



UNITED STATES COPYRIGHT OFFICE

## 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., Mellon Postdoctoral Fellow, Center for the Humanities, Wesleyan 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:*

Glushko-Samuels Intellectual Property Law Clinic  
Professor Victoria Phillips, Director  
Jill Crosby, Student Attorney  
Kristin Rheins, Student Attorney  
David Chaykowsky, Student Attorney  
Tate Fowler, Student Attorney

Parties interested in contacting Peter Decherney should reach him at [decherney@sas.upenn.edu](mailto:decherney@sas.upenn.edu) (215.746.3156).

### ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 2: Audiovisual Works — Online Learning

### ITEM C. OVERVIEW

**THE JOINT EDUCATORS PROPOSED EXEMPTION IS PERMISSIBLE AS DEMONSTRATED THROUGH SUGGESTED STATUTORY LANGUAGE AND DEFINING OF “QUALIFIED ONLINE EDUCATIONAL ENTITIES”**

Under 17 U.S.C. § 1201, the Joint Educators are seeking a permissible exemption that allows educators and preparers of online learning materials to use short excerpts of motion pictures for criticism, comment, illustration, and explanation when use of the excerpt constitutes

**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.

transformative fair use and contributes significantly to learning. This proposed exemption is similar to the existing 1201 educational exemptions for massive open online courses (MOOCs), college faculty, and K-12 educators by way of three categories of educators using copyrighted materials to teach students. The Joint Educators, therefore, ask that the Copyright Office follow the trends set by these existing exemptions due to the identical reasoning for their implementation.<sup>1</sup> The only way this exemption differs from its predecessors is in the educators, learners, and qualified online educational entities it recognizes as worthy of accessing high-quality excerpts of motion pictures.

Through the proposed exemption, the Joint Educators are advocating for the right of these nontraditional educators, learners, and qualified online educational entities to receive the same exemption previously granted and now recommended for renewal to accredited and/or non-profit educational institutions. Of course, the definition of qualified online educational entities appears broad because the goal of the Joint Educators is to finally include every student currently being left behind by the impenetrable walls of the United States' educational ecosystem where only those of a certain race, socioeconomic status, age, educational attainment level, etc. may obtain access to learning. The opposition's criticism of the proposed exemption involving what classifies an educator, a student, or even a qualified online educational entity largely reflects the unconscious bias across the United States in viewing these nontraditional educators as an unqualified and lowly version of the costly universities currently gatekeeping educational opportunities for all.

Educational entities encompass more than just K-12 institutions and accredited and/or nonprofit universities. Innovation is opening the sector to for-profit and/or nonaccredited online educational entities, which this proposed exemption covers, as these entities offer learning opportunities for students of all backgrounds. The Joint Educators recognize that the nontraditional online learning platforms represented by this proposed exemption are, in fact, difficult to narrow due to their innovative nature, but nonaccredited and/or for-profit online educational entities are a crucial and growing part of the education sector. As society evolves, the difficulty in drafting statutory language to address innovation is a persistent problem across all agencies and the United States government overall, but these qualified online educational entities are still worthy of recognition and therefore an exemption regardless of their nonconforming nature. Defining this proposal to a reasonable degree is possible.

Recognizing that the Copyright Office must identify a limit to narrowly construe this exemption, the Joint Educators seek to further define their proposal by now suggesting the following statutory language for an exemption under § 201.40(b)(1)(ii):

By educators of qualified online educational entities and preparers of online learning materials acting at the direction of educators of those entities, for the purpose of teaching registered learners of the qualified online educational entities in courses requiring close analysis of film and media excerpts when the transformative fair use of the excerpts contributes significantly to learning, for the purpose of criticism, comment, illustration, or explanation, where the qualified online educational entities through the online platform limits transmissions to the extent technologically feasible to such registered learnings,

---

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

institute copyright policies and provide copyright informational materials to educators, registered learners, and relevant preparers of online learning materials, and apply technological measures that reasonably prevent unauthorized further dissemination of a work in accessible form to others or retention of the work for longer than the learners registration with the qualified online educational entities.

To further narrow this permissible proposed exemption, the Joint Educators largely suggest the definition outlined by the NTIA be included for the term “qualified online educational entity” for § 201.40.<sup>2</sup> Qualified online educational entities are:

Online entities registered with their state or local jurisdiction or by the federal government as an entity, for-profit or not-for-profit, with an educational purpose or mission.

The statutory language proposed draws from the current exemptions under 37 CFR § 201.40(b)(1)(ii)(A)-(B), which were both recommended for renewal, in addition to the language proposed by the NTIA in their recommendation supporting the Joint Educators in the 8<sup>th</sup> Triennial Rulemaking Proceeding.<sup>3</sup>

The qualified online educational entity definition can successfully be recognized in a coherent, bound exemption and applied to the examples discussed in the Joint Educators’ Initial Comment. As demonstrated by the opposition, specifically the DVD CCA and AACCS LA, in their first exhibit, “Udemy’s mission is to improve lives through learning.”<sup>4</sup> Udemy would fall under the definition as a qualified online educational entity since improving lives through learning is an educational mission. Khan Academy is also a qualified educational entity, as shown by the opposition’s fourth exhibit. In their Form 990 that it files as a 501(c)(3) organization, Khan Academy indicates that their mission is “a free world-class education for anyone, anywhere,” which demonstrates an educational purpose.<sup>5</sup> It is important to note that despite the mischaracterization by the opposition, Common Sense was never intended to be considered by the Joint Educators as a qualified online educational entity, but rather as, a source generating an idea for an example of how a short excerpt of a motion picture can be employed by an educator as a transformed fair use.

Ultimately, the Joint Educators’ statutory language is comparable to existing exemptions’ statutory language. Safeguards are installed for copyrighted works through the proposed exemption to address the risk of infringement, and the Joint Educators are only seeking an exemption for short excerpts of motion pictures. Additionally, this proposed exemption does require the institution to apply strong technological protection measures preventing unauthorized further dissemination of works. The Joint Educators proposed exemption is narrowly construed with the language provided along with definitions.

---

<sup>2</sup> *Exemptions to Permit Circumvention of Access Controls on Copyrighted Works*, NTIA, 11 (October 1, 2021), [https://cdn.loc.gov/copyright/1201/2021/2021\\_NTIA\\_DMCA\\_Letter.pdf](https://cdn.loc.gov/copyright/1201/2021/2021_NTIA_DMCA_Letter.pdf).

<sup>3</sup> *Id.* at 13.

<sup>4</sup> DVD CCA and AACCS LA Reply Comment, Exhibit 1 at 7 (Feb. 20, 2024).

<sup>5</sup> DVD CCA and AACCS LA Reply Comment, Exhibit 4 at 1 (Feb. 20, 2024).

## **THE JOINT EDUCATORS PROPOSED EXEMPTION IS PROTECTED UNDER THE FAIR USE PROVISIONS OF TITLE 17**

Education and innovation are essential tenets of our society, and thus, educators must be protected to instruct and teach for the purposes of education equity. Educators need the tools to provide their students equal access to education, including the use of audiovisual works. Every opportunity for education clearly falls under fair use protections under Section 107 of the Copyright Act.

Fair use is an essential principle of copyright law. Fair use was crafted in the Copyright Act to protect criticism, commentary, and scholarship and to allow copyrighted works to be observed in educational and research spaces. The fair use analysis typically consists of four factors; (1) the purpose and use of the copyright right; (2) the nature of the copyrighted work; (3) the amount and substantiality of the work; and (4) the effect of use on the market.

This exemption does implicate the use of copyrighted works; however, this exemption, and its examples, should be allowed under the exemption for many reasons, including the principle of fair use as found under § 107 of the Copyright Act.<sup>6</sup> The opposition tries to claim the Joint Educators' proposal infringes upon the four factors of fair use, but this is categorically false, especially in relation to the first and fourth factors.<sup>7</sup> Below the Joint Educators describe why this exemption is fair use on a factor-by-factor basis. These factors are generally balanced subjectively, but often the first and fourth factor are weighed the most in favor of fair use.

### **1. Purpose of the Use**

The first factor weighs in favor of fair use. The first factor analyzes the purpose of the use of copyrighted work. Fair use has its limits and is not all-encompassing for every purpose of use. Contrary to the opposition's assertions, the Joint Educators are not proposing that any use should be allowed nor are the Joint Educators trying to broaden the scope of fair use to dangerous levels. This proposed exemption puts forth uses that are only for educational purposes by educational entities. Education has long been held appropriate under the principles of fair use for the "purpose of criticism or comment."<sup>8</sup>

Criticism and commentary are at the core of accepted reasons for fair use and are necessary for the understanding and progression of all artistic works. Without criticism and commentary, such as those provided within an educational space, creativity would flounder. To promote new cultural production, creators must have the opportunity to use and learn about copyrighted material to generate new and novel ideas. Education about copyrighted works of art helps inform students what can be done creatively.

The opposition believes this proposed exemption is too broad, and the Register misconstrued that in the Eighth Triennial Rulemaking as well; however, the proposed exemption is intended only to apply to educational entities that employ educators or demonstrate that they themselves are educators that provide or develop content. The issue the opposition takes is that

---

<sup>6</sup> 17 U.S.C. § 107.

<sup>7</sup> See Joint Creators Class 2 Long Comment at 5-10.

<sup>8</sup> 17 U.S.C. § 107.

the Joint Educators propose the exemption should be recognized for all brands of educators for-profit, non-profit, nonaccredited, or accredited. Education, at its core, is a tenet of a proper, progressive society. Education should be afforded to all individuals, through equal means. Education is always used for commentary and criticism of every subject, and use of these copyrighted works serves these purposes in educational programs and institutions.

## **2. Nature of the Copyrighted Work**

The second factor weighs in favor of fair use. The second factor looks to the nature of the copyrighted work, which is often seen as how much protection is afforded to a copyrighted work based on whether the works are creative or factual and whether works are published or unpublished. However, 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.”<sup>9</sup> The Joint Educator’s proposed educational use is highly transformative.

## **3. Amount and Substantiality Used**

The third factor weighs in favor of fair use. The third factor observes the amount and substance used from copyrighted works. The Joint Creators have already conceded the third factor does not weigh against a finding of fair use for the proposed exemption.<sup>10</sup> The opposition notes that their concession only remains if our proposed exemption retains existing limitations to merely short portions of motion pictures.<sup>11</sup> There is no reason to believe that an educator will show an entire film, nor are there any examples to back that idea. The Joint Educators have already affirmed the idea that these uses will be limited and concise to the necessary amount to create educational equity in all learning spaces.

## **4. Effect on the Market of the Copyrighted Work**

The fourth factor weighs in favor of fair use. The fourth factor investigates the effect on the market derived from the use of copyrighted works. The opposition claims that widespread commercial use of motion pictures risks significant market harm to copyright owners. These copyright owners mainly sell their motion picture works for entertainment. The entertainment market serves a distinctive purpose from the educational sphere.

The opposition claims the fourth factor weighs against fair use due to the commercial nature of these institutions.<sup>12</sup> However, that mistakes what the commercial nature of these institutions are. These institutions sell educational opportunities—the commercial nature stops there. Each class is an individual experience focusing solely on education and scholarship. Assignments and lessons during these classes do not invoke a commercialization aspect. Following this, the copyrighted works used to further the lessons of the class are just collateral when it comes to the commercialization of these educational institutions.

---

<sup>9</sup> *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006).

<sup>10</sup> *See Joint Creators Class 2 Long Comment* at 8.

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

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

The Joint Creators note several organizations that grant licenses to motion pictures, such as Swank or Kanopy, but these services are not accessible to every educational institution.<sup>13</sup> Additionally, some of these services, like Swank, only offer entire films whereas some of these educators only intend to use small clips to illustrate their points. There still is no meaningful market for licensing short film clips.

Many of these services may have high expenses and there is no guarantee that they will have the motion pictures that an instructor may need to use. Additionally, these services are often provided by colleges as amenities for students, not educational tools. These services may sometimes only be available for on-campus students, which may leave off-campus and virtual students and professors without a means to properly use them. Without this exemption, educators are being forced to suffer an undue burden. These services, and the copyright owners, will not suffer a market harm if educators are given an opportunity to use short portions of motion pictures to illustrate an educational topic or subject. In fact, it is more likely that an educator will entice students to seek out a full film, through rentals or streaming services.

#### **THE JOINT EDUCATORS EXAMPLES ARE PERMITTED UNDER FAIR USE**

The Joint Educators have outlined three possible examples for our exemption. These examples were criticized by the opposition for being unrelated; however, this is because these classes require this exemption to ensure they will not be criminally punished for their improper use of motion picture clips.

The first example is Udemy, a for-profit, non-accredited educational entity, that has a class entitled “Learn English with Movie Clips.” The class is intended to use films to help its students learn the English language, however, currently the class only uses film stills. If this exemption is approved, this class would be able to use audiovisual works to ensure its students can learn the English language by actually hearing it and interpreting it from popular media they may be familiar with. This class’s use of the copyrighted works is transformative per the first and second factors, because it is repurposing the works for both commentary on the English language and scholarship to teach the English language. Additionally, these classes would not use a large amount of the films and would not infringe upon the third factor. Finally, the market for these copyrighted works is typically for entertainment purposes. Faculty using these works to teach language would not cause harm to the market.

The next example comes from Khan Academy’s class on “Storytelling.” Faculty in the course use Pixar films to show how storytelling can draw from personal experiences to create intimate stories. This use is allowed under fair use as well, as it is transformative in commentating on the writing and story techniques the filmmakers used to craft a perfect story. By using these films, the educators are able to give their students a proper understanding of storytelling. Additionally, this course uses only short clips and not entire films so the uses would not infringe upon the third factor or impact the market for the works. For entertainment purposes, viewers would want to watch the whole film and not just these short clips.

---

<sup>13</sup> *Id.* at 9.

If the proposed exemption were granted, there will be many more examples next cycle where the Joint Educators could show educators properly using audiovisual clips for the purposes of educational equity. It is imperative to allow all educators to have the necessary tools to give their students a fulfilling educational experience.

## **SECTION 1201 ALIGNS WITH THE JOINT EDUCATORS EXEMPTION AND REQUESTS**

Under 17 U.S.C. § 1201(c), five factors are examined to determine whether an exemption should be granted. The first four factors indicate that the exemption sought by the Joint Educators allowing entities that have the same educational function as those already exempted should be granted. The availability of copyrighted works is burdened by TPM restrictions for the nontraditional educational entities the Joint Educators are advocating for, the opposition's comments admit to as much in their proposals of alternatives to full length feature films that educators could otherwise make clips of for fair use in the online classroom.<sup>14</sup>

The second factor more specifically speaks to the principle that should inform this analysis; that the use of the copyrighted material is the same here as in previously granted exceptions: educational. The opposition's point that exemption classes cannot be properly refined by use is well taken,<sup>15</sup> but the Joint Educators are refining a class by specifically designating the nonaccredited and/or for-profit entities left out of previous exemptions for other educational entities.<sup>16</sup> The factors concerning availability here can hardly be different than in instances where the same exemption was granted for others; here, any difference in determination for the first four factors is based on an aversion to a particular business model. Stifling marketplace innovations in educational business models is not the call of Section 1201 or copyright law.<sup>17</sup> The Joint Creators claim accurately that an educator could abuse the exemption, circumventing technological protection and going beyond the intended legal use of copyrighted material.<sup>18</sup> The prospect of anyone violating the law is never dismissible, but the pertinent question is what distinguishes the educators here from a rogue college professor. The educators of accredited and non-profit entities have survived the same argument because when someone goes beyond the scope of an exemption and breaks the law, they do just that. Fortunately, an extensive litigious structure has been cultivated to enforce compliance.

As for the third factor, nonaccredited and/or for-profit entities engaging in education face the very same burdens their traditional counterparts face. The use of quality film clips is today an essential tool for educating generations whose experiences are increasingly digitalized. American film is a cornerstone of the nation's cultural contributions to the world; any entity teaching students about American culture or American dialects of English in a nation of immigrants is burdened when it must engineer substitutes for film clips. DVD CCA and AACCS LA contend that entities of the class at issue can use screen capture to make their own clips.<sup>19</sup> This alternative

---

<sup>14</sup> See Joint Creators Class 2 Long Comment at 12-13; DVD CCA and AACCS LA Class 2 Long Comment at 14.

<sup>15</sup> DVD CCA and AACCS LA Class 2 Long Comment at 5-6.

<sup>16</sup> See Joint Educators Class 2 Long Comment at 2.

<sup>17</sup> See Daniel S. Hurwitz, *A Proposal in Hindsight: Restoring Copyright's Delicate Balance by Reworking 17 U.S.C. § 1201*, UCLA Ent. L. Rev. 263, 290 (2006).

<sup>18</sup> Joint Creators Class 2 Long Comment at 4.

<sup>19</sup> DVD CCA and AACCS LA Class 2 Long Comment at 12-13.

forces these qualified online educational entities to work with clips that are inferior in sound and picture quality, apparent in the opposition's own exhibit.<sup>20</sup> This reduction in quality is particularly troubling in the context of any class relating to film studies. Minor details including sharpness, lighting, and the make-up on an actor's face can be essential to *mise-en-scène* and the creative expression of the author. This can be compromised by even minor losses of quality. The opposition demands that the class concerned here reads Shakespeare in prose. Because other entities that have the same educational function and social benefit have been granted the same exemption sought here, this disadvantage is again based on a non-traditional business model whose differences are suited to shorter certificate programs.

The Joint Creators do offer a very general solution to the burden imposed by the absence of exemption: other people's money. The Joint Creators state that there is availability of copyrighted works and no impact on these educational entities because the certificate programs and their faculty can simply avail themselves of licensing and streaming services.<sup>21</sup> Accredited and non-profit entities do not have to pay these costs, which are ultimately transferred to students. The Joint Creators implicitly propose the solution that students who may be trying to avoid often prohibitively expensive traditional educational programs should absorb these costs when it lists streaming services students can subscribe to.<sup>22</sup> Even if these services offered clips, the increasing costs of education cannot logically be accepted as an available alternative for those who would be burdened by the absence of exemption; it is itself the burden as literally as it could be stated. Payments by educational entities or their participants in the stead of an exemption is not a meaningful alternative for § 1201 analysis, they are result of policy hostile to educational purpose for the sake of licensing revenue. The policy reflected in previous exemptions is the contrary.

The final factor discussed here concerns the effect the exemption would have on the market for or value of copyrighted works. While the opposition claims this exemption would eliminate the licensing otherwise necessary,<sup>23</sup> that entities are using substitutions for high quality clips as discussed by the opposition indicates that the absence of this exemption is not generating licensing revenue that would be lost if the exemption were to be granted.<sup>24</sup> Here it becomes clear that opposition to this exemption has to speak out of both sides of its mouth; either there are few entities at issue who would benefit, and thus § 1201(a)(1)(C)(v) is of little relevance against the exemption, or there is a significant impact on the market because there are legions of students who would benefit from the exemption. Conversely, the Joint Educators does not premise this request for exemption on presently seismic market ramifications. Rather, the exemption is principled on the fairness of extending the very same exemption accredited and non-profit educational entities enjoy, having faced many of the same arguments featured in the opposition, to nonaccredited for-profit entities that also serve an educational function. The request is further principled on keeping § 1201 exemptions current with the changing educational landscape.

---

<sup>20</sup> DVD CCA and AACCS LA Long Comment, Exhibit 11.

<sup>21</sup> See Joint Creators Class 2 Long Comment at 8-9.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 8.

<sup>24</sup> See *id.* at 14; DVD CCA and AACCS LA Class 2 Long Comment at 12-13 (explaining use of screen capture by *Learn English with Movie Clips*).



The differences raised by the Joint Creators for this well-defined class of educators is that many nonaccredited for-profit educational entities are “scams.”<sup>25</sup> The word “many” does a lot of work here, and it is unclear where definitive evidence for the claim or the degree to which this industry is troubled is found.<sup>26</sup> The Joint Creators offer scant evidence to implicate an entire industry so severely, and the Joint Educators cannot reasonably be burdened to prove the contrary. But in the interest of this class of educators, it is worth repeating points made in the initial comment. Nonaccredited and/or for-profit educational entities offer certificate programs that are far less expensive than college or law school degrees.<sup>27</sup> Their programs often last months, not years, so the return on educational investment is more immediate for students and society.<sup>28</sup> The certificates awarded can shore up a resume and sometimes satisfy employers’ requirements.<sup>29</sup> The certificates generally are not coveted the way a Bachelor’s or Juris Doctorate degree is,<sup>30</sup> and yet, every year many students make a rational calculation that spending this level of time and money to earn such a certificate is the next step to advancing their market potential and self-actualization. Even assuming *arguendo* that there are clear instances of some “scams” among this industry, for traditional institutions of learning misappropriation of funds and resources is not a completely foreign phenomenon. But when policy approaches education and the institutions that provide it, it does not base deprivation of any entire industry or group on particular bad actors. The opposition does not substantiate that instances of scams are so pervasive or systemic for the class considered here that separate treatment should be imposed on these educators.

For these reasons, § 1201 factors inform an acceptance of the proposed exemption. Most fundamentally, the exemption clearly defines a presently unexempted class that would make the same use that exempted entities would for the same purpose: education. Failing to create this exemption ultimately forces students to shoulder additional costs rather than stand on the shoulders of giants in contravention of copyright policy and the public good. It further leaves educators working fearfully in the shadow of a criminal statute.

#### **OPPOSING COMMENTS ASSUME NONACCREDITED AND FOR-PROFIT EDUCATIONAL ENTITIES ARE ILLEGITIMATE WITHOUT ANY PROOF**

While it is ultimately the role of the Register to decide how to allocate exemptions in this proceeding, the Joint Educator’s proposed statutory language and arguments articulate the belief in a more diverse, equitable educational landscape. All qualified online educational entities and their learners deserve access to high quality motion picture clips for criticism and comment to match the pace of a rapidly changing field. The opposition challenges this by claiming that “access controls protecting motion pictures are not causing educational deficiencies,” but fails to

---

<sup>25</sup> Joint Creators Class 2 Long Comment at 12.

<sup>26</sup> *See id.* (citing to a single *Washington Post* article).

<sup>27</sup> Joint Educators Class 2 Long Comment at 6-7.

<sup>28</sup> *What Are Certificate Programs? A 2023 Guide*, Coursera (Nov. 9, 2023), <https://www.coursera.org/articles/certificate-programs>.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

address the ways that withholding this exemption disadvantages the vast number of students that rely on alternative educational methods.<sup>31</sup>

Accreditation does not guarantee an education more legitimate than one without. Historically, academia at all levels has been gatekept from many, particularly those in underserved or impoverished communities. While accreditation agencies began with the mission to standardize student experiences, it is not a foolproof method, nor one that offers itself to all educators. The Joint Creators allege that there are a growing number of nonaccredited and for-profit learning platforms that are “scammers.”<sup>32</sup> This mischaracterizes the Joint Educators’ proposal entirely and narrows the confines of what legitimate education looks like. The Joint Educators do not suggest that any instructor or institution that labels itself an “educator” be entitled to the benefits of our proposed exemption. Rather, the Joint Educators argue that the Register should heed our suggestions to define “qualified online educational entities” so that accreditation and non-profit statuses are not pre-requisite barriers to circumventing technological protection measures. If social and technological progress is not grounds to revisit statutory language constructed for a growing group of alternative educators, then what is?

There are few instances in which accredited and for-profit institutions have made their needs for high quality motion picture clips known. How can educational entities that seek legitimacy and recognition confidently use motion pictures or assert their wish to circumvent technological protection measures if the punishment for doing so is criminal sanctions? The Joint Creators allege that the Initial Comment “[has] not provided substantial evidence of for-profit or non-accredited entities seeking to circumvent access controls to make noninfringing use motion picture clips in educational materials.”<sup>33</sup> While the samples the Joint Educators provided in the Initial Comment may not reach the purposefully impossible bar set by our opposition, the lack thereof speaks volumes.

Suggesting time-consuming and costly ways to utilize clips instead of granting this exemption is a blatant expression of inequity. The opposition argues that the same value generated by motion pictures can be achieved through the arduous process of having “the script physically performed to record the audio and visual” by the instructor.<sup>34</sup> Suggesting that educators create more work for themselves ignores the job they already have—teaching. Instructors should not have to worry about the methods by which they obtain teaching material, nor should they have to create it wholly themselves when it already exists. They also declare that screen capture and clip licensing are readily available to nonaccredited and for-profit educators.<sup>35</sup> DVD CCA and AACCS LA provide a screen capture that they believe “[offers] sufficient quality to see gestures relevant to culture and to learn from the actors’ body language” for online users of Udemy to learn a new language.<sup>36</sup> Leaving certain educational entities to use screen capture while others are afforded the luxury of high quality clips disadvantages learners and educators. For language learning in particular, clips are necessary for students to be able to fully absorb new

---

<sup>31</sup> Joint Creators Class 2 Long Comment at 12.

<sup>32</sup> Joint Creators Class 2 Long Comment at 12.

<sup>33</sup> Joint Creators Class 2 Long Comment at 13.

<sup>34</sup> DVD CCA and AACCS LA Class 2 Long Comment at 12.

<sup>35</sup> *Id.*

<sup>36</sup> DVD CCA and AACCS LA Long Comment, Exhibit 11.

language material. There is no reason to deny alternative learners access to the same quality of material that their peers have. Not only do these suggestions mischaracterize the examples provided by the Joint Educators, but they also fundamentally misunderstand the rationale behind our proposed exemption.

Without this exemption, educators remain limited to the confines of traditional, and perhaps antiquated, notions of how a legitimate learning institution can function. The opposition attacks education by classifying the examples given in the Initial Comment as “a strawman set up to distract from the true nature of the class,” and improperly claims that appropriately refining a class is “impossible” because the Joint Educators provide “limited examples.”<sup>37</sup> The “limited examples” offered in our Initial Comment illustrate the fear that prior educators have felt before the Register granted them exemptions. Any lack of examples identified by the opposition are merely a demonstration that alternative educators do not wish to be held criminally liable for attempting to teach alongside their accredited, not-for-profit peers.

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

*See* Joint Educators Initial Comments.<sup>38</sup>

**ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGEMENT USES**

*See* Joint Educators Initial Comments.<sup>39</sup>

---

<sup>37</sup> DVD CCA and AACCS LA Class 2 Long Comment at iii.

<sup>38</sup> *See* Joint Educators Class 2 Long Comment (Dec. 21, 2023).

<sup>39</sup> *Id.*