Before the
U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS

In the Matter of Section 1201 Exemptions to Prohibition Against Circumvention of Technological Measures Protecting Copyrighted Works

Docket No. 2014-07

Comment of

- **Peter Decherney, Professor of Cinema Studies and English, University of Pennsylvania,**
- **Michael X. Delli Carpini, Professor and Dean, Annenberg School for Communication, University of Pennsylvania,**
- **College Art Association,**
- **International Communication Association,**
- **Library Copyright Alliance, and**
- **Society for Cinema and Media Studies.**

Requested Class of Work for Exemption – Proposed Class 3 (Audiovisual Works—Educational Uses—Massive Open Online Courses)

Audiovisual works embodied in physical media (such as DVDs and Blu-Ray Discs) or obtained online (such as through online distribution services and streaming media) that are lawfully made and acquired and that are protected by various technological protection measures, where the circumvention is accomplished by students and faculty participating in Massive Open Online Courses (MOOCs) for the purpose of criticism or comment.

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I. Commenter Information

This Comment is submitted on behalf of Peter Decherney, Professor of Cinema Studies and English at the University of Pennsylvania, Michael X. Delli Carpini, Professor and Dean of the Annenberg School for Communication at the University of Pennsylvania, the College Art Association (CAA), the International Communication Association (ICA), the Library Copyright Alliance (LCA), and the Society for Cinema and Media Studies (SCMS). Parties interested in contacting the submitter should contact Sarah O'Connor and Mark Patrick at (202) 274-4148 or by email at so6921a@student.american.edu or mp9853a@student.american.edu.

The joint petitioners filing this comment represent over 300,000 artists, art historians, curators, critics, collectors, educators, librarians, publishers, professors, scholars, professional university staff, and professionals in the visual arts, all interested in improving the quality of higher education in the United States. The College Art Association (CAA) is a professional association that promotes excellence in scholarship and teaching in the history and criticism of the visual arts and in creativity and technical skill in the teaching and practices of art. The International Communication Association (ICA) is an academic association dedicated to the study, teaching, and application of human and mediated communication. The Library Copyright Alliance (LCA) consists of three major library associations—the American Library Association, the Association of Research Libraries, and the Association of College and Research Libraries—with a unified goal of fostering global access and fair use of information for creativity, research, and education. The Society for Cinema and Media Studies (SCMS) is an organization dedicated to the study of the moving image. The ICA and SCMS were petitioners in the corresponding

2012 request for exemption,[1] and their involvement in this Comment is a testament to the growing importance and prevalence of massive open online courses ("MOOCs").[2]

II. Overview

The DMCA exemptions granted in the past to facilitate teaching and learning in traditional courses have helped to bring the traditional classroom into the digital age.[3] The natural next step is to recognize that students and faculty participating in massive open online courses are entitled to an educational experience that is on par with that of their counterparts in traditional college and university courses. MOOCs perform a public service by providing open and affordable education. However, the creation of MOOCs is currently encumbered by the same restrictions the DMCA once placed on the use of audiovisual material in the traditional educational context. Audiovisual works incorporated into MOOCs are rendered educational by the nature of their use and by design must be tailored. Time limits inherent in the production and format of MOOCs make it extremely difficult to incorporate audiovisual materials without an exemption that allows for circumvention so that those creating MOOCs can use short clips tailored to their educational purpose.

One of the benefits of this triennial rulemaking is that it allows the Copyright Office and the Librarian of Congress to adjust the exemptions to accommodate advances in technology and changes to the educational landscape. Few phenomena have grown as quickly or dramatically as MOOCs have, with student enrollment, university participation, and course offerings growing almost exponentially over the last few years. In 2012, Coursera, now the largest provider of

[1] 2011 Comment of Peter Decherney, et al.
[2] *See infra* Part IV.A (defining "massive open online courses").
[3] Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65,260, 65,266-70 (2012).

MOOCs, had registered more than 1.7 million students.[4] Today, over 11 million people have enrolled in MOOCs through Coursera.[5] From 2013 to 2014, the number of universities offering MOOCs doubled to over 400—including 22 of the top 25 universities in the United States according to US News World Report. Between 16 and 18 million students participated in MOOCs in 2014 alone.[6] The number of courses has similarly doubled to more than 2,400.[7] If the Librarian withholds an exemption this year and MOOCs continue to grow at this dizzying pace, hundreds of universities, thousands of professors, and tens of millions of students will be adversely affected in the meantime.

Promulgating exemptions that exclude massive open online courses would arbitrarily disfavor an approach to learning that is an affordable and effective alternative to the traditional classroom. Indeed, studies suggest MOOCs may provide as strong a learning experience as the traditional classroom. In 2010, the Department of Education released a report on online education that concluded, "classes with online learning (whether taught completely online or blended) on average produce stronger student learning outcomes than do classes with solely face-to-face instruction."[8]

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[4] Laura Pappano, *The Year of the MOOC*, N.Y. TIMES (Nov. 2, 2012), http://www.nytimes.com/2012/11/04/education/edlife/massive-open-online-courses-are-multiplying-at-a-rapid-pace.html?pagewanted=all.
[5] COURSERA, https://www.coursera.org (last visited Feb. 4, 2015).
[6] Dhawal Shah, *Online Courses Raise Their Game: A Review of MOOC Stats and Trends in 2014*, CLASS CENTRAL (Dec. 27, 2014), https://www.class-central.com/report/moocs-stats-and-trends-2014/.
[7] *Id.*
[8] U.S. DEPARTMENT OF EDUCATION, EVALUATION OF EVIDENCE-BASED PRACTICES IN ONLINE LEARNING: A META-ANALYSIS AND REVIEW OF ONLINE LEARNING STUDIES 18 (Sept. 2010), *available at* https://www2.ed.gov/rschstat/eval/tech/evidence-based-practices/finalreport.pdf.

III. Technological Protection Measures and Methods of Circumvention

Access to motion pictures and other audiovisual works is controlled by numerous technological protection measures (TPMs). Almost all DVDs employ the Content Scramble System (CSS), for which the Library of Congress granted an exemption in the previous iteration of this proceeding. The Advanced Access Content System (AACS) is the successor to CSS and is the standard TPM on Blu-Ray Discs. A variety of entirely different TPMs protect audiovisual works distributed online through distribution services or streaming media. MOOCs and traditional courses involve the same technological protection measures and methods of circumvention, and our Comment on Proposed Class 1 describes them in greater detail.[9]

IV. Asserted Noninfringing Use(s)

Proposed Class 3 would cover the same kinds of non-infringing uses as Proposed Class 1, with the only significant difference being the context: a massive open online course. Accordingly, we refer the reader to our comments on Proposed Class 1 for a discussion of college and university faculty and student uses in general. This comment will focus on the MOOC phenomenon in particular and the additional issues presented by uses in that context.

A. Defining "Massive Open Online Course"

MOOCs are free online versions of college and university courses open to anyone, with essentially unlimited enrollment. Aside from video instruction, MOOCs may feature online quizzes and forums to encourage student engagement, virtual office hours where professors engage with students, and graded assignments (using software or peer students to do the grading) to evaluate whether students learn from the course. MOOCs are offered in a wide range of subjects. In 2014, the three most popular subject areas were Humanities, Computer Science and

[9] Comment of Peter Decherney, et al. on Proposed Class 1, Part III (describing the relevant TPMs and methods of circumvention for Proposed Class 1).

Programming, and Business and Management, but MOOCs are offered in a variety of disciplines, including Engineering, Art and Design, and Health and Medicine.[10] The proliferation of MOOCs has also led to courses being taught in 13 different languages.[11] MOOCs have increased access to education by providing courses to those who would not otherwise be able to pay, offering participants flexibility in their educational experience, and offering anyone with access to an Internet connection the opportunity to learn from the most esteemed professors in their fields.

In addition to a definition of MOOCs, the Notice of Proposed Rulemaking proposed a series of possible distinctions between different kinds of MOOCs—"(a) courses offered with free and open content versus courses that require course materials to be licensed by users, (b) courses requiring registration and/or identity verification versus courses without such requirements, (c) courses offered for free versus paid courses, and (d) whether the provider is a nonprofit or for-profit entity."[12] We discuss below why none of these distinctions makes a difference legally, either for fair use purposes or for Section 1201(a)(1). First, though, it's important to note that, as a descriptive matter, MOOCs occur on both sides of each of the proposed binaries. Each MOOC provider has a different approach to distributing and protecting their online course offerings. So, although MOOCs regularly incorporate open educational resources, the content created by or for the MOOCs themselves is not necessarily free and open.[13] While most MOOC providers require

[10] Dhawal Shah, *Online Courses Raise Their Game: A Review of MOOC Stats and Trends in 2014*, CLASS CENTRAL (Dec. 27, 2014), https://www.class-central.com/report/moocs-stats-and-trends-2014/.
[11] *Id.*
[12] Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 79 Fed. Reg. 73,856, 73,861 (Dec. 12, 2014) (to be codified at 37 C.F.R. pt. 201).
[13] *See* Joan Cheverie, *MOOCs and Intellectual Property: Ownership and Use Rights*, EDUCAUSE (Apr. 16, 2013), http://www.educause.edu/blogs/cheverij/moocs-and-intellectual-property-ownership-and-use-rights; Timothy Vollmer, *Keeping MOOCs Open*, CREATIVE COMMONS (Nov. 1, 2012), http://creativecommons.org/tag/coursera (arguing for MOOCs to

registration,[14] some do not.[15] Similarly, MOOCs cannot be limited to courses offered for free, and certainly cannot be limited to those that require payment of a fee. By definition, MOOCs are free to participate in, and the larger providers offer their courses for free.[16] To the best of our knowledge, there are no MOOCs that require payment to view lecture videos and participate in the online learning experience. However, this distinction should not factor into the exemption because it has no bearing on the fair use analysis.[17] Finally, the definition of MOOCs cannot be limited to nonprofit or for-profit providers. According to *The Chronicle of Higher Education*, four major players in the MOOC universe are Coursera, edX, the Khan Academy, and Udacity; of these, edX and the Khan Academy are non-profit while Coursera and Udacity are for-profit.[18] No responsible definition of the term can leave out half of the major providers.

It would artificially constrain the growth and evolution of MOOCs to limit the definition in any of the ways mentioned above. MOOCs provide the same public benefit regardless of the approach the provider takes to protecting their online course offerings, whether payment or

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make their content free and open). There are certainly MOOCs that do make their materials available in this way. *See* Mary Lou Forward, *The OpenCoureWare Consortium Joins edX to Expand Access to High Quality Educational Opportunities Using Openly Licensed, Modifiable Content*, OPEN EDUCATION CONSORTIUM (Mar. 6, 2014), http://www.oeconsortium.org/the-opencourseware-consortium-joins-edx-to-expand-access-to-high-quality-educational-opportunities-using-openly-licensed-modifiable-content/.

[14] *See Terms of Use*, COURSERA, https://www.coursera.org/about/terms (last visited Feb. 4, 2015) ("In order to fully participate . . . , you must register for a personal account on the Site . . . .").

[15] *See Harvard Open Courses: Open Learning Initiative*, HARVARD EXTENSION SCHOOL, http://www.extension.harvard.edu/open-learning-initiative (last visited Feb. 4, 2015) ("You do not need to register to view the lecture videos.").

[16] *See, e.g.*, COURSERA, https://www.coursera.org (last visited Feb. 4, 2015) ("Take the world's best courses, online, for free."); EDX, https://www.edx.org (last visited Feb. 4, 2015) (offering free online courses and classes from the world's best universities).

[17] *See infra* Part IV.C (highlighting that all the proposed uses qualify as fair use, regardless of the distinctions specifically enumerated in the Notice of Proposed Rulemaking).

[18] *Major Players in the MOOC Universe*, THE CHRONICLE OF HIGHER EDUCATION, http://chronicle.com/article/The-Major-Players-in-the-MOOC/138817/#id=overview (last visited Feb. 4, 2015).

registration is required, or the provider's tax-status. For example, if the Librarian were to provide an exemption that protects only non-profit MOOC providers, it would have substantial adverse effects on teachers and students in Coursera and Udacity courses despite the lack of any meaningful difference between the actual uses made by the faculty and students. Coursera alone accounted for more than a third of the MOOCs offered in 2014.[19]

Shortly before exemptions were announced following the last triennial rulemaking proceeding, Georgetown University Provost Robert Graves published a blog post in which he stated, "The ability of massive open online courses to deliver exactly the same experience simultaneously to thousands and thousands of students breaks the mold of traditional university education. We can all see their potential to increase access to education and reduce the costs of education."[20] In the time since, MOOCs have moved closer to realizing many in academia's expectations.[21] Limiting the definition of a "massive open online course" under the exemption in any of the ways discussed above would limit what may be the future of higher education.[22]

B. Scope of Exemption

MOOCs are a logical extension of higher education, growing exponentially in enrollment, number of courses offered, and extent of university participation. MOOCs provide a tremendous public benefit by making college and university courses available to anyone with an Internet connection. In support of online education, President Obama has encouraged colleges "to

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[19] Dhawal Shah, *Online Courses Raise Their Game: A Review of MOOC Stats and Trends in 2014*, CLASS CENTRAL (Dec. 27, 2014), https://www.class-central.com/report/moocs-stats-and-trends-2014/.
[20] Robert Groves, *Our Moment in Time*, THE PROVOST'S BLOG (Sept. 21, 2012), https://blog.provost.georgetown.edu/our-moment-in-time/.
[21] *See supra* notes 4-7 (highlighting the statistical growth of MOOCs).
[22] *The Future of Universities: The Digital Degree*, THE ECONOMIST (June 28, 2014), http://www.economist.com/news/briefing/21605899-staid-higher-education-business-about-experience-welcome-earthquake-digital.

embrace innovative new ways to prepare our students for a 21st-century economy and maintain a high level of quality without breaking the bank."[23] If MOOCs are to make education more affordable, faculty and students must have the same rights in MOOCs as in the in-person classroom.

1. Students and Faculty Participating in MOOCs Need to Circumvent TPMs on Audiovisual Works in the Same Ways They Do in the In-Person Classroom

Students and faculty engage in fundamentally the same kinds of activities, whether they are in a MOOC or in a traditional college or university classroom. The proposed exemption encompasses uses that are the online equivalent of core traditional educational uses: incorporation of excerpts in faculty lectures and student projects. These uses mirror those discussed in the accompanying Comment for Proposed Class 1, which seeks an exemption for audiovisual works circumvented by college and university faculty and students for the purpose of criticism or comment.[24]

Co-petitioner Peter Decherney is a Professor of Cinema Studies and English at the University of Pennsylvania, and he has been a driving force behind each of the three previous exemptions requested and granted for educational use. Next fall, Professor Decherney will be offering his first MOOC, titled *The Hollywood Film Industry*. The course will examine the history and current state of Hollywood. In addition to multimedia lectures that will incorporate short clips of audiovisual works, the course will contain video essays prepared by students in which they analyze short film and video clips using their own voiceover commentary. Just as students in University of Pennsylvania Professor Al Filreis's "Modern Poetry" MOOC post

[23] Megan O'Neil, *Obama Proposals for Colleges Highlight Online Courses*, THE CHRONICLE OF HIGHER EDUCATION (Aug. 22, 2013), http://chronicle.com/blogs/wiredcampus/obama-proposals-for-colleges-highlight-online-courses/45595.

[24] Comment of Peter Decherney, et al. on Proposed Class 1, Part IV (outlining the noninfringing uses of the requested exemption).

essays in which they quote from the poems they are discussing,[25] students in Professor Decherney's MOOC will be expected to use examples of the media they are analyzing. Students in Professor Decherney's current classes already have that ability as the result of the 2012 rulemaking. Multimedia expression has become a staple of academic work across disciplines, and the education exemption now needs to embrace the aspects of university education that have become part of the everyday workings of higher education since the last rulemaking.

MOOCs are offered in a wide range of disciplines and an exemption should reach beyond MOOCs on film and media studies. As we show in our Comments on Proposed Class 1, use of high quality video excerpts enriches traditional courses in virtually every discipline offered by colleges and universities. The same holds true for their counterparts online.

2. The Ways in Which MOOCs Differ from Traditional Classroom Courses Further Demonstrate the Need for an Exemption

While the uses envisioned for this exemption are fundamentally the same as conventional classroom uses, the ways in which MOOC lectures differ only serve to further highlight the need for an exemption. MOOCs differ from traditional courses in three key ways. First, the lectures that make up a MOOC are given entirely online. Second, these lectures are video files created prior to the start of the course. Third, video lectures in MOOCs are typically seven to ten minutes long. These differences make circumvention of TPMs even more necessary for MOOCs than traditional classes.

The MOOC "classroom" is typically a page in a web browser on the student's computer. As a result, students can disengage from the classroom experience in one click. To keep students focused, they need to be engaged in a rich learning experience. If instructors are able to

[25] Modern & Contemporary American Poetry, COURSERA, https://www.coursera.org/course/modernpoetry (last visited Feb. 6, 2015).

incorporate clips in the body of their video lectures, students are less likely to be distracted by the myriad temptations of the Internet.

Part of the attractiveness of MOOCs is that students can access MOOCs on their own schedules and pause, rewind, and re-watch lectures at will. This is possible because MOOCs typically consist of a series of video lectures. Each video lecture is a single video file containing both the faculty member's recorded presentation and any third party visual aids required for the lecture. Educators developing lectures for a MOOC must extract the relevant clips from their source in order to embed a clip into the lecture file. An exemption allowing MOOC faculty to circumvent TPMs on audiovisual works would open up many works for use and make embedding them into the video lecture a much less daunting task.

Finally, MOOCs are given in short segments, sometimes as short as 10 minutes, which further necessitates an exemption. In-person courses often consist of significantly longer lectures, often times stretching beyond an hour. The limited duration of MOOC lectures requires instructors to choose clips of audiovisual works more carefully and to tailor those clips to show only what is essential to the purpose of the lecture. Consequently, faculty use of audiovisual works in MOOCs is especially likely to be modest and carefully calibrated to a legitimate transformative purpose. Also, faculty who teach MOOCs will need access to the widest possible variety of audiovisual works in order to find effective excerpts.

3. High Resolution Content is Crucial to the MOOC Experience

As we argue in our Comment in support of Proposed Class 1, high-resolution video plays an increasingly vital role in the classroom.[26] Blu-ray discs and other high definition formats are as important in MOOCs as they are in traditional college and university classrooms. In fact,

[26] Comment of Peter Decherney, et al. on Proposed Class 1, Part V.B (highlighting the demand for high resolution content in the modern classroom).

MOOCs differ from the traditional classroom in a number of ways that make high definition content even more crucial.

In the traditional classroom, professors deliver lectures in-person, typically from the front of the classroom. When professors incorporate audiovisual works into their lectures, students have a more limited frame of reference from which to judge the resolution of the audiovisual work. In the MOOC context, however, professors and educators deliver video lectures that are typically recorded in high definition. Therefore, students in MOOCs experience a transition from the lecturer in HD to the audiovisual excerpt in SD. This disruption in video quality is noticeable and may distract the viewer and dilute the point.

Reduced production quality may also distract enrolled students from the lesson. Laptops in the classroom are a well-known distraction. In fact, more and more professors are banning them.[27] For obvious reasons, a MOOC instructor does not have this option. However, if the student does not feel engaged in the presentation, they are only a click away from removing themselves from a MOOC.[28]

Finally, MOOCs incorporate, and need to be able to incorporate, high definition video into lectures and student projects to remain on equal footing with the in-person classroom. The exemptions should not be crafted in such a way that they create unequal classes of students. From the outset, MOOCs have faced an uphill struggle to legitimize their courses in the eyes of

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[27] *See, e.g.*, Dan Rockmore, *The Case for Banning Laptops in the Classroom*, THE NEW YORKER (June 6, 2014), http://www.newyorker.com/tech/elements/the-case-for-banning-laptops-in-the-classroom; Valerie Strauss, *Why a Leading Professor of New Media Just Banned Technology Use in Class*, WASHINGTON POST (Sept. 25, 2014), http://www.washingtonpost.com/blogs/answer-sheet/wp/2014/09/25/why-a-leading-professor-of-new-media-just-banned-technology-use-in-class/.

[28] *See* Mary Flanagan, *The Classroom as Arcade*, INSIDE HIGHER ED (June 6, 2014), https://www.insidehighered.com/views/2014/06/06/technology-classroom-distraction-students-essay (discussing the struggle to keep students' attention in the modern classroom).

students and others who are skeptical that online education can be as rich and immersive as the physical classroom. However, access to courses at the college and university level is still truly limited. MOOCs can serve as more than just an extension of the classroom, but also as a tool to promote social justice and parity of education amongst all people. President Obama's 2015 State of the Union Address underscored the importance of expanding accessibility to education, reasoning that, "By the end of this decade, two in three job openings will require some higher education. Two in three. And yet, we still live in a country where too many bright, striving Americans are priced out of the education they need. It's not fair to them, and it's not smart for our future."[29] For MOOCs to succeed and continue to reach individuals who would not otherwise have access to higher education, MOOCs must have equity and parity with the in-person classroom.

4. The Utility of Audiovisual Works Goes Far Beyond "Close Analysis"

The Notice of Proposed Rulemaking encourages commenters for Proposed Class 3 to address the scope of the proposed exemption and whether it can be limited to uses requiring close analysis of the copyrighted work. As the discussion of the variety of academic uses in our Comment on Proposed Class 1 shows, close analysis is just one of the many ways that audiovisual works can be used for teaching.[30] MOOCs cover a wide range of disciplines and granting this exemption would enable additional disciplines to begin offering MOOCs. This wide range of disciplines utilizes excerpts from audiovisual works in a variety of ways, some of which may not be readily categorized as "close analysis." For example, the HarvardX course *China* covers the modern society and state that is emerging in China which bears the indelible imprint

[29] *Transcript: President Obama's State Of The Union Address*, NPR (Jan. 20, 2015, 8:50 PM), http://www.npr.org/2015/01/20/378680818/transcript-president-obamas-state-of-the-union-address.

[30] *See* Comment of Peter Decherney, et al. on Proposed Class 1, Part IV.B (discussing the variety of ways professors across disciplines have made use of the exemption).

of China's historical experience, of its patterns of philosophy and religion, and of its social and political thought.[31] Beautifully produced, this MOOC uses audiovisual works to highlight the beauty of the country and provide enrolled students with a sense of its culture. According to the edX course description, "ChinaX introduces new features to make the riches of Harvard's visual collections and the expertise of its faculty more accessible to learners worldwide." If an exemption was granted and limited to the use of audiovisual works for close analysis of those works, it would not necessarily cover uses like this and those highlighted in the accompanying Comment on Proposed Class 1. Audiovisual works provide compelling, vivid, dynamic historical and geographic representations. An exemption should not be limited to cases involving close analysis.

C. Proposed Uses Qualify as Fair Use

Section 107 of the Copyright Act provides that the fair use of a copyrighted work "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."[32] The statute instructs courts to consider four factors in deciding whether a use is fair: "(1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work."[33] Each of these factors weighs in favor of the uses sought under this exemption.

The first factor weighs heavily in favor of a fair use finding. The proposed class of uses is strictly educational. Additionally, the audiovisual works incorporated into MOOC lectures would

[31] China, EDX, https://www.edx.org/course/china-harvardx-sw12x#.VMvWyUuJeaI (last visited Feb. 4, 2015).
[32] 17 U.S.C. § 107
[33] *Id.*

be repurposed for criticism or commentary, in addition to the overarching purpose of teaching. Even audiovisual works that are factual or educational in nature are subject to the creative expression of the MOOC creator in terms of arrangement, accompanying message, and overall effect. This repurposing renders the uses transformative.[34] When a use is transformative, it strongly favors a finding of fair use.[35]

The Notice of Proposed Rulemaking asks commenters to consider a series of distinctions among MOOCs in connection with whether the contemplated uses are lawful.[36] However, none of these distinctions is significant for purposes of the fair use analysis. The fundamentally educational purpose and transformative character of the use is decisive. Neither charging for courses nor operating as a for-profit entity affects the fair use calculus. As the Supreme Court observed in *Campbell,* the exclusion of for-profit activities from fair use "would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107 . . . since these activities are generally conducted for profit in this country."[37] Relatedly, whether the provider of a MOOC course makes it available under an open license or reserves standard copyright to itself should not make a difference. From scholarly biographers[38] to the creators of *South Park*,[39] no other fair user has been expected to forfeit their own copyrights in exchange for the right to make lawful use of existing material. Finally, whether courses require registration or identity verification is

[34] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (distinguishing a transformative use that "adds something new, with a further purpose or different character, altering the first [work] with new expression, meaning, or message" from a use that "merely supersedes the objects of the original creation").
[35] *See id.* (holding that transformative works "lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright").
[36] *See supra* notes 12-18 and accompanying text.
[37] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994) (citation omitted).
[38] *See* Sundeman v. Seajay Society, Inc., 142 F.3d 194, 208 (4th Cir. 1998) (ruling use of unpublished novel for scholarly criticism was permissible fair use).
[39] *See* Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687 (7th Cir. 2012).

not relevant. Record keeping has never been a prerequisite for fair use or any other limitation or exception to copyright.

The second factor focuses on the nature of the work, specifically considering whether it is the kind of work that copyright law tends to favor. This factor calls for recognition that some works are closer to the core of intended copyright protection than others. The exemption requested in this Comment applies to audiovisual works that range in subject matter from fictional to factual. While the second factor generally will not favor fair use for uses where the underlying work is highly creative, courts have found that the second factor "may be of limited usefulness where the creative work of art is being used for a transformative purpose."[40] And of course, highly creative works are often the subjects of criticism and commentary, so there must be room for fair use of such works in appropriate circumstances.

Regarding the third factor, circumvention is necessary to allow faculty participating in MOOCs to seamlessly incorporate short portions of works and isolated still images directly into their lectures. Given that the nature of a MOOC is to break a traditional lecture into short, concise segments, time is of the essence and the amount and substantiality of the audiovisual works used must by definition be carefully limited to amounts essential to the pedagogical purpose. Similarly, the student uses are typically limited to the incorporation of short portions of audiovisual works into student-developed projects. Transformative uses that repurpose no more of a work than is appropriate to achieve the transformative purpose are favored under the third factor.[41]

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[40] Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 612 (2d Cir. 2006).
[41] *See* Author's Guild, Inc. v. HathiTrust, 755 F.3d 87, 98 (2d Cir. 2014) (acknowledging that the third factor hinges on "whether 'no more was taken than necessary'" (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 589 (1994))).

Finally, the fourth factor weighs in favor of finding fair use since the uses have no effect on the potential market for or value of the copyrighted work itself. The uses are transformative in that they are for a different purpose and for a different audience. Therefore, the uses do not act as mere substitutes in the relevant market for the works.[42] In fact, allowing these uses makes DVDs and other media more valuable, making libraries more inclined to buy them, and perhaps even to pay more for them.

D. 17 U.S.C. § 110(2)

Section 110(2) allows for certain uses of copyrighted works by nonprofit educators in the context of distance education. Those works are limited to "nondramatic literary or musical work[s] or reasonable and limited portions of any other work, or display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session."[43] In enacting § 110(2), Congress clearly recognized the value and legitimacy of the use of "limited portions" of audiovisual works for distance learning.

For this proposed exemption, however, § 110(2) is not relevant because it is limited to systematic instruction as a part of a curriculum of an accredited, non-profit institution.[44] Because MOOCs, by definition, are open to anyone, § 110(2) would not permit the uses described in the proposed exemption. Section 110(2) is not required, however, and does not preclude fair use. Section 110(2) operates alongside fair use to carve out specific uses of copyrighted works that are acceptable in distance learning. Uses in distance learning that do not meet the requirements of § 110(2), such as MOOCs, may still constitute fair use.

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[42] *See id.* at 99 ("[A]ny economic 'harm' caused by transformative uses does not count because such uses, by definition, do not serve as substitutes for the original work").
[43] 17 U.S.C. § 110(2) (2005).
[44] § 110(2)(A).

V. Asserted Adverse Effects

If the Librarian withholds an exemption in this proceeding, the faculty and students participating in MOOCs, and the faculty and students who will be deterred from participating in MOOCs, would all be adversely affected. Institutions and instructors would continue to be deterred from developing, providing, and improving MOOCs. Time limitations would prevent instructors and students from providing and engaging in the best educational experience possible. And finally, the lack of available alternatives guarantees these adverse effects will not be remedied until the next iteration of this proceeding.

A. Lack of Exemption Deterrent to Growth of Online Education

The perceived inability to deploy fair use has discouraged universities from providing certain types of MOOCs entirely. Professor Decherney delayed offering a MOOC in part because of the perceived copyright risk. As a result of widespread concerns about circumvention and fair use, only one college or university currently offers a film and media studies MOOC despite the fact that there is likely to be widespread interest.[45] If an exemption is not granted, Professor Decherney will have to change the format of his course, which is an extension of his in-person class, and reduce the level of student involvement.

The production quality of MOOCs has been significantly restricted by the lack of access to audiovisual works and the uncertainty many professors and faculty have regarding use of audiovisual works in the online classroom. Anne-Marie Bouche, an Associate Professor of Art History at Florida Gulf Coast University told us: "Making digital materials more accessible and

[45] *See The Language of Hollywood: Storytelling, Sound, and Color*, COURSERA, https://www.coursera.org/course/hollywood (last visited Feb. 4, 2015).

clarifying the terms of fair educational use for online courses and courses having an online component would greatly assist the development of such courses in the future."[46]

B. Limited Time Available in MOOC Format Amplifies Need for Exemption

Without an exemption, the time constraints of MOOCs would adversely affect the learning experience by forcing instructors to either include audiovisual material that does not best serve its intended purpose, forgo including audiovisual material entirely, or assign audiovisual material for review outside of class. By design, MOOCs are limited in time. MOOC instructors must teach concepts in video lectures that are typically seven to ten minutes in length, when they would normally have over an hour. One minute of a MOOC lecture could constitute more than 10% of the time available to cover the material. As a result, instructors must make the most out of every second. Instructors must utilize only the best material possible to show a concept or make a point and cannot afford to waste time displaying unnecessary portions. Limiting instructors by preventing access to TPM-protected audiovisual works would severely limit their ability to make the most out of this compressed lecture by incorporating the most effective audiovisual works. Alternatively, MOOC instructors may chose to forgo incorporating audiovisual material entirely in the interest of saving time. As we discussed in our Comment on Proposed Class 1, the presence of audiovisual materials in the educational context is invaluable.

Instructors may instead choose to direct students away from the MOOC to locate and watch particular audiovisual material. As we previously mentioned, the struggle to keep students' attention is even more relevant in the online classroom. By asking students to navigate to a video content provider such as YouTube, there is the risk that the student will get distracted and not return. Additionally, part of the beauty of the MOOC experience is that the entire course is

[46] Written Response of Anne-Marie Bouche, Associate Professor of Art History at Florida Gulf Coast University, to Online Survey (Dec. 1, 2014).

confined to a single provider's website and the video lectures found within. Requesting students to locate and access audiovisual material outside the MOOC provider's website complicates student participation in a way that could be avoided if the proposed fair use of audiovisual materials was permitted.

C. Production Quality Can Make or Break a MOOC

Just as quality plays an important role in the traditional college or university classroom experience,[47] it is also essential to the MOOC experience. In the classroom, students notice works that are not the quality they might normally see outside of the educational setting. David Simon is the creator and show runner of the television series *The Wire*, which was recently reissued in high definition. He spoke to the effect that quality has on the audience, both currently and historically, stating:

> [T]here can be no denying that an ever-greater portion of the television audience has HD widescreen televisions . . . and that they feel notably oppressed if all of their entertainments do not advantage themselves of the new hardware. It vexes them in the same way that many with color television sets were long ago bothered by the anachronism of black-and-white films, even carefully conceived black-and-white films. For them, *The Wire* seems frustrating or inaccessible . . . .[48]

In a MOOC, the visually perceptible, frustrating difference between the lecture recorded in high definition and the accompanying audiovisual clips that may only be shown in standard definition due to the lack of an exemption is extremely distracting.

The time limitations of MOOCs also oblige professors to use the highest quality material possible to demonstrate a concept, given their inability to address a raised hand and retrace their steps as they might in the classroom. Active student participation is a crucial element of the in-person classroom. Among other things, it allows students to ask questions to help clarify what is

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[47] *See* Comment of Peter Decherney, et al. on Proposed Class 1, Part V.B (discussing the demand for high resolution audiovisual material in the modern classroom).

[48] David Simon, *The Wire in HD (Updated with Video Clips)*, THE AUDACITY OF DESPAIR (Dec. 3, 2014), http://davidsimon.com/the-wire-hd-with-videos/.

being taught. Students are often encouraged to participate and ask questions because if one student has a question, chances are others do as well. Because video lectures in MOOCs are often pre-recorded, there is no option for students to participate while the lecture is playing. As a result, the material encompassed in the MOOC video lecture must be of the highest quality possible to make up for material that would have been made easier to conceptualize with the help of student participation.

Additionally, the lack of an exemption would result in an unintended bias towards physical classroom education. A second-class experience in MOOCs would suggest to students that they are engaging in a second-class education. Online education is making higher education available to people who might never have a chance to attend traditional courses. An exemption would help give MOOCs parity with the physical classroom.

D. Lack of Available Alternatives

For the same reasons articulated in our Comment in support of Class 1, screen capture technology, licensing, and DVD jukeboxes are not viable alternatives to circumvention.[49] The use of screen capture technology results in clips from audiovisual works that are of decreased quality. Screen capture also results in a loss of valuable information, including even single frames, which can be essential to the intended analysis. Similarly, licensing does not suffice as a valid circumvention alternative because it would promote a permissive system that endangers academic freedom, it is an inefficient waste of time and money, and fail entirely in the case of orphan clips. Finally, DVD jukeboxes remain an unacceptable alternative because of their cost, the hardware requirements, and because they do not enable clips to be incorporated seamlessly into an online course or lecture.

[49] Comment of Peter Decherney, et al. on Proposed Class 1, Part V.D (describing the lack of available alternatives to circumvention in relation to Proposed Class 1).

Another alternative to incorporating clips in lecture videos would be to instruct students to navigate elsewhere on the Internet to find a clip. The risk, of course, is that once students navigate away from the course, they will never come back.

VI. Statutory Factors

The proposed class of works and its uses qualify for an exemption under the factors enumerated in § 1201(a)(1)(C), as described below.

(i) the availability for use of copyrighted works

This comment and request for exemption is not premised upon a general lack of availability of works, but rather on the unavailability of works stored on certain TPM-encumbered formats for specific educational uses.

(ii) the availability for use of works for nonprofit archival, preservation, and educational purposes

Today, MOOCs are available across a wide variety of disciplines and are as varied in subject matter as courses in the traditional college and university setting. Most MOOCs are taught by the same college and university professors that teach those courses at institutions across the country. As a result, they use the same resources they use for their traditional courses to create MOOCs. The audiovisual works contained in their respective libraries are selected on the basis of their educational value and by their relevance to courses in the curriculum. College and university libraries across the country have developed extensive collections of audiovisual works in DVD and Blu-ray formats, as well as subscribing to TPM-protected online distribution services. However, because of the DMCA's ban on the circumvention of TPMs, the works are not "available" for the uses described in this proposed class.

(iii) the impact that the prohibition on the circumvention of TPMs applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research

As discussed previously in this Comment, the DMCA's prohibition on circumvention of TPMs severely limits professors and students' ability to participate in MOOCs.[50] Without an exemption, issues of time, quality, and a lack of available alternatives will continue to inhibit the production of and participation in MOOCs. In fact, the DMCA may slow the growth of MOOCs as an educational medium. For MOOCs to fulfill their promise to make elite education available to anyone with access to the Internet, an exemption must be granted to provide faculty and students participating in MOOCs with the same access to audiovisual materials as their counterparts in the physical classroom.

(iv) the effect of circumvention of TPMs on the market for or value of copyrighted works

Should this petition be granted, the use of circumvention would be limited to minimize any potential effects on the market for or value of copyrighted works. The proposed uses discussed in this exemption are educational in nature and would otherwise be considered fair use. Constraints on time mean that lecturers and professors developing MOOCs will not take for use more of an audiovisual work than is necessary. The content being used in MOOCs is limited, and often the accompanying message is transformative in nature. Furthermore, because so many professors producing MOOCs are using resources at their home institution, the market for audiovisual works acquired by libraries may actually be diminished should an exemption not be granted.

[50] *See supra* Part V.

Conclusion

For the foregoing reasons, we respectfully seek the following:

- An exemption for all audiovisual works embodied in physical media (such as DVDs and Blu-Ray Discs) or obtained online (such as through online distribution services and streaming media) that are lawfully made and acquired and that are protected by various technological protection measures, where the circumvention is accomplished by students and faculty participating in Massive Open Online Courses (MOOCs) for the purpose of criticism or comment.

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