Before
The Copyright Office
Library of Congress

In the Matter of Exemption to Prohibition on
Circumvention of Copyright Protection Systems for Access Control Technologies

Comments of Professor Renee Hobbs on behalf of the
Media Education Lab at the Harrington School of Communication and Media at the University of Rhode Island

I. Requested Class of Work for Exemption

Lawfully accessed audiovisual works used for educational purposes by kindergarten through twelfth grade educators.[1]

II. Introduction: Educators Across the Curriculum Use Media To Connect and Teach But Are Hampered By the DMCA

> *Ms. Emily Jones, a hypothetical high school literature teacher, wants to show her class clips from different film adaptations of* Wuthering Heights *to discuss the artistic choices in character, plot, and tone. She cannot find the particular clips she wants to use online, so she orders DVD copies of each film. The school librarian advises her that while she may not compile clips from the DVDs, she may compile clips from VHS films. Unfortunately, not all of the adaptations made in the last ten years are available on VHS. Ms. Jones knows she can make a clip by using a camcorder to film the television as the DVD plays, but she does not have a camcorder. Instead, she downloads screen capture software that only produces clips of five minutes or less. When she shows her class a short clip from the 1992 film, the students complain about the lack of high definition: "Why don't you just show us an old silent movie, Ms. J?!" She then shows her students a trailer of the 2011* Wuthering Heights *film on YouTube; her first attempt results in five minutes of buffering. She refreshes the link, and the whole class is treated to a commercial for an online dating service. The next year, Ms. Jones decides to scrap her plans to do the compare/contrast activity, and simply plays one of the movies in full. One kid smirks, "It's Movie Day!" and other students start to whisper, text on their cell phones, and put their heads down on their desks.*

Kindergarten through twelfth grade (K-12) educators, like Ms. Jones, need the ability to edit and compile portions of audiovisual works into a clip reel before entering the classroom. On average, a teacher has fifty minutes in the classroom. Without this exemption, educators spend

[1] "Educators" refers to classroom teachers and supporting personnel, including teaching aides, student teachers, library personnel with instructional duties, and information technology personnel who support instructional activities.

that valuable class time queuing up movies to the applicable segment, switching videos, searching for streaming media online, watching unavoidable and often inappropriate advertisements, and fast-forwarding to the applicable section. The students become distracted—especially the younger children—and teachers waste more class time regaining control of the classroom. Educators are further limited by the video and audio quality of the media they may currently show, since alternative methods of screen-capture and recording off the screen with a camcorder produce low resolution video. These low resolution videos are completely insufficient for detail-oriented lessons, such as those on the workings of biological organisms in science class or ornate costume design in theater class. Educators, and the educational experience they provide to students, are harmed by not being able to pre-cut and compile the clips beforehand.

In addition to her work as Founding Director of the Harrington School of Communication and Media at the University of Rhode Island and her national and international leadership as a scholar, advocate, and media education specialist, Professor Renee Hobbs is active in offering professional development programs to kindergarten through high school teachers, helping them to better integrate media into their classrooms. She works with these educators through the Media Education Lab, whose mission is to improve the practice of media literacy through scholarship and community service. While Professor Hobbs benefits from the current exemption to the DMCA and can incorporate copy-protected film clips into her college curriculum, she must teach using insufficient alternative media in providing models of media integration for the K-12 teachers' use. It is vital that K-12 teachers to have the same ability to incorporate high quality media clips into their classrooms.

Professor Hobbs shows educators how to include film, television, and other media in ways that build students' critical thinking, self-expression and writing, collaboration, and problem-solving. She encourages educators to integrate excerpts of movies and television programs into Language Arts, Social Studies, and Health Education curricula. For example, elementary students learning about the civil rights movement may view and discuss a clip from *The Jackie Robinson Story*. Students learning about substance abuse prevention will better understand the representation of smoking in the media and the complex role of product placement after watching a clip featuring Julia Roberts in *My Best Friend's Wedding*. Students who are studying the historical development of television news will benefit from viewing and discussing excerpts from both the documentary *Edward R. Murrow: This Reporter* and the major motion picture *Good Night, and Good Luck* as a means to understand the generic conventions of non-fiction media.

Conferences hosted by the National Council of Teachers of English (NCTE), the International Reading Association (IRA), the National Association for Media Literacy Education (NAMLE), and the International Society for Technology in Education (ISTE) are designed as spaces for the professional development of educators where large numbers of K-12 and college educators regularly interact. At these conferences, many educators tell Professor Hobbs how much they need media in their curriculum, but while college-level educators benefit from an exemption, K-12 teachers do not. When Professor Hobbs explains to K-12 educators how they can legally create a clip reel (using screen capture or resorting to VHS editing, for example), educators complain that these methods are too time-consuming and insufficient for their purposes. With this proposed exemption, educators will only have to compile the clip reel once, perhaps with the help of the school's technology coordinator or librarian. Once the clip is made,

that teacher may use it year after year as a vital part of their lesson plan. In addition, teachers generally resort to streaming a "good enough" film clip on YouTube, often with a deep sense of frustration because it is not the "best text" or the exact portion of the media that they want to use. For example, if a teacher wants to show only a few minutes of an interview from *The Daily Show with Jon Stewart*, the teacher must either fast-forward through the pre-selected segments available on the Comedy Central network website, which may not be the clips the teacher wants to show, or be at the mercy of whichever short clips of the show were posted to YouTube, if any. What is most frustrating to classroom teachers is the large number of highly distracting and inappropriate advertisements and other clutter that students see when shown a clip on YouTube. With this exemption, K-12 educators would create and play a clip reel, devoid of extraneous advertisements.

III. Without the Exemption, Educators Refrain From Using Media In Their Curriculum

Media literacy is the ability to access, analyze, evaluate, and create messages using the wide variety of communication tools now available. Media literacy education empowers students to be both critical thinkers and creative producers of an increasingly wide range of messages using image, language, and sound. It is the skillful application of literacy skills to media and technology measures. This objective spans the curriculum, as educators at every level incorporate media to connect and teach. Media literacy is no longer relegated to the technology, media, and performing arts teachers' curriculum; digital media is used as a tool across disciplines and many teachers are highly encouraged by their school leaders to incorporate media in their lesson plans.

Media literacy goes beyond acclimating students to a technological world; it is an opportunity for teachers to exemplify proper media usage. Educators help students understand

the rights and responsibilities of ownership and fair use by exemplifying lawful use. And yet, most educators refrain from using media because they are not permitted to do so in an effective way.

a. Some Information Is Only Effective When Presented Non-Textually

Educators are not able to teach effectively without this exemption. As a kindergarten and first grade teacher in Greenbelt, Maryland, Ellen Moiani knows firsthand that some information is best presented visually and non-textually.[2] This is especially important with respect to children in the age group she teaches who cannot yet read, or cannot read well. Media is essential for older students, too. Some subjects, like the sciences, require students to see and experience lessons, like dissections and representations of particulate matter, through media.[3] A high school chemistry teacher in Kansas could not effectively show her class a documentary about large crystal structures found in caves because of the low quality representation. Arts teachers also need to frequently use media. Teachers at Duke Ellington School of the Arts helped students write and direct *Greenwood is Burning*, an original play about the "Black Wall Street" riots in Tulsa, Oklahoma. To prepare for the production, students spent weeks viewing clips of documentaries and movies on the period. The educators who helped them in this process

[2] Haluk Özmen, *Effect of animation enhanced conceptual change texts on 6th grade students' understanding of the particulate nature of matter and transformation during phase changes*, 57 EDUC. 1114 (Aug. 2011), *available at* http://www.sciencedirect.com/science/article/pii/S0360131510003532; Aman Yadav, et al., *If a picture is worth a thousand words is video worth a million? Differences in affective and cognitive processing of video and text cases*, 23 J. OF COMPUTING IN HIGHER EDUC. 15 (Apr. 2011), *available at* http://dx.doi.org/10.1007/s12528-011-9042-y (explaining study assessing the affective and cognitive processing of stories in video and text formats found that "video and video + text versions of the stories led to higher levels of . . . engagement . . . and recall of particular information").

[3] Özmen, *supra* note 2, at 1114-26 ("suggesting that multiple representations such a[s] a mixed set of verbal (written or oral) and pictorial [learning tools], not only have the potential of capturing students' attention to the concepts to be taught but also support their conceptual understandings in a certain domain. . . . We know that traditional science teaching generally makes use of static models and diagrams and as such, are not effective in increasing students' understanding of chemical concepts . . . Recently, aware of students' difficulties and alternative conceptions, science and chemistry teachers have used different instructional methods for teaching the chemical representation of matter. Similarly, different researches have employed alternative teaching approaches or combinations to show the effectiveness of them on students' understanding or alternative conceptions").

required many high-quality clips of media to teach nuances in everything from voice and accent to architecture and costume. Without this exemption, educators wasted time and missed critical details only discernible through high quality media.

b. Educators Waste Valuable Class Time Shuffling Media and Cannot Keep Student Attention

Without this exemption, educators will continue to waste valuable class time and lose students' attention because they have to shuffle through and queue media in class. Kristin Hokanson, a teacher and staff development professional from Pennsylvania, likes to show multiple clips from one or more original sources. She uses clips of DVDs and often wastes class preparation time marking the points where she would like to start and stop a scene from a motion picture being shown in class. Once in class, Ms. Hokanson spends even more time switching DVDs and again finding the exact point to start a scene. The more media she uses to enrich her lessons, the more class time she loses switching, searching, and queuing. When the average class period is fifty minutes, every moment is important.

This shuffling process takes considerably longer when educators use films where viewers cannot, by the disc's encoding, fast forward past the many previews that generally precede each film. Eldridge Gilbert is a principal and Social Studies teacher at a middle school in Houston, Texas. Without the requested exemption, he spends five times as much time preparing media for use in class as compared to the time he spends on all other lesson preparations. And regardless of how much time Mr. Gilbert spends outside class marking the start and stop points of clips, he cannot lessen the amount of time he wastes shuffling media during class.

Edie Lozano, an English Literature teacher at Edinburg High School in Texas, needs to show various media clips side by side to illustrate different character archetypes, tones, and plot lines. As she switches movies, her students start talking. She wastes class time calming them

down, and as soon as a clip is finished, the problem repeats itself. The time wasted in the shuffling and fast forwarding process is especially disruptive in an elementary school environment where the audience has a lower attention span. Furthermore, the educational value of the comparison between works is often lost because the elapsed time and consequent disruption that occurs when Ms. Lozano must go through the same, inefficient process over and over again. This shuffling problem is magnified when the subject of the class is media, like film studies or theater classes.

c. By Streaming Media On Websites, Teachers Risk Exposing Their Students to Distracting and Inappropriate Advertisements

Many teachers attempt to avoid the shuffling problem by searching for suitable clips on streaming websites. However, when they try to access their pre-selected clips online, they often encounter other issues that prove challenging to their classroom environment. Clips from streamed media sites are often preceded by advertisements that waste valuable classroom time and distract the students. John Landis, the Technology Coordinator at Russell Byers Charter School in Philadelphia, refers to this problem as "poison for focus" because of the distracting advertisements and their negative effect on his students' attentiveness. Mr. Landis once showed a class a public service announcement on the health effects of soda, and a hyperlink to a video entitled "Fat A**" appeared at the end of the video. While college and university students might be able to ignore such advertisements, high school students, and younger students in particular, simply will not let an advertisement entitled "Fat A**" play without immediately making comments or jokes.

Kindergarten teacher Ms. Moiani also relies on streaming media to find the clips she needs to supplement classroom instruction because she cannot compile portions of audiovisual works. But she is often disappointed when the clips she is prepared to show via streaming are

suddenly unavailable. The unavailability may be caused by a number of factors. Sometimes the user has removed the clip; sometimes the streaming website itself has removed it; sometimes her school adjusts its filter and a website that may be used for a completely innocuous purpose is barred from being accessed on the school's network; and sometimes the school is unable to support the bandwidth needed to stream the clip at the time she planned to present it to her students. This unreliability is a constant issue. The quality of these streamed clips depends on the source of the content and whether the person who uploaded the content to the site used means insufficient to replicate the quality of the source material. Educators should not be forced to rely on notoriously unreliable and transient media.

Educators also have no control over what advertisements are displayed on the website's homepage and alongside the video. These advertisements may endorse products or other media that are inappropriate for the audience, like Ms. Moiani's kindergartners. Advertisements that include displays of weaponry and sexually suggestive content are inappropriate for the classroom and precipitate rounds of questioning from inquisitive students which, once again, wastes valuable classroom time. During one class, Ms. Moiani went to the YouTube home screen to find a video on shapes and accidentally exposed her kindergartners to a movie trailer glorifying gun violence. The students responded excitedly and shouted questions. Even for advertisements that are not inappropriate, if they appear as "banners" with the clip meant to be shown, those banners are a constant source of distraction throughout the clip and may, again, precipitate questions and waste time. If Ms. Moiani were allowed to create her own clips she would not have to rely on unreliable streaming media and run the risk of introducing potentially inappropriate material into her elementary school classroom.

d. Educators Cannot Effectively Supplement Their Lessons With Media

Livi Drake is a high school film teacher at Duke Ellington School of the Arts. In addition to wasting valuable class time shuffling media in order to compare film techniques and styles of different audiovisual works, Ms. Drake has no way for her students to access the copyrighted works when they do their homework. Currently, she assigns homework that her students must complete based entirely on their memory of the clips shown in class or using YouTube links. The first method requires far too great a retention for students; for their other classes, they have a textbook right in front of them. Indeed, the study of film is highly detail-specific. The second method of posting YouTube links is unreliable and inappropriate. The only way for Ms. Drake to effectively teach film and assign homework to complement her teaching is to create a clip reel that she may show in class and also post online in an access-controlled, student-only website.

e. Teachers Are Not Able To Splice and Compile Clips From Works In DVD and Blu-ray Formats, and the VHS Format Is Unworkable and Obsolete

This request for an exemption is not premised on a general lack of audiovisual works in the marketplace, but the practical unavailability of these works for particular educational purposes. Many works that drive this request for this exemption are only available for purchase in DVD or Blu-ray disc formats, or only available in streaming or digital formats. Copyrighted works in alternative formats, like VHS, are either unavailable for purchase, prohibitively expensive, or were never made available on that format. The VHS format is a medium on its way to obsolescence, if not already obsolete.[4] In fact many "born digital" materials will never be available on VHS or digital disc formats, and accessible only via streaming websites. These materials are rarely commercially available in hard copy, leaving educators no control over

[4] *See* Geoff Boucher, *VHS Era is Winding Down*, L.A. TIMES, Dec. 22, 2008, *available at* http://articles.latimes.com/2008/dec/22/entertainment/et-vhs-tapes22.

access. In addition, schools are more likely to equip classrooms with digital media players or computers with disc drives, not VCRs.

IV. The Alternative Ways For Educators To Incorporate Media Are Insufficient For Educational Purposes

a. Screenshot and Screen Capture Methods Produce Low Quality Clips

Two alternatives to circumvention—screenshot and screen capture methods—are insufficient because they produce clips with unacceptably poor sound and picture quality. The screenshot method requires recording the television screen with a camcorder and then digitizing that recording with a computer. The result is a grainy, poor-sounding and unsynchronized video, altered by glare, dust, and ambient noise. Alignment is often skewed and portions of the work might be lost. For educators of film—where quality is integral to the lesson—these videos are almost useless.

The second alternative method is "screen capture," which requires using a DVD player with an analog output, and running that analog output to a VCR or a computer capable of capturing and digitizing an analog signal. While this method is not affected by environmental and camera alignment issues, the output forces a reduction in picture resolution to that of VHS, a loss of approximately 2/3 of available pixels.[5] The quality of the video produced by screen capture is insufficient. High school film teachers, like Ms. Drake, use clips of audiovisual works in class to highlight methods of lighting, camera techniques, or other topics of study which require in-depth analysis. Theater classes at Duke Ellington School of the Arts require media to research the time period—including dialect and patterns of speech—of the plays they perform, study the social conditions of the characters the students portray, and analyze the stylistic concepts with which the director approached his subject matter. Here, it is evident that not only

[5] A DVD frame has a resolution of 720 x 480 pixels; a VHS camcorder recording will have a resolution of 230 x 480 pixels.

visual, but also audio quality, are important. Some classes, like theater history and styles classes, employ media for these purposes almost constantly. High quality picture and audio are crucial for teaching subtleties in directing, lighting, set design, acting, voice, and costume design. The low quality of screen-captured video significantly limits the utility of the materials as teaching tools. The loss in quality affects student reception of the work and subsequent retention of the information presented, too.

According to John Landis, Technology Coordinator at the Russell Byers Charter School in Philadelphia, some classroom teachers do not have the technological savvy to use screen capture software and other circumvention alternatives. Under the requested exemption, a Technology Coordinator like Mr. Landis would be able to help teachers in their schools edit and compile clip reels that may be used for many years to come and by many teachers in his school. Some teachers, like Mr. Landis, use computer-based screen capture like those available from TechSmith. Most teachers use free versions of such software like Jing. Spiro Bolos is a high school Social Studies teacher in Illinois who attempted to use Jing to show portions of *Elizabeth* to his students. Jing only allowed him to clip portions of media up to five minutes in length, but the first portion he needed for use in class ran 5:47 minutes and the last, and most important, part of the clip was not actually captured. Jing allows either file download or upload to Screencast.com, but even a short clip took Mr. Bolos over two hours to upload from his home computer. This is a real limitation to the effective educational use of media. The requested exemption would allow library and information technology personnel to aid Mr. Bolos in editing and compiling clips.

V. Using Portions Of Audiovisual Works For Educational Purposes Falls Under the Scope Of Classic Fair Use

Transformative educational uses are favored under Section 107 of the Copyright Act, but are impeded in practice by the anti-circumvention provision of Section 1201.[6] Section 107 designates four factors for determining whether the use of a copyrighted work is a 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.

For this proposed class, the intended uses are non-profit educational ones. The language of the first factor distinguishes between commercial and non-profit educational uses, clearly favoring the latter. For the second factor, the requested exemption will apply to audiovisual works that are of special pedagogical interest or importance. While the works to be sampled for classroom use may have been originally designed for commercial entertainment, when used in the context of digital and media literacy, the use that the exceptions will enable is always educational in character. Regarding the third factor, the portion to be sampled is usually short relative to the length of the entire audiovisual work; only the amount needed for the curriculum will be sampled. For the fourth factor, educational users lawfully access the original audiovisual work, and only then sample small clips from the original to show to their classes. The clips are shown only in the classroom, and are not distributed to students or elsewhere. It is unlikely that these clips sampled from audiovisual works will leave the teaching environment. For the film studies homework that Ms. Drake assigns, students would access the clip reel from student-only access-controlled websites. If in some unusual case the works did leave the classroom, a brief

[6] 17 U.S.C. § 107.

clip chosen from an audiovisual work for its educational value is unlikely to substitute for the entire audiovisual work in the market.

The legislative history supports the understanding of fair use described above. According to one House Report, it is clear that "assuming the applicable criteria are met, fair use can extend to the reproduction of copyrighted material for purposes of classroom teaching."[7] Another House Report explicitly listed the "reproduction by a teacher or student of a small part of a work to illustrate a lesson. . . ." among examples of fair use.[8]

VI. Conclusion

For the foregoing reasons, the Media Education Lab requests an exemption for lawfully accessed audiovisual works for educational purposes by K-12 educators. The existing exemption draws an arbitrary line between K-12 and university educators. Currently, teachers at Duke Ellington School of the Arts cannot compile high quality media clips in their film studies classes, yet down the street, a professor who teaches Composition I at Georgetown University can. This line becomes even fuzzier when one considers the proliferation of Advanced Placement and International Baccalaureate classes in high schools where educators teach on a college level. Effective use of media in the classroom should not hinge on venue.

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

[7] H.R. REP. No. 83, 90th Cong., 1st Sess. 33 (1967).
[8] H.R. REP. No. 94-176, at 65 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5680.

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