



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

[ ] Check here if multimedia evidence is being provided in connection with this comment.

### ITEM A. COMMENTER INFORMATION

This Comment is submitted on behalf of Peter Decherney, Professor of Cinema and Media Studies and English, University of Pennsylvania; Sarah Banet-Weiser, Ph.D., Professor and Dean, Annenberg School for Communication, University of Pennsylvania; Nate Harrison, Ph.D., Dean of Academic Affairs and Professor of the Practice, Media Arts, School of the Museum of Fine Arts at Tufts University; Lauren van Haaften-Schick, Ph.D. Student in History of Art, Department of History of Art and Visual Studies, Cornell University; Shiv Gaglani, Ed Tech Entrepreneur and Medical Student; and the Society for Cinema and Media Studies (SCMS) hereinafter known as “Joint Educators.”

#### *Represented by:*

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### ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 2: Audiovisual Works— Online Learning

### ITEM C. OVERVIEW

Under 17 U.S.C. § 1201, the Joint Educators propose to add an exemption to allow educators and preparers of online learning materials offered by qualified educational entities to use short, high-quality excerpts of motion pictures and television shows. This exemption advances educational purposes because these excerpts will contribute to students’ learning through criticism, comment, illustration, and explanation. The Joint Educators’ proposed exemption is analogous to existing 1201 exemptions in its educational goals, use, and TPMs employed, but this separate class of innovative, nontraditional educational entities, specifically for-profit, nonaccredited learning programs, is distinct in the educators and students it represents. Currently, Massive Open Online Courses (“MOOCs”), K-12 schools, and universities have an exemption to use short, high-quality motion picture excerpts to teach. The utilization of the

**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 website 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.

audiovisual clips by these exempted entities serves as concrete evidence that shows how other legitimate educational entities could thrive in a similar manner.

In the Eighth Triennial Rulemaking, the Register found that the Joint Educators' inclusion of these online learning platforms in their proposed exemption "lack[ed] support to expand its existing exemption to for-profit and/or unaccredited educational companies or organizations," because "it would seemingly encompass any online video that could be characterized as an educational experience."<sup>1</sup> For this reason, the Register found the balancing of factors one and four slightly tipping against fair use. However, the Register's analysis misconstrued the proposed exemption's educational uses. The Joint Educators hope to clarify that the proposed exemption should only apply to "educational entities that employ educators or demonstrate that they themselves are educators that provide or develop content" regardless of whether they are accredited or of a for-profit status, and this limitation is in accordance with the guidelines suggested by the National Telecommunications and Information Administration (NTIA) in its letter supporting the Joint Educators' proposed exemption in the previous rulemaking.<sup>2</sup> As detailed more below, the NTIA identified clear requirements for the types of qualified educational entities who would be eligible to use the proposed exemption. The Joint Educators believe the inclusion of these additional safeguards will ensure that the uses requested are truly for educational criticism, comment, illustration, and explanation by qualified online providers and will easily qualify as fair use under the four factors of Section 107 of the Copyright Act. The educational entities will also limit these online learning materials, to the extent technologically feasible, to registered learners of the online learning platform, institute copyright policies, and provide copyright information to educators and preparers of online learning materials, learners, and relevant staff members. These additional safeguards will allow for the extension of this vital exemption to a broader scope of legitimate educational entities and help to level the education playing field.<sup>3</sup>

The educational ecosystem has also continued to change dramatically in the past three years as the digital migration has taken firm hold in this field now. Learning plans offered by these nontraditional online educational entities are increasingly sought after by students of all ages and backgrounds. The pandemic accelerated a trend in online learning that was already present. Due to their flexible, personalized, practical skill approaches, students of all backgrounds and ages are seeking an education from these nontraditional educational entities. Further, employers now recognize the productive value of these certificate programs, bootcamps, and professional development courses. Nontraditional educational entity registered students include adults continuing their education to reskill, K-12 children supplementing their learning or being homeschooled, and young adults looking to receive a much more affordable and job-ready education. In addition to the increasing prevalence, there are proven psychological benefits from incorporating motion picture excerpts into learning plans. High-quality audiovisual clips can increase learning retention and student engagement by providing compelling visual stimulus. Every year that students are denied these benefits, they are adversely impacted by this restriction.

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<sup>1</sup> Section 1201 Rulemaking: Eight Triennial Proceeding, Recommendation of the Register of Copyrights, 59 (2021).

<sup>2</sup> *Exemptions to Permit Circumvention of Access Controls on Copyrighted Works*, NTIA, 10, 11 (October 1, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-10-28/pdf/2021-23311.pdf>.

<sup>3</sup> *Id.*

With the noninfringing nature and meeting of the 1201 statutory factors by the Joint Educators' proposed exemption, the U.S. Copyright Office possesses the authority to address the adverse effects impacting qualified but nontraditional educational entities in their ability to make noninfringing uses of short excerpts of motion pictures for educational purposes. The Copyright Office has an important role to play in the ongoing federal and state effort to advance educational and digital equity for the students and educators currently left behind with restricted access to high-quality pedagogy and educational materials. Efforts to advance equity are being carried out across administrative agencies and branches of government, and the Copyright Office can support these efforts with this exemption. The Joint Educators urge the Register to implement the proposed exemption for qualified nontraditional educational entities regardless of their status as a for-profit or their educational accreditation to use short, high-quality excerpts of motion pictures for the transformative educational purpose of criticism, comment, illustration, and explanation.

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

There are numerous technological protection measures (TPMs) that control access to copyrighted audiovisual works. As described in the Joint Educators' comments in the previous rulemakings, the TPMs employed vary based on whether they are protecting copyrighted content on digital video discs (DVDs), Blu-Ray Discs, or streaming platforms.<sup>4</sup> With current multimedia trends, audiovisual works are now most viewed through video streaming platforms, such as Netflix, Hulu, Amazon Prime Video, etc.<sup>5</sup>

DVDs may employ Analog Protection System (APS) scrambling, Content Scramble System (CSS) encryption, or disc corruption. Of course, APS scrambling has become irrelevant with the move towards digital rather than analog videos.<sup>6</sup> In terms of CSS encryption, an authentication process occurs between the DVD drive and the DVD player software where the player uses a key to decrypt the video data.<sup>7</sup> Meanwhile, disc corruption installs a scheme where portions of DVD discs are mangled in a manner that renders them unreadable, and copying the disc sequentially causes corrupted areas to skip and get stuck.<sup>8</sup>

Blu-Ray discs use Advanced Access Content System (AACS) encryption as a first level TPM. The AACS system uses keys that can be revoked if it is determined they are compromised.<sup>9</sup> As a second level of protection, BD-Plus or Cinavia is used. BD-Plus further mangles stream files with instructions on how to repair the mangled files on the disc.<sup>10</sup> Meanwhile, Cinavia protection involves steganography or watermarking where a special encrypted data signal is placed within an audio channel in an audio track, which the video player

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<sup>4</sup> *Learning Center, Miraizon*, [http://www.miraizon.com/support/info\\_copyprotection.html](http://www.miraizon.com/support/info_copyprotection.html) (last visited Nov. 28, 2023).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

detects to verify whether playback should be allowed.<sup>11</sup> Generally, online streaming platforms use protected streaming as a TPM. This measure uses encryption to protect audiovisual works.

Concerning the relevant methods of circumvention to gain access to a copyrighted work, technical programs are widely available online to disable TPMs. These decryption programs rewrite the protected work in a manner that preserves the video data, frame, and resolution. The Joint Educators' proposed exemption acknowledges that TPMs are necessary to protect copyrighted audiovisual works. The Joint Educators' petition proposed employing the same TPM policy granted in the exemption for MOOCs to use motion pictures for educational uses.<sup>12</sup>

The educational entity will limit these online learning materials, to the extent technologically feasible, to registered learners of their online learning platform, institute copyright policies, and provide copyright information to educators and preparers of online learning materials, learners, and relevant staff members, and to the extent technologically feasible, will work to reasonably prevent unauthorized further dissemination of the materials in accessible form to others.

Ultimately, this TPM policy will effectively limit illegal uses of copyrighted audiovisual works as it has done with current exemptions.

#### **ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES**

#### **THE PROPOSED EXEMPTION WILL ENSURE THAT NO EDUCATORS OR STUDENTS ARE LEFT BEHIND**

As stated in their petition,<sup>13</sup> the Joint Educators propose to add an exemption under 17 U.S.C. § 1201 that would allow all online educators and preparers of online learning materials offered by qualified educational entities to use short excerpts of motion pictures, which includes television shows and videos. The purpose of this exemption would be for criticism, comment, illustration, and explanation in offerings to registered students of online learning platforms when the use of the excerpt constitutes transformative fair use and contributes significantly to learning. With the inclusion of movies and television shows in learning materials, this proposed class of audiovisual works for online learning includes works protected by copyright.

This proposed exemption builds off existing 1201 educational exemptions in its goals, yet the separate proposed class is distinct in the educators and students it represents. Currently, within the realm of motion picture copyright exemptions for educational purposes, there is an exemption for college and university faculty, students, or employees acting at the direction of faculty, or K-12 educators and students to use motion pictures for educational purposes.<sup>9</sup> Additionally, there is an exemption for faculty and employees acting at the direction of faculty in MOOCs to use motion pictures for educational uses.<sup>10</sup> The Joint Educators propose to expand motion pictures used for educational purposes in online learning beyond the non-profit or accredited educational institutions to include online learning platforms offered by qualified

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<sup>11</sup> *Id.*

<sup>12</sup> 37 CFR 201.40(b)(1)(ii)(B)).

<sup>13</sup> Joint Educators, *Petition for New Exemption Under 17 U.S.C. § 1201 9<sup>th</sup> Triennial Rulemaking* (Aug. 25, 2023), <https://www.copyright.gov/1201/2024/petitions/proposed/New-Pet-Joint-Educators.pdf>.

educational entities that offer supplemental education, upskilling, retraining, recharging, and lifelong learning regardless of their status as a for-profit or their educational accreditation.

The proposed exemption has the very same goal as the renewed educational exemptions in providing students access to high-quality audiovisual learning materials. However, the DMCA's statutory prohibition on circumvention still stands in the way of achieving complete educational and digital equity across all educational entities. The proposed exemption can achieve this universal goal in promoting equal access and high-quality educational materials across the United States and close the gap for the educators and students currently left behind. The Joint Educators' proposal would also promote innovation in the nontraditional online educational field allowing qualified educational entities, such as 2U, LinkedIn Learning, Skillshare, Udemy, etc., to utilize motion picture excerpts for legitimate educational purposes. These online education providers design various programs to teach students of all ages and educational backgrounds across a wide array of subject areas and skillsets. The programs include learning plans, which may be formatted as certificate programs, bootcamps, or training and development courses.

Participation in a certificate program, accredited or nonaccredited, helps students develop or strengthen career skills in a specific subject.<sup>14</sup> Certificate programs cover countless skills across subject areas such as business, marketing, language learning, film, data science, etc. Regardless of whether students possess prior education, they will benefit from a certificate program because they are taught technical skills that prepare them for practical skills at either a beginner or advanced level.<sup>15</sup> A certificate notation on a resume signals to employers that the job candidate has the on-demand, applicable skills for a role. Meanwhile, bootcamps teach students skills at a fast pace, and they are typically aimed at teaching computing and other technical skills. Bootcamps tend to focus on a single computer area like cybersecurity or a coding language like Python.<sup>16</sup> Like certificate programs, bootcamps teach students job-related skills through practical learning. Due to the confidence in the relevant, high-demand skills taught to students, bootcamps often offer a tuition-back guarantee for students that do not land a job after the program's completion.<sup>17</sup> Beyond certificate programs and bootcamps, there are general learning and development courses, which are sometimes called microdegrees or nanodegrees. These courses provide educational videos for students seeking personal and professional growth and for businesses looking to create custom online training courses to upskill their employees. These courses support and advance students' careers as continuous professional development is now desired by employers in the modern workforce.

The nontraditional educational entities described above are adversely affected in their ability to make noninfringing uses of short excerpts of motion pictures, yet these entities account for a crucial and growing part of the education sector. Students' driving motive to acquire an education is to increase their prospects for securing and succeeding at a job, and these

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<sup>14</sup> *What Are Certificate Programs? A 2023 Guide*, Coursera (Nov. 9, 2023), <https://www.coursera.org/articles/certificate-programs>.

<sup>15</sup> *Id.*

<sup>16</sup> Michelle Jones et al., *What Is A Bootcamp? Getting Into Tech Without A Degree*, FORBES (Aug. 15, 2023, 11:57 AM), <https://www.forbes.com/advisor/education/what-is-a-bootcamp/>.

<sup>17</sup> *Id.*

nontraditional learning paths appeal to students and employers because they provide practical skills.<sup>18</sup> Major companies like Accenture, IBM, Google, and Bank of America are not requiring college degrees for numerous entry-level jobs to remove a paper ceiling, which will build a diverse workforce and address talent gaps that are plaguing industries.<sup>19</sup> The role that this class of online educators and preparers of online learning materials plays in the education sector is meaningful, and the proposed exemption would ensure that these nontraditional educational entities are no longer adversely affected.

## **EDUCATIONAL EQUITY IS HINDERED BY THE STATUTORY PROHIBITION ON CIRCUMVENTING ACCESS CONTROLS**

Beyond the meaningful role that these innovative, nontraditional educational entities play in providing students with practical skills, the demand for the online learning opportunities described above has skyrocketed. The COVID-19 pandemic drove educators and students to online learning; although, the pandemic simply accelerated a trend that was already there. In 2012, 25% of United States college students took at least one distance learning course.<sup>20</sup> This number rose to 36% by 2019 according to NCES.<sup>21</sup> The trend in online education is predicted to continue growing. For instance, 2U has expanded to 76 million people globally in its learner network.<sup>22</sup> Also, the eighth annual Changing Landscape of Online Education (CHLOE) report indicates an increased demand for online and hybrid learning along with a decrease in demand for face-to-face courses.<sup>23</sup> With more students increasingly turning to online learning, it is time to treat all educational entities equally.

In recognizing the need for the Joint Educator's proposed exemption, the students of these educational entities are the central consideration. The students suffer consequences when nontraditional educational entities are adversely affected in their ability to make noninfringing uses of high-quality motion pictures excerpts. Educational innovations enable students of any age, educational level, and circumstance to learn. These are the same students who would otherwise not be able to receive a degree from a traditional institution, but are empowered by certificate programs, bootcamps, or training and development courses.

In addition to the practical skills that nontraditional educational entities teach, numerous characteristics of these learning programs help to expand education to underserved students. First, the cost of these online learning programs is significantly less expensive than a traditional

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<sup>18</sup> Michael T. Nietzel, *New Coursera Survey: Industry Certificates Hold Strong Appeal For College Students And Employers*, FORBES (Sept. 27, 2022, 7:44 AM), <https://www.forbes.com/sites/michaelnietzel/2022/09/27/new-coursera-survey-industry-certificates-hold-strong-appeal-for-college-students-and-employers/?sh=7d71db6f2e29>.

<sup>19</sup> *Id.*

<sup>20</sup> Ilana Hamilton & Veronica Beagle, *By The Numbers: The Rise Of Online Learning In The U.S.*, FORBES (May 24, 2023, 1:31 PM), <https://www.forbes.com/advisor/education/student-resources/online-learning-stats/>.

<sup>21</sup> *Id.*

<sup>22</sup> *2U Releases 2022 Transparency & Outcomes Report*, 2U (July 27, 2023), <https://2u.com/latest/2022-transparency-outcomes-report/>.

<sup>23</sup> Quality Matters & Eduventures Research, *CHLOE 8: Student Demand Moves Higher Ed Toward a Multi-Modal Future* (Aug. 15, 2023), <https://www.qualitymatters.org/qa-resources/resource-center/articles-resources/CHLOE-8-report-2023>.



degree. Certificate programs can cost anywhere from \$50 a month to \$6,000 for the program.<sup>24</sup> In comparison, in 2023-2024, the average estimated budgets (tuition and fees, housing and food, and allowances for books and supplies, transportation and other personal expenses) for full-time undergraduate students range from \$19,860 for public two-year in-district students and \$28,840 for public four-year in-state students to \$46,730 for public four-year out-of-state students and \$60,420 for private nonprofit four-year students.<sup>25</sup> Another consideration for traditional degree programs at colleges and universities is that it is difficult for students who must work a full-time job to attend. The nontraditional educational entities' learning programs are typically much more flexible in offering a variety of paces and asynchronous learning options. Furthermore, these programs provide flexibility to learn at your own pace and in just a few weeks or months rather than years.<sup>26</sup> The cost, flexibility, time, and practical skills taught through these learning programs enable marginalized groups to seek an education and career advancement regardless of their location, employment, education, and income status.

As these learning programs become a more viable and increasingly sought replacement for college and university degrees,<sup>27</sup> young adults can consider nontraditional education routes. Students considering a pivot to a different career or advancement in their current role can greatly benefit from what these online educational entities have to offer. For example, Skillshare, a learning community for creators, found that 60% of individuals identifying as creative professionals are looking to switch companies or careers in light of the current economy.<sup>28</sup> Professionals today must continue to learn new skills for both job retention and career advancement. These nontraditional educational entities are designed to enable the life-long learning approach, which is already required in certain professions like law and medicine and are becoming increasingly necessary in other technological sectors as well.<sup>29</sup> Skill sets for jobs have changed approximately 25% since 2017, which is expected to double by 2027, and 89% of learning and development proponents believe proactively building skills will support the navigation of this work evolution.<sup>30</sup> With the new wave of automation and generative artificial intelligence, jobs are threatened as skill gaps widen and reskilling is made imperative.<sup>31</sup> Life-long learning and reskilling are now more necessary than ever before, and these nontraditional educational entities are a large part of the solution.

In consideration of automation and artificial intelligence, nontraditional educational entities can improve learning capabilities for students by personalizing learning experiences.

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<sup>24</sup> *What Are Certificate Programs? A 2023 Guide*, Coursera (Nov. 9, 2023), <https://www.coursera.org/articles/certificate-programs>.

<sup>25</sup> *Trends in College Pricing and Student Aid 2023*, CollegeBoard (Nov. 2023), <https://research.collegeboard.org/media/pdf/Trends%20Report%202023%20Updated.pdf>.

<sup>26</sup> See *What Are Certificate Programs? A 2023 Guide*, *supra* note 24.

<sup>27</sup> See Nietzel, *supra* note 18.

<sup>28</sup> 2023 *Trendshare*, Skillshare (2023), <https://www.skillshare.com/blog/wp-content/uploads/2023/02/Skillshare-Trendshare-Report-2023.pdf>.

<sup>29</sup> Bernard Marr, *The Top 5 Education Trends In 2023*, FORBES (Feb. 17, 2023, 2:26 AM), <https://www.forbes.com/sites/bernardmarr/2023/02/17/the-top-5-education-trends-in-2023/?sh=6ce19da64d39>.

<sup>30</sup> 2023 *Workplace Learning Report*, LinkedIn Learning (2023), <https://learning.linkedin.com/content/dam/me/learning/en-us/pdfs/workplace-learning-report/LinkedIn-Learning-Workplace-Learning-Report-2023-EN.pdf>.

<sup>31</sup> Jorge Tamayo et al., *Reskilling in the Age of AI*, Harvard Business Review (Sept.-Oct. 2023), <https://hbr.org/2023/09/reskilling-in-the-age-of-ai>.

Through data-driven insights and algorithms, online educational entities can adapt to each learner's pace, preferences, and strengths to enhance engagement and boost retention rates by catering to individual needs.<sup>32</sup> This customization helps break down barriers for any student in pursuit of an education.

Primary and secondary students also utilize these online educational entities. Students use these learning programs alongside their college or high school curriculum.<sup>33</sup> With the flexibility, interactive nature, and personalization of these nontraditional educational entities, primary and secondary students can benefit from these entities in ways that they cannot in traditional classrooms. Examples of these innovative educational entities that are geared towards pre-kindergarten, primary, secondary, and homeschooling students include ABCmouse and Create & Learn in addition to the platforms previously mentioned. Additionally, ensuring that young learners have equal access to high-quality audiovisual learning materials has never been more necessary in light of the national teacher crisis. Administrators say that to deal with the staffing shortfalls, they are relying again this year on long-term substitute teachers, hiring emergency certified teachers with no teaching qualifications or experience, bringing in teachers from overseas, and increasing class sizes.<sup>34</sup> With the increase in edtech, nontraditional educational entities are one of the solutions to this crisis as students, parents, and schools turn to these platforms.

Recognizing the value of what these platforms have to offer, colleges and universities have already partnered with these nontraditional educational entities. Through a partnership, 2U will launch 50 new degree programs with six universities.<sup>35</sup> Traditional higher education institutions and their career services departments are recognizing and promoting the value of these innovative educational entities as well. The educational landscape is evolving. As innovation continues, these nontraditional educational entities are becoming more prominent learning institutions. Education is a right that students of all ages and backgrounds should have access to. The DMCA's statutory prohibition on circumventing access controls adversely impacts these educational entities uses of short excerpts of motion pictures to provide access to quality educational materials in achievement of equity across the United States education sector.

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<sup>32</sup> Aaleen F, *Revolutionizing Education: The Power of EdTech and Online Learning Platforms*, MEDIUM (Aug. 11, 2023), <https://medium.com/@aaleen.f01/revolutionizing-education-the-power-of-edtech-and-online-learning-platforms-6e9e6fc55f82>.

<sup>33</sup> Cory Stieg, *7 Ways Students Use Codecademy to Get Ahead in Class (& Life)*, Codecademy (Sept. 5, 2023), <https://www.codecademy.com/resources/blog/learn-to-code-on-your-own-in-college/#:~:text=Lots%20of%20our%20learners%20use,and%20start%20gaining%20practical%20experience>. See also *High School Camps Powered by 2U*, 2U, <https://bootcamps.2u.com/highschool/> (last visited Nov. 19, 2023).

<sup>34</sup> Shannon Pettypiece, *From 'crisis' to 'catastrophe,' schools scramble once again to find teachers*, NBC News (Aug. 13, 2023, 7:00 AM), <https://www.nbcnews.com/politics/economics/crisis-catastrophe-schools-scramble-find-teachers-rcna98083>.

<sup>35</sup> *2U Signs 50 New Online Degrees with Six University Partners*, 2U (Nov. 10, 2023), <https://investor.2u.com/news-and-events/press-releases/news-details/2023/2U-Signs-50-New-Online-Degrees-with-Six-University-Partners/default.aspx>.



## THE QUALITY OF EDUCATIONAL MATERIALS IS HINDERED BY THE STATUTORY PROHIBITION ON CIRCUMVENTING ACCESS CONTROLS

The Joint Educators' proposed exemption directly impacts the quality of educational materials provided by the nontraditional educational entities. Most importantly, none of the benefits of using motion picture excerpts can be reaped if they are not of the highest quality. Screen capture is a technology that enables encrypted works to be used without a license. However, screen capture has a reduced image resolution, jumbled audio synchronization, and frame incoherence. Screen capture is not a suitable alternative for high-quality motion picture excerpts due to the degraded picture quality, distorted image and audio, and dropped frames. Providing screen capture to nontraditional educational entities would widen the learning gap amongst students and further exacerbate inequalities. Opponents have previously argued that screen capture is an adequate alternative to circumvention since high-quality images are not necessary for analysis in learning programs. This assumption fails to register the dramatic shift in educational practice that has taken place since the advent of the Internet.<sup>36</sup> Low quality screen captures defeat the purpose of the Joint Educators' proposed exemption entirely. Learners are accustomed to high video quality in their lives outside of education with the prevalence of streaming services and social media. The connections, analysis, and comprehension of students is decreased with the poor quality of screen captures. High-quality motion picture excerpts are necessary to improve students' ability to learn across disciplines, as described below.

First, high-quality motion picture excerpts are necessary parts of curricula given the increasingly digital society students now face. Being literate in our society requires that students can read and analyze audiovisual media.<sup>37</sup> Regardless of the context, exposure to videos in learning plans ensures students can digest audiovisual clips, which play a crucial role in modern media. The benefits of using high-quality motion picture excerpts to teach can enhance learning and retention while providing students with necessary perspectives and skills to succeed in both their professional and personal lives.

Second, high-quality motion picture excerpts promote student engagement.<sup>38</sup> Incorporating a television show or motion picture into a lesson quickly peaks students' interest, especially when pulled from popular media. Educational materials that are both engaging and interesting to students grab their attention and increase their willingness to learn. Watching these clips can improve retention according to psychology. For instance, "two presentations of the same information should lead to better retention than a single presentation."<sup>39</sup> This variability in the information encoded through multiple modalities, such as viewing a video clip and reading a text, should enhance retention.<sup>40</sup> Additionally, visual depiction of learning material can facilitate

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<sup>36</sup> Lyndon Seitz, *How Did the Internet Change the Way We Learn?*, Broadband Search (Dec. 4, 2023), <https://www.broadbandsearch.net/blog/how-internet-changed-learning-education>.

<sup>37</sup> Jon Goodspeed, *Support students' learning, and find the best video streaming sites for schools and classrooms*, Common Sense Media (Nov. 10, 2022), <https://www.common sense.org/education/articles/teachers-essential-guide-to-showing-movies-and-videos-in-the-classroom>.

<sup>38</sup> *Id.*

<sup>39</sup> Andrew C. Butler et al., *Using Popular Films to Enhance Classroom Learning: The Good, the Bad, and the Interesting*, *Psychological Science* 20(9), p. 1162 (2009), [http://psychnet.wustl.edu/memory/wp-content/uploads/2018/04/Butler-et-al-2009\\_PsychSci.pdf](http://psychnet.wustl.edu/memory/wp-content/uploads/2018/04/Butler-et-al-2009_PsychSci.pdf).

<sup>40</sup> *Id.*

dual coding, which is the psychological concept that visual information in addition to verbal information leads to better retention.<sup>41</sup>

Evidence supports the benefits of using high-quality motion picture excerpts to teach. Two experiments showed that when the information depicted in a film was consistent with the information read within text, “watching the film clip increased correct recall by about 50% relative to reading the text alone.”<sup>42</sup> Considering that repeatedly reading information-dense passages provides limited retention improvement after a single reading, the use of high-quality films in this study showed increased learning likely due to encoding variability and dual coding.<sup>43</sup> There can be concerns as to whether the film is historically accurate, especially when used in history lessons; however, this study overall demonstrated that popular films could increase learning and interest, and educators can mitigate effects from misinformation present in films when showing them in the classroom.<sup>44</sup>

High-quality audiovisual clips can also be used to present perspectives that would be difficult to convey through a different medium. Films can present multiple perspectives to students and enable them to gain an understanding of and empathize with the experiences of individuals and communities far removed from their reality.<sup>45</sup> Students will be able to make much better connections to individuals depicted on a screen rather than through text. When teaching human rights, film depicts experiences of survivors and underscores the human capacity for resilience, which can have a memorable impact on students where other teaching mechanisms would struggle to do so.<sup>46</sup> High-quality audiovisual clips can provide a first-hand depiction of an experience rather than reading a second-hand account through text. Movies, television shows, and videos can facilitate the sharing of diverse stories and highlight experiences and perspective of individuals from under-represented groups.<sup>47</sup> Ultimately, including high-quality television shows and film clips will further equity initiatives.

The benefits of high-quality motion picture clips extend across subject areas. Petitioner Peter Decherney has long used short motion picture excerpts to facilitate the comment and criticism of films as these clips are a crucial component of the multimedia criticism field’s existence. Beyond multimedia interpretation and analysis, the audiovisual clips can be used in history and human rights courses as explained above. Additionally, motion picture excerpts are essential in language learning programs. A study indicated that movies are a valuable source of input for English language learning as watching improves English oral skills and vocabulary acquisition.<sup>48</sup> Learners imitated native speakers in movies and learned how to pronounce English

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1166.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 1167.

<sup>45</sup> Noam Schimmel, *Using films to encourage reflection and critical thinking in your teaching*, Time Higher Education (Oct. 15, 2021), <https://www.timeshighereducation.com/campus/using-films-encourage-reflection-and-critical-thinking-your-teaching>.

<sup>46</sup> *Id.*

<sup>47</sup> Goodspeed, *supra* note 37.

<sup>48</sup> Norwati Roslim et al., *Exploring Movies for Language Teaching and Learning at the Tertiary Level*, Asian Journal of University Education 17(3), p. 278-79 (July 2021), <https://files.eric.ed.gov/fulltext/EJ1309430.pdf>.

words, and most importantly, the students enjoyed using movies to learn English and felt motivated.<sup>49</sup>

The Joint Educators' exemption can improve language learning clips with high-quality motion picture excerpts. Udemy, a for-profit, nonaccredited online educational entity, currently has a lesson entitled "Learn English with Movie Clips," which is intended to help students learn English from the real-world context of a movie scene.<sup>50</sup> Although, when watching a preview of the course, only a still from the movie is provided and then the script of a scene is read rather than a motion picture excerpt being played.<sup>51</sup> Providing only a screenshot of the movie clearly limits the effectiveness of the course and adversely impacts students trying to learn English pronunciation, accents, and gestures within the culture. A high-quality audiovisual clip could achieve the intended objective of this course since students could hear and watch a conversation carried out in English and additionally learn from the actors' body language.

The extent to which movies can be utilized to learn is limitless. In another example, high-quality motion picture excerpts can also be used to teach the art of storytelling as demonstrated by the course entitled "Storytelling" that is facilitated by the MOOC Khan Academy.<sup>52</sup> In Unit 2, high-quality motion picture excerpts are utilized to highlight the importance of storytelling as explained by the directors, storyboard artists, and animators at Pixar.<sup>53</sup> This unit "Pixar in a Box: the art of storytelling" includes clips from well-known Pixar movies as the practitioners explain how, for instance, in the introduction, to use personal experiences to make a story come to life.<sup>54</sup>

Beyond these important subject matters, motion picture excerpts can be utilized to learn about psychology. For instance, the children's advocacy group Common Sense provides a lesson plan for teachers looking to explain social psychology concepts to students.<sup>55</sup> Clips from the miniseries *Maid* can be used to teach about the United States social welfare system. Meanwhile, clips from the popular television show *Succession* can be used to teach about corporate compliance. Law school classes often utilize the proverbial expert testimony scene from *My Cousin Vinny* to teach about the rules of evidence. These are only a few examples in which high-quality motion picture excerpts can contribute to students' learning as the list is endless.

As demonstrated below, MOOCs, K-12 schools, and universities possess a fair use exemption to use these copyrighted motion picture clips for educational purposes. The Joint Educators offer these covered entities' uses as real-world examples. For-profit, nonaccredited entities' use of such motion picture excerpts in learning programs would be used in the same manner as MOOCs, K-12 schools, and universities in advancing student learning. Most of the

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<sup>49</sup> *Id.*

<sup>50</sup> See Zahed Besharati, *Learn English with Movie Clips*, Udemy (Nov. 2023), <https://www.udemy.com/course/learn-english-with-movie-clips/>.

<sup>51</sup> *Id.*

<sup>52</sup> *Storytelling*, Khan Academy, <https://www.khanacademy.org/humanities/hass-storytelling/storytelling-pixar-in-a-box/ah-piab-we-are-all-storytellers/v/storytelling-introb> (last visited Dec. 12, 2023).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> See Christine Elgersma, *Inside Out and SEL: A Movie Guide and Lesson Plan for Your Classroom*, Common Sense (July 7, 2023), <https://www.commonsense.org/education/articles/inside-out-and-sel-a-movie-guide-and-lesson-plan-for-your-classroom>.

uses by these remaining educational entities can only be hypothetical as copyright laws currently stand in the way of these educators and students.

The use of copyrighted motion picture excerpts by these educational entities is currently illegal. Those who run these educational entities must grapple with the adversity they already face in light of their wages, limited time, and difficult jobs, especially in the face of the national teacher shortage, to also overcome the complex process of getting copyright permission or a license to use the audiovisual clips. Educators would have to navigate the lengthy legal process to identify the permission they need, identify and locate the copyright owner, and then negotiate permissions to license.<sup>56</sup> This is not a feasible pursuit for teachers creating a learning plan to follow. The statutory prohibition on circumventing access controls clearly hinders the quality of educational materials teachers can present to students by putting unnecessary blocks in front of nontraditional educators.

### **THE USES BY QUALIFIED EDUCATIONAL ENTITIES ARE NONINFRINGING UNDER 17 U.S.C. § 107**

The Joint Educator’s proposed exemption is consistent with the requirements of fair use under the Copyright Act. Section 107 permits the use of copyrighted work “for purposes such as criticism, comment, news reporting, teaching, scholarship, or research.”<sup>57</sup> The Librarian upheld the Joint Educator’s two renewals for MOOCs, K-12 schools, and colleges and universities in the Eighth Triennial Rulemaking, noting that the use of motion picture excerpts falls within the bounds of fair use.<sup>58</sup> Also, the current Notice of Proposed Rulemaking (NPRM) acknowledged that both of these exemptions still fulfill fair use requirements with the Copyright Office’s recommendation of renewal.<sup>59</sup> These renewals have been repeatedly determined to be noninfringing.

Both of these existing exemptions have allowed non-profit or accredited educational institutions to expand learning boundaries by incorporating short excerpts of motion pictures into course curriculum. The Joint Educators seek an analogous allowance for qualified but nontraditional educational entities regardless of their status as a for-profit or their educational accreditation. These nontraditional educational entities currently would need to pay licensing fees to utilize copyrighted motion picture excerpts in learning plans. The current market for short clip for educational purposes seems to still be essentially nonexistent if an educator does not want to use the entire film. More importantly, these educators could currently face criminal sanctions if they implement such material in their courses without permission even though it qualifies as fair use. All educational entities should possess an equal right to the fair use of short, high-quality excerpts of motion pictures, so all teachers can effectively educate students of all backgrounds and ages.

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<sup>56</sup> *How To Get Copyright Permission or a License?*, Copyright Alliance, <https://copyrightalliance.org/faqs/copyright-permission-or-license/> (last visited Nov. 28, 2023).

<sup>57</sup> 17 U.S.C. § 107.

<sup>58</sup> Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 86 Fed. Reg. 59,627, 59,529 (Oct. 28, 2021).

<sup>59</sup> Exemptions to Permit Circumvention of Access Controls on Copyrighted Works, 88 Fed. Reg. 72,013, 72,017 (Oct. 19, 2023) (to be codified at 37 C.F.R. pt. 201).

An examination of the four factors of fair use indicates that the educational uses of the Joint Educator’s proposed exemption are noninfringing fair uses. Under § 107 of the Copyright Act, courts evaluate four factors on a case-by-case basis to determine whether a use constitutes fair use: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>60</sup>

The first factor weighs in favor of a fair use finding. The proposed class of uses is strictly for educational purposes by qualified educational entities as suggested by the NTIA, which is one of the acceptable fair use examples listed in the preamble of § 107. Any use permitted under this exemption would be solely for the purpose of educating learners that fall outside the bounds of accredited, non-profit educational spaces. Rather than utilizing the copyrighted works for their original entertainment purpose, these educators use motion picture excerpts to teach students through tailored learning plans and discussions. In *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court ruled that the more transformative the use, the more likely a court is to find for fair use, regardless of commercial nature.<sup>61</sup> Educators regularly repurpose motion picture excerpts into educational tools in a fashion that is highly transformative.<sup>62</sup> Moreover, the collateral commercial benefit of some of these nontraditional educational entities covered by this proposed exemption does not create a bar to fair use as many of the activities covered in the preamble of § 107 have a for-profit basis.<sup>63</sup> The Register acknowledges that fair use is valid in commercial contexts if transformative.

The Register has expressed concern and denied the Joint Educators’ exemption in previous filings because it believes the exemption to be over-broad by including for-profit educators.<sup>64</sup> The commercial nature of any of these qualified for-profit educational entities does not undermine their legitimacy or their entitlement to fair use protections. The qualified educational entity will limit these only learning materials, to the extent technologically feasible, to registered learners of their online learning platform, institute copyright policies, and provide copyright information to educators and preparers of online learning materials, learners, and relevant staff members. Further, these entities will work to reasonably prevent unauthorized further dissemination of the materials in accessible forms to others.

Second, the nature of these copyrighted works lends themselves to fair use. Films and television shows are created for mass audiences’ entertainment both across the United States and abroad. The specific educational uses requested by the Joint Educators advance the goal of

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<sup>60</sup> 17 U.S.C. § 107.

<sup>61</sup> See generally *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994)

<sup>62</sup> *Id.* at 580 (stating that the key purpose of the first factor in a fair use assessment is to determine whether the new work merely “supersede[s] the objects” of the original creation, or instead adds something new, with a further purpose of different character).

<sup>63</sup> *Id.* at 569 (“The language of the statute makes clear that the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character.... If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities “are generally conducted for profit in this country.”).

<sup>64</sup> *Exemptions to Permit Circumvention of Access Controls on Copyrighted Works*, *supra* note 2.

promoting educational equity. These motion picture excerpts can be transformed to be an effective learning tool because the engaging and appealing nature of television and film can illustrate difficult concepts for students in ways that a slide deck, oral lecture, or textbook cannot. For example, watching clips of a nature documentary can provide the highest quality visual imagery for a biology course attempting to explain abstract concepts like animal evolution or photosynthesis. Transformative uses like this may seem inconsequential, but they are invaluable to students and educators.

The third statutory factor also weighs in favor of fair use. The Joint Educators only request an exemption for the nontraditional educational entities to incorporate short excerpts of motion pictures for educational purposes. These excerpts would be used for criticism, comment, illustration, and explanation in offerings to registered students of the nontraditional educational entities when the use of the excerpt would contribute significantly to learning. Any incorporation and use of the motion picture excerpts would be appropriately concise and limited to the extent necessary for the aforementioned purposes.

Finally, the last factor is most contentious for copyright owners but still weighs in favor of fair use. The Copyright Office has already acknowledged that the use of motion picture excerpts for educational purposes by K-12 schools, universities, and MOOCs has a minimal effect on the content market at best.<sup>65</sup> Also, the use of motion picture excerpts for educational purposes does not substitute for the entire work in the marketplace.<sup>66</sup> It is a stretch to argue that the use of very short motion picture excerpts by qualified educators in online learning for educational purposes usurps or even harms the market for films and television shows for entertainment.

In the Eighth Triennial Rulemaking, the NTIA communicated its view on each of the proposed exemptions from the DMCA’s prohibition against circumvention because the NTIA, as contemplated by Congress, can contribute its subject matter expertise.<sup>67</sup> Overall, the NTIA’s letter addresses the difficulty of creating precise language that protects content providers from being taken advantage of and supports the Copyright Office in doing so.<sup>68</sup> Regardless, the NTIA “believes the established safeguards articulated in the MOOC exemption provides good guidance.”<sup>69</sup> The Joint Educator’s proposed exemption limits the use of copyrighted clips to short excerpts of motion pictures for educational purposes, fulfilling the fourth fair use factor.

With the suggestion that these educational entities within the Joint Educators’ proposed exemption should be required to acquire an accreditation or become a nonprofit to take advantage of the exemption, the NTIA responded that “it would be sufficient to qualify for this exemption if the entity is registered with their state or local jurisdiction as an entity, for-profit or

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<sup>65</sup> Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 83 Fed. Reg. 54,010, 54,010 (Oct. 26, 2018).

<sup>66</sup> See *Campbell*, 510 U.S. at 591 (“cognizable market harm” is limited to “market substitution”).

<sup>67</sup> See *Exemptions to Permit Circumvention of Access Controls on Copyrighted Works*, *supra* note 2; See, e.g., H.R. Rep. No. 105–551, pt. 2, at 23 (July 22, 1998) (noting NTIA’s “expertise in the area of telecommunications and information services and technologies”); 144 Cong. Rec. E2136–02 (Oct. 12, 1998) (in which the Chair of the House Commerce Committee “consider[ed] it vital for the Register to consult closely” with NTIA).

<sup>68</sup> Letter from Evelyn L. Remaley, Assistant Sec’y of Com. for Comm’n and Info., NTIA, to Shira Perlmutter, Reg. of Copyrights and Dir. of U.S. Copyright Off., 11 (Oct. 1, 2021).

<sup>69</sup> *Id.*



not-for-profit, with an educational purpose or mission,” especially in consideration of the expanded opportunities for new small business and online learning opportunities.<sup>70</sup> In terms of technological protection methods articulated, the NTIA believed the safeguards articulated in the MOOC exemption provided good guidance as the “institutional and technological limitations continue to be appropriate to prevent infringing uses of the short clips created for this exemption.”<sup>71</sup> The Joint Educators endorses these requirements and clarifies that qualified educational entities should meet these standards.

With these educational registration and mission safeguards and all four statutory factors leaning towards a fair use finding, the use of short motion picture excerpts for educational purposes by these qualified educational entities for criticism and comments should be deemed a non-infringing transformative use.

### **THE PROPOSED EXEMPTION MEETS THE §1201(a)(1)(C) STATUTORY FACTORS**

The Joint Educator’s proposed exemption meets the statutory factors enumerated in §1201(a)(1)(C). Accordingly, and as requested, below is a general analysis of the statutory factors, which are more thoroughly explored and evidenced in the sections above.

#### **(i) The availability of the copyrighted works:**

The Joint Educator’s proposed exemption is not premised upon a general lack of availability of copyrighted works but rather the unavailability of works made inaccessible by TPMs for specific educational uses that would benefit students of nontraditional educational entities. As online learning grows, the digital content that can be used for effective learning measures also increases. For example, online learning platforms may use clips from the public domain, DVDs, and various streaming services. Despite current availability, the DMCA’s prohibition on circumventing TPMs on copyrighted works prevents nontraditional educational entities from equitable access to digital sources.

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

As discussed in detail above, the Joint Educators continue to petition for this exemption to promote students’ ability to learn and the continued innovation of education. The use of motion picture excerpts is a proven tool for educational success. Combining film clips with learning programs has positive impacts on learning progress. High-quality motion picture excerpts encourage student engagement with popular and relatable media content. More importantly, not all students learn the same way. Further, students are far more likely to learn best when they take in information through multiple modalities.<sup>72</sup> Using multiple modalities to explore a particular subject engages different senses, which can deepen students’ understanding. Presenting learning material through the various contexts of multiple modalities increases learning retention and recall. Additionally, allowing all educational entities to use decrypted film

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<sup>70</sup> *Exemptions to Permit Circumvention of Access Controls on Copyrighted Works*, *supra* note 2.

<sup>71</sup> *Id.* at 12.

<sup>72</sup> Youki Terada, *The Science of Drawing and Memory*, Edutopia (Mar. 14, 2019), <https://www.edutopia.org/article/science-drawing-and-memory>.

clips supports dual coding theories. Dual coding increases retention when a visual depiction of material taught is presented with verbal or text presentations.

**(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:**

As described in the sections above, the inability of the nontraditional educational entities to legally circumvent TPMs significantly undermines their ability to provide students with a quality educational experience. Adding motion picture excerpts to courses that currently do not have access without licensing agreements will promote engaging and effective learning experiences for students of all backgrounds and ages. A large portion of the population is turning toward online learning or using alternative learning methods to augment traditional education. These educators and students will always remain at a disadvantage if the Copyright Office does not install this exemption to close the gaps that exist in the American education system.

**(iv) the effect of circumvention of technological measures on the market for or value of copyrighted works:**

Allowing educators to circumvent technological measures to access film clips would be strictly limited to minimize any potential effect on the market or value of copyrighted works. The Joint Educator's proposed exemption requires that all educational entities requesting access to copyrighted material limit their sharing to registered learners, implement copyright policies, provide clear copyright information, and work to reasonably prevent unauthorized sharing of such materials. Also, the TPM policy instituted in the proposed exemption is the same policy as the MOOC exemption.

These motion picture excerpts are meant only for the limited purpose of educating students by emphasizing or illustrating a specific concept as part of an enhanced learning experience. Because the clips being used are short in duration and not meant to replace the experience of viewing the work in its entirety, the incorporated clips should actually encourage students to purchase streaming subscriptions or rent the larger works, which would undoubtedly increase the market value of the copyrighted works excerpted. Overall, the limitations imposed regarding an institution's accreditation or for-profit status harm presently excluded educators and students far more than they benefit copyright holders.

**(v) such other factors as the Librarian considers appropriate:**

The TEACH Act may be a relevant consideration for the Librarian, but it can ultimately be determined to not apply to the 1201 exemption pertaining to online education.

Copyright law has always sat at the intersection between creators and consumers, serving as the arbiter of how creative works should be distributed among the public. With this responsibility comes the need to adapt the law to new technological demands and methods of digital dissemination. The Technology, Education and Copyright Harmonization Act of 2002, colloquially known as the TEACH Act, was formulated to address the challenges that online educators faced when they sought to make copies of creative works to use in their lessons,

similar to the ways face-to-face teachers were doing with photos, tapes, and other recordings.<sup>73</sup> The TEACH Act was undoubtedly a remedy for a pressing problem, one that has only grown and changed as online learning has become commonplace in the United States. However, the dimensions of online learning have shifted dramatically, and students' needs have far outgrown the confines of the statute.

Further, the Act authorizes online educational entities to digitize works for online education, but only to the extent that they are allowed to use those works in Section 110(2) of the Copyright Act.<sup>74</sup> Thus, the material allowed by the Act remains significantly limited by antiquated restraints. The TEACH Act revolutionized the impact that copyrighted materials have on different classroom settings, but this occurred over twenty years ago and must be adapted to suit its initial purpose: equity among students and educators.

The NTIA noted that the TEACH Act is an important, but dated, resource for the Copyright Office to consider. The NTIA argued that the TEACH Act “can be instructive, but this exemption process is designed to be flexible and innovative,” and therefore does not need to work within the confines of a statute that “may be dated or irrelevant to the circumstances at hand.”<sup>75</sup> Further, the NTIA acknowledged the need for an exemption that is “appropriately inclusive” while affording copyright owners adequate protections against infringement for their works.<sup>76</sup> In an effort to strike an ideal balance, the Joint Educators endorse the NTIA recommendation that the exemption be limited to “educational entities that employ educators or demonstrate that they themselves are educators that provide or develop content whether or not they are accredited or are for-profit or not-for-profit.”<sup>77</sup>

The legislative history of the TEACH Act does more than suggest the Internet had already and would continue to revolutionize educational practices in years to come. In 2002, the internet was still in its relative infancy. In his report to the Committee on the Judiciary on the Teach Act, Senator Hatch and the Senate Judiciary Committee expressed a desire for the United States to remain competitive by expanding education beyond a traditional brick-and-mortar building and normalizing learning at all ages and for all trades.<sup>78</sup> If all educational entities do not have access to the same materials to make their lessons vibrant and effective, the most disadvantaged students will fall further behind than they already are. Granting the Joint Educator's exemption carries forth the spirit of the TEACH Act into the modern era of education.

Also, as detailed in the section below, the Copyright Office has a role to play in advancing educational and digital equity.

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<sup>73</sup> Technology, Education and Copyright Harmonization (“TEACH”) Act: Hearing Before the Senate Committee on the Judiciary, 107 Cong. 1 (2001) (Statement of Marybeth Peters).

<sup>74</sup> *Id.*

<sup>75</sup> *Exemptions to Permit Circumvention of Access Controls on Copyrighted Works*, *supra* note 2.

<sup>76</sup> *Id.* at 11.

<sup>77</sup> *Id.*

<sup>78</sup> (Committee on the Judiciary Report on Technology, Education and Copyright Harmonization Act of 2001) S. Rep. No. 107-31, at 4 (2001).

## THE PROPOSED EXEMPTION WILL PLAY A CRUCIAL ROLE IN BROADER GOVERNMENT EFFORTS TO ADVANCE DIGITAL EQUITY

The Copyright Office has a role to play in advancing the public interest through copyright law. In balancing the monetary interests of creators with the responsibility to enable adversely impacted users to make noninfringing uses of high-quality motion picture excerpts, it is essential to also consider the need for copyright law to keep up with technological advancements and educational needs. Most importantly, the adverse effects resulting from the prohibition on circumventing access controls for motion pictures hinder both educational equity and digital equity. The Joint Educators' proposed exemption builds off existing 1201 exemptions to allow nontraditional educational entities to use motion pictures excerpts for educational purposes.<sup>79</sup> Enabling the remaining qualified online educators and preparers of online learning materials to use short excerpts of motion pictures for educational purposes would ensure the goal of equity across educational and digital contexts is fully promoted. The actions and filings by other agencies and previous legislation can provide background information on the prevalence of equity considerations and the need to evolve with technological advancements.

The NTIA communicated its view on each of the proposed exemptions from the DMCA's prohibition against circumvention in the last triennial rulemaking. As the Joint Educators' proposed exemption stands to address technological advancement, the NTIA's comments are a highly relevant consideration. In their analysis of the Joint Educators' proposed exemption, the NTIA recognized that "without the exemption it is likely that innovation in online learning will be hampered," so the NTIA recommended granting the expansion of the exemption to include online educators with some modifications.<sup>80</sup> The NTIA found that the Joint Educators demonstrated "these for-profit online educational entities should be treated equally with not-for-profit educational entities."<sup>81</sup> The NTIA argued "this change will permit greater access to quality content to more learners as more and more content is accessed virtually" while repairing the disparity created by the current exemptions since permitting the new group to take short clips of audiovisual works will enhance learning in these online environments in exactly the same way.<sup>82</sup>

The NTIA recommended the exemption for online educational entities should contain minimal changes to strike the right balance and drawing from the existing MOOC exemption:

By educators and preparers of online learning materials offered by educational entities to registered learners of online learning platforms when use of the film and media excerpts will contribute significantly to learning, including for the purpose of criticism, comment, illustration and explanation, where the online provider will limit these online learning materials, to the extent technologically feasible, to registered learners of the online learning platform, institute copyright policies, and provide copyright information to educators and preparers of online learning materials, learners, and relevant staff members, and the online provider, to the extent technologically feasible, will work to

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<sup>79</sup> See 37 CFR 201.40(b)(1)(ii)(A)); 37 CFR 201.40(b)(1)(ii)(B)).

<sup>80</sup> *Id.* at 8, 9.

<sup>81</sup> *Id.* at 10.

<sup>82</sup> *Id.*

reasonably prevent unauthorized further dissemination of online learning materials in accessible form to others, including after the registration period ends.<sup>83</sup>

The Joint Educators wholeheartedly support the NTIA's suggestions concerning the proposed exemption. Additionally, it is important to note the NTIA recognized "that screen capture seldom provides the clip quality required for the users of this exemption."<sup>84</sup> Overall, the NTIA draws meaningful conclusions about the Joint Educators' filing for this proposed exemption in the last rulemaking proceeding, especially as the NTIA has subject matter expertise in technology initiatives. With the additional evidence provided above in this rulemaking, the Joint Educators emphasize the proposed exemption will advance educational and digital equity.

Beyond the NTIA's filing on this proposed exemption, initiatives by this executive agency provides perspective on the landscape of educational and digital inequities persisting across the United States and how they are being addressed across the government. As established in the Infrastructure Investment and Jobs Act, the NTIA is leading the Broadband Equity, Access, and Deployment (BEAD) Program, which will provide \$42.45 billion in funding to build equitable access to universal, reliable, affordable, and high-speed Internet coverage throughout the United States.<sup>85</sup> The BEAD program will help close the digital divide as Broadband Now reports that 42 million Americans have no access to broadband technology, which includes everything from WiFi and satellite to fiber-optic cables.<sup>86</sup> BEAD is just one of many initiatives led by the NTIA as the department also leads the Tribal Broadband Connectivity Program (TBCP), the Broadband Infrastructure Program (BIP), Connecting Minority Communities (CMC) Program, Enabling Middle Mile Broadband Infrastructure Program, and Digital Equity Act Programs. With all these programs geared toward increasing broadband access, the digital divide will improve. The increased access to the internet may result in even more students using the online educational entities for learning, and the proposed exemption will ensure that the educational materials are of the highest quality.

The Federal Communications Commission (FCC) also plays a major role in advancing digital equity. On November 15, 2023, the FCC approved rules to prevent and eliminate digital discrimination of access to broadband services as required by the Infrastructure Investment and Jobs Act.<sup>87</sup> With these digital equity efforts passed by Congress and carried out by the federal agencies, ensuring equal access is a top priority; although, the executive branch is the initiator of these efforts as Executive Order 13985 of January 20, 2021 entitled Advancing Racial Equity and Support for Underserved Communities Through the Federal Government was implemented by the Biden-Harris Administration with the goal of embedding a focus on equity into the fabric

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<sup>83</sup> *Id.* at 13.

<sup>84</sup> *Id.* at 16.

<sup>85</sup> See Infrastructure Investment and Jobs Act of 2021, Division F, Title I, Section 60102, Public Law 117-58, 135 Stat. 429 (Nov. 15, 2021).

<sup>86</sup> Natalie Campisi & Korrena Bailie, *Millions Of Americans Are Still Missing Out On Broadband Access And Leaving Money On The Table-Here's Why*, FORBES (May 26, 2023, 1:58 PM), <https://www.forbes.com/advisor/personal-finance/millions-lack-broadband-access/>.

<sup>87</sup> *Task Force to Prevent Digital Discrimination*, FCC, <https://www.fcc.gov/task-force-prevent-digital-discrimination> (last visited Nov. 19, 2023).

of federal policymaking.<sup>88</sup> The Administration reaffirmed this continued commitment when President Biden signed a new Executive Order on February 16, 2023, entitled Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.<sup>89</sup> Delivering equity means ensuring “all can participate, prosper, and reach their full potential.”<sup>90</sup> The Joint Educators believe their proposed exemption furthers this goal because the online educational entities will no longer be inhibited by the DMCA’s statutory prohibition on circumventing access controls, so these educators and students currently left behind can access quality audiovisual learning materials through high-quality short motion picture excerpts.

Ultimately, the equity initiatives across the federal government and state governments demonstrate that advancing equitable access to education is a worthy objective for the Copyright Office.

## CONCLUSION

The Joint Educators ask that the Librarian implement the circumvention exemption for the described nontraditional but qualified educational entities. Remote learning has the potential to bridge the massive gaps that exist in the United States education system. However, if for-profit, nonaccredited educational entities do not have access to the use of high-quality motion picture excerpts that their accredited, non-profit counterparts do, students using the nontraditional educational entities will be at a stark disadvantage. The Joint Educators urge the Copyright Office to follow other federal agencies in leveling the educational playing field and promoting digital equity across all American populations. As alternative learning methods become more mainstream, it is increasingly important that educators have free and efficient ways of accessing high-quality motion picture excerpts to educate populations often left behind.

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<sup>88</sup> *FACT SHEET: President Biden Signs Executive Order to Strengthen Racial Equity and Support for Underserved Communities Across the Federal Government*, White House (Feb. 16, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/02/16/fact-sheet-president-biden-signs-executive-order-to-strengthen-racial-equity-and-support-for-underserved-communities-across-the-federal-government/>.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*