



UNITED STATES COPYRIGHT OFFICE

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

ITEM A. COMMENTER INFORMATION

This reply comment is submitted on behalf of Brigham Young University (“BYU”) and Brigham Young University-Idaho (“BYU-Idaho”) (collectively, “Commenters”).

This Comment was prepared by the BYU Copyright Licensing Office, which provides services and resources to the university’s faculty, staff and students relating to copyright issues that arise on campus. Interested parties may contact the following individuals:

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ITEM B. PROPOSED CLASS ADDRESSED

This reply comment addresses Proposed Class 1: Audiovisual Works—Criticism and Comment.

The reply comment addresses arguments and evidence presented by the DVD Copy Control Association (“DVD CCA”), the Advanced Access Content System Licensing Administrator, LLC (“AACSLA”), and the following Joint Creators and Copyright Owners

Privacy Act Advisory Statement: Required by the Privacy Act of 1974 (P.L. 93-579)

The authority for requesting this information is 17 U.S.C. §§ 1201(a)(1) and 705. Furnishing the requested information is voluntary. The principal use of the requested information is publication on the Copyright Office Web site and use by Copyright Office staff for purposes of the rulemaking proceeding conducted under 17 U.S.C. § 1201(a)(1). NOTE: No other advisory statement will be given in connection with this submission. Please keep this statement and refer to it if we communicate with you regarding this submission.

(“Joint Creators”): 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”) (collectively, “Opponents”).

ITEM C. OVERVIEW

As set forth in Commenters’ original comment, the current DMCA exemptions for motion pictures used for educational purposes should be consolidated and expanded to include the following class of works:

Motion Pictures (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).

This revision would simplify the DMCA exemption for noninfringing educational performances, by aligning it with the statutory conditions for such performances and eliminating extraneous conditions, such as distinctions between different categories of educational users and unnecessary restrictions to “short portions” of motion pictures. Such an exemption would give life and meaning to the policies embodied in the educational performance exemptions when they were enacted by Congress.

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

This reply comment relates to technological protection measures (TPMs) employed on DVDs, Blu-ray discs, and by various online streaming services. Such TPMs and methods of circumvention have been described adequately in prior rulemaking proceedings.

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGEMENT USES

I. After Extensive Study, the Register Previously Concluded That Existing DMCA Exemptions Relating to Motion Pictures Should Be Consolidated and Simplified

The existing DMCA exemptions relating to motion pictures—which are separated into *seven* separate classes—are needlessly complex and difficult to interpret, especially for teachers

and educational administrators without formal legal training. Nevertheless, Opponents recommend maintaining the current exemptions and suggest that, “proponents strain to paint the existing exemptions as overly intricate and difficult to understand.”¹

Despite Opponents’ suggestion, the Register reached the opposite conclusion in the recent comprehensive study of Section 1201, stating:

The Office agrees that, in some cases, it can make a greater effort to group similar classes together, and will do so going forward. For example, in the upcoming seventh rulemaking, the Office will consider consolidating some of the separate classes related to motion pictures into broader categories, such as *one* related to educational uses.²

Commenters agree with the Register’s conclusion, and have submitted a proposal to consolidate and simplify the exemption for educational uses. While some Opponents seem to agree, at least in part, that Commenters “may be correct that the regulations found in 37 C.F.R. § 201.40(1) could benefit from some clarification,”³ they have not suggested any meaningful alternatives for consolidating the classes into broader categories, including one for educational uses, as contemplated by the recent 1201 Study.

II. An Exemption Limited to Facilitating Nonprofit Educational Performances Is Appropriately Narrow and Focused

As set forth above, Commenters propose revising the current DMCA exemptions relating to motion pictures to establish a straightforward, narrowly-tailored exemption “where circumvention is undertaken *solely in order to facilitate noninfringing performances* of the

¹ Joint Creators, [Class 1 Opposition Comments](#) at 8 (Feb. 12, 2018) (“Joint Creators 2018 Comment”).

² U.S. Copyright Office, [Section 1201 of Title 17](#), at 109 (2017) (“1201 Study”) (emphasis added).

³ Joint Creators 2018 Comment at 8.

works for nonprofit educational purposes” Opponents object to Commenters’ proposal as “overbroad,” “vague,” and “unworkable.”⁴

In raising this objection, Opponents mischaracterize Commenters’ proposed revision and overstate its potential impact by suggesting:

[E]ven the most favorable interpretation of the language would still lead to the conclusion that the lack of specificity makes the request resemble the class described as “all motion pictures on DVD” (which has been found to be too broad and vague). The language does not even approach a refined class of the kind where exemptions have been granted, such as the exemption for film studies and other courses requiring close analysis.⁵

Contrary to Opponents’ suggestion, Commenters’ proposed exemption does not resemble a class directed generally to “all motion pictures on DVD.” Rather, it is limited to circumvention undertaken solely to facilitate noninfringing performances for nonprofit educational purposes, which satisfy all of the statutory conditions set forth in 17 U.S.C. § 110(1) or § 110(2). This limited exemption would not apply to users outside of nonprofit educational institutions, or even to non-educational performances at such institutions, such as those occurring at sporting events or many student club activities. Such a limited exemption—directed to specific noninfringing uses—is appropriately narrow and focused under the DMCA.

The test for evaluating proposed classes is not whether such proposals “approach a refined class of the kind where exemptions have been granted” in the past, as suggested by Opponents. By its very nature, the triennial rulemaking proceeding contemplates changes over time to the number of classes and the scope of the classes. Indeed, a “primary goal” of the

⁴ DVD CCA and AACS LA, [Class 1 Opposition Comments](#) at 9, 11 (Feb. 12, 2018) (“DVD CCA 2018 Comments”).

⁵ *Id.* at 11.

rulemaking proceeding is to “assess whether the prevalence of . . . technological protections, with respect to particular categories of copyrighted materials, is diminishing the ability of individuals to use these works in ways that are otherwise lawful.”⁶

As the Register has noted, “Crafting the appropriate scope of a ‘class’ is one of the major functions of the rulemaking proceeding.”⁷ In each of the past four rulemakings, the Register has recommended changes to the language and scope of the exemptions for educational uses of audiovisual works.⁸ Likewise, in the current rulemaking, the Register should be free to craft an appropriate scope for the class of works under consideration, without being constrained to carry forward unnecessary restrictions and limitations simply because they were adopted in past rulemakings.

Opponents contend—without support—that Commenters’ proposed class is somehow deficient because, “the request does not limit the proposed class of work in the way that Congress intended for this rulemaking.”⁹ Commenters respectfully disagree. The rulemaking process “ensure[s] that the concept of fair use remains firmly established in the law” and

⁶ H.R. REP.NO. 105-551, pt. 2, at 37 (1998) (“COMMERCE COMMITTEE REPORT”).

⁷ See, e.g., U.S. Copyright Office, [Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies](#) at 9 (Nov. 17, 2006) (“2006 Recommendation”); U.S. Copyright Office, [Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights U.S. Copyright Office](#), at 17 (Oct. 8, 2015) (“2015 Recommendation”) (“[A] major focus of the rulemaking proceeding is how to define the ‘class’ of works for purposes of the exemption.”).

⁸ 1201 Study at 102 (“The language and scope of this exemption has changed with each rulemaking.”).

⁹ *Id.*

“extends into the digital environment the bedrock principle of ‘balance’ in American intellectual property law for the benefit of both copyright owners and users.”¹⁰

The current DMCA exemptions relating to motion pictures are unduly restrictive and do not represent an appropriate balance between the interests of copyright owners and educational users. Congress has recognized that educational uses are socially beneficial; it has repeatedly and consistently emphasized that such uses should be favored under copyright law.¹¹ The DMCA is no exception. The statute requires that favored educational uses must be considered during the triennial rulemaking proceeding, as follows:

In conducting such rulemaking, the Librarian shall examine—

- (i) the availability for use of copyrighted works;
- (ii) the availability for use of works for *nonprofit archival, preservation, and educational purposes*;
- (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, *teaching, scholarship, or research*;
- (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and
- (v) such other factors as the Librarian considers appropriate.¹²

In addition, when the DMCA was enacted, the Commerce Committee was “concerned that marketplace realities may someday dictate a different outcome, resulting in less access, rather than more, to copyrighted materials that are important to *education, scholarship, and other socially vital endeavors*.”¹³ The Senate Judiciary Committee also stated, “The [DMCA] is

¹⁰ *Id.* at 26.

¹¹ *See, e.g.*, 17 U.S.C. §§ 107(1), 108(h)(1), 109(b)(1)(A), 110(1), 110(2), 110(8), 112(f)(1), 114(b), 504(c)(2), 512(e), 1201(d), 1203(c)(5)(B), 1204(b).

¹² 17 U.S.C. § 1201(a)(1)(C) (emphases added).

¹³ COMMERCE COMMITTEE REPORT at 35-36 (emphasis added).

designed to facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and *education* in the digital age.”¹⁴

Unfortunately, the current DMCA exemptions for motion pictures are so cumbersome and restrictive that they provide only marginal practical benefit to many educators and students, who are presumably the intended beneficiaries. While Commenters’ proposed exemption is broader in some senses than the current exemptions, it is appropriately narrow and focused on nonprofit educational uses, which are consistently favored under the statute.

III. Commenters Decision to Discontinue Purchasing Dedicated Classroom Media Players Is Reasonable In View of Industry Trends Away From Optical Discs.

Opponents seize on the fact that both BYU and BYU-Idaho have decided not to replace aging DVD players and Blu-ray players, claiming the decision is a problem “entirely of BYU’s own making.”¹⁵ This argument disingenuously ignores the unmistakable industry trend away from physical discs such as DVDs and Blu-ray discs, toward streaming media and digital downloads. According to Digital Entertainment Group (“DEG”), disc sales accounted for \$4.7 billion in sales in 2017, a decline of 14% from 2016.¹⁶ Conversely, DEG stated that subscription streaming revenue grew by more than 30% to \$9.5 billion.¹⁷ As another indicator of the same trend, a number of computer manufacturers are moving away from selling devices with built in DVD or Blu-ray drives. For example, a senior Apple executive told CNN that optical drives “are

¹⁴ S. REP.NO. 105-190, at 1–2 (1998) (emphasis added) (“SENATE JUDICIARY COMMITTEE REPORT”)

¹⁵ DVD CCA 2018 Comment at 11; Joint Creators 2018 Comment at 21.

¹⁶ Ricardo Lopez, *Disc Sales Decline Deepens in Annual Home Entertainment Spending Report*, Variety (January 9, 2018), <http://variety.com/2018/digital/news/home-entertainment-spending-2017-1202658638/> (citing DEG study found at http://degonline.org/portfolio_page/deg-year-end-2017-home-entertainment-report/).

¹⁷ *Id.*

holding us back . . . they're anchors on where we want to go.”¹⁸ In addition, Sony is no longer making optical drives.¹⁹

The decline in disc sales and rentals has been a consistent trend over the past few years that is likely to continue over the next three years and beyond. This national trend is far from a problem of BYU's own making. In response to the trend, BYU and BYU-Idaho made the reasonable decision that, going forward, they will not continue to purchase DVD and Blu-ray players, which serve no educational purpose other than playing motion pictures on formats that are becoming increasingly outmoded. Unsurprisingly, it appears that a number of other nonprofit educational institutions have come to the same conclusion.²⁰

Of course, the trend away from DVDs and Blu-ray discs is nothing new. As the decades have passed, motion pictures have been made available on a wide variety of media formats, which have come and gone. Some examples of formats that have been rendered obsolete include Super 8mm, Betamax, VHS, Laserdisc, etc. Copyright law should not compel nonprofit educational institutions to maintain outmoded devices for playing motion pictures in obsolete formats or to constantly update their technology to keep up with the ever-changing media market.

¹⁸ Harry McCracken, *Apple's Schiller: 'Old Technologies Are Holding Us Back'*, CNN (Oct. 27, 2012), <https://www.cnn.com/2012/10/26/tech/gaming-gadgets/apple-mac-schiller/index.html>.

¹⁹ Brooke Cothers, *Sony to Exit PC-use Optical Drives, Say Reports*, CNET (Aug. 27, 2012), <https://www.cnet.com/news/sony-to-exit-pc-use-optical-drives-say-reports/> (citing Japanese-language reports).

²⁰ See, e.g., Adams, T., & Holland, C. (2017). [Streaming Media in an Uncertain Legal Environment: A Model Policy and Best Practices for Academic Libraries](#). *Journal of Copyright in Education and Librarianship*, 1(2), 1–32, at 8 (“Like many educational institutions, [George] Mason [University] began decommissioning VHS and DVD players in classrooms through a gradual phase-out program beginning around 2012.”).

IV. Commercially Available DVD Players and Blu-ray Players Do Not Meet the Needs Of Modern Educators and Students

Opponents argue that in 2006, the Register considered and rejected a proposed exemption similar to the one advanced by Commenters.²¹ Ironically, the record presented in 2006 included evidence of two Pioneer DVD players commercially available at the time, which were better suited to meet the needs of educators and students than any players available on the market today. Specifically, the Pioneer DVD players provided “a barcode command stack feature that allows users to select beginning and end frames of specific clips of motion pictures on DVDs and save them to the player’s memory for later playback.”²²

BYU is quite familiar with these specialized DVD players, having partnered with Pioneer in 1999 to assist with the development and launch of the first DVD player with barcode control.²³ BYU also created the first interactive WebDVD programs for language teaching using the movies *C'eravamo tanto amati* and *Orfeu Negro*. These programs provided enhanced language learning opportunities by enabling instructors and students to search movies for words or phrases, view the search terms in a clickable list, and select one or more desired search terms, causing the DVD to jump directly to the desired location and begin playback of the movie to hear the selected search term(s) in context. This valuable teaching content—which cost hundreds of thousands of dollars to create—is now rendered obsolete and can no longer be used, due to the discontinuance of specialized DVD players and other subsequent changes in technology. Standard DVD players and Blu-ray players that are commercially available today do not support

²¹ DVD CCA 2018 Comment at 9-10.

²² 2006 Recommendation at 14 (Nov. 17, 2006).

²³ Previously, in the mid-1970s, BYU purchased a pre-production model of the first Sony-Phillips laserdisc player and ultimately created the first language learning videodiscs.

these features nor provide similar interactive video features designed to meet the needs of modern educators and students.

Even when the Pioneer DVD players were available in 2006, the Register still found that playback of DVDs in class adversely affected teaching in film courses, as follows:

A particular characteristic of most commercially released DVDs is that upon insertion into a DVD player, certain sequential screens must be allowed to run their course. Although the required duration of required introductory screens may vary, most contain at a minimum a studio logo screen and a copyright warning notice prior to displaying the menu screen. These screens are wholly appropriate for the copyright owner to include and, in general, do not have any negative implications for the public. Yet, for the film and media professors' intended use, these screens waste valuable class time. The larger the number of DVDs that need to be shown, the greater the amount of class time spent watching material that serves no pedagogical purpose. . . .

Ten percent of educational classroom time is a significant social expenditure, particularly when classroom time is a limited and precious resource. While a delay of a few minutes during private, in-home use would be unlikely to constitute an adverse effect of the prohibition for purposes of this rulemaking, the same amount of time unnecessarily expended in the classroom for teaching purposes does qualify as an adverse effect.²⁴

These problems are only exacerbated today, when specialized DVD players and other media players are no longer available.

V. Nonprofit Educational Institutions Cannot Afford to Equip Classrooms With Outmoded Media Players

Opponents claim that purchasing Blu-ray players or drives for each classroom would not present an “undue hardship,” and therefore is a solution to the problems facing educational institutions.²⁵ However, the cost to educational institutions of purchasing a Blu-ray player for

²⁴ 2006 Recommendation at 23-24.

²⁵ DVD CCA 2018 Comment at 12; *see* Joint Creators 2018 Comment at 21.

each classroom is prohibitive and would be an extreme hardship. As a result, this is not a viable solution to the problem that Commenters and other educational institutions are facing.

According to the Department of Education, as of 2008, there were 2,663,000 instructional rooms in public schools *alone* in the United States.²⁶ Therefore, even if the cheapest models listed by DVD CCA and AACCS LA were purchased (\$69.99 per Blu-ray player),²⁷ American public schools would have to spend at least \$186 million to equip classrooms with Blu-ray players. This sum does not include classrooms at private schools or at colleges and universities. Clearly, the cost of purchasing a Blu-ray player for each classroom is prohibitively expensive and outside the budgets of cash-strapped educational institutions.

In addition, Blu-ray players do not last forever, and educational institutions would need to replace players about every six years.²⁸ Assuming that schools would replace players on a six-year rotation schedule based on life expectancy, the *annual* cost to maintain an aging inventory of Blu-ray players would be more than \$31 million for American public schools alone. Updating and protecting aging inventory of Blu-ray players is simply not a feasible solution for budget-conscious educational institutions.

²⁶ U.S. Department of Education. Institute of Education Sciences, National Center for Education Statistics. (2010). Table 108: Number and internet access of instructional computers and rooms in public schools, by selected school characteristics: Selected years, 1995 through 2008, *Digest of Education Statistics* (2010 ed.). Retrieved from https://nces.ed.gov/programs/digest/d10/tables/dt10_108.asp.

²⁷ DVD CCA 2018 Comment at 12.

²⁸ Ben Taylor, *The Average Lifespan of 7 Popular Tech Products*, Business 2 Community (December 29, 2015), <https://www.business2community.com/tech-gadgets/average-lifespan-7-popular-tech-products-01413366> (citing Consumer Electronics Association report).

VI. Streaming Services and Other Digital Movie Providers Are Not Viable Alternatives for Educational Institutions.

Opponents assert that “the marketplace offers a variety of options for acquiring digital copies of motion pictures.”²⁹ Although the Joint Creators and Copyright Owners suggest many digital movie providers, none of these are options available to Commenters or other educational institutions.

Generally, digital movie providers only allow a user to establish an account for personal use.³⁰ Thus, accounts cannot be established for an educational institution or a class. Additionally, none of the digital movie providers gives Commenters or other educational institutions access to all of the movies needed for the vast array of classes that are offered. Educational institutions often require obscure films for classes, which are simply not available through current digital media providers.

VII. Conclusion

In summary, Commenters propose revising the current DMCA exemptions for motion pictures used for educational purposes, to align with the statutory conditions for noninfringing performances set forth in 17 U.S.C. §§ 110(1) and 110(2). Such an approach would simplify the DMCA exemptions and increase the likelihood that instructors and pupils would be able to use the educational performance exemptions in the manner contemplated by Congress when they were enacted into law.

²⁹ Joint Creators 2018 Comment at 23.

³⁰ *See, e.g.*, Netflix, Netflix Terms of Use, <https://help.netflix.com/legal/termsfuse> (last visited March 12, 2018) (referring to the user as a “member” in the individual sense). Other digital movie providers use similar language that limits establishing accounts to an individual user and not an institution.