

**EXEMPTION TO THE PROHIBITION OF CIRCUMVENTION OF COPYRIGHT
PROTECTION SYSTEMS FOR ACCESS CONTROL TECHNOLOGIES**

**REPLY COMMENTS OF PROFESSOR RENEE HOBBS ON BEHALF OF THE MEDIA
EDUCATION LAB AT THE HARRINGTON SCHOOL OF COMMUNICATION AND
MEDIA AT THE UNIVERSITY OF RHODE ISLAND**

**I. Media is a Crucial Component of Kindergarten Through Twelfth Grade Education,
Making it Necessary to Exempt Audiovisual Works for Educational Uses**

In the comments filed by Petitioner Professor Renee Hobbs, a leading educator and trainer in the field of media literacy education, with wide experience in many parts of the United States, on behalf of the Media Education Lab at the Harrington School of Communication and Media at the University of Rhode Island on December 1, 2011, Professor Hobbs requested an exemption, now designated as class 8, that applies to: *Lawfully accessed audiovisual works used for educational purposes by kindergarten through twelfth grade educators.*

Kindergarten through twelfth grade (“K-12”) educators use media as an essential part of their teaching practice.¹ In a survey conducted by Professor Hobbs, 97% of K-12 educators polled expressed that media is an important component of their teaching experience. Media use empowers students to be both critical thinkers and creative producers of an increasingly wide range of messages using image, language, and sound.² This usage spans the curriculum as primary and secondary educators at every grade level, and in all subjects, incorporate media into their lesson plans.³

¹ See, e.g., Stephanie Diamond Hicks, *Technology in Today’s Classroom: Are You a Tech-Savvy Teacher?*, 84 THE CLEARING HOUSE: J. EDUC. STRATEGIES, ISSUES & IDEAS 188 (2011) (lauding the benefits of using technology in the classroom); Deborah L. Linebarger, *Teaching with Television: New Evidence Supports an Old Medium*, PHI DELTA KAPPAN, Nov. 2011, at 63 (“[W]hen teachers use TV in thoughtful ways, they can create a learning environment that dramatically supports learning, especially for kids who struggle with basic content and skills.”).

² See Renee Hobbs, DIGITAL AND MEDIA LITERACY: CONNECTING CULTURE AND CLASSROOM (2011).

³ See, e.g., Laura Stein & Anita Prewett, *Media Literacy Education in the Social Studies: Teacher Perceptions and Curricular Challenges*, 36 TEACHER EDUC. Q. (2009) (applying to high school social studies teachers); Tessa Jolls & Denise Grande, *Project SMARTArt: A Case Study in Elementary School Media Literacy and Arts Education*, 107 ARTS EDUC. POL’Y REV. (2005) (applying to elementary school arts teachers).

While college-level professors have benefited from exemptions in previous rulemakings, K-12 educators still suffer for lack of an exemption. Among the Industry Commenters responding to the proposed exemption,⁴ some draw an arbitrary line between the college professors who show their 18 year-old students a clip of the documentary *Planet Earth* and the high school teachers who show their 18 year-old students the same clip. Industry Commenters recognize that high quality media is integral to education, but apparently only at the college level. They write: “[the high school] teacher who wants to ‘show only a few minutes of an interview . . . lacks any need for the quality that the [Copyright] Office previously concluded college-level faculty often require.”⁵ This differentiation is illogical and baseless. College professors and K-12 teachers are equally in need of quality media because of the ever-blurring line between high school and college curricula.⁶

II. K-12 Teachers are Harmed by the Restriction on Access to High Quality Media

a. Teachers Need High Quality Media to Teach Effectively

There is no question that high quality digital media formats have become the universal standard in daily life, and student receptivity to media in the classroom is dependent upon teachers meeting students’ expectations.⁷ Many K-12 students are unfamiliar with low-definition

⁴ This reply comment is being filed in response to Joint Comments filed by the Motion Picture Association of America, Association of American Publishers, American Society of Media Photographers, Business Software Alliance, Entertainment Software Association, Picture Archive Council of America, and the Recording Industry Association of America (“MPAA Joint Comment”); Comments filed by the Advanced Access Content System Licensing Administrator LLC (“AACLS LA Comment”); and Comments filed by the DVD Copy Control Association (“DVD CCA Comment”) (collectively “Industry Commenters”).

⁵ MPAA Joint Comment, at 43.

⁶ See Press Release, Dep’t of Educ., High School Students Use Dual Enrollment Programs to Earn College Credits, New Reports Say (Apr. 6, 2005), available at <http://www2.ed.gov/news/pressreleases/2005/04/04062005a.html> (stating that 69% of public high schools offer Advanced Placement and/or International Baccalaureate courses).

⁷ Aman Yadav, *If a picture is worth a thousand words is video worth a million? Differences in affective and cognitive processing of video and text cases*, 23 J. COMPUTING HIGHER EDUC. 15 (April 2011), available at <http://dx.doi.org/10.1007/s12528-011-9042-y> (explaining study assessing the affective and cognitive processing of stories in video and text formats found that “video and video + text versions of the stories led to higher levels of . . . engagement . . . and recall of particular information”).

forms of media like VHS. Students have high-definition television at home, see movies in IMAX projection and 3D in the theaters, and play video games on their LCD computers wherever they go. In fact, this generation of students is so unaccustomed to non-digital media that the integration of media in the classroom loses its impact and efficacy when it is not high quality, frustrating the entire purpose of teachers' lesson plans.

Furthermore, if high quality is important in entertainment media, it is at least equally necessary for educational purposes. In commercial, non-educational settings, it is seen as critical to up-convert or remaster old television shows and movies to appeal to today's digital consumer.⁸ Industry Commenters continually change and upgrade their media formats because they recognize that better formats matter. K-12 students in the classroom, however, are relegated to lower quality analog media without this exemption.

The Industry Commenters claim that the exemption proposal shows no need for high quality audiovisual works, but they ignore the obvious curriculum-wide importance of image quality.⁹ They never mention the film studies teacher who analyzes a movie director's choices in composition, editing, and scenic effects. They disregard the science teacher who shows film clips on the microscopic details of living organisms. They overlook the theater teacher who explores the subtleties in acting and staging of different movies. All teachers need media in the classroom, but for detailed and highly technical lessons, high quality media is crucial.

⁸ See, e.g., *Cost Plus World Market Partners with Paramount Pictures for the Newly Remastered Rerelease of "TITANTIC" in 3D*, BUSINESS WIRE (Feb. 27, 2012 11:00 AM), <http://www.businesswire.com/news/home/20120227006431/en/Cost-World-Market-Partners-Paramount-Pictures-Newly>; *Hammer to Remaster Old Classics into HD*, SCIFI PULSE, <http://scifipulse.net/2012/01/hammer-to-remaster-classic-films-into-hd/>; *Disney to Remaster Four More Classics in 3D*, BUZZFEED, <http://www.businesswire.com/news/home/20120227006431/en/Cost-World-Market-Partners-Paramount-Pictures-Newly>.

⁹ DEPT. OF ED, EDUCATIONAL TECHNOLOGY IN U.S. PUBLIC SCHOOLS: FALL 2008 1, 3 (2008), <http://nces.ed.gov/pubs2010/2010034.pdf> (showing that 65% of public schools use high-quality digital content in the classroom).

b. K-12 Teachers Need to Use High Quality Media Because Non-digital Media is No Longer Available

Not only is high quality digital media necessary for effective teaching across the curriculum, it is quickly becoming the only form available. In the past, teachers were able to turn to VHS for their media needs. Now, however, copyrighted works are either unavailable for purchase in VHS format or were never made available in that format to begin with. For example, popular motion pictures *Munich* (2006), *Flags of Our Fathers* (2007), *Invictus* (2009), *Jane Eyre* (2011), and *The King's Speech* (2011), all of which offer obvious educational value, were never released in VHS format, but are currently available in digital formats. VHS is an outdated and archaic format.

Even if teachers are successful in finding a VHS version of the clip they need, they are met with further obstacles. Their school must also have a hard-to-locate and expensive VCR, as opposed to the now ubiquitous DVD player, which is available at one-third the cost of a VCR.¹⁰ Texas principal Eldridge Gilbert reports that he does not have one VCR in his entire middle school. Even for those teachers who still have access to a VCR, fast forwarding, rewinding, and switching from one VHS tape to the next wastes far too much time in class; this time should be reserved for teaching, not readying materials. Expecting teachers to be able to rely on this format in the future restricts their ability to use media in the classroom.

III. The Industry Commenters' Proposed Alternatives are Insufficient Because They are Unreliable and Substandard

a. Media Compilation Websites are Undependable and Offer Limited Inventory

The Industry Commenters' suggested alternatives to the proposed exemption are insufficient, incomplete, and inoperable. Industry Commenters propose that teachers utilize

¹⁰ Search of VCRs and DVD players on BESTBUY.COM, <http://bestbuy.com> (search "VCR" and then search "DVD player") (showing that the least expensive new VCR is \$87.24 and the least expensive new DVD player is \$27.21).

media compilation websites to access media and integrate it into their lesson plans.¹¹ Yet this assertion fails to account for the many issues associated with Internet use, including inconsistent connections, slow bandwidth, website unavailability, and school district-imposed content filters. Each of these defects is uncontrollable and unpredictable, and serves to chill teachers' enthusiasm for utilizing media in their curricula. The reality for most educators is that school-based Internet is simply not sufficiently reliable to depend upon as a keystone of their lesson plans.

The media websites that Industry Commenters suggest, such as Anyclip.com, present an extremely limited clip inventory, constraining teachers' ability to locate particular clips needed for their lesson plans. In order for media compilation websites to be adequate alternatives to circumvention for clip compilation uses, these websites would need, at a minimum, to offer educationally relevant clips from movies still in commercial distribution. Yet, a perfunctory search reveals that they do not. For example, a biology teacher wishing to show his students a clip relating to eugenics from the popular 1997 blockbuster, *Gattaca*, would be met with a "no results found" page on Anyclip.com. Four of the five movies listed above as being unavailable on VHS are similarly unavailable on Anyclip.com. Nor does Anyclip.com offer any clips from television shows, documentaries, or short films. This supposed alternative is meant to mitigate the harm that results from teachers' limited access to media resources, but it is too limited to be viable.

Moreover, those limited clips that are available for use on Industry Commenters' suggested sites are also subject to discretionary editing by the website administrators, thereby decreasing their utility in K-12 classrooms. These websites censor clips for violence and language, forcing teachers to choose from an even more limited and unrepresentative media

¹¹ MPAA Joint Comment, at 38.

selection. These restrictions prevent the history teacher from illustrating the violence of World War II in *Flags of Our Fathers* with appropriate student groups or the literature teacher from considering dialect and historical context in *The Reader*. These restrictions further frustrate the media literacy educator's efforts to provoke student discussion of ethical choices in media making. The website administrators also split longer scenes into separate clips, forcing teachers and students to sit through page loading, buffering, and advertisements. These constraints likewise inhibit educators' ability to teach effectively.

b. Smartphones Offer Inferior Media Quality

Despite what Industry Commenters suggest,¹² smartphone video capture of on-screen images is an inadequate substitute for the proposed exemption. It is unreasonable to assume that all educators, many of whom are paid far less than they deserve,¹³ own smartphones with the capability to capture media and project it onto a larger screen for viewing. Moreover, where teachers are not asked to furnish chalk, textbooks, or other relatively low-cost school supplies for their classrooms, it is unacceptable to require that they provide expensive smartphones meant for personal use for classroom applications.

Even assuming teachers do own these devices, the additional equipment needed to transfer the phone-recorded video to a computer, television, or projector may not be found among a school's standard audiovisual inventory. Furthermore, in the process of recording the desired clips, the recording process significantly degrades the media quality.¹⁴ Smartphones are meant to be phones, not cameras, and therefore are less technologically advanced due to cost and

¹² DVD CCA Comment, at 41.

¹³ Dave Eggers & Nínive Clements Calegari, *The High Cost of Low Teacher Salaries*, N.Y. TIMES, Apr. 30, 2011, http://www.nytimes.com/2011/05/01/opinion/01eggers.html?_r=2.

¹⁴ Tim Moynihan, *Smartphone Camera Battle: iPhone 4S vs. the Android Elite*, PCWORLD (Oct. 16, 2011 9:00 PM), http://www.pcmworld.com/article/241955/smartphone_camera_battle_iphone_4s_vs_the_android_elite.html (“You won't find optical zoom lenses, big sensors, high-quality glass, or manual exposure controls in a smartphone camera.”).

size constraints. They record poorly, especially in low light, and they produce recordings with substantially lower quality than the media they record. Add to that the unsteady hand of the person holding the camera; increased pixilation from re-recording; and poor synchronization of the frame rate between the display and the camera, creating moving lines in the picture; and it becomes clear that the use of smartphones is not a viable alternative to the proposed exemption.

IV. K-12 Teachers are Frustrated in Their Efforts to Incorporate Media in the Classroom

Teachers are adversely affected by the lack of an exemption. On average, teachers have forty to fifty minutes in the classroom—too much of which may be squandered queuing up movies to the applicable portion, switching DVDs, searching for streaming media online, watching unavoidable and often inappropriate advertisements on streaming media websites, and fast-forwarding to the applicable section.

This wasted time extends far beyond preference¹⁵ or mere inconvenience.¹⁶ Eldridge Gilbert, middle school principal and social studies teacher, spends five times as much time preparing media for use in class as compared to the time he spends on all other lesson preparations. Edie Lozano, an English Literature teacher at a Texas high school, loses her students' attention each time she must transition between different DVD discs, wasting valuable class time regaining their focus. Kindergarten teacher Ellen Moiani once showed her students a YouTube video on shapes, and accidentally exposed them to a movie trailer glorifying gun violence before the intended clip played. These are but a few examples of the deleterious

¹⁵ MPAA Joint Comment, at 9

¹⁶ See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64,556, 64,558 (Oct. 27, 2000) (codified at 37 C.F.R. pt. 201) (citing a House Manager's Report that "mere inconveniences, or individual cases . . . do not rise to the level of a substantial adverse impact.").

consequences felt by teachers, and experienced by their students, who have not been afforded the proposed exemption.

These stories, and others like them, are not mere isolated anecdotes; rather they illustrate the widespread frustration of many K-12 teachers. The examples provided are symptomatic of harm felt across the curriculum and across the country. The Petitioner offers these instances merely to demonstrate the harm teachers in general experience nationwide when systematically engaging in instructional practices employing media resources. Teachers who educate K-12 and college students alike value media resources for how they engage learners, activate critical thinking, illustrate key concepts, and build important connections between theory and practice and between classroom and culture, but only K-12 teachers are frustrated in the fulfillment of this good practice.

V. Lawful Uses Are Impeded By Technological Protection Measures

The uses that would be facilitated by the exemption requested are lawful ones that fall squarely within the mandate that section 1201 confers on the Copyright Office and the Librarian of Congress. Many of the uses just described fall within the ambit of Sec. 110(1) of the Copyright Act.¹⁷ Beyond that, use of copyright content for classroom teaching is a classic fair use.¹⁸ Importantly, the incorporation of media in teacher's lessons represents a strong transformative use of the copyrighted material, and for a fair use analysis, transformativeness is the most important consideration.¹⁹ Thus, for example, when teachers take a clip, subject it to critical analysis, and frame it with discussion and lecture the use is transformative because the teacher "add[s] something new, with a further purpose or different character, altering the first

¹⁷ 17 U.S.C. § 110(1).

¹⁸ § 107 (listing "teaching" as illustrative of a fair use).

¹⁹ See Neil Weinstock Netanel, 15 LEWIS & CLARK L. REV. 715 (2011) (demonstrating the rise of transformativeness over the fair use factors).

[work] with new expression meaning, or message.”²⁰ High school film teacher Livi Drake lectures on film technique, displays an exemplar movie clip, and prompts a class discussion on the students’ observations. Similarly, a film teacher may wish to show her students clips from *Birth of a Nation*, *Rosewood*, and *Do the Right Thing* to display and contrast cinematic depictions of lynching.

The argument for fair use is stronger when considering the inherent restrictions on licensing the media, such as, the limited and censored content discussed above. At least until such time as the media clip choices teachers need for pedagogical purposes are readily available, it seems implausible to assert that their unlicensed use will affect copyright owners’ earnings in a legally significant way. Under present conditions, however, teachers are faced only with bad choices: to violate Section 1201, to spend inordinate time searching for adequate media clips to support a lesson plan, or—worse—to avoid media usage altogether.

The Industry Commenters’ fail to present any counterarguments against considering a wide range of classroom uses of audio-visual clips to be fair use, and the Librarian of Congress has already twice approved clips of audiovisual works used for educational purposes as a non-infringing use.²²

VI. The Requested Exemption is an Appropriately-Framed Exemption

Industry Commenters also contend that the requested exemption is framed incorrectly.²³ In past rulemakings, the Copyright Office only exempted classes of work that were rigid subsets

²⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

²² Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68,472, 68,474 (Nov. 27, 2006) (codified at 37 C.F.R. pt. 201); Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43,825, 43,827 (July 27, 2010) (to be codified at 37 C.F.R. pt. 201).

²³ MPAA Joint Comment, at 42.

of section 102 subject matter.²⁴ But as Congress envisioned when it instituted a triennial de novo rulemaking, the interpretation of classes of work has evolved. In the 2006 and 2009 rulemakings, the Librarian of Congress considered and approved use-based classes of work; most notably, an exemption for educational uses by film professors and then all professors was granted.²⁵ The Librarian recognized that as long as the class of work begins as a subset of Section 102, it could be further refined by use and/or user.²⁶ The proposed exemption is a subset of section 102—audiovisual works—that has been further defined by its use—K-12 education. For all the reasons listed above, the requested exemption should be granted.

Submitted For:
Professor Renee Hobbs
Founding Director, Harrington School of Communication and Media
Director, Media Education Lab
University of Rhode Island
8 Ranger Road
Kingston, RI 02881

Submitted By:
Erik T. Israni, Elizabeth F. Jackson, Kristin Wall, and Michele-Ann C. Wilson
Student Attorneys
Glushko-Samuelson Intellectual Property Law Clinic
Washington College of Law, American University
4801 Massachusetts Avenue, NW
Washington, DC 20016

²⁴ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64,556, 64,560 (Oct. 27, 2000) (codified at 37 C.F.R. pt. 201) (“If Congress had wished to provide for exemptions based on the status of the user or the nature of the use—criteria that would be very sensible—Congress could have said so clearly.”).

²⁵ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68,472, 68,473-68,474 (Nov. 27, 2006) (codified at 37 C.F.R. pt. 201); Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43,825, 43,827 (July 27, 2010) (to be codified at 37 C.F.R. pt. 201).

²⁶ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68,472, 68,474 (Nov. 27, 2006) (codified at 37 C.F.R. pt. 201); *see also* Letter from Lawrence E. Strickling to Marybeth Peters, Nov. 4, 2009, *available at* <http://www.copyright.gov/1201/> (stating that the National Telecommunications and Information Administration supported tailoring proposed classes by their use and/or user).