YouTube Red, Apple Music and Pandora, including on mobile devices, through in-home voice assistants, and in their vehicles; (ii) for consumers to view motion pictures at home or on the go via discs, downloadable copies, digital rental options, cloud storage platforms, TV Everywhere, video game consoles, and subscription streaming services; (iii) for consumers to play their favorite video games on consoles, computers, and mobile devices; and (iv) for consumers to enjoy and learn from books, journals, poems and stories (including through subscription, lending, and rental options) on dedicated e-book readers, such as the Kindle and the Nook, on tablets and smartphones, and via personal computers. As the Register concluded in the recent Section 1201 Study, “[t]he dramatic growth of streaming

services like Netflix, Spotify, Hulu, and many others suggests that for both copyright owners and consumers, the offering of access—whether through subscriptions, *à la carte* purchases, or ad-supported services—has become a preferred method of delivering copyrighted content. . . .

[T]he law should continue to foster the development of such models.” U.S. Copyright Office, [*Section 1201 of Title 17: A Report of the Register of Copyrights*](#) 45-46 (2017) (“1201 Study”).

ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 1: Audiovisual Works – Criticism and Comment

ITEM C. OVERVIEW

The Joint Creators and Copyright Owners did not oppose renewal of the existing exemptions applicable to circumvention to access short portions of motion pictures for certain educational purposes, documentary filmmaking, e-book authorship involving non-fiction film analysis, and noncommercial video creation.¹ However, the proponents now request that the current exemptions be replaced by a single exemption that does not retain critical limitations from the existing regulations. In their new proposal, the proponents seek to: (1) dilute their obligation to consider using alternatives to circumvention and screen-capture technologies; and (2) expand the exemptions applicable to DVDs, Blu-ray discs, and online streams and downloads to include numerous activities that the Register and Librarian have repeatedly and consistently declined to cover, including, *inter alia*: creating fictional films and e-books; creating non-fiction e-books that do not require close analysis of films; distributing for-profit videos; and engaging in an unlimited number of “educational” activities, including via Massive Open Online Courses

¹ The Joint Creators and Copyright Owners continue to believe that exempting the entire category of “non-commercial videos” is vastly overbroad and prone to abuse. Nevertheless, given the Register’s repeated adoption of the existing exemption for this class of works, our comments will not belabor the issue.

(“MOOCs”). Some commenters also seek to allow the creation of complete, unauthorized, unprotected copies of motion pictures.

Although the Joint Creators and Copyright Owners do not object in principle to rewording the existing regulatory language, the language must be appropriately targeted to preserve existing limitations and to prevent an unwieldy exemption that goes beyond what is warranted by the record. Those who would eliminate the limitations have not presented any new information to support discarding the current, common-sense boundaries. Moreover, the petitioners have not demonstrated that using screen-capture technologies, or other licensed marketplace alternatives, is inadequate for accomplishing many of the petitioners’ desired uses of motion pictures. Indeed, motion pictures are even more broadly available today than they were three years ago for presenting clips in a classroom setting and for licensing uses in videos, films, and e-books that are not exempted by the current regulations. The Register should preserve the existing limitations contained in the current exemptions.²

ITEM D. TECHNOLOGICAL PROTECTION MEASURE(S) AND METHOD(S) OF CIRCUMVENTION

Multiple proponents support the following text: “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 works for the purpose of criticism or comment, where the motion picture is lawfully made and acquired on a DVD protected by the Content Scrambling System [(“CSS”)], on a Blu-ray disc protected by the Advanced Access Control System [(“AACS”)], via a digital transmission protected by a technological measure, *or a similar technological protection measure intended to control access to a work*, where the person

² Although the petitioners requested exemptions applicable to motion pictures, the Copyright Office described this class as applying to all audiovisual works. There is nothing in the record to justify expanding the exemptions to apply to video games. The limitation to motion pictures should be retained.

engaging in circumvention reasonably believes that non-circumventing alternatives are unable to produce the required level of high-quality source material.” *E.g.*, Electronic Frontier Foundation (“EFF”), [Class 1 Long Comment](#) at 2 (Dec. 18, 2017) (“EFF 2017 Comment”) (emphasis added). Yet, the italicized language related to “similar” access controls is overbroad and unsupported.

Although some commenters hint at a desire to expand the existing exemptions to cover circumvention of AACSS2, a relatively new technology used to protect Ultra HD motion pictures, and other access controls such as High-Bandwidth Digital Content Protection (“HDCP”) encryption used to protect works delivered via High-Definition Multimedia Interface (“HDMI”) cables, the comments barely address these expansions. *E.g.*, International Documentary Association (“IDA”), *et al.* (hereinafter “Joint Filmmakers”), [Class 1 Long Comment](#) at 10, 19 (Dec. 18, 2017) (“Joint Filmmakers 2017 Comment”); Authors Alliance, *et al.*, [Class 1 Long Comment](#) at 6 (Dec. 18, 2017) (“Authors Alliance 2017 Comment”). The record for the current proceeding contains no evidence in support of the inclusion of such access controls; accordingly, they should continue to be excluded from the exemptions. *See also* Joint Creators and Copyright Owners, [Class 4 Long Comment](#) (Feb. 12, 2018) (“Joint Creators and Copyright Owners 2018 Class 4 Comment”).

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

1. The Commenters Rehash Old Arguments And Present No New, Impactful Facts.

Without proffering sufficient evidence or meritorious legal arguments to distinguish the current record from the 2015 record, the commenters seek to broaden the reach of the exemptions applicable to accessing motion pictures. Their ongoing criticism of how the Copyright Office has handled this rulemaking process over the past twenty years is unjustified

and inapposite. *See, e.g.*, EFF 2017 Comment at 5-7 (expressing the belief that the exemptions are overly complicated due to the Register’s statutory interpretations).

In early rulemaking cycles, EFF, along with other groups that opposed the very existence of § 1201, repeatedly requested expansive exemptions that were clearly improper under the statute, which limits exemptions to “particular classes of copyrighted works.” 17 U.S.C. § 1201(a)(1)(C). For example, EFF and others sought exemptions for accessing all motion pictures in “ways that do not result in copyright infringement.” EFF, [Comment](#) at 6 (Feb. 17, 2000). The newly proposed exemption resembles those early, rejected requests. While the newly proposed exemption is limited to “use of short portions of works for the purpose of criticism and comment,” if the proposal is adopted, that limitation will no doubt be next on the petitioners’ triennial chopping block.³ Indeed, BYU already requests that the Register discard the limitation.

Although in 2006 the Register altered the approach to defining particular classes of works and began granting what has turned into a proliferation of exemptions, she has attempted to stay true to the statutory parameters and to the instructions contained within the legislative history.⁴ *See* 1201 Study at 20-30, 105-10; U.S. Copyright Office, [Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention: Recommendation of the Register of Copyrights](#) 99 (2015) (“2015 Rec.”) (“A mere requirement that a use be ‘noninfringing’ or ‘fair’ does not satisfy Congress’s mandate to craft ‘narrow and

³ Since 2006, many petitioners have employed a strategy of proposing somewhat circumscribed exemptions covering apparently narrow activities in order to get their noses under the proverbial tent, only to inevitably return three years later to say that the granted exemption is too narrow, and then to return three years after an expansion is granted to do the same thing, thereby moving closer and closer to the early-requested, broad-based exemptions rejected by the Register.

⁴ The Joint Creators and Copyright Owners continue to believe that the Register’s initial, pre-2006 interpretations of the statute and legislative history were correct.

focused’ exemptions. For this reason, the Register has previously rejected broad proposed categories such as ‘fair use works’ or ‘educational fair use works’ as inappropriate. An exemption should provide reasonable guidance to the public in terms of what uses are permitted, while at the same time mitigating undue consequences for copyright owners.”). There is no reason to abandon that approach now.

There is no all-purpose, fair use exemption to § 1201(a) because Congress intentionally avoided creating a requirement that an act of circumvention result in copyright infringement in order for liability to attach under § 1201. 1201 Study at 43. That decision has helped to create a vibrant digital marketplace for copyrighted works that has increased consumer access in a variety of exciting ways. *Id.* at 45-46. This proceeding was not designed to imperil that success or to create exemptions that swallow the anti-circumvention rule. It was designed to determine whether the anti-circumvention prohibition has any *substantial* adverse effects on noninfringing uses that can be addressed through regulations *without* undermining digital business models. Staff of House Comm. on the Judiciary, 105th Cong., Section-by-Section Analysis of H.R. 2281 as passed by the United States House of Representatives on August 4, 1998 6-7 (Comm. Print 1998) (“Manager’s Report”). That is why the statute requires the Register to consider not only whether some theoretical noninfringing use of a work might be inhibited by an access control, but also what “the effect of circumvention of technological measures [will be] on the market for or value of copyrighted works.” 17 U.S.C. § 1201(a)(1)(C)(iv).⁵

⁵ The Joint Creators and Copyright Owners object to the NPRM’s request that they proffer a list of types of uses or users who should be excluded from the exemption. [Exemptions To Permit Circumvention of Access Controls on Copyrighted Works: Notice of Proposed Rulemaking](#), 82 Fed. Reg. 49,550, 49,559 (Oct. 26, 2017) (“NPRM”). It is not the opponents’ burden to identify categories of uses or users who have not built a record to support the creation of an exemption in their favor. 1201 Study at 111-12.

2. The Proponents Overstate The Complexity Of The Existing Exemptions.

The proponents strain to paint the existing exemptions as overly intricate and difficult to understand. While they may be correct that the regulations found in 37 C.F.R. § 201.40(1) could benefit from some clarification, the proponents greatly exaggerate the regulations' complexity. Solely for the purpose of using short portions of motion pictures for criticism and comment, the following users may circumvent the identified access controls on lawfully acquired motion pictures accessed via lawful discs, online streaming services, or download services:

- (i) documentary filmmakers, (ii) multimedia, nonfiction e-book authors for film analysis, (iii) creators of noncommercial videos (including via a paid commission if the commissioning entity's use is noncommercial), and (iv) college and university faculty (including for MOOCs*) and students for educational purposes, using screen-capture technology,* or if the user reasonably believes that screen-capture technology or other non-circumventing alternatives are unable to produce the required level of high-quality content for close analysis of motion pictures, by circumventing CSS, AACS, or access controls applied by online streaming or distribution services;
- (v) K-12 educators (including in GED programs) for educational purposes, using screen-capture technology,* or if the user reasonably believes that screen-capture technology or other non-circumventing alternatives are unable to produce the required level of high-quality content for close analysis of motion pictures, by circumventing CSS or access controls applied by online streaming or distribution services;
- (vi) K-12 students (including in GED programs) for educational purposes, using screen-capture technology; and
- (vii) educators and participants in nonprofit digital and media literacy programs offered by nonprofit entities with educational missions, for face-to-face instructional activities, using screen-capture technology.

* A "MOOC" is an online course offered by an accredited, nonprofit, educational institution to officially enrolled students that limits transmissions pursuant to this exemption to those students; institutes copyright policies; provides copyright informational materials to faculty, students, and relevant staff members; and applies technological measures that reasonably prevent unauthorized further dissemination of the work or retention of the work for longer than the course session, as contemplated by 17 U.S.C. § 110(2).

* “Screen-capture technology” means a technology that appears to be offered to the public as enabling the reproduction of motion pictures after content has been lawfully acquired and decrypted.

The Joint Creators and Copyright Owners would not oppose the Register recommending usage of this language, which comprises 323 words, in the C.F.R.⁶ Indeed, if the Register believes that she can reduce the number of words in the current exemptions while retaining their current limitations, the Joint Creators and Copyright Owners do not object in principle to her doing so. However, they do object to expanding the scope of exempted activity solely in the name of simplicity.

3. The Specific Limitations Of The Current Exemptions Are Grounded In The Law And Remain Necessary Under The Current Record.

The record in this proceeding is virtually identical to the record presented during the 2015 cycle. Thus, no expanded exemptions from liability are justified. The existing limitations should be retained.⁷

(a) Documentary Filmmaking

In the past two cycles of this rulemaking, petitioners have requested that the exemption include filmmakers outside of the documentary genre. The Register, for good reason, denied the request both times because uses of portions of motion pictures in non-documentaries are less likely to warrant a finding of fair use. See U.S. Copyright Office, [*Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention:*](#)

⁶ The current, relevant exemptions use 956 words.

⁷ EFF’s claim that “[t]here are undoubtedly dozens of other communities that occasionally, with varying but legitimate justifications, make fair use of video that requires circumvention” presents no evidence for the Register to rely upon to expand the categories of users covered by the exemptions. EFF 2017 Comment at 11. One specific category of users that EFF identifies as needing an exemption – lawyers – is very likely already covered by the existing regulations because the use of the videos in the courtroom is almost certainly a noncommercial use, regardless whether the lawyers are being paid for their clients’ work.

[*Recommendation of the Register of Copyrights*](#) 130 (2012) (“2012 Rec.”) (“It is true that the use of motion picture excerpts in a fictional film may enhance the film, but that does not necessarily mean that the use is fair. Notably, fictional films differ from [educational uses and documentaries] because there is no basis to assume that fictional films’ primary purpose is to offer criticism or comment. Rather, the purpose of a fictional film is typically entertainment.”); 2015 Rec. at 79 (“[T]he use of motion picture clips in narrative films diverges from educational uses and uses in documentaries because there is no presumption that their primary purpose is to offer criticism or commentary, as opposed to being included for entertainment purposes.”).⁸

The Register’s fair use analysis from 2015 applies with equal force to the record presented in this proceeding:

With respect to non-documentary films, the first statutory factor, the purpose and character of the use, does not clearly favor proponents. While the purpose of this rulemaking is not to opine on specific uses, the Register observes that, based on the record in this proceeding, a number of examples of uses offered by proponents do not necessarily appear to be related to criticism or comment or otherwise transformative. . . .

[T]he second factor, the nature of the work, tends to weigh against a finding of fair use because motion pictures are generally creative. [T]he third factor tends to favor proponents because presumably the uses would be limited to short portions of the overall work.

Considering the fourth factor, the effect of the use on the potential market for or value of the copyrighted work, the record suggests that extending an exemption to narrative films may interfere with primary or derivative markets for the underlying work and, in particular, the licensing market for motion picture excerpts. Joint Filmmakers suggest that limiting the exemption to uses of short portions of clips makes it unlikely that the proposed uses will interfere with the market for the underlying copyrighted work as a whole, but this does not address the effect on the licensing market for the clips themselves. While Joint Filmmakers profess to “have no interest in an exemption that covers clips just for entertainment value,” proponents offer no satisfying way to refine this category to

⁸ The Joint Creators and Copyright Owners, at times, make fair uses of footage from motion pictures, including in entertaining, scripted films. The fact that such uses are sometimes fair uses does not justify including scripted films within the exemption.

exclude “entertainment value” uses from the types of transformative uses associated with documentary filmmaking. Meanwhile, opponents raise persuasive concerns that an exemption for non-documentary films would undermine a vibrant licensing market. The fourth factor therefore weighs relatively substantially against fair use.

2015 Rec. at 81-82.⁹

Many of the examples put forward by the Joint Filmmakers were previously presented during the 2015 cycle. *E.g.*, Joint Filmmakers 2017 Comment at 11 (discussing the movies *Chavez* and *Steve Jobs*). Although the Joint Filmmakers also submit new personal statements from filmmakers who express a desire to use short portions of motion pictures in their movies, these statements do not alter the above analysis. As with the uses discussed in 2015, the statements reflect a desire to use short portions of motion pictures “to flesh out the motivations” of characters or “to further the story line.” *Id.* at 81. Thus, “it is not immediately apparent that these uses are transformative or should not be licensed.” *Id.* For example, Alfred Spellman wants to use clips to “depict pop culture events that occurred over the course of [his characters’] relationship.” James Carman wants to use clips from feature films to avoid paying to create “footage of space” for use in a science fiction film. Jon Katzman wants to circumvent to access footage of the first Super Bowl to avoid licensing clips for a scripted movie about that event. Zack Andrews wants to circumvent to access footage of the cartoon *Scooby Doo* so that characters can watch the cartoon before entering a haunted house. Matthew Miller wants to

⁹ Although the Register previously concluded that “the third factor tends to favor proponents because presumably the uses would be limited to short portions of the overall work,” 2015 Rec. at 81, the Joint Creators and Copyright Owners respectfully submit that this conclusion was based on an incomplete analysis of the third factor. Because, under that factor, “the extent of permissible copying varies with the purpose and character of the use,” *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 586-87 (1994), the fact that a clip is “short” will not always result in the third factor favoring a defendant. A clip could be short and still not be a fair use if it involves copying more than was necessary to achieve a legitimate purpose, or if it is the “heart” of the work. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564-65 (1985).

circumvent to access footage of Adolf Hitler to “use it as a prop in a briefing scene” in a “time travel movie.” He also wants to circumvent to access clips from the movie *Goodfellas* to tell a scripted story about the mobster Henry Hill. Rachel Ward wanted to circumvent to insert a clip from *Back to the Future* into a “fictional exploration of the real historical friendship between the great writer Mark Twain and the genius inventor Nikola Tesla” because the clip would have served as “an analogous comedic touchstone.” Absent additional detail, it appears that all of these uses should be licensed.¹⁰

Many of the filmmakers who have participated in the rulemaking assert that license fees are often higher than they are willing to pay. While unfortunate, the fact that a copyright owner has chosen to make works available on terms that are not palatable to a particular user does not make that user’s proposed use fair or justify granting an exemption. Many filmmakers work licensing fees into their budgets. There is clearly a market for licensing footage from motion pictures, and it is clear that unlicensed uses harm that market. Unless a use is sufficiently transformative, or the factors weigh in favor of fair use for some other reason, the clear harm to the copyright owner under the fourth factor will almost always counsel that proponents’ uses fall outside of fair use, thus requiring a would-be user to obtain a license.

MPAA members actively exploit the market for licensing film clips for these types of uses. Each year, MPAA member companies license, collectively, thousands of clips for use in a variety of works, including TV shows, fictional films, and documentaries. Each studio makes

¹⁰ The Joint Filmmakers argue that licensing is not an alternative because licenses frequently contain non-disparagement clauses. Joint Filmmakers 2017 Comment at 21. However, virtually none of the actual or potential uses of footage in fictional films identified by the Joint Filmmakers involve criticism of the movies used or their copyright owners. Thus, the non-disparagement clauses are a red herring.

information about obtaining such licenses readily available on its respective website.¹¹

Paramount, for example, provides a list of the movies in its catalog, by genre. See [Paramount Pictures website](#), (listing in the “Sci-Fi” genre titles including *Star Trek* and *Invasion of the Body Snatchers*). [Universal’s licensing website](#) even allows the user to search its “entire library for keyword matches in all categories, including Title, Synopsis, Genre, Release Year, Cast Member, Writer, Director, Producer, etc.” If a user is looking for clips related to George or Rosemary Clooney, for example, the user can run a search for “Clooney” and identify the relevant Universal titles available for licensing. See [Universal Clips Website](#).

Many of the examples of narrative films that the Joint Filmmakers describe involve the use of copyrighted news coverage, as opposed to other television shows or feature films. Joint Filmmaker 2017 Comment at 19-20, Statement of Tim Pedegana, Statement of Michael Mailer, Statement of Lianne Halfon, Statement of Roberto Miller, Statement of Joshua Lewis, Statement of Megan Griffiths, *et al.*, Statement of Brenda Goodman. Clips of news footage are readily available for licensing. CNN, for example, provides a website that makes it extremely easy for the user to locate content related to historical events and to license that content, including for use in entertainment projects. See [CNN Website](#). NBCUniversal Archives also offers a [searchable database](#) of news coverage and [contact points](#) for licensing requests. The fact that a work qualifies as a news program does not render all unlicensed use of the program noninfringing. See, e.g., *Los Angeles News Serv. v. Reuters Television Intern.*, 149 F.3d 987, 994 (9th Cir. 1998).

¹¹ See [Universal Studios Media Licensing](#); [Warner Bros. Clip & Still Licensing](#); [Sony Pictures Film Clip & Still Licensing](#); [Paramount Film Clip Licensing](#); [Fox Studios FAQ](#); [The Walt Disney Studios Licensing Website](#); [The Walt Disney Studios Contact Information for Licensing](#).

Given that licenses are readily available for using short portions of motion pictures, the Register should once again conclude that “exemptions in this area must be carefully focused on noninfringing uses so as not to undermine copyright owners’ ability to license portions of motion pictures for entertainment purposes and other derivative uses outside of the parameters of fair use, including through clip licensing services.” 2015 Rec. at 95. Maintaining the exemption’s limitation to documentary filmmaking does so.

Nevertheless, and despite the Register’s prior statement that “the category of ‘documentary’ should not be construed in an unduly narrow fashion,” 2015 Rec. at 103, the Joint Filmmakers assert that the regulations must be changed because “documentary is one of the most confusing and perplexing genre classifications in film.” Joint Filmmaker 2017 Comment at 7. Yet, this term is regularly used in society and generally understood to identify a particular type of work. It is not that difficult to distinguish between a scripted, fictional film – even one that is based on real events – and a documentary film. Indeed, it is the category of film for which the same proponents initially requested an exemption in 2010. It is also contained within the name of one petitioner, the International Documentary Association, which has an award ceremony called the “[IDA Documentary Awards](#).” There is also a widely cited “[Documentary Filmmakers Statement of Best Practices in Fair Use](#).” In its 2010 petition, IDA referred to documentary filmmakers as a “discrete and identifiable group of users.” IDA, [Comment](#) at 10 (Dec. 2, 2008). The Joint Filmmakers’ claim that the term IDA originally proposed for inclusion in an exemption has somehow become unconstitutionally vague, Joint Filmmaker 2017 Comment at 8, is unsupportable.¹²

¹² IDA’s proposed class of works in 2010 was stated as follows: “Motion pictures and other audiovisual works in the form of Digital Versatile Discs (“DVDs”) that are not generally available commercially to the public in a DVD form not protected by Content Scramble System

(b) *Multimedia e-Books For Film Analysis*

The fair use analysis regarding uses of short portions of motion pictures in multimedia e-books is similar to the fair use analysis regarding filmmaking, discussed above. For this reason, it is crucial to preserve the limitation to non-fiction e-books. Although Authors Alliance claims that creating fan fiction novels using the Ren'Py platform (or other similar platforms) would qualify as a fair use, Authors Alliance 2017 Comment at 2, such works would frequently infringe the right to prepare derivative works. *See Salinger v. Colting*, 641 F. Supp. 2d 250, 267 (S.D.N.Y. 2009), *rev'd on a different issue* by 607 F.3d 68 (2d Cir. 2010) (“[W]hether Defendants term *60 Years* a sequel or not, the Court finds that as a novel that continues the story of *Catcher* and its protagonist . . . it is the kind of work that an author would ‘in general’ develop or license others to develop and ‘recast[s], transform[s] or adapt[s]’ *Catcher* such that it constitutes a derivative work as defined by 17 U.S.C. § 101.”); *Paramount Pictures Corp. v. Axanar Prods.*, No. 2:15-cv-09938-RGK-E, 2017 U.S. Dist. LEXIS 19670, at *28-30 (C.D. Cal. Jan. 3, 2017) (“the prequel depicted in the Axanar Works is the kind of potential derivate” that plaintiffs would license, and thus there was “little doubt that ‘unrestricted and widespread conduct [like defendant’s] would result in a substantially adverse impact’” on the market for the *Star Trek* works) (citation omitted); *see also TCA Television Corp. v. McCollum*, 839 F.3d 168, 180 (2d Cir. 2016) (“[T]he focus of inquiry is not simply on the new work, *i.e.*, on whether that work serves a purpose or conveys an overall expression, meaning, or message different from the copyrighted material it appropriates. Rather, the critical inquiry is whether the new work uses

technology when 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 accessing material for use in a specific documentary film for which substantial production has commenced, where the material is in the public domain or will be used in compliance with the doctrine of fair use as defined by federal case law and 17 U.S.C. § 107.”

the copyrighted material itself for a purpose, or imbues it with a character, different from that for which it was created.”); *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014) (first factor analysis must not override a copyright owner’s exclusive right to prepare derivative works). Accordingly, the petitioners’ example of “an author[,] who goes by the pseudonym Holdt[, who] is interested in creating a multimedia e-book that would ... transform the story of an existing canon by taking characters from the original canon and putting them in a different movie universe” does not support an expansion of the current exemption language. Authors Alliance 2017 Comment at 18; *see also id.* at 21 (discussing fan’s desire to write an e-book based on a musical created by a character in the show *Supernatural*).¹³

In addition, the limitation to e-books involving film analysis remains necessary because, as in 2015, “their request is not supported by the record. It may well be the case that there are additional fair uses by multimedia authors that would support a more broadly defined exemption, but no such uses were identified. Rather, the uses that proponents rely upon were limited to nonfiction multimedia ebook titles offering film analysis.”¹⁴ 2015 Rec. at 138; *see also* NPRM at 49,558 (“[T]he Office favors specific, ‘real world’ examples supported by evidence over speculative, hypothetical observations.”).

(c) *Noncommercial Videos*

As the Register has repeatedly concluded, limiting the exemption for videos containing short portions of motion pictures to *noncommercial* uses is essential for concluding that the uses

¹³ The Joint Creators and Copyright Owners acknowledge authors may, in some circumstances, make fair use of pre-existing works in books. *See, e.g., SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1265 (11th Cir. 2001). That does not, by itself, justify an exemption.

¹⁴ It appears that the petitioners’ example of Kirby Ferguson references film analysis, so this work does not support an expansion. Authors Alliance 2017 Comment at 17. Moreover, Mr. Ferguson’s prior projects were all audiovisual works, presumably covered by existing exemptions. The anonymous projects described at pages 18-20 of the petitioners’ comments also appears to involve film analysis.

at issue are likely non-infringing.¹⁵ 2015 Rec. at 100 (refusing to expand the noncommercial limitation). The commenters do not introduce any new legal arguments or facts to support discarding this limitation. Accordingly, the Register’s 2012 and 2015 reasoning remains relevant in the present proceeding.

In 2012, the Register rejected a request to amend the exemption to cover “primarily noncommercial videos.” The Register determined that the request was not adequately supported, but granted a version of the exemption, modified to fit the record before her:

To the extent proponents for noncommercial videos seek an expanded exemption covering “primarily noncommercial videos” – as opposed to “noncommercial videos” – they have not demonstrated a meaningful number of such uses that would qualify as noninfringing. It is true that a work may be commercial in nature and still be transformative. However, proponents identify only a single video that allegedly falls within this category in that it generated advertising revenue. It is not clear from the record, however, why this example should be considered “primarily noncommercial” as opposed to “primarily commercial.” Moreover, a single cited use is an insufficient basis upon which to conclude that “primarily noncommercial” uses are more likely than not to be noninfringing. On the other hand, proponents have established a sufficient basis for clarifying that the proposed exemption for noncommercial works may include videos created pursuant to a paid commission, provided that the commissioning entity uses the work solely in a noncommercial manner. . . . Based on this, the Register finds that the definition of “noncommercial videos” should clarify that noncommercial videos may include videos created pursuant to a paid commission, provided the commissioning entity uses the work solely in a noncommercial manner.

2012 Rec. at 139.

¹⁵ The exempted class is already unreasonably broad. The Register has previously questioned the noninfringing status of some of the noncommercial videos that proponents have claimed to qualify as fair uses. *See, e.g.*, 2015 Rec. at 82 (“The Register credits opponents’ concern that several of the videos provided as examples may be insufficiently transformative to support a determination of fair use. . . . [S]uch uses may instead be derivative works that require permission from copyright owners of the original work.”); *see also Soc’y of Holy Transfiguration v. Gregory*, 689 F.3d 29, 61 (1st Cir. 2012) (“The Archbishop contends the first factor still favors a finding of fair use because any copying he did was not for commercial gain. But removing money from the equation does not, under copyright law, remove liability for transgressing another’s works.”).

In 2015, the petitioners requested the same expansion to cover “primarily noncommercial videos.” The Register again declined to recommend the requested change:

[I]n considering the noncommercial video exemption, although EFF/OTW suggest expanding the exemption to replace the term “noncommercial” with the phrase “primarily noncommercial,” they fail to offer a rationale for such an expansion. Although they cite examples where commissions or exhibition stipends are paid to artists by noncommercial entities for noncommercial uses, it is not clear why these works would not be considered “noncommercial.” Indeed, the current exemption states explicitly that “noncommercial videos include work created pursuant to a paid commission where a commissioning entity’s use is noncommercial,” and the Register believes this clarification should be continued.

2015 Rec. at 100.

Now, the proponents seek to jettison the limitation to “noncommercial” videos entirely, without offering any new examples of commercial videos that would qualify as fair use or submitting any statements from commercial video creators who have been adversely affected by the prohibition on anti-circumvention. The Register should decline to recommend this unsupported expansion of the existing exemption.

(d) Specific Educational Uses

There are three primary expansions proposed for the exemptions applicable to educational uses. First, the proposed new exemption language proffered by EFF would allow kindergarten through twelfth grade students and educators and participants in nonprofit digital and media literacy programs to access short portions of motion pictures, using not only screen-capture technology, but also by defeating CSS, AACS, and online services’ access controls. Second, EFF and the Joint Educators propose discarding the aspects of the 2015 exemption for MOOCs appropriately drawn from the TEACH Act and § 110. Third, BYU proposes an extreme expansion that would allow creating complete copies of motion pictures for any “performances of the works for nonprofit educational purposes, in accordance with 17 U.S.C. § 110(1) or § 110(2).” The Register should not recommend adoption of any expansion.

(i) Screen-capture

In 2015, the Register concluded as follows:

As with prior rulemakings, the Register is limited to the record presented. The evidence demonstrates that screen-capture technology has markedly improved since the last proceeding and can serve as an adequate substitute to circumvention in cases where close visual or audio analysis of the excerpts is not required. In fact, *screen capture may well be adequate to fulfill the majority of the educational uses at issue*. As explained above, the Register finds that the evidentiary record for proposed uses in connection with K-12 students and media literacy after-school or adult education programs (apart from GED programs) is not well developed, and does not demonstrate that screen capture cannot meet these needs. Accordingly, the Register recommends a screen-capture exemption for these categories to address the possibility of circumvention when using this technology.

2015 Rec. at 101 (emphasis added).

In this proceeding, there is even less in the record regarding these uses than there was in 2015. The petitioner who initially requested these exemptions in 2015, Renee Hobbs, stated in her renewal petitions that students were successfully using the exemption and that the exemption has led to a “growth in the practice of digital and media literacy education.” Renee Hobbs, [Renewal Petition for Educational Uses By K-12 Instructors and Students](#) at 3 (Aug. 1, 2017); Renee Hobbs, [Renewal Petition for Educational Uses By College and University Instructors and Students](#) at 3 (Aug. 1, 2017). Accordingly, the current scope of the exemptions appears to be sufficient, and there is no justification for discarding the limitation requiring the use of screen-capture technology or the limitation to face-to-face instruction. *See* NPRM at 49,558 (“Proponents of exemptions should present their complete affirmative case for an exemption during the initial round of public comment . . .”).

(ii) MOOCs

The Joint Educators’ request to expand the existing exemption to cover all online courses appears to be based, in the first instance, on a misunderstanding of the current regulations.

Whereas the current exemption is limited to “courses offered by accredited nonprofit educational institutions to *officially enrolled students*[,]” the Joint Educators state that it applies to “free online versions of college and university courses *open to anyone*, with essentially unlimited enrollment.” Joint Educators, [Class 1 Long Comment](#) at 2 (Dec. 18, 2017) (“Joint Educators 2017 Comment”). Based on this mischaracterization of the current exemption, they claim they seek to expand it to cover courses offered *to enrolled students*, which is already a requirement of the current exemption. Indeed, the Register specifically included this requirement because it is required in § 110(2). 2015 Rec. at 102.

The Register also included other limitations on the scope of the exemption that are contained in § 110(2). She did so because that provision “offers important and meaningful guidance concerning Congress’ desire to balance pedagogical needs in distance learning with copyright owners’ concerns of harmful impact.” *Id.* The Joint Educators’ comments, which seek to discard these limitations, do not contain any persuasive arguments or analysis-altering facts to challenge this conclusion. Their assertion, Joint Educators 2017 Comment at 8-9, that there might be fair uses that are not covered by the TEACH Act misses the point. This proceeding “is not the forum in which to break new ground on the scope of fair use.” 2015 Rec. at 109. In order to ensure that the conduct at issue is likely non-infringing and will not harm copyright owners, the Register should retain the existing limitations.

(iii) Short Portions Limitation

BYU seeks a brand new exemption for copying “[m]otion [p]ictures (including television shows and videos), as defined in 17 U.S.C. § 101, where circumvention is undertaken solely in order to facilitate noninfringing performances of the works for nonprofit educational purposes, in accordance with 17 U.S.C. § 110(1) or § 110(2).” BYU, [Class 1 Long Comment](#) at 1 (Dec. 18,

2017) (“BYU 2017 Comment”). BYU claims that this exemption is necessary for the following reasons:

[T]o make noninfringing performances under the classroom exemption, instructors or pupils must have access to licensed decryption and playback devices in the classroom, such as DVD players, Blu-ray players, or computers with licensed optical drives. As technology advances, however, fewer and fewer classrooms will be equipped with such licensed decryption and playback devices. For example, although BYU and BYU-Idaho currently have numerous media-enabled classrooms with DVD or Blu-ray players, both universities have decided not to replace such devices as they age out over the next several years.

BYU 2017 Comment at 3.

First, BYU identifies a problem that is not caused by access controls, but by BYU’s decision to stop supplying its classrooms with devices capable of playing optical discs. BYU claims that “optical drives are becoming increasingly rare in new computers.” BYU 2017 Comment at 4. However, they have failed to establish a record to demonstrate there is any content that can only be accessed via discs. Moreover, even if such content exists, educators can connect disc players to their computers to watch movies in the classroom. *See* 2015 Rec. at 125 (“[I]t remains possible to access disc media through the use of peripheral devices.”); *see also* [Computer Optical Drives](#).

Second, BYU’s “decision” will apparently not be implemented for “several years.” Thus, BYU has not identified a substantial adverse effect that is likely to occur within the next three years. *See* NPRM at 49,551 (listing requirements for granting an exemption).

Third, BYU has not identified a noninfringing use in which it seeks to engage that requires unauthorized access. As the Register has repeatedly concluded, and should conclude again during this proceeding, no court has held that space-shifting is fair use. Indeed, it is infringing conduct. *See* 2015 Rec. at 107-27; Joint Creators and Copyright Owners, Class 3 Long Comment (Feb. 12, 2018); *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 862 (9th

Cir. 2017). The fact that BYU is an educational institution should not alter this analysis.¹⁶ The Supreme Court has held that “the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement.” *Campbell*, 510 U.S. at 584; *see also Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984) (“Even copying for noncommercial purposes may impair the copyright holder’s ability to obtain the rewards that Congress intended him to have.”).

Although § 110(1) allows BYU to engage in certain public performances of complete motion pictures in the classroom without obtaining licenses, it does not allow those performances to be generated from unauthorized copies. Nor does it contain any limitation on the reproduction right. If Congress wanted educational institutions to be exempt from purchasing complete copies of works, it would have included an exception to the reproduction right within § 110 – which it clearly did not.

The educational exemptions granted in 2015 are limited to copying short portions of works for transformative purposes. Thus, they are more compatible with § 110(2), which limits online transmissions by educational institutions to “reasonable and limited portions” of motion pictures. They are also more compatible with fair use, given that the third factor specifically favors the use of no more of a work than is necessary to accomplish a legitimate purpose. *See* 2015 Rec. at 70 (“[T]he Register suggests that the ‘short portions’ limitation provides useful guidance as to what is generally likely to be a fair use in these contexts without imposing a wholly inflexible rule as to length. As a general matter, longer uses are less likely to be considered fair because they are more likely to usurp the market for a work.”); *id.* at 99 (“[T]he

¹⁶ BYU claims that *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 98-99 (2d Cir. 2014) and *Authors Guild v. Google*, 804 F.3d 202, 229 (2d Cir. 2015) render all copying for educational purposes a fair use. This mischaracterizes the holdings of these cases, which involved particular, circumscribed uses, not at issue here.

use of only short segments is critical to the Register’s determination in this proceeding that a significant number of the desired uses are noninfringing.”).

Fourth, BYU’s proposed exemption would pose a significant threat to the value of copyrighted works. *See* 17 U.S.C. § 1201(a)(1)(C)(iv). Not only would BYU avoid purchasing digital copies of works to suit its preferences, it would create complete copies of works that would be “in the clear.” These copies would then apparently be circulated around university campuses, which could result in the production of additional copies, some of which might end up online.¹⁷

Fifth, the marketplace offers a variety of options for acquiring digital copies of motion pictures. These alternatives to circumvention include [Vudu’s Disc-to-Digital program](#); digital copies made available with purchases of discs through redeem codes; digital copies available for rental or long term access; access through [Movies Anywhere](#) and [UltraViolet](#); streams available through [Hulu](#), [Netflix](#), [Amazon Video](#), [YouTube Red](#); permanent downloads available through [Apple iTunes](#) and [Google Play](#); and other services (some of which offer time-limited downloads of many titles). *See* 2015 Rec. at 124 (“Opponents introduced detailed evidence of a wide variety of platforms and media that can serve as alternatives to circumvention.”). These

¹⁷ The proponents claim (*e.g.*, EFF 2017 Comment at 10) that the opponents’ inability to prove that anyone has misused an exemption demonstrates that no one has done so. This argument is misleading. The Joint Creators and Copyright Owners have no insight into who is purportedly relying on the exemptions or what they do with unprotected content after engaging in circumvention. The proponents often withhold the names of individuals who reportedly use the exemptions. Online infringement continues to cause significant harm to the motion picture industry, including on college campuses. Also, exemption opponents have identified during multiple cycles examples of noncommercial videos that constitute infringement. *See, e.g.*, 2015 Rec. at 82 (“The Register credits opponents’ concern that several of the videos provided as examples may be insufficiently transformative to support a determination of fair use.”). So, there is evidence of harm in the record.

offerings are discussed in more detail in the Joint Creators and Copyright Owners' comment on Proposed Class 3.

4. An Expansion To Cover New Access Controls Is Not Justified.

The Joint Creators and Copyright Owners support the comments concurrently submitted by AACS LA. There is no evidence in the record of a need to circumvent TPMs to copy motion pictures in formats with higher quality than Blu-ray. *See* Joint Filmmaker 2017 Comment, Statement of Jim Morrisette at 2 (“[I]ndependent filmmakers will be at a distinct disadvantage if they cannot acquire *at least HD (1080)* content to include in their 4K productions.”) (emphasis added). The proponents have certainly not demonstrated a substantial adverse impact due to the inability to circumvent AACS2 on protected Ultra HD discs. The proponents do not demonstrate that content is exclusively available on such discs. *See id.* at 5 (showing that all extras for the film *Arrival* are available on either the Blu-ray disc or the Ultra HD disc).

No one has released a universal hack to all Ultra HD films protected by AACS2. The integrity of the AACS2 and Ultra HD technology is an especially important component of the ecosystem that is resulting in the increased availability of motion pictures. The Register and the Librarian should not undermine this integrity by authorizing widespread hacking, which could negatively impact “the market for or value of” some of the industry’s most exciting products. 17 U.S.C. § 1201(a)(1)(C)(iv).

Nor is an expansion to cover circumventing HDCP to access content through HDMI cables supported by the record. *See* Joint Creators and Copyright Owners 2018 Class 4 Comment; Digital Content Protection, LLC, Class 4 Long Comment (Feb. 12, 2018). HDCP is a critically important access control that enables protected delivery of content via a wide range of

devices, including cable and satellite television set-top boxes, video game consoles, and Blu-ray players.

5. The Screen-Capture Exemptions Should Be Retained As Alternatives To The Other Forms Of Circumvention In Which The Proponents Seek To Engage.

As discussed above, in 2015, the Register concluded as follows with respect to screen-capture technology:

The record contains many examples of screen-capture technologies, most of which are available for less than \$100, and in some cases, for free. The record also demonstrates that these products can be relatively easy to use and are generally able effectively to capture content played back from DVDs, Blu-ray discs, and online streaming services. Finally, the record also suggests that a variety of screen-capture technologies are available for use on either Windows or Apple operating software, although the makers of some of these programs suggest that use of the software may itself require circumvention, particularly on a Mac.

2015 Rec. at 85.

The Register also concluded that some of the copying in which the petitioners sought to engage could be adequately accomplished using screen-capture technology. *E.g.*, 2015 Rec. at 86 (“[T]he record does not demonstrate that all noncommercial videos . . . require high-quality images that would be obtained through circumvention of access controls on DVDs, Blu-ray discs, or digitally transmitted video. . .”). Given her conclusion that *some* screen-capture technologies *might* involve circumvention, and that some petitioners raised concerns that, without exemptions covering screen-capture, it was unclear whether using such software constituted prohibited circumvention, the Register exempted use of such software. *Id.* at 88, 101. Then, for petitioners who had met their burden regarding the need, at times, to circumvent using other methods, the Register allowed for such circumvention if a user reasonably believed that higher quality content is “required.” *Id.* at 103-06. Finally, she cautioned that “[p]rospective users of the recommended exemptions should take pains to ensure that they satisfy each

requirement of these narrowly tailored exemptions before seeking to invoke them. The Register encourages users to seek out and employ non-circumventing screen-capture technology or other technologies that can be employed in lieu of circumvention.” 2015 Rec. at 103 (emphasis added).

Multiple proponents argue in favor of removing the prohibition on using non-screen-capture circumvention where screen-capture technologies would be sufficient to suit a user’s purposes. *See* Authors Alliance 2017 Comment at 4; BYU 2017 Comment at 5-6; Joint Filmmakers 2017 Comment at 27-28. However, they have not submitted any evidence to demonstrate that screen-capture is no longer a viable alternative. The time for doing so has now passed. *See* NPRM at 49,558 (“Proponents of exemptions should present their complete affirmative case for an exemption during the initial round of public comment . . .”). Indeed, since the requested exemption pertains to short portions of works, screen-capture is the most narrowly tailored and appropriate method of obtaining access, since the user can capture only the short portion of the motion picture that the user actually needs to accomplish his or her purpose. In contrast, non-screen-capture methods involve bypassing protection measures in a manner that disables the access restrictions for the entire work.¹⁸

6. Other Alternatives To Circumvention Exist.

Numerous alternatives to circumvention exist, which supplement the existing exemptions and give the commenters, especially educators, a wide array of options. Long gone are the days of needing to pull up scenes in a film-studies class using a disc player. Using digital copies,

¹⁸ BYU argues that the Register is not authorized to identify what types of circumvention methods are covered by exemptions, but supplies no authority to support this argument. BYU 2017 Comment at 5. Neither the statute nor the legislative history prohibits the Register from specifying the method of circumvention. Indeed, the Register’s ability to do so is implicit in the statute.

educators can, prior to class, open multiple, authorized, digital copies of motion pictures and pause each one at the scene they wish to perform for students. Licensed clip services also continue to be available. For example, the Fandango [Movie Clips Website](#) and Fandango [YouTube Channel](#) offer a wide variety of clips and movie trailers. A more complete discussion of the methods of digital dissemination being used by MPAA members and other distributors of motions pictures is discussed in the Joint Creators and Copyright Owners' comment on Proposed Class 3.

DOCUMENTARY EVIDENCE

The Joint Creators and Copyright Owners are not submitting any exhibits for this proposed class. Throughout the comment, links are provided for documentary evidence.

DATE: February 12, 2018

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