

*Before the*  
**U.S. COPYRIGHT OFFICE**  
**LIBRARY OF CONGRESS**

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

**Docket No. 2014-07**

**Written Reply Comment of**

Renee Hobbs  
Professor of Communication Studies  
Founder, Media Education Lab  
Harrington School of Communication and Media  
University of Rhode Island  
Kingston RI  
[hobbs@uri.edu](mailto:hobbs@uri.edu) / @reenehobbs

**Signatories:**

American Library Association  
Chicago IL  
Jonathan Band, Attorney  
[jband@policybandwidth.com](mailto:jband@policybandwidth.com)

Frances Jacobson Harris  
Professor Emerita, University Library  
Former Librarian, University Laboratory High School, University of Illinois at  
Urbana-Champaign  
[francey@illinois.edu](mailto:francey@illinois.edu) / @franceyharris

Michelle Ciulla Lipkin  
Executive Director  
National Association for Media Literacy Education (NAMLE)  
[mciullalipkin@namle.net](mailto:mciullalipkin@namle.net)

Media Literacy Now, Inc.  
Watertown, Massachusetts  
Eric McNeill, President  
[emcn17@gmail.com](mailto:emcn17@gmail.com)

## **Requested Class of Work for Exemption – Proposed Class 2 (Audiovisual Works— Educational Uses – Elementary and Secondary Schools)**

**Proposed Subclass 2:** Audiovisual works – educational uses – primary and secondary schools (K-12) This proposed class would allow kindergarten through twelfth-grade educators and students to circumvent access controls on lawfully made and acquired motion pictures and other audiovisual works for educational purposes. This exemption has been requested for audiovisual material made available in all formats, including DVDs protected by CSS, Blu-ray discs protected by AACS, and TPM-protected online distribution services.

### **I. Commentator Information**

Renee Hobbs is a Professor of Communication Studies at the Harrington School of Communication and Media where she directs the Media Education Lab, which provides curriculum materials and professional development education in digital and media literacy education to elementary and secondary teachers in school districts across the United States. The American Library Association is a national membership organization with more than 55,000 librarians, archivists, teacher-librarians and library educators. Frances Jacobson Harris is Professor Emeritus at the University Laboratory High School, University of Illinois at Urbana-Champaign and a nationally-recognized leader in school librarianship. Michelle Ciulla Lipkin is the Executive Director of the National Association for Media Literacy Education (NAMLE), a national membership organization. Erin McNeil is the President of Media Literacy Now, an advocacy organization for media literacy education.

### **II. Overview**

We request an exemption that enables educators and students in grades kindergarten to twelfth grade to use artifacts of their cultural heritage – classic and contemporary film and other contemporary digital media – for a range of digital and media literacy education practices that engage, motivate and inspire children and young people in American public, parochial and private schools. Such learning experiences activate important skills and competencies, including the ability to access, analyze, evaluate, create and share messages in a wide variety of forms.

Today, a wide variety of digital tools enable even very young children to create new works by re-purposing existing works in ways that advance their learning. As a novel instructional strategy, research evidence is beginning to demonstrate the effectiveness of digital literacy learning practices.<sup>1</sup> When students use copyrighted material in creating their own new digital works, they demonstrate their understanding of academic content, strengthen collaboration skills and activate critical and creative thinking. Digital and media literacy learning practices also help children and young people reflect on the social

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<sup>1</sup> See for example the research reports published by the Digital Media and Learning Research Hub, established by the

consequences of media in society and take action in the use of information and communication to make a difference in the world. Such purposes involving the use of copyrighted content in education are well-aligned with the goals of copyright law, which is to promote creativity, innovation and the spread of knowledge.<sup>2</sup>

The rights holders do not oppose renewal of the existing exemption for elementary and secondary school instructors. Rather, they oppose only our proposed expansion of the exemption. In this comment, we respond to the opponents' claims and emphasize that students and teachers need access to high-quality media – in all formats and across all devices – as an essential part of teaching and learning today.

**1. Opponents do not recognize that students' and teachers' access to and use of high-quality media generally qualifies as fair use.** Opponents question whether educational uses of digital media qualify as fair use and they make elaborate arguments about the distinctions between educational use and fair use. We claim that the instructional practices of digital and media literacy, which include the ability to access, critically analyze and create media, are highly likely to be fair uses and that children and young people develop these essential competencies and skills in the classroom through hands-on, minds-on learning. We understand, of course, that not all educational uses are fair uses. The current 2012 exemption limits circumvention to K-12 teachers, denying access to copyrighted works in certain formats to learners. But because these currently inaccessible works have real value for use by learners, the law is having substantial adverse effects on digital and media literacy learning. Students need access to state-of-the-art digital media texts (including in the latest high-definition formats) in order to comment on how these works affect their personal and social identity, how they reflect and shape the attitudes and values of audiences, and how they influence culture and values. Learners *and* teachers in elementary and secondary schools must both be able to select, manipulate and have access to the widest variety of meaningful and educationally valuable digital content available on DVDs, Blu-Ray discs and other high definition content.

**2. Opponents ignore the fact that the instructional practices of digital and media literacy require that students manipulate copyrighted digital content to critically analyze and create new works as part of the learning process.** Opponents have an outdated view of teaching and learning. Some comments suggest that students are doing little more than merely watching videos to gain content knowledge about topics in history or science, for example. In actuality, digital and media literacy learning has become increasingly focused on the pedagogy of student media production. This rise in focus on student-centered media production tied to learning in the subject areas has been made possible from the rise of easy access to digital technology. In many schools, computers are plentiful enough that students are able to engage in activities of critically analyzing and creating digital media as a fundamental part of the process of learning. Research is beginning to demonstrate the value of more digitally intensive learning experiences that include digital and media literacy instructional strategies. For example, new research

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<sup>2</sup> Crews, K. (1993). *Copyright, Fair Use and the Challenge for Universities*. University of Chicago Press.

used survey data to compare middle school children in urban Chicago to students of the same age in Silicon Valley, finding that Chicago students who participated in digital and media literacy programs reported more political interest and identified as digital media makers more frequently than the more affluent Silicon Valley youth, despite growing up in a community where family and neighbors had much less access to technology. The researchers attribute this difference to the focus on digital media production in school curricula and in after-school programs for the Chicago students. This educational program hinged on digital remix practices, and they even called their social networking platform “Remix World.” This example speaks directly to the issue of the very real educational benefits of students actively involved in creating and manipulating digital texts.<sup>3</sup> In another example a four-year study of 5,000 middle school students in Texas found that those engaged in 1-to-1 laptop programs were less likely to have disciplinary problems than students in schools without laptops.<sup>4</sup> The ability to create media as part of the learning process in elementary and secondary schools also helps develop students’ technology skills, and research shows that after three years, low-income students who get to manipulate media as part of their learning display the same levels of technology proficiency as wealthier students in the control schools.<sup>5</sup> Such programs also offer cost efficiencies including reduced costs for textbooks, paper, assessments, and paperwork, as well as a reduction in disciplinary actions.<sup>6</sup> For these reasons, we urge the Librarian to grant an exemption that supports the continuing development of innovative instructional practices that use digital media, including digital and media literacy education.

### **3. Opponents do not acknowledge that educational fair use is evolving to be increasingly sensitive to the situation and context of the learning environment.**

Opponents argue that our request is too broad and they recommend a definition that limits use to short clip compilations for film analysis, comment and criticism. But this definition is far too narrow; an exemption written to include only these practices would likely have a harmful effect on education, increasing confusion and reducing innovation among both educators and learners.

Teaching and learning is a highly variable practice; situational variation is necessary for education to be responsive to the specific contexts of K-12 education. More important, because digital media is changing so rapidly, a robust spirit of experimentation by educators and students is required in order to discover the educational value of these new tools and technologies. With 50 million children and teens in American schools, and more than 3 million teachers, the range of instructional practices and strategies used by educators will inevitably be broad. It is in the public interest that educators be encouraged to be innovative in using digital media in ways that advance student learning. A too

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<sup>3</sup> Barron, B., Gomez, K., Pinkard, N., Martin, C. (2015). *The Digital Youth Network: Cultivating Digital Media Citizenship in Urban Communities*. Cambridge, MA: MIT Press.

<sup>4</sup> Shapley, K., Sheehan, D., Sturges, K., Caranikas-Walker, F., Huntsberger, B., & Maloney, C. (2009). *Evaluation of the Texas Technology Immersion Pilot: Final outcomes for a four-year study (2004–05 to 2007–08)*. Austin: Texas Center for Educational Research.

<sup>5</sup> *ibid.*

<sup>6</sup> Greaves, T., Hayes, J., Wilson, L., Gielniak, M., & Peterson, E. (2010). *Project RED key findings*. Shelton, CT: MDR. Retrieved from One-to-One Institute at [www.one-to-oneinstitute.org/NewsDetail.aspx?id=85](http://www.one-to-oneinstitute.org/NewsDetail.aspx?id=85)

narrowly-written exemption will discourage the kinds of educational innovation that are desirable and beneficial to learners, and, ultimately to society.

**4. There is no good reason to create separate rules for digital media in different formats.** Digital media is constantly evolving. While in 2015, DVDs dominate the marketplace, this may not be true in 2017. Opponents use a divide-and-conquer strategy by elaborately distinguishing between media content in different formats and for use with different devices. The intent and spirit of the copyright law, its flexibility and responsiveness to changes in media, education and technology, does not warrant the creation of separate rules for different types of digital media. Elaborate new rules that create different exemptions for DVD, Blu-Ray and streaming media have the potential to create more confusion by creating an elaborate category system that treats media in different digital formats differently. Such a rule does not reflect the spirit of copyright law and would certainly discourage the innovative educational use of digital media in elementary and secondary schools. For these reasons, this exemption has been requested for audiovisual material made available in all formats, including DVDs protected by CSS, Blu-ray discs protected by AACS, and TPM-protected online distribution services.

**5. Student creative expression is fully subject to the legal protection of copyright and fair use.** Opponents' concern about the breadth of our exemption is unwarranted. In particular, they are concerned that student-created media might not constitute a fair use. Student creative expression is fully entitled to fair use protection, as the doctrine is not limited in its application to only to people over the age of 18. Right now, the DMCA has created a chicken-egg problem for educators: Learners need to access encrypted digital content in order to manipulate it to create new work that is transformative; yet, without the ability to legally access the work, they cannot create new works. Unless students can access encrypted digital content, they cannot engage in the kinds of manipulation and creative work that are needed in order to make transformative works.

**6. Opponents have narrowly formulated ideas about length and brevity of copyrighted content that do not reflect the spirit of copyright law.** In particular, courts have established that educators should have the ability to determine the amount and length of work necessary to accomplish a particular educational purpose. In *Cambridge Univ. Press v. Patton*,<sup>7</sup> the U.S. Court of Appeals for the 11th Circuit found that professors' sharing of excerpts from copyrighted works with students in their courses "is of the nonprofit educational nature that Congress intended the fair use defense to allow under certain circumstances."<sup>8</sup> Hard numerical limits of the appropriate amount of work used – in particular the idea that works must be "short" or "brief" -- were recognized in this case to be legally inappropriate. Instead, the court explained that lawful, noninfringing uses must simply be well-aligned and proportional to the instructor's particular instructional objectives. One of the reasons why elementary and secondary educators and students need an exemption to circumvent digital content in all its forms comes from the strong alignment between the pedagogy of digital and media

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<sup>7</sup> 769 F.3d 1232 (11th Cir. 2014).

<sup>8</sup> 769 F.3d 1232 (11th Cir. 2014).

literacy and the concept of transformative use. Students and teachers both need to have access to digital content in order to make transformative use of copyrighted content for learning purposes. Transformative uses “lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright.”<sup>9</sup>

### **7. Opponents understate the importance of image quality for teaching and learning.**

They use a legal argument to claim that fair use does not require the use to be technologically convenient. But in many schools and for many learners, access to high quality images is needed in order for a lesson to accomplish its pedagogical goals. Image quality increases viewers’ sense of psychological involvement with media. For example, when we are teaching high school students about how “the media is the message,” we sometimes want students to experience how the format itself can shape emotional response. In other situations, educators need highest-quality images simply in order for the content to be usable, as we have previously demonstrated that the quality of the classroom environment, with the differences in projection screens, light leakage and other factors affect learner response. Also, the diminished quality of sound is a substantial liability for classroom use. Degraded sound and image quality may affect student engagement, which can then result in decreased learning. The Copyright Office will recall that in 2012, social studies teacher Spiro Bolos demonstrated the results of an experiment he conducted with students at New Trier High School in Evanston, Illinois, where he found that the quality of student discussion was improved when students conducted a close analysis of a high-quality clip as compared with a screencast version.

**8. Screen capture does not suffice to meet the full range of educational needs of educators or learners.** In particular, screen capture does not offer educators the flexible use of closed captioning or language tracks that are available on DVDs or Blu-Ray discs. Closed captioning is a powerful tool for advancing students’ reading comprehension. Same language subtitling (SLS) is the instructional practice of using captioned videos to encourage reading and increase reading proficiency. Students are able to hear the words being spoken and read the words being spoken at the same time. The use of entertainment media with closed captioning in the K-12 classroom has been shown to dramatically increase students’ reading comprehension.<sup>10</sup>

Screen capture and media streaming alternatives do not meet the needs of all educators or learners. Opponents of our exemption claim that screen capture and media streaming provide adequate alternatives to circumvention. But these tools, while valuable, have some important limitations that differentially affect the 50 million students in elementary and secondary schools. Apart from the degraded image quality, many educators do not have the most up-to-date hardware or software or cannot afford the cost of the fee-based screen capture tools. Opponents submitted video clips created using WM Capture, which costs \$79 for a single computer, a cost which is unlikely to be absorbed by the school district and would need to be paid for out-of-pocket by modestly-paid classroom

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<sup>9</sup> Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

<sup>10</sup> Kothari, B., & Bandyopadhyay, T. (2014). Same language subtitling of Bollywood <sup>a</sup>lm songs on TV: Effects on literacy. *Information Technologies & International Development*, 10(4), 31–47

educators, whose average starting salary in 2012 was \$35,672.<sup>11</sup>

Screencasting simply doesn't work to capture all forms of digital media. Opponents do not acknowledge what we have previously documented: that screencasting does not always work when using encrypted DVDs, Blu-Ray discs, Netflix, Amazon Prime, Roku, Hulu Plus, or other streaming services.

**9. Media streaming platforms do not replace the need for circumvention in all cases.**

Streaming platforms, while valuable, should not be considered a substitute for the need for circumvention of a variety of forms of digital media content. Streaming media often have steep fees that limit access. For example, access to Discovery Education streaming media may cost as much as \$10,000 or more annually for a school district. Even for paying customers, access is limited as the license contract may limit the ability of students or teachers to use clips to create student-produced media projects. For this reason, librarians and educators have recognized that streaming media may position learners in a "receive only" mode, thus limiting the new forms of active, hands-on, minds-on creative learning that digital literacy requires. Plus, educators in rural and urban communities may not be able to count on high-speed Internet access that streaming media requires. Streaming media offers a limited selection of content and often includes advertisements that can interfere with the learning experience. Screen capture software, while valuable, is not sufficient for the needs of teachers and learners in K-12 education. For all these reasons, teachers and students need to be able to access the content of digital media on DVDs, Blu-Ray discs and other high definition content.

**10. The use of copyrighted materials for digital and media literacy education is inherently a transformative use.** Media literacy educators have long recognized that transformative use is an essential dimension of this particular approach to teaching and learning. That is why they developed the *Code of Best Practices in Fair Use for Media Literacy Education* in 2007.<sup>12</sup> In particular, media literacy education emphasizes the critical analysis of works of entertainment, news, advertising and popular culture as a way to deepen critical thinking, reflect on how values are transmitted through media, and connect home and classroom. The vast majority of audiovisual works in circulation were not intended for classroom use but have much value when used for educational purposes. As a means of learning, students critically analyze entertainment media and then create something new with it, manipulating "quoted matter," using it "as raw material transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society."<sup>13</sup> In our view, opponents to our exemption trivialize and dismiss the significant benefit that such educational use offers to society. For all these reasons, we disagree with opponents who believe our exemption is too broad.

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<sup>11</sup> <http://www.nea.org/home/2011-2012-average-starting-teacher-salary.html>

<sup>12</sup> Media Education Lab, Program on Information Justice and Intellectual Property, and Center for Media and Social Impact (2007). *Code of Best Practices in Fair Use for Media Literacy Education*. Available: <http://www.cmsimpact.org/fair-use/related-materials/codes/code-best-practices-fair-use-media-literacy-education>

<sup>13</sup> Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

**11. Elementary and secondary educators support students in learning to make lawful, transformative work and discourage infringing uses.** Teachers have a deep interest in encouraging students' lawful behavior. Because they are learning, and learning sometimes involves making mistakes, some students may create works that are infringing, many others will create work that is transformative. One of the ways that students learn best is through hands-on experience, guided by educators who help them develop reasoning and analysis skills. We have found that elementary and secondary students, with appropriate support, can learn to apply the four-factor test to analyze whether a particular use of copyrighted material is likely to be infringing or lawful. In fact, educators are increasingly active in seeking to develop their understanding of copyright and fair use. In Fall 2014, more than 700 educators enrolled in the MOOC (massively online open course) offered on the Canvas Network to develop their own knowledge about how to support student learning of their rights and responsibilities under copyright law in a digital era.<sup>14</sup> Online learning and discussion boards like the Copyright Confusion wiki demonstrate that educators are educating themselves and helping students to understand how to create digital media that is noninfringing.<sup>15</sup> Educators who use digital tools, texts and technologies have created and now use a variety of curriculum materials to help teach about students' rights and responsibilities under the law. For example, Common Sense Media, a San Francisco-based non-profit organization, has developed a copyright education curriculum now widely used in American schools to help students determine how, when and why they may use copyrighted content as part of their own creative expression. For example, in Grades K- 2, children learn about authorship by putting their name and date on a work they create; in Grade 3, they learn about plagiarism and how to cite sources. In middle school, students learn about how copyright protects their rights and responsibilities as creators and users of the works of others. In high school, students are introduced to the legal and ethical dimensions of copyright.<sup>16</sup> The exemption offered to K-12 teachers in 2012 did not have any demonstrated negative impact on copyright holders and we do not anticipate any to occur when elementary and secondary students have the legal right to bypass encryption for fair use purposes. For these reasons, opponents' concern about the breadth of our exemption is unwarranted.

**12. An exemption for students and teachers in elementary and secondary schools does not harm the economic interests of media industries or technology providers.** Opponents conclude their argument by presenting a classic legal double bind: they first imply that abuses occurred if students were engaged in circumvention and they then suggest that no exemption is needed if students made use of screen capture. This superficial ploy trivializes the importance of the DMCA 1201 process in supporting the innovative uses of digital media in the context of elementary, secondary and higher education. It's worth noting that opponents provide no evidence to show that the DMCA 2012 exemption to K-12 teachers has led to any abuse or harm to the industry. For these reasons, an exemption should be provided to allow kindergarten through twelfth-grade educators and students to circumvent access controls on lawfully made and acquired

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<sup>14</sup> <https://www.canvas.net/courses/copyright-clarity>

<sup>15</sup> <http://copyrightconfusion.wikispaces.com/>

<sup>16</sup> <https://www.common Sense Media.org/educators/scope-and-sequence>



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