UNITED STATES COPYRIGHT OFFICE

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

**Reply Comments of the Electronic Frontier Foundation, New Media Rights, Organizational for Transformative Works on Proposed Class 1 – Audovisual Works – Criticism and Comment**

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

## ITEM A. COMMENTER INFORMATION

Electronic Frontier Foundation ("EFF") is a member-supported, nonprofit public interest organization devoted to maintaining the traditional balance that copyright law strikes between the interests of copyright owners and the interests of the public. Founded in 1990, EFF represents thousands of dues-paying members, including artists, consumers, hobbyists, students, teachers, and researchers, who are united in their reliance on a balanced copyright system that ensures adequate protection for copyright owners while facilitating new creativity, innovation, and broad access to information in the digital age.

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New Media Rights ("NMR") is a non-profit public interest program that provides legal services to creators and Internet users whose projects require specialized internet, intellectual property, privacy, and media law expertise. These legal services include counsel regarding section 1201 of the DMCA. NMR also engages in education and policy advocacy to benefit these clients. NMR is an independently funded program of California Western School of Law, a 501(c)3 non-profit. Further information regarding NMR's mission and activities is available at http://www.newmediarights.org.

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The Organization for Transformative Works ("OTW") is a nonprofit organization established in

2007 to protect and defend fanworks from commercial exploitation and legal challenge. "Fanworks" are new, noncommercial creative works based on existing media. The OTW's nonprofit website hosting transformative noncommercial works, the Archive of Our Own, has over 770,000 registered users and receives over 115 million page views per week. We represent artists who make works commenting on and transforming existing works, adding new meaning and insights—from reworking a film from the perspective of the "villain" to retelling the story as if a woman, instead of a man, were the hero.

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In filing these reply comments, we collectively represent the interests of artists, educators, students, filmmakers and ordinary citizens who seek to make fair use of motion pictures for purposes of criticism and commentary.

*Note:* the American Library Association, the Association of Research Libraries, the Association of College and Research Libraries, and the Authors Alliance support this submission, as does Professor Peter Decherney, who has participated in these proceedings since 2006 on behalf of educators. Other organizations may be offering support via separate submissions.

## ITEM B. PROPOSED CLASS ADDRESSED

*Proposed Class 1:* Motion Pictures (including television shows and videos), as defined in 17 U.S.C. 101, where circumvention is undertaken solely in order to make use of short portions of the works for the purpose of criticism or comment, where the motion picture is lawfully made and acquired on a DVD protected by the Content Scrambling System, on a BluRay disc protected by the Advanced Access Control System, via a digital transmission protected by a technological measure, or a similar technological protection measure intended to control access to a work, where the person engaging in circumvention reasonably believes that non-circumventing alternatives are unable to produce the required level of high-quality source material.

## ITEM C. OVERVIEW

The predictable pattern we identified in our opening comments has been repeated once again: a set of proponents have submitted ideas for exemptions to cover a variety of practical, socially valuable and otherwise lawful activities. And a coalition of entertainment entities object – insisting, without evidence, that the proposed exemptions might harm the continued growth of audiovisual markets. The Copyright Office could now play its traditional part by recommending a set of complicated exemptions that cover a variety of fair uses, and leave it to the lawyers (or in some cases clinical law students, or in the average case no one at all) to explain to artists, filmmakers, educators and students what they are and are not allowed to do.

We urge the Copyright Office and the Librarian of Congress to choose instead to break this pattern and adopt an alternative approach: a streamlined over-arching exemption that simply and cleanly clears a path for lawful fair uses, keeping in mind that in almost two decades there has never been a shred of evidence that any of the motion picture exemptions has resulted in infringement or otherwise harmed the market for audiovisual works.

## I. The Proposed Exemption Is Well Within the Copyright Office's Legislative Authority, and Reflects the Legislative and Regulatory History of Section 1201

Opponents described the proposed exemption as a "thinly disguised, impermissible categorical exemption" that is "impermissible under the statutory structure." We'll take each claim in turn.

First, the proposed Class 1 is far from a categorical exemption of fair use. The exemption is limited to (1) short portions, (2) of motion pictures, (3) on particular physical or digital media, (4) for purposes of commentary or criticism, (5) only where the person engaging in circumvention reasonably believes that non-circumventing alternatives are unable to produce the required level of high-quality source material and (6) only where the use is a fair use. These limits go far beyond anything required by the statute or regulations, and are hardly coextensive with Section 107.

Indeed, opponents did not challenge any of the language above as an impermissibly broad or categorical when it was proposed and renewed for the existing 8 subclasses from current Class 1 last year. This proposal retains nearly all of the limitations in the current video exemptions.

In fact, the sole limitation removed in this proposal versus the current Class 1 subclasses are the references to particular types of users. While evidence that various users will be harmed may be useful in determining whether an exemption is needed, that does not mean that exemptions must be tied to distinctions based on labeling types of users, any more than exemptions must be tied to the specific named individuals who have asked for them.

If opponents' principal concern is that a user limitation helps combat piracy, they should support that proposition. They do not. In fact, they offer no evidence of any connection whatsoever between exempted uses and piracy, regardless of the type of user. To the contrary, in the 2015 rulemaking process during testimony in Los Angeles regarding the documentary filmmaking exemption, Simon Swart, a representative of 20th Century Fox Home Entertainment, after giving a lengthy discussion of piracy generally, was asked specifically if there was a connection between piracy and the exempted uses. Here is that exchange:

> MS. CHARLESWORTH: Do you have any evidence -- maybe this is not in your department -- but a connection between sort of the types of uses and using Blu-ray clips and derivative clips in films in the way that has been described here today and piracy.

> MR. SWART: We don't have a direct link as far as I am aware but I can look into that. As I say, we do monitor the actual piracy resources with the MPAA around the world. I am not sure of the exact link to short form content.[1]

Mr. Swart did not supplement the record.

As for opponents' second claim, there is no statutory restriction precluding the proposed exemption. As explained in our opening comments, exemptions should be crafted in light of the clear legislative history showing that the 1201 exemptions proceeding is intended to protect fair uses. We can do better than a motion picture exemption that is inaccessible to the average user and that arbitrarily makes criticism-and-commentary-based fair use unavailable to certain types of users. If the last 20 years of exemption proceedings have taught us anything, it is that it is difficult to predict who may need to engage in anti-circumvention to engage in exempted uses. As the list of exempted user groups have grown to include four different varieties of educators, video gamers, vehicle safety researchers, and farmers—but not, for example, attorneys—it is time to acknowledge that "type of user" is not a useful distinction.

The proposed exemption more closely tracks the legislative and regulatory history, makes the class practically more accessible to the average user, and acknowledges 6 past proceedings and 20 years of evidence showing that there are a variety of fair users that need to make use of short portions of motion pictures for the purpose of criticism or comment. This approach is supported by the evidence of parties who have argued for related video exemptions in this and prior proceedings, and is well within the Copyright Office's authority to approve this exemption.[2]

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[1] 1201 Rulemaking Process Public Roundtable 05-20-2015, p 82, ln 6-16. https://www.copyright.gov/1201/2015/hearing-transcripts/1201-Rulemaking-Public-Roundtable-05-20-2015.pdf.

[2] In addition to the supporting evidence provided in previous years' proceedings and this proceeding's renewal stage to support Class 1, additional evidence of the range of those making fair use is offered in the current stage of this proceeding as follows: Author's Alliance et al, Long Comment Regarding A Proposed Exemption Under 17 U.S.C. §1201 (2017), https://www.copyright.gov/1201/2018/comments-121817/class1/class-01-initialcomments-authors-alliance-et-al.pdf; Brigham Young University, Long Comment Regarding A Proposed Exemption Under 17 U.S.C. §1201 (2017), https://www.copyright.gov/1201/2018/comments-121817/class1/class-01-initial-comments-byu.pdf; Comments of the Electronic Frontier Foundation, New Media Rights, Organization for Transformative Works on Proposed Class 1 - Audiovisual Works - Criticism and Comment, Regarding A Proposed Exemption Under 17 U.S.C. §1201 (2017), https://www.copyright.gov/1201/2018/comments-121817/class1/class-01-initialcomments-eff.pdf; Comments of Film Independent, the International Documentary Association, Kartemquin Films, Regarding A Proposed Exemption Under 17 U.S.C. §1201 (2017), https://www.copyright.gov/1201/2018/comments-121817/class1/class-01-initialcomments-fi-ida-kef.pdf; Free Software Foundation, Long Comment Regarding A Proposed Exemption Under 17 U.S.C. §1201 (2017), https://www.copyright.gov/1201/2018/comments-121817/class1/class-01-initialcomments-fsf.pdf; Joint Educators, Long Comment Regarding A Proposed Exemption Under 17 U.S.C. §1201 (2017), https://www.copyright.gov/1201/2018/comments-121817/class1/class-01-initialcomments-joint-

## II. There Is Ample Evidence of the Need for a Simpler, User-Friendly Exemption

The Joint Creators claim that there is no real need for a less complex video exemption.[3] But they offer little support for that claim.

Notably, they offer no direct response to the ample empirical and practical evidence we submitted in our opening comments. Instead, their main answer is an attempt to shorten and translate the 2015 exemption into something other than legalese.[4] While their effort to shorten the exemption is laudable, the challenge is not length alone. The rule is written in language suitable for a grade level of 19.6, or third-year graduate school,[5] meaning that most people who need to rely on the exemptions will not have the educational level required to understand them. That challenge is evident in the Joint Creators' own version. To take just one example, the Joint Creators define a MOOC not in terms of its educational offerings, but whether it provides a host of copyright trainings and uses TPMs. It is hard to imagine that even a sophisticated MOOC administrator would define her own program in that way, or know that she should to avoid legal liability.

The legislative history of Section 1201 indicates that preserving fair use should be paramount in these triennial rulemaking proceedings. Excess verbiage and complex language undermines that goal.

## III. Screen Capture and Licensing Are Not Adequate Substitutes for an Exemption

Opponents also continue to insist that screen-capture is a viable option.[6] Initially, we note that the proposed exemption already requires that its beneficiaries have a reasonable belief that circumvention is necessary to accomplish their fair uses. Widely known and available alternatives, if they existed, could bear on the reasonability of that belief. In this respect the proposed streamlined exemption is no different in substance from the existing exemptions the Office has already indicated its intent to renew. Instead, the proposal simply eliminates arbitrary barriers and traps for the unwary.

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educators.pdf; Joint Filmmakers, Long Comment Regarding A Proposed Exemption Under 17 U.S.C. §1201 (2017), https://www.copyright.gov/1201/2018/comments-121817/class1/class-01-initialcomments-joint-filmmakers.pdf; The National Association of Criminal Defense Lawyers, Short Comment Regarding A Proposed Exemption Under 17 U.S.C. §1201 (2017), https://www.copyright.gov/1201/2018/comments-121817/class1/class-01-initialcomments-nacdl.pdf.

[3] Joint Creators and Copyright Owners Comment Regarding a Proposed Exemption Under 17 U.S.C. § 1201 ("Joint Creators Opp'n") at 8.

[4] *See id*. at 8.

[5] *See* 37 CFR § 201 Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule at p. 65946-50.

[6] Joint Creators Opp'n at 25-26; DVD CCA/AACS Comments Regarding a Proposed Exemption Under 17 U.S.C. § 1201 at 36-41.

### A. Licensing markets remain limited and laden with onerous conditions incompatible with fair use.

Today, as in the past, some of the opponents make some clips available to some people on a voluntary basis. What they do not do, and will not do, is allow fair users to (1) freely choose the clips that they need to make their particular points,[7] (2) without copyright owner editorial control. For example, the Universal site touted by the Joint Creators as exemplary requires that the "User shall not disparage, criticize, belittle, parody, alter or otherwise negatively comment upon the clip and/or still in connection with the Use."[8] The prohibition on "alter[ation]," of course, prevents any of the standard editing that in which many fair users engage, including captioning for information or for effect. This editorial control is particularly inconsistent with fair use, which often involves criticism or commentary the copyright owner might not endorse.

In addition, the limited licensing market that exists is generally unavailable to noncommercial users, who neither know about nor have access to paid or individually negotiated licensing regimes. Opponents claim, for example, that the MPAA licenses "thousands" of clips a year.[9] But "thousands" of user-generated videos using clips appear on YouTube *each week*; the MPAA's activity is a drop in the ocean. The Universal site, for its part, clearly states on its front page that it is a "business to business" site. It requires requests for licensing NBC content to be faxed, "on letterhead and include a description of your program along with the term, territory, media and number of runs you will need," which ordinary fair users are unlikely to be able to state, if they even have fax machines. Other types of content require completely different transactions.[10] These are not real options for most people.

### B. Screen capture is useless or inadequate in the absence of a workable exemption.

#### 1. Lawsuits based on screen-capture technologies continue.

Contrary to some of the assumptions that have come to inform these proceedings, screen-capture technologies are not a safe harbor; copyright owners, including the opponents, have recently raised

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[7] If one wanted to make an argument about George Clooney, for example, Universal will determine whether a film in which Clooney appeared is "available for licensing," Joint Creators Opp'n at 13, on a blanket basis; if the film is not available for licensing, the critic is apparently out of luck. (Actually, given the operation of Universal's internal search engine, searching for George Clooney will also return results for Rosemary Clooney, Curious George, and George Burns, so the would-be licensor needs some time on her hands. One will also encounter numerous works in the database marked "unknown," e.g., https://www.universalclips.com/catalog-items/13872).

[8] *Terms & Conditions*, (available through beginning the account creation process at https://www.universalclips.com/account/request-account)

[9] Joint Creators Opp'n at 12.

[10] FAQ, Universal Studios Media Licensing, https://www.universalclips.com/faq. Universal does not recognize fair use as an option. *See id.* ("If you plan to use clips from any property owned by NBC/Universal in a project shown to the general public or used for commercial gain, you must purchase a license for that property").

Section §1201 claims against technologies that appear very similar to those discussed in these proceedings.[11]

### 2. The quality of screen capture is still unreliable and/or very low.

There is a reason that the opponents' examples of successful screen capture involve PowerPoints and other non-television and film substrates:[12] screen capture generally doesn't work for the classes of uses actually covered by the proposed exemption, and screen capture providers don't pretend otherwise.[13] Opponents have provided *no* documentary evidence that current screen capture software can even capture DVD, Blu-Ray, or Netflix-style streaming video output, much less capture it at a high enough fidelity to survive ordinary editing practice, as detailed in prior proceedings by Tisha Turk and others. Occasional workarounds exist, but they require users to capture only a portion of the video screen, and are therefore readily derailed by cursor movement, on-screen notifications, a window at the wrong size or aspect ratio, and especially slow broadband.

As proponents demonstrated in previous proceedings, screen capture is insufficient for DVD, Blu-Ray, and streaming video. Indeed, screen capture regularly produces not merely low-resolution content but black screens because of the design of the DRM on these products.[14] As Gizmodo explains, "There's only one big block on screenshots on Android and indeed iOS: when DRM-protected video is playing, with Netflix the best example. Right now there's no way around this restriction, even using the desktop applications we've mentioned."[15] General purpose screen recording software will not help.[16] This general unusability further reinforces the unreasonableness of distinguishing between types of software for purposes of the relevant uses.

Even if screen capture worked, it would not provide the high quality that may be necessary to a use. In particular, because screen capture is in part dependent on the quality of a user's internet connection, people in some markets can capture only extremely low-quality source, below what

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[11] *See UMG Recordings, Inc. v. PMG Technologies UG*, No. 16-cv-07210 (C.D. Cal., filed Sept. 26, 2016) (including §1201 claim against software provider allowing capture of audio from YouTube).

[12] Video games, for example, are often optimized to support approved in-game recordings.

[13] Indeed, that appears to be a main reason that the providers identified by the opponents state that they are DMCA-compliant, though neither we nor the opponents are in a position to confirm this at the technological level.

[14] https://www.dvd-cloner.com/knowledge/about-dvd-copy-for-mac/how-to-take-screenshots-in-mac-os-x-s-dvd-player-application.html; https://support.techsmith.com/hc/en-us/articles/203732478-Snagit-Mac-Cannot-capture-DVD-video-on-OS-10-7-or-later.

[15] David Nield, *How to Take Screenshots of Anything (Even When They're Blocked)*, Gizmodo (Jan. 23, 2017), https://fieldguide.gizmodo.com/how-to-take-a-screenshot-of-anything-even-when-theyre-1791505218.

[16] *Recording Netflix get sound but only black screen video*, Open Broadcaster Software, (Sept. 19, 2017), https://obsproject.com/forum/threads/recording-netflix-get-sound-but-only-black-screen-video.74657/; *see also iOS 11 Prevent Screen Record like Netflix*, Stack Overflow (last visited Mar. 12, 2018), https://stackoverflow.com/questions/46319665/ios-11-prevent-screen-record-like-netflix/46370265#46370265 (explaining the technical steps used by Netflix and others on iOS).

would be acceptable under virtually any circumstances. Our expert Tisha Turk will provide examples at the hearing.

Other situations in which screen capture is unlikely to function well include judicial settings. Experts on evidence recognize that poor-quality visual presentations often affect a factfinder's assessment of the *evidentiary value* of the visuals. Even if an outsider wouldn't consider quality very significant, a good attorney will look for the highest quality available. Moreover, low quality capture may not include crucial essential details.

But the importance of quality to presentation extends beyond the courtroom. Any video will lose substantial numbers of viewers, regardless of content, if it doesn't have the high-quality viewers now expect.[17] Persuasion, regardless of context, requires effective presentation, and image quality is part of that effectiveness, regardless of whether there are specific details that would be lost in a low-quality image.[18]

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[17] Chris Tribbey, *Verizon: Online Viewers Expect TV-Quality Video, Broadcasting & Cable*, Jun. 29, 2016, http://www.broadcastingcable.com/news/technology/verizon-online-viewers-expect-tv-quality-video/157690 ("[A] new consumer survey from Verizon Digital Media Services (VDMS), . . . found that online video service providers can increase video viewership by 25% by providing a high-quality viewing experience. . . . "It's clear that poor video quality results in high rates of viewer abandonment," a summary of the report reads.").

[18] *See, e.g.*, Jordan S. Gruber et al., *Video Technology*, 58 Am. Jur. Trials 481 § 50 (2018) (noting that "the quality of the image will greatly affect the persuasive power of the evidence" and recommending obtaining the highest technologically feasible quality); Sanorita Dey et al., *The Art and Science of Persuasion: Not All Crowdfunding Campaign Videos Are The Same*, CSCW 2017 - Proceedings of the 2017 ACM Conference on Computer Supported Cooperative Work and Social Computing, p. 755-769 (finding that "The perceived quality of audio and video was the most frequently mentioned factor for all three [Kickstarter] project categories [tested] (n = 690). [Survey respondents] strongly criticized lower quality audio and video in their comments," including low resolution; for all three types of campaigns studied, audio-video quality had the most significant/positive associations with the outcome of the campaigns); Karl F. MacDorman et al., *Gender Differences in the Impact of Presentational Factors in Human Character Animation on Decisions in Ethical Dilemmas*, 19 Presence 213, 214-16 (2010) (finding that motion quality or jerkiness and photorealism or the lack thereof affected the persuasiveness and effectiveness of evidence for male respondents); Robert E Smith et al., *Modeling the determinants and effects of creativity in advertising*, 26 Marketing science 819–833 (2007) (explaining marketing value of high-quality video); John G Beerends & Frank E De Caluwe, *The influence of video quality on perceived audio quality and vice versa*, 47 Journal of the Audio Engineering Society 355–362 (1999) (noting importance of video quality for effectiveness); Lee et al., *Assessment of Motion Media on Believability and Credibility: An Exploratory Study*, 36 Public Relations Review, pp. 310, 312 (2010) (finding that high production values improve video credibility); Miriam J. Metzger et al., *Social and Heuristic Approaches to Credibility Evaluation Online*, 60 Journal of Communication 413-439 (2010) (finding that technical quality characteristics online are often more important than the quality of arguments).

To its credit, the Copyright Office has acknowledged the need for quality in presentation in past proceedings. For example, in its 2012 Recommendation, the Librarian, citing remix creator Jonathan McIntosh's well known video *Buffy v Edward* which required a variety of zooming and cropping techniques to achieve its expression, noted that "[T]he Register is able to perceive that Buffy vs Edward and other noncommercial videos would suffer significantly because of blurring and the loss of detail in characters' expression and sense of depth."[19] Even in 2015, filmmaker Rick Bowman, foreshadowing the demand for higher quality footage, noted that "at this past years American Film Market event in Los Angeles, distributors didn't want to look at any films unless they had been filmed in 4k."[20]

In 2015, the Librarian cited a variety of evidence from the record that supported the need for quality source materials.[21] The Librarian noted that "the record generally demonstrates that consumer devices and expectations have at the same time increased as high definition continues to supplant standard definition and ultra-high-definition formats (i.e., 4K and 8K resolution) begin to penetrate the market." Also in 2015, filmmaker Rick Bowman recognized the demand for 4K and higher quality footage, noting that "at this past years American Film Market event in Los Angeles, distributors didn't want to look at any films unless they had been filmed in 4k."[22]

Three years on, the trends the Librarian aptly observed in past proceedings are still present. Consumer devices and expectations continue to increase, as do the requirements of distributors of content.[23] Most major distributors and broadcasters are now asking for submissions in 4K and offering some service and content to consumers in 4K.[24] Just three years from now in 2021, before the next 1201 exemption proceeding, the National Association of Broadcasters estimates over half of American households will have 4K televisions.[25] Moreover, "upconverting" continues to not be a satisfactory substitute in many circumstances.[26] Proponent New Media Rights is directly

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[19] Recommendation of the Register of Copyrights, October 2012, at 133.
[20] Comments of New Media Rights In the matter of Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies 2015, at p 7.
[21] Recommendation of the Register of Copyrights, October 2015, at 84-92.
[22] Comments of New Media Rights In the matter of Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies 2015, at p 7.
[23] Joint Filmmakers, Long Comment Regarding A Proposed Exemption Under 17 U.S.C. §1201 (2017), https://www.copyright.gov/1201/2018/comments-121817/class1/class-01-initialcomments-joint-filmmakers.pdf. *See also* industry materials encouraging consumers to adopt 4K on their devices, including Amazon's 4K store https://www.amazon.com/4K-Store/b?ie=UTF8&node=11598814011; Universal's 4K page https://www.uphe.com/uhd-education, Sony's list of products and services surrounding 4K; and Sony's list of 4K services and product https://www.sony.com/search?query=4k&locale=en_US.
[24] *Id.*
[25] Also note that the National Association of Broadcasters submitted comments to the FCC in 2016 that "more than half of all TV households will have a 4K Ultra HD set within five years," Comments of the National Association of Broadcasters In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, September 21, 2016, citing US TV set and Blu-ray player projections through 2025, SNL Kagan (Apr. 21, 2016).
[26] Recommendation of the Register of Copyrights, October 2015, at 51, 67.

aware of a situation in the recent past where a client had paid significant sums of money to upconvert standard definition video clips, only to be told by a broadcaster/distributor that the upconverted clips were inadequate, and the filmmaker must use their own budget to obtain access to better quality original footage.

The proposed exemption then reflects the ever-changing market conditions that the Librarian has already acknowledged in past proceedings.

### 3. In practice, those entitled to the exemption choose the technology that makes sense to them, because most of them do not know about §1201 until it's too late.

In 2009, 2012, 2015, and in this proceeding, proponents submitted evidence and testimony that the vast majority of people making fair uses of film and television do not know about §1201. They guide themselves according to a concept of fair use, which (even if fuzzy at the edges) is far more intuitive than the contours of the existing exemptions. In the twenty years since §1201 was enacted, it has penetrated no further into the consciousness of ordinary fair users.

For example, as Professor Rebecca Tushnet testified in 2012, trademark lawyers (specializing in a coordinate branch of intellectual property) do not know about Section 1201.[27] As the evidence submitted in this proceeding indicates, federal prosecutors (charged with enforcing §1201 criminally) and defense attorneys do not know about it. Other fair users, especially those who are not part of a user community that is organized enough to send representatives to these proceedings, do not know about it. They will not know about it, no matter what happens in these proceedings. The only part of their situation that the Office can affect is whether their concededly fair uses will nonetheless make them subject to having their works suppressed and even potentially to civil liability.

The situation is similar for National History Day students making educational videos examining historical events.[28] In 2015, the Copyright Office rejected the example of such students because, although the competition requirements made clear that video quality would be part of the assessment, top quality video was not *absolutely* required to win. That conclusion, wrong in itself

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[27] Testimony of Rebecca Tushnet, June 4, 2012, at https://www.copyright.gov/1201/2012/hearings/transcripts/hearing-06-04-2012.pdf at 259.

[28] As a reminder, NHD is particularly valuable for students who are 'slipping through the cracks' of our education system. For example, one special education student who'd been put into a program for kids "who could not learn." His NHD class was his only "regular" class. He produced a documentary that made it to the state finals. The next year, he took two "regular" classes and produced another documentary for NHD that made it to nationals. By the end of high school, he was enrolled in all honors classes. http://www.nhd.org/images/uploads/NHD1_KeyFindingsbrochureFINAL.pdf. These are the kinds of students who the Office held needed to know, somehow, that they ought to hamper their own chances of succeeding. NHD rules direct students to consider fair use, but there is—understandably—no mention of the DMCA or its exemptions. Contest Rule Book, http://www.nhd.org/images/uploads/RuleBook14.pdf. The rules encourage the use of high quality materials; clarity of presentation, including quality of visuals, is worth 20% of the evaluation. http://www.nhd.org/images/uploads/docrules.pdf.

(since it required students to impair their own persuasiveness) missed the point. It is uncontested that knowledge of the DMCA is highly limited, and that the National History Day instructions direct students to consider factors relevant to fair use, but not to §1201. As a result, students attempting to do well will make the best video they can. Only when challenged—for example, when they post their videos on YouTube and wish to contest a DMCA takedown—will they discover they are lawbreakers. This unnecessary, accidental legal exposure is a substantial harm to lawful uses.

A distinction between screen capture and other methods of circumvention—made, we must note, without any evidence about the actual technological functioning of the screen capture software, because screen capture providers don't participate in these proceedings—just creates a trap for the unwary. Given the actual uses that are being made, the only way to protect concededly fair users such as the prosecutors and defense attorneys who don't know the DMCA exists is to make the exemption technology-neutral.

Given this evidence, submitted in four iterations of the rulemaking but yet to be addressed by the Office in any of its final recommendations, it is incumbent on the Office to account for the significance of users' lack of knowledge of the proposed legal distinction between screen capture and other methods. The Office has indicated that it intends to follow the Administrative Procedure Act;[29] even absent that, fundamental principles of due process counsel in favor of recognizing the fact that the screen capture distinction is one that ordinary fair users of video do not make.

Relatedly, given that both screen capture and other methods of circumvention are subject to TPMs in the current environment, people who are entitled to an exemption on the merits of their uses should not be limited to capturing the video at a particular point in its journey through the computer. The statutory factors do not provide the Office with reasons to determine that people entitled to an exemption must use a particular technology to do so.

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[29] Under the APA, a decision is arbitrary and capricious where "the agency has … entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency …." *Nat. Res. Def. Council v. U.S. E.P.A.*, 658 F.3d 200, 215 (2d Cir. 2011) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).). Simply put, "the agency must explain why it decided to act as it did." *Butte Cty. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010); *see also Nat'l Ass'n of Clean Water Agencies v. EPA*, 734 F.3d 1115, 1136–38 (D.C. Cir. 2013) (rejecting agency rule under APA substantial evidence standard where group challenging rule presented credible evidence contrary to agency findings and agency offered only "mere assertion" that rule accounted for contrary evidence in reply); *Butte Cty.*, 613 F.3d at 194 (rejecting agency finding under APA substantial evidence standard where agency failed to "articulate a satisfactory explanation" and agency "ignore[d] evidence contradicting its position" (internal quotation marks and citations omitted)); *N.L.R.B. v. E-Systems,* Inc., 103 F.3d 435, 439 (5th Cir. 1997) (agency must not "ignore[] relevant evidence without explaining and justifying its decision to do so"); *Water Quality Insurance Syndicate v. United States*, 225 F. Supp. 3d 41, 68-69 (D.D.C. 2016) (APA's substantial evidence standard isn't met "when an agency ignores factual matters or fails to respond adequately to meritorious arguments raised in opposition to the agency's action;" agency "is not free to ignore, without explanation, the record evidence").

## IV. There Is No Statutory Reason to Limit the Exemption Based on Type of TPM

AACS LA seeks, as it has in the past, to further limit the Class 1 exemption to exclude AACS2. That suggestion should be rejected. As the Office has noted, "the landscape for access controls protecting motion pictures offered via online distribution services is constantly changing."[30] Also, there is an ever-increasing demand for higher quality material.[31] There is nothing in the statute or regulatory history that requires crafting exemptions that cannot adapt.

In fact, of the ten current exemptions and their subclasses, only the Class 1 exemptions identify specific types of technological protection measures in addition to the category of works exempted. Class 9, regarding 3D printing, identifies "Computer programs that operate 3D printers that employ microchip reliant technological measures to limit the use of feedstock . . . ,"[32] but does not identify specific types of technological protection measures. All other current classes exempt circumvention of categories of works for certain uses under any technological protection measure, without reference to specific types.

Limits based on TPM type cause real harm to fair uses. AACS LA's response, along with the passage of time, highlights how inflexible and quickly outdated an exemption that focuses on specifically named technological protection measures can become[33]. The language "similar technological protection measure" takes existing standards and allows the short clips of motion pictures exemption to adapt, just other classes already do.

Focusing the key limitations on the category of work and use will avoid these harms. We can look to current classes as examples of how this approach works well. Class 4, for instance, involves "Computer programs that enable smartphones and portable all-purpose mobile computing devices to execute lawfully obtained software applications . . . "[34] By not specifying a specific type of technological protection for an exemption to install software on smartphones or all-around devices, this allows the exemption to continue to apply as technological protection measures evolve, and as new types of devices enter the space.

The Copyright Office should recommend that the Librarian bring Class 1 into harmony with other exemptions by allowing more flexibility with regard to the relevant technological protection measures.

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[30] Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights, at p. 126 n.731 (2012).
[31] *Supra* p.8-9
[32] 2015 DMCA Triennial Rulemaking p. 65963, https://www.gpo.gov/fdsys/pkg/FR-2015-10-28/pdf/2015-27212.pdf.
[33] AACS LA Opposition Comments, Seventh Triennial Proceeding to Determine Exemptions to the Prohibition Circumvention, Recommendation of the Register of Copyrights (2018).
[34] *Id.*

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

Please see opening comments.

## ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

Please see above.

## DOCUMENTARY EVIDENCE

Please see above.