

Before the
U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS

**In the Matter of exemption to prohibition on circumvention
of copyright protection systems for access control technologies**

Docket No. RM 2008-8

Comment of

- **Peter Decherney, Assistant Professor of Cinema Studies, University of Pennsylvania,**
- **Katherine Sender, Associate Professor, Annenberg School for Communication, University of Pennsylvania,**
- **Michael X. Delli Carpini, Dean, Annenberg School for Communication, University of Pennsylvania,**
- **International Communication Association, and**
- **Society for Cinema and Media Studies.**

I. Requested Classes of Work for Exemption

Class One: Audiovisual works contained in a college or university library, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by media studies or film professors.

Class Two: Audiovisual works contained in a college or university library, when circumvention is accomplished for the purpose of making compilations of portions of those works for coursework by media studies or film students.

II. Introduction

The 2006 DMCA exemption for media professors has transformed the field of film and media education, and it has helped bring media studies into the digital age. It is a landmark in the field on par with the Supreme Court's Sony Betamax decision, which ushered in a renaissance in

the teaching and study of film and video.¹ New avenues for teaching have been opened up and many university and college faculty members across the country have been able to do their jobs unhampered by anti-circumvention restrictions on the fair use of copyrighted material under Section 107 and the application of the educational exemptions of Section 110 of the Copyright Act.

The expansion of the renewal petitioners to include two of the major media studies professional organizations testifies to the importance the exemption has gained in the field. The joint petitioners now represent over 6,600 media educators. The International Communication Association (ICA) is an academic association dedicated to the study, teaching, and application of human and mediated communication. With over 4,300 members, the association's primary goal is to advance the study of human communication by encouraging excellence in academic research. The Society for Cinema and Media Studies (SCMS) is an organization dedicated to the study of the moving image. The college and university faculty and students who are members of the organization aim to promote all aspects of media studies within higher education, to encourage research and scholarship, and to advance and facilitate the teaching of media studies in order to promote cultural awareness.

The exemption has been used to teach such varied courses as World Film History, Documentary Film and Television, Animation, Visual Communication, Mexican Cinema, Race in Popular Culture, Anthropology and Film, Surveillance and Privacy, Film Music, and the

¹ See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (holding that time-shifting was a substantial non-infringing fair use of copyrighted materials, thus precluding Sony from being subject to liability for potential contributory copyright infringement).

Internet and New Media. As Harvard professor D.N. Rodowick² declares, “The DMCA exemption has been incredibly important and indeed essential to my teaching. This is especially true for the large lecture class I teach for Harvard's core curriculum, The Art of Film.”³ Professor Rodowick’s statement is typical of the many positive notes we have received in response to the 2006 exemption. As a result of the exemption, media studies professors have cut down on the time wasted in class by switching discs and clicking through menus and advertisements; it has improved the quality of clips that can be used in class; and it has allowed media professors to make clips from films, television shows, and DVD extras that are not available in other formats and are extremely valuable for teaching. Most importantly, the exemption has permitted media studies professors to take advantage of presentation and editing software that enables us to show clips side-by-side, mix clips with stills and text on the same screen, and annotate clips with voiceover narration and/or hand-drawn notes.

The exemption has also been used in ways not originally anticipated. Bryn Mawr professor Hoday King,⁴ for example, regularly uses clips while giving exams. The exemption has also helped her to make clips for students who require special exam circumstances, because of learning disabilities. As she explains,

“I once taught a deaf student who required closed-captioned exam clips; I preferred to give her a separate copy of the clip so that the captions would not be visible to the other students taking the exam. I also once taught a legally blind student who required a special monitor and environment to view film clips.

² D.N. Rodowick, Professor, Department of Visual and Environmental Studies, Director of Graduate Studies in Film & Visual Studies, Harvard University.

³ Email from Professor D.N. Rodowick, November 15, 2008.

⁴ Hoday King, Assistant Professor, Department of History of Art, Program in Film Studies, Bryn Mawr College.

Having the ability to make extra copies of clips permits me to accommodate these students, and therefore to remain compliant with ADA requirements.⁵

One professor, who preferred to remain anonymous [hereinafter “Professor JP”], echoed Professor Rodowick’s comments and explained how fundamental the exemption is to media education. “I’m really not sure I’d be able to do my job effectively,” Professor JP writes, “without the legal ability to do this . . . it’s one thing to ask students to rent videos or watch a TV show on Hulu and it’s another entirely to be able to walk them through something (virtually) with clips and commentary, etc.”⁶

The last quote suggests two things. First, that media professors are using clips in truly transformative ways. Second, that media professors remain uncomfortable discussing the ways that they teach with digital media. As a result, we are asking you to renew this important exemption and expand it to reflect the specific needs of media professors.

We are also requesting the expansion of the exemption to include the other members of the classroom: the students. For the past three years, media professors have benefited greatly from the anticircumvention exemption, and we now hope to extend this exemption to allow students to enhance their learning experience in the field of media and film studies. While professors are able to circumvent CSS encryption to compile clips and create useful comparisons to teach relevant material, students are still subject to the anticircumvention provision, which restricts their ability to fully utilize and learn from information that is not otherwise available in unprotected formats. Students need to have the ability to manipulate content to facilitate their

⁵ Email from Professor Hoday King, November 13, 2008.

⁶ Email from Professor JP, November 16, 2008.

learning, rather than passively watching as their professors demonstrate techniques. Expanding the exemption to include students will allow them to apply their knowledge and understanding of the subject matter in meaningful ways.

III. Media Landscape

With the continued decline of the VHS format and a lack of an effective technological solution, media professors and students need this exemption to maintain the quality of the learning environment. In order to teach effectively, faculty and students need to take advantage of the high resolution, special features, and extras available in protected formats, including DVDs, Blu-Ray discs, and online formats.

In 2006, the media landscape included VHS and DVD formats, and two new “next generation” DVD formats, Blu-ray and HD-DVD, were on the horizon. Professors Peter Decherney, Katherine Sender, and Michael Delli Carpini [hereinafter “media professors”] submitted statistics that showed there were nearly 45,000 DVD titles available, with approximately 200 DVD titles released each week, totaling about 10,000 annually.⁷ Since then, the number of DVD titles has more than doubled to 93,015 (as of 11/7/2008).⁸

During the last Rulemaking, the Joint Reply Comments of AAP: Association of American Publishers, *et al.* [2006 Reply Comment 11, hereinafter “Joint Reply”] pointed to the availability of videos in VHS format as a viable alternative to granting the exemption.⁹ The

⁷ Source of original statistic: DEG: The Digital Entertainment Group - <http://www.dvdinformation.com/Highlights/index.cfm#4>) cited in Decherney Comments, Appendix A, page 20.

⁸ <http://www.thedigitalbits.com/> DVD and HD Format Stats (last visited November 18, 2008). Net total of Region 1 discs released. Does not include discontinued or adult titles.

⁹ See Joint Reply, Sections V-C and V-H and Attachment B.

premise of this argument was that VHS was not protected and therefore that the making of non-infringing uses of portions of VHS media was a viable alternative to circumvention. As a result, the Joint Reply held that the exemption need not be granted; media libraries had merely to stock more VHS tapes.¹⁰ The media professors' reply comment [2006 Reply Comment 5, hereinafter "Decherney Reply"] pointed out the fallacy of that argument: it incorrectly focused on the availability of other means and not the fact that those other means were inadequate.¹¹ The Decherney Reply refocused the argument to ask *why* a digital copy was needed. The answer is video image quality. The primary reasons that the VHS format was an ineffective substitute included loss of video quality, alteration of aspect ratio, alteration of video contrast, lower resolution, increased pixilation, decreased detail, and distorted vertical blending.¹² VHS technology has not changed or improved in the last three years, nor is it likely that VHS technology will be improved as it is an increasingly obsolete technology, and these issues remain impediments to its use as a teaching tool.

Further, the Decherney Reply described the decreasing availability of the VHS format, specifically in widescreen format, as opposed to "Pan and Scan."¹³ In fact, the media professors were unable to locate VHS sales data; that data is just as difficult to locate today. According to the MPAA's *2007 Entertainment Industry Market Statistics*, the number of VHS cassettes sold

¹⁰ *See Id.* at 29. "The [media professors] would also have the option, if their library's acquisition policy did not foreclose it, of using VHS copies of the work at issue... it is only because of library acquisition policies; it is not because the works are no longer available in VHS format."

¹¹ If the only requirement of the media professors was to obtain mere video clips of films, and nothing more, then the arguments found in the Joint Reply would have been valid. In that scenario, VHS would have been a viable alternative. However, as Professor Decherney argued, the primary issues were video quality and the ability to compare and contrast.

¹² *See* Decherney Reply, Section III.

¹³ *Id.* at 8.

to US dealers for rentals was 0.3 and for sell-through to customers was 0.0 (in millions of units).¹⁴ This information (and the paucity of sources for it) help to illustrate how far the VHS format has fallen. Just before the last rulemaking, a number of studios announced that they would no longer be releasing movies in VHS format.¹⁵ Retailers also seemed to be abandoning VHS, including such giants as Walmart, Best Buy, Circuit City, and Amazon.com.¹⁶ By the time the analysis of the first quarter of 2008 sales was published, VHS, “which for a number of years [had] dragged down the industry’s overall growth, has finally ceased to be a factor.”¹⁷ With new titles no longer being released on VHS, VHS is now about as useful as 8-Track cartridges.

Any argument that VHS is a viable alternative cannot be valid. Not only is VHS-based content inaccessible, given the decline of VHS as a commercial format, the deficiencies in the VHS format that were identified in the DeCherney Reply remain unchanged. Nor are the Joint Reply’s suggestions valid that technology permits the requisite uses without circumvention.

For all of the formats that media professors need to use, i.e., DVD, Blu-Ray, MPEG-4, and other digital formats, commercially released video content (including special features) exists almost exclusively in protected formats. Unfortunately, although technology continues to advance at a rapid pace, the marketplace has not yet provided an effective non-circumventing

¹⁴ The numbers for 2005 were 14.9 million for rentals and 33.8 million for sell-through. Report available at <http://www.mpa.org/USEntertainmentIndustryMarketStats.pdf> at 17 (last visited November 23, 2008).

¹⁵ Susanne Ault, *Studios Unwinding VHS Shipments*, Video Business, Aug. 12, 2005, available at <http://www.videobusiness.com/article/CA634637.html> (last visited November 18, 2008).

¹⁶ Jennifer Netherby, *VHS Moves Further Out of the Picture*, Video Business, Jan. 28, 2005, available at <http://www.videobusiness.com/article/CA612454.html> (last visited November 18, 2008).

¹⁷ Susanne Ault, *2008 Q1 About Even With Last Year*, Video Business, Apr. 18, 2008, available at <http://www.videobusiness.com/article/CA6552516.html> (last visited November 18, 2008).

device to respond to the concerns of media professors who need to maximize the quality and efficiency of their classroom time and curriculum.

Three years ago, a few DVD players on the market, known as DVD jukeboxes, contained features enabling professors to show their students a series of digital video clips, using command stacks, barcode stacks, and bookmarks.¹⁸ Even so, those DVD players required several minutes to load and change discs, wasting valuable classroom time. The Librarian of Congress determined that these devices were ineffective to meet the goals of media and film studies professors who only have a limited amount of classroom time.

In the three years since, there have been no major changes in the marketplace to accommodate the demands of media and film studies professors. Further, there are no signs that such improvements will be made over the next three years. While some of the DVD jukeboxes have been upgraded, consumer reviews still indicate that there are problems with load time and overall functionality.¹⁹ Furthermore, on average, the DVD players allow for memory recall of only five discs at a time, which is inadequate because professors often require the use of more than five discs during a given class period.²⁰ The electronic devices currently available fail to adequately meet the needs of these professors. Until the marketplace catches up to the demands

¹⁸ Command stacks and bar stacks are programmable features which allow users to save video playlists into the player's nonvolatile flash RAM for automatic recall and display. Bookmarks serve to mark a particular location on the disc and skip to that location (DVD chapter navigation is a form of DVD bookmarking).

¹⁹One consumer review on amazon.com noted that the “DVD player is very slow to open, load, and recognize DVDs. [Furthermore,the] DVD player, when paused for 5 minutes or longer, would stop the movie and not keep track of where I was.”
http://www.amazon.com/review/product/B00092HNO0/ref=cm_cr_pr_link_next_2?%5Fencoding=UTF8&showViewpoints=0&pageNumber=2.

²⁰ The Pioneer DVD-V8000, which is the updated version of the Pioneer DVD-V7400, the DVD player that was discussed as the best proposed alternative to CSS circumvention in the last rulemaking, only holds one disc at a time. http://www.bhphotovideo.com/c/product/439140-REG/Pioneer_DVDV8000_DVD_V8000_Progressive_Scan_DVD.html#specifications.

of media and film studies professors, it is imperative that this Section 1201 exemption be renewed, so that media professors can continue to reap its benefits.

Similarly, it was suggested during the hearings that licensing might constitute a viable alternative to renewing the exemption.²¹ This alternative is invalid on its face for several reasons. It would be inefficient and retard the spontaneity of classroom instruction in which professors must respond quickly to student questions and needs. Requiring a licensing agreement or licensing fee to make fair use of a work nullifies the meaning and the purpose of fair use.²² Most importantly, the licensing of clips for classroom use could turn into either an overt or unintentional form of censorship. What if a copyright holder could not be found? What if the copyright holder could not reply to a request promptly? What if a copyright holder did not want to give permission for his or her work to be used in a critical way? Literature professors do not need to license the quotations that they read in class. Chemistry professors do not need permission to use a particular compound in class. Requiring media professors to license clips for use in class would endanger academic freedom and diminish the educational experience for students. For these reasons, licensing cannot constitute an alternative to circumvention when the circumvention is completed for the purposes of teaching, scholarship, and research, three core principles codified in Section 107 of the Copyright Act describing fair use.²³

²¹ Testimony of Mr. Bruce Turnbull, DVD Copy Control Ass'n, and Ms. Sandra Aistars, Time Warner, Inc. Transcript on Public Hearing on Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (Apr. 3 2006).

²² See 17 U.S.C. § 107.

²³ See *id.* (“[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, *teaching (including multiple copies for classroom use), scholarship, or research*, is not an infringement of copyright.”) (emphasis added).

Another major benefit of the Blu-ray or DVD formats for professors is the ability to include special features.²⁴ Examples of special features include documentaries, alternate takes, deleted scenes, multiple language subtitles, director and actor commentary, and other behind-the-scenes footage that gives the viewer a greater sense of the entire film. As Dan Gurlitz of Koch Lorber Films said in 2005, “It's these kinds of distinctive, one-of-a-kind additions to a film's DVD release that make them more than just a movie on a disc. They become sophisticated experiences.”²⁵

The special features of content-protected Blu-ray and DVD formats also provide additional and important educational tools. Currently, for example, in professor Decherney's World Film History survey class, he lectures on the early history of animated film. When it comes time to discuss the technologies behind Disney's first animated feature, *Snow White*, he can make use of the DVD extras to show Walt Disney himself demonstrating the famous multi-plane camera. Professor Rodowick has benefited from the ability make clips from DVD extras as well. As he explains, “I do occasionally use DVD extras in similar ways. For example, I have made a clip from the making-of featurette from *Russian Arc* to demonstrate differences between raw footage and digitally enhanced images that I use in several different classes.”²⁶ American University professor Patricia Aufderheide²⁷ describes DVD extras as “critically important” for the teaching of documentary film. “For instance,” she continues, “the making-of extra on *Winged*

²⁴ This ability is completely lacking on VHS.

²⁵ Thomas K. Arnold, *DVD Extras Go the Extra Mile*, USA Today, Mar. 8, 2006, available at http://www.usatoday.com/life/movies/news/2006-03-08-dvd-extras_x.htm (last visited November 18, 2008).

²⁶ Email from Professor D. N. Rodowick, November 15, 2008.

²⁷ Patricia Aufderheide, Professor, Film & Media Arts, Director of Center for Social Media, American University.

Migration includes an explanation of how filmmakers altered reality by training the birds they filmed to imprint on the filmmakers.”²⁸

IV. Benefits of Renewing Exemption

In 2006, the Library of Congress granted an exemption to the DMCA for media professors for “[a]udiovisual works included in the educational library of a college or university’s film or media studies department, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by media studies or film professors.”²⁹ Following the grant of this exemption, media and film professors have proceeded to use the exemption to benefit their students in many different ways, as exemplified below. Renewal of this exemption will allow professors to continue to demonstrate theories and techniques relating to media and film studies. Furthermore, an expansion of this exemption, as proposed in Section V, will broaden the resources available to professors for use in classroom demonstrations and will facilitate a more active learning environment by extending the exemption to students in the course of their studies.

Professor Aufderheide, for example, believes that the DMCA exemption helps her tremendously. One of her courses includes a segment on the evolution of nature films, beginning with safari documentation through ecological advocacy films and action-adventure series from cable television.³⁰ Some of these works, such as *Rat* and *An Inconvenient Truth*, are only available on DVD. Without the exemption, she would be unable to use these works to demonstrate the evolution of the genre.

²⁸ Email from Professor Patricia Aufderheide, November 18, 2008.

²⁹ 71 F.R. 68480, November 26, 2006.

³⁰ Email from Professor Patricia Aufderheide, *supra* note 22.

Many television series have never been released on VHS, and it is only their availability on DVD, Blu-Ray, and other digital formats that allows them to be the focus of academic study. Because of the exemption, many of these programs can be effectively used in classrooms, and, as a result, they will remain important to scholars and students long after their commercial lives are over.

Professor Jason Mittell³¹ of Middlebury College has used the DMCA exemption extensively, particularly in his course on animation. The short nature of most animated films would have required him to change DVDs, he estimates, approximately every seven minutes and then spend more time locating the particular clip he required.³² The exemption has allowed him to show clips of animated works of Disney and Warner Bros. films back to back for comparisons of the differences in art, style, timing, and framing. He has also embedded clips into PowerPoint presentations. For his work with television shows in another course, he created a series of parallel scenes from clips of the show *Lost*, where the scenes he needed were located on a number of different DVDs. “If I didn’t have [the DMCA exemption], I would need to either rely on what is available in low-res[olution] YouTube versions, or carry a box of DVDs to each class.”³³ The above examples are only a few of the many ways that the DMCA extension granted in the previous Rulemaking has positively impacted the teaching community.

It is not merely media professors who recognize the importance and benefits of the DMCA exemption. Representative Rick Boucher of Virginia has recognized the chilling effect

³¹ Jason Mittell, Associate Professor American Studies and Film & Media Culture, Chair of Film & Media Culture, Middlebury College.

³² E-mail of Professor Jason Mittell, November 19, 2008.

³³ *Id.*

that the DMCA has had. Three times, Representative Boucher has attempted to amend the DMCA to ameliorate any chilling effect on fair use, culminating in the Freedom and Innovation Revitalizing U.S. Entrepreneurship Act of 2007, or the FAIR USE Act.³⁴ The failure of the FAIR USE Act and its predecessors suggests that media professors are unlikely to see a legislative solution to their problem—at least not before the next rulemaking.

Per the Federal Register’s Notice of Inquiry, the burden of proof falls on the proponents of an exemption “to provide evidence either that actual harm currently exists or that it is ‘likely’ to occur in the ensuing 3–year period.”³⁵ All of the harms present in the last Rulemaking remain in place today: the lack of technological alternatives, the necessity for video fidelity and clarity that only digital video can provide, and the ever-present constraints on classroom time.³⁶ A renewal of the exemption for a further 3-year period remains the only way to avoid harming the media professors’ fair use of these works. Further, given the positive impact on professors and students, the negligible impact on content owners, and the attention the DMCA is receiving in Congress, specifically with respect to circumvention for non-infringing uses, we respectfully ask that the exemption be renewed.

V. Need for Expansion of the Existing DMCA Exemption

As important as the granted exemption is, it is vital to note how narrowly tailored it is. As it currently exists, the exemption applies only to film and media studies professors where exempted circumvention is limited to works that reside in their university’s film or media studies

³⁴ H.R. 1201 (110th Congress).

³⁵ 73 F.R. 58073, 58075.

³⁶ 2006 Final Rule, 71 F.R. 68472, 68474.

department library.³⁷ Thus we now seek an expansion of the existing DMCA exemption in two ways. First, we propose expanding the exemption to include all works located in all libraries of a particular college or university. Second, we propose expanding the class of users covered by the exemption from film and media studies professors to include all students performing film and media studies coursework.

A. Expand the exempted class of works to include all audiovisual works included in a college or university library.

The rationale for this expansion is straightforward: the current exemption places an unnecessary limit on the range of films that can be taught, and it often requires the wasteful expenditure of resources to purchase multiple copies of each work. If the university wishes to provide a particular work to its student body, the most logical and accessible place to store that work is the main library. This permits the greatest number of students and faculty to have access to the work; indeed, that is the primary function of libraries, especially university libraries.³⁸ We limit the scope of our exemption to a college or university library to maintain a narrowly tailored class, as required by Section 1201.

In order to permit a film and media studies professor to work within the parameters of the exemption, however, the university must buy a second copy of each work for their film or media studies department. Further, most universities do not have a dedicated film and media studies

³⁷ “Audiovisual works included in the educational library of a *college or university’s film or media studies department*, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom *by media studies or film professors.*” 71 F.R. 68480 (emphasis added).

³⁸ See <http://www.straightdope.com/columns/read/2236/how-did-public-libraries-get-started>. Industrialist Andrew Carnegie (1835-1911) felt that one of the weaknesses of early libraries was that they catered chiefly to scholars and the upper classes. They were only open during the day, when the working classes were working, and many imposed age restrictions on use. Carnegie, however, thought libraries and books should be available to everyone. By 1920, the Carnegie estate had donated \$50 million to erect 2,500 library buildings, including 1,700 in the U.S.--by far the most sustained and widespread philanthropic enterprise ever devoted to libraries. Carnegie's donations got libraries started in small towns, not just big cities, throughout America.

library, and they use the main library as their repository. For those institutions, money and space would have to be set aside to construct such a library, and then the university would have to stock the library with films.

Those institutions that do have multiple libraries do not store the same titles. At the University of Pennsylvania, for example, the primary library is the Van Pelt library. According to their catalog, Van Pelt carries 9,311 DVD titles.³⁹ In comparison, the number of titles carried by the University of Pennsylvania's Cinema Studies program is only 1,735.⁴⁰ Under the current exemption, this severely limits the range of media that professors can teach effectively.

The advantages realized by the media professors under the current objective could be greatly expanded by extending the landscape of available titles covered by the exemption. Indeed, Professor JP writes, "There's no question that I would benefit from being able to access the campus library and most definitely the system-wide DVD library!"⁴¹

It is important at this point to recall that the university or college has already purchased these works for its general student body and faculty, of which the film and media professors are a subset. Put another way, the film and media professors already have access to these works through their employment, but they cannot use these works as a teaching resource because they are not specifically located in a dedicated film or media studies library. We merely seek the logical extension of the exemption to include those works to which the professors *already have legal access*.

³⁹ E-mail from Marjorie Hassen, Director of Public Services, Van Pelt-Dietrich Library, University of Pennsylvania, November 24, 2008.

⁴⁰ Provided by the Cinema Studies Program, University of Pennsylvania.

⁴¹ E-mail of Professor JP, *see* note 6 *supra*.

B. Expand the exempted class of users to include all students performing film and media studies coursework.

During the research and discovery period for the 2006 rulemaking, it became clear to us that creating transformative multimedia work has become a key element of critical media education. In a survey of the members of the Society for Cinema and Media Studies, more than half of the respondents said that they regularly ask their students to construct multimedia works as part of their coursework. Three years later, multimedia assignments for students have become pervasive. At the University of Pennsylvania, more than 300 students used library facilities for graded multimedia class assignments in spring 2008 alone. According to the Director of the University of Pennsylvania's Weigle Information Commons, "the majority of these assignments required the ability to take clips from DVDs . . . and edit them together. Total use of the [multimedia] lab in April 2008 was more than 800 patrons."⁴²

Student work ranged from extraction of clips for use in class presentations to critical mash-ups to voiceover commentary to the use of still images in graphic works (it is important to note that even capturing still images from DVDs requires circumvention).

In a course on Surveillance and Privacy, for example, University of Virginia professor Siva Vaidyanathan⁴³ asks students to analyze representations of surveillance in feature films. He requires students to use clips of *The Conversation*, *Blow-Up*, and other films during in-class presentations.⁴⁴ Obviously classroom presentations by students are subject to the same constraints that harmed professors prior to the 2006 rulemaking.

⁴² E-mail from Anuradha Vedantham, Director, Information Commons, Van Pelt-Dietrich Library, University of Pennsylvania, November 18, 2008.

⁴³ Siva Vaidyanathan, Associate Professor, Media Studies and Law, University of Virginia.

⁴⁴ E-mail from Professor Siva Vaidyanathan, November 19, 2008.

Many professors go further and require students to use multimedia works in place of or in addition to traditional writing assignments. Professor Michael Solomon⁴⁵ requires students to prepare a commented scene of two to five minutes in length in two of his classes, Introduction to Mexican Cinema and a graduate seminar Cinema 68.⁴⁶ Professor Solomon has three primary objectives in assigning these projects. First, the exercise is designed to force students to think more carefully about a single scene and develop a close reading of their chosen scene.⁴⁷ Second, the exercise helps students become familiar with basic aspects of manipulating visual media, thus discovering the temporal nature of cinema, in contrast to a print medium.⁴⁸ Finally, the project moves students away from traditional essays and papers and towards an audiovisual form of academic presentation.⁴⁹

Professor Mittell also regularly assigns multimedia, remix projects. Many of his students noted frustration with the quality and tediousness of having to use video capture tools. As one student wrote,

I think this is a really important assignment that would benefit greatly from a more accessible format. A more direct route for re-editing than *SnapZ* would save a lot of time and improve the quality of the final project. With *SnapZ*, the quality of the images and sound is compromised and it takes a considerable amount of time to render the clips in final cut pro. Clearly, we are using these movies as narrative texts to break down and analyze for academic purposes, in no way commercial or exploitative. The assignment allows us to re-configure the narrative structure by using the material of the film to analyze the syuzhet, fabula, and other formal elements of the text in a hands on way, which would be impossible to accomplish in mere theoretical terms. The re-structuring of the narrative itself is the most important element of the assignment, and *allowing*

⁴⁵ Michael Solomon, Associate Professor of Romance Languages, University of Pennsylvania.

⁴⁶ E-mail of Professor Solomon, November 19, 2008.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

students the use of the DVD directly without the superfluous step of re-formatting would make a big difference in both the process and the outcome of the assignment. (emphasis added).

This student's experience is not an isolated occurrence. As Professor JP writes, "I'd love it if students could legally do more with clips, but at this time it's technically very challenging from an instructional point of view."⁵⁰

The expansion of the current exemption to include students would also help with assignments that require the use of still images. In many cases, it is necessary to circumvent copy protection in order to capture a still image. University of Pennsylvania professor Louise Krasniewicz⁵¹ often assigns projects requiring the use of media clips in her Mythology and the Movies and Anthropology and the Cinema courses. Part of the project requires the students to have access to still images from the movies for storyboarding, poster production, game design, or comic book production. According to professor Krasniewicz, the reason for the assignments is to get students to understand what goes into the production of a motion picture, help them comprehend the structure of a narrative, and enable them to connect text and visuals.⁵² Student comments reflected that they worked harder and had to think more creatively when working on new media projects.

Prior to the 2006 Rulemaking, it was clear that in order for an exemption to be granted, the class of works had to be specifically and narrowly defined. However, during the 2006 Rulemaking, the Register of Copyrights devoted significant attention to the issues revolving

⁵⁰ E-mail from Professor Anonymous, *see* note 6 *supra*..

⁵¹ Louise Krasniewicz, Anthropologist and Senior Research Scientist, American Section. University of Pennsylvania Museum of Archaeology and Anthropology.

⁵² E-mail of Professor Krasniewicz, November 19, 2008.

around the class of works problem.⁵³ The conclusion of the Register of Copyrights was that “depending upon the circumstances, it can be appropriate to *refine a class by reference to the use or user* in order to remedy the adverse effect of the prohibition and to limit the adverse consequences of an exemption.”⁵⁴

The proposed expansions of the existing exemption for media professors will not change the class of works, i.e., audiovisual works. Similarly the proposed expansion to apply to students performing media or cinema studies coursework would still apply to audiovisual works, but would adopt a broader refinement so as to remedy the adverse effects that will continue under the current, more restrictive exemption. Under the reasoning of the Register of Copyrights in the last rulemaking cycle, the proposed expansions are both permissible and appropriate.

VI. Conclusion

For these reasons, we respectfully seek the following:

- Renewal of the granted DMCA exemption for audiovisual works included in the educational library of a college or university’s film and media studies department, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by media studies or film professors,
- An expansion of the same to include all audiovisual works included in a college or university’s library, and

⁵³ Marybeth Peters, Register of Copyrights. *Recommendation of the Register of Copyrights in RM 2005-11; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*. November 17, 2006. The argument was introduced in Section I.C.3 (pp. 9-10), and the determination was made in Section III.A.1 (pp. 15-24).

⁵⁴ *Id.* at 19. (emphasis added).

- An expansion of the same to include use by all students performing film or media studies coursework.

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