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UNITED STATES COPYRIGHT OFFICE



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

*Please submit a separate comment for each proposed class.*

***NOTE:** This form must be used in all three rounds of comments by all commenters not submitting short-form comments directly through [regulations.gov](https://www.regulations.gov), whether the commenter is supporting, opposing, or merely providing pertinent information about a proposed exemption. When commenting on a proposed expansion to an existing exemption, you should focus your comments only on those issues relevant to the proposed expansion.*

**[ ] Check here if multimedia evidence is being provided in connection with this comment**  
*Commenters can provide relevant multimedia evidence to support their arguments. Please note that such evidence must be separately submitted in conformity with the Office's instructions for submitting multimedia evidence, available on the Copyright Office website at <https://www.copyright.gov/1201/2018>.*

### ITEM A. COMMENTER INFORMATION

This Comment is submitted on behalf of Peter Decherney, Professor of Cinema and Media Studies and English at the University of Pennsylvania; Michael X. Delli Carpini, Professor and Dean of the Annenberg School for Communication at the University of Pennsylvania; Katherine Sender, Professor of Communication Studies at the University of Michigan, the Department of Communications at the University of Michigan; Steve F. Anderson, Associate Professor of Digital Media at the University of California Los Angeles School of Theater, Film & Television; Patricia Aufderheide, University Professor and School of Communication Founder at the American University Center for Media & Social Impact; the International Communication Association (ICA); and the Society for Cinema and Media Studies (SCMS). Parties interested in contacting the submitter should contact Peter Decherney at [decherney@sas.upenn.edu](mailto:decherney@sas.upenn.edu) (215-746-3156) hereinafter known as "Joint Educators."

### ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 1: Audiovisual Works – Criticism and Comment

### ITEM C. OVERVIEW

Joint Educators propose modifying the current Massive Open Online Course (MOOC) circumvention exemption to include *all* online educational offerings in order to promote fairness, access, and innovation in online learning. In the last triennial review, the Librarian recognized the need for using multimedia examples in online teaching.<sup>1</sup> Today, three years later, Joint Educators are asking the Librarian to expand the exemption to accommodate more of the online education ecosystem, including online-only courses offered by accredited for-profit institutions, blended online courses, modular online education, and continuing skills courses. The pedagogical reasons for employing audiovisual works in a course do not change when a course is

<sup>1</sup> *See generally* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 80 Fed. Reg. 65,944, 65,962 (Oct. 28, 2015) (codified at 37 C.F.R. pt. 201).

Privacy Act Advisory Statement: Required by the Privacy Act of 1974 (P.L. 93-579)

The authority for requesting this information is 17 U.S.C. §§ 1201(a)(1) and 705. Furnishing the requested information is voluntary. The principal use of the requested information is publication on the Copyright Office Web site and use by Copyright Office staff for purposes of the rulemaking proceeding conducted under 17 U.S.C. § 1201(a)(1). NOTE: No other advisory statement will be given in connection with this submission. Please keep this statement and refer to it if we communicate with you regarding this submission.

offered online rather than in person, and learners should be entitled to the same quality of education irrespective of venue.

These reply comments clarify misunderstandings and at times misleading statements made by Joint Creators and DVD CCA & AACCS LA in their opposition comments. Specifically, Joint Educators will (1) clarify the scope of the proposed exemption; (2) show how professors, students, life-long learners, and educational institutions are being harmed from the restrictions of the current exemption; (3) explain why, contrary to opponents' belief, the TEACH Act is the wrong point of reference for a 1201 exemption pertaining to online education; (4) assert that this rulemaking should consider *all* relevant technological protection measures that are used to prevent circumvention, including AACCS2; and (5) illuminate why the alternatives to circumvention suggested by opponents are insufficient.

## **I. Joint Educators Propose an Expanded Exemption to Covers All Online courses.**

Joint Educators want *all online courses* to be covered by the proposed expanded exemption, which will increase the quality of and affordable access to education for all types of learners. This broadened online education exemption will ensure the growth of innovative educational offerings and enhance the skillset of our current and future workforce. Throughout this process, Joint Educators state that they are seeking to broaden the scope of the exemption to courses that are neither MOOCs<sup>2</sup> nor traditional online courses offered by non-profit, accredited institutions.<sup>3</sup> Accordingly, Joint Creators misread Joint Educators' petition as "asking for something that is already covered by the current exemption, "namely for-credit courses."<sup>4</sup> In fact, all online courses and educational offerings, *whether for-credit or not*, are not included under the current MOOC exemption. Joint Educators' proposed expanded exemption will result in greater access to high quality, affordable choices for all types of online learners.

## **II. Expanded Exemption Will Decrease Harms to Professors, Students, Life-long Learners, and Educational Institutions.**

As provided by Joint Educators in their initial comment, there are several harms that result from the current exemption, including, but not limited to: 1) harm to professors who are limited to providing educational courses at non-profit, accredited institutions and are unsure about whether their activities are within the scope of the exemption; 2) harm to students whose access to high-quality online education will be limited when they seek instruction through for-profit or unaccredited programs; and 3) harm to society as a whole if high quality, affordable and innovative educational offerings are not encouraged because of limitations in the current exemption. These harms, which were set forth in the Joint Educators' original comment were overlooked by Joint Creators, who claim without merit that no harms were presented.<sup>5</sup>

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<sup>2</sup> *Id.* (recognizing MOOCs as non-credit bearing open courses).

<sup>3</sup> Joint Educators Comment at 1-4.

<sup>4</sup> See Joint Creators Opp'n at 19-20.

<sup>5</sup> See *generally* Joint Educators Comment at Item E. *Contra* DVD CCA & AACCS LA, Class 1 Opp'n at 33 ("In the context where there are no participants other than those from accredited, nonprofit educational institutions, [they do not provide] no specific examples of actual courses that would utilize this exemption outside of those institutions, and no legal analysis (beyond the assertion just noted), the situation is the same as it was in the previous proceeding."); Joint Creators Opp'n at 20.

Professors and other instructors are harmed because they are currently unable to offer specific innovative and novel online course offerings on a variety of platforms. In their comment, Joint Educators provided numerous examples of courses and institutions not covered by the existing MOOC exemption.<sup>6</sup> For example, Professor Decherney, who has already devoted significant time and effort into creating an engaging and meaningful online course for University of Pennsylvania students, is unable to offer a version of this MOOC to a wider range of learners through for-profit or unaccredited institutions because they are outside the bounds of the current MOOC exemption. As a result, instructors like Decherney are forced to limit the dissemination of their expertise; and the learners, who would otherwise benefit from such instruction, suffer as well.

The current MOOC exemption has allowed many learners to benefit from expanded access to quality online education, but due to the institutional restrictions many others are still being excluded. In their initial comment, Joint Educators explained that today's digital educational opportunities take a wide variety of forms.<sup>7</sup> Excluding innovative educational offerings from the exemption limits students' access to high quality sources of education.<sup>8</sup> For-profit and unaccredited institutions' have the potential to reach a wealth of currently un- or under-served learners. Khan Academy, Lynda, Strayer, and Great Courses are all pioneers in the online education market, but their growth can only reach so far before they are inhibited by the limitations of the current exemption. Research has shown that the majority of people are visual learners.<sup>9</sup> This has led to a pedagogical trend of incorporating audiovisual clips into educational offerings of all kinds to promote retention, problem solving, and critical thinking. Creating an expanded exemption that allows *all* online learning opportunities the same access to audiovisual works for educational purposes currently enjoyed by certain MOOCs will result in a varied range of high quality choices, along with greater affordability, *for all types of online learners* – from traditional students seeking degrees to lifelong learners, and current and potential employees enhancing their skills to professionals in search of continuing education.

The harms just noted are exacerbated by the current Class 1 educational exemption's lack of clarity with respect to scope. Uncertainty about whether particular educational innovations are covered may lead to risk-averse choices that compromise potential learning opportunities. The current exemption is confusing, and the result is that traditional universities offering professional training or certificate programs through fee-for-service branches are unsure of whether these activities fall within the scope of the narrowly defined Class 1 educational exemption. For example, non-profit universities like Duke University, whose business school has a for-profit executive education company that employs the same professors and uses the same material as its non-profit offering, may be uncertain about the permitted scope of their activities under the current exemption.<sup>10</sup> When instructors at an eligible institution circumvent TPMs to use media in

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<sup>6</sup> Joint Educators Comment at Item E.

<sup>7</sup> *Id.* at 2.

<sup>8</sup> *Id.* at 2, 5-8.

<sup>9</sup> Rachel Gillet, *Why We're More Likely To Remember Content With Images And Video (Infographic)*, FAST CO. (Sept. 18, 2014), <https://www.fastcompany.com/3035856/why-were-more-likely-to-remember-content-with-images-and-video-infogr>; *see also* Patricia Vakos, *Why the Blank Stare? Strategies for Visual Learners*, PEARSON-PRENTICE HALL E-TEACH, [http://www.phschool.com/eteach/social\\_studies/2003\\_05/essay.html](http://www.phschool.com/eteach/social_studies/2003_05/essay.html).

<sup>10</sup> *Duke Corporate Education*, DUKE UNIVERSITY (2018), <http://www.dukece.com>.

a course for MBA students their activities clearly fall within the scope of the exemption, but when the course is presented to working professionals the answer is unclear. For these reasons, Joint Educators are not only asking for an expansion of the current MOOC exemption but are also seeking clarification on what is covered by the current Class 1 educational exemptions.<sup>11</sup>

### **III. The TEACH Act is the Wrong Point of Reference for an Online Education 1201 Exemption**

Restrictions on educational practice originating in the Technology, Education & Copyright Harmonization (“TEACH”) Act<sup>12</sup> should not be routinely imported into 1201 rulemaking proceedings because 1) the TEACH Act does not define the scope of all non-infringing online education, in that Congress intended for it to only provide a safe harbor; and 2) the TEACH Act is static and therefore outdated, in contrast to the 1201 exemption process, which is designed to be fluid and capable of adaptation to changing circumstances.

#### **a. The TEACH Act Does Not Define the Scope of All Non-Infringing Distance Education**

The TEACH Act was not intended to address the question of online educational practice in general; instead, it merely defines a limited set of clearly “not infringing activities” that fall into its safe harbor boundaries.<sup>13</sup> Despite claims to the contrary by DVD CAA & AACCS LA, the TEACH Act is “not the manifestation of Congress’ intended scope of non-infringing online educational activities.”<sup>14</sup> Opponents’ characterization misrepresents the express Congressional purpose of the TEACH Act which was to create a safe harbor – not to define the scope of educational fair use.

The Senate specifically expressed that the TEACH Act was meant to “mak[e] clear a ‘safe harbor’ for educational uses of copyrighted works for which there need not be negotiations or licensing arrangements.”<sup>15</sup> It was not intended to define the scope of educational fair use.<sup>16</sup> In fact, the legislative history of the TEACH Act expressly states that it was critical that fair use remain available to those whose activities are outside its scope.<sup>17</sup> As a result, the routine

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<sup>11</sup> Joint Educators Comment at 3.

<sup>12</sup> 17 U.S.C. § 110(2).

<sup>13</sup> *See id.* (stating that the performance of copyrighted works as an integral part of a class session given to enrolled students in a digitally transmitted course this is offered by a non-profit, accredited institution employing TPMs is “not infringing”).

<sup>14</sup> DVD CAA & AACCS LA Class 1Opp’n at 34 (“The TEACH Act is directly related to the DMCA and manifests what Congress thought to be noninfringing”).

<sup>15</sup> *Promoting Technology and Education: Turbocharging the School Buses on the Information Highway: Hearing on S. 487 Before the S. Comm. on the Judiciary*, 107th Cong. 3 (Opening statement of Committee Chairman, Hon. Orrin Hatch, a U.S. Senator from the State of Utah) [ hereinafter S. Hrg. 107-221].

<sup>16</sup> *Id.* at 6.

<sup>17</sup> S. REP. No. 107-31, at 14-15 (2001) (“As the Register's Report makes clear "critical to [its conclusion and recommendations] is the continued availability of the fair use.”); (“Nothing in this Act is intended to limit or otherwise to alter the scope of the fair use doctrine needing to retain the ability to use fair use as *critical*.”); S. Hrg. 107-221, at 3 (“Beyond the legislative safe harbor provided by this legislation, opportunities for students and lifetime learners of all kinds, in all kinds of locations, is limited only by the human imagination and the cooperative creativity of the creators and users of copyrighted works.”).

incorporation of restrictions originating in the TEACH Act is unnecessary and inappropriate in the 1201 rulemaking context.<sup>18</sup> This adverse effect is in conflict with the TEACH Act’s purpose itself – which was to encourage the expansion and growth of distance education.<sup>19</sup> In actuality, as the Register of Copyright correctly observed in 2015, the TEACH Act and a 1201 exemption for online learning are an “imprecise fit.”<sup>20</sup>

**b. The Fixed Nature of the TEACH Act is Inconsistent with the Fluidity of the DMCA 1201 Triennial Rulemaking Process**

Changing developments in technology and the pedagogy of education is unaccounted for by the static nature of the TEACH Act which has not been substantially updated since 2002.<sup>21</sup> Nevertheless, Joint Creators mistakenly argue that placing TEACH Act restrictions on a 1201 exemption for online education strikes a balance between “pedagogical needs in distance learning with copyright owners’ concerns of harmful impact.”<sup>22</sup> Joint Creators’ assertion ignores the inconsistency between a 15-year-old piece of legislation and a rulemaking process that was designed to adapt to changing circumstances.

As stated in Joint Educators’ initial comment, relying on the TEACH Act restrictions perpetuates an outdated vision of technology and teaching that dates back to the early 2000s and fails to recognize today’s innovative educational offerings, let alone those that may arise in the next several years. In striking contrast, the rulemaking provision of Sec. 1201(a)(1) is a purposefully flexible and responsive provision aimed at studying and reviewing changing circumstances.<sup>23</sup> The exemption process is purposefully fluid and designed to fit both the *current* and *future* needs of distance learning students, instructors, and copyright owners. Therefore, mechanically importing the TEACH Act’s static and outdated conception of online education into this rulemaking proceeding is unnecessary, unwise, and contrary to Congress’ purpose and intent in enacting the DMCA.

**c. The 1201 Rulemaking Process is the Correct Forum to Discuss the Harms Caused by Encumbering the Current Exemption with the TEACH Act Restrictions**

Pursuant to the Notice of Proposed Rulemaking, Joint Educators’ initial comment argues that inappropriately encumbering online education anti-circumvention exemptions with the

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<sup>18</sup> See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 80 Fed. Reg. 65,944, 65,962 (Oct. 28, 2015) (codified at 37 C.F.R. pt. 201) (importing the TEACH Act expressions what is unequivocally “non-infringing activities” precluding any other teaching activities that also qualify as fair use).

<sup>19</sup> See S. Hrg. 107-221, at 3-5.

<sup>20</sup> See Section 1201 Rulemaking: Sixth Triennial Proceeding, Recommendations of the Register of Copyright at 102 (2015) [hereinafter Registers 2015 Recommendation] (noting “the strict contours of section 110(2) may be an imprecise fit for the rapid emergence of the MOOC model.”).

<sup>21</sup> See The TEACH Act, Pub. L. 107-273 Div. C, Title III, §§ 13210(6), 13301(b), Nov. 2, 2002, 116 Stat. 1909, 1910).

<sup>22</sup> Joint Creators Opp’n at 20 (“She did so because that provision “offers important and meaningful guidance concerning Congress’ desire to balance pedagogical needs in distance learning with copyright owners’ concerns of harmful impact.”).

<sup>23</sup> See generally 17 U.S.C. § 1201(a)(1).

TEACH Act restrictions has harmed teachers, students, and society.<sup>24</sup> The NPRM notes that in assessing proposed exemptions the Copyright Office evaluates whether “[u]sers are adversely affected in their ability to make such noninfringing uses or, alternatively, users are likely to be adversely affected in their ability to make such noninfringing uses during the next three years.”<sup>25</sup> Joint Educators’ initial comment asserts that online educators are currently and are likely to continue being inhibited from conducting the full range of permitted *noninfringing* educational fair uses, due in large part to the incorporation of restrictions derived from the TEACH Act.<sup>26</sup>

Joint Creators misunderstand the Joint Educators’ arguments regarding the insufficiency of the TEACH Act as an attack on the TEACH Act itself,<sup>27</sup> and thus assert this rulemaking process is the inappropriate forum to discuss the TEACH Act.<sup>28</sup> To the contrary, the question here is not the wisdom of the TEACH Act, but the question of whether the restrictive terms it employs in defining a safe harbor should be an important point of reference in the current rulemaking process.<sup>29</sup> Accordingly, Joint Educators’ arguments are indeed appropriate and relevant to this proceeding.

**d. The MOOCs Currently Offered by Proponents Comply with the Requirements of Both the TEACH Act and the DMCA**

As a result of the exemption passed during the last triennial rulemaking, Professor Decherney now teaches a MOOC offered by the University of Pennsylvania that is delivered through the platform edX. The course is titled “Hollywood: History, Industry, Art” and is modeled after the course Professor Decherney teaches in person at the University of Pennsylvania. Students who wish to take this course must register through the edX platform which requires the student to provide their full name, email, create a username, create a password, and agree to the “Terms of Service and Honor Code.”<sup>30</sup> The “Terms of Service and Honor Code” describe the rules of conduct required for edX and explains how users identities will be authenticated by requiring a current webcam photo and a copy of a government issued photo identification.<sup>31</sup> In addition to the rules outlined in the “Terms of Service,” edX also prevents students from downloading their lectures and through extension, any clips embedded into the lectures.

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<sup>24</sup> Joint Educators Comment at 8-10.

<sup>25</sup> Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 82 Fed. Reg. 49551 (Oct. 26, 2017) [hereinafter NPRM].

<sup>26</sup> Joint Educators Comment at 8.

<sup>27</sup> Joint Creators Opp’n at 20.

<sup>28</sup> *Id.* (“Their assertion, Joint Educators 2017 Comment at 8-9, that there might be fair uses that are not covered by the TEACH Act misses the point. This proceeding “is not the forum in which to break new ground on the scope of fair use.” 2015 Rec. at 109).

<sup>29</sup> Joint Educators Comment at 8 (“the restrictions in the TEACH Act to accredited, non-profit institutions are misplaced when incorporated into a 1201 exemption for online learning and therefore has unintended adverse effects.”).

<sup>30</sup> *Sign in or Register*, EDX, [https://courses.edx.org/register?course\\_id=course-v1%3APennX%2BHollywoodX%2B1T2016&enrollment\\_action=enroll&email\\_opt\\_in=true](https://courses.edx.org/register?course_id=course-v1%3APennX%2BHollywoodX%2B1T2016&enrollment_action=enroll&email_opt_in=true).

<sup>31</sup> *Terms of Service*, EDX (Oct. 22, 2014), <https://www.edx.org/edx-terms-service>.

Despite a suggestion of the contrary by DVD CCA & AACCS LA, Professor Decherney's MOOC utilizes and complies with the current exemption and the TEACH Act,<sup>32</sup> as well as the corresponding requirements of the DMCA. Professor Decherney's course both requires registration and employs technology that blocks students from downloading the clips used in the course. The technology used to prevent students from downloading the clips satisfies the requirement that the work not be accessible for longer than the class session and the prevention of unauthorized further dissemination of the work. Lastly, the "Terms of Service" satisfies the requirement that the online education providers should make copyright policies and copyright information materials available to faculty and students.

As this demonstrates, DVD CCA & AACCS LA concerns are unfounded, and Joint Educators urge the Librarian to see them for what they are, namely a distraction from Joint Educators' contention that all online courses should be able to benefit from an exemption allowing the use of short clips in their courses.

#### **IV. The Rulemaking Process Does Not Require the Participation of Potential Beneficiaries**

First and foremost, under the Notice of Proposed Rulemaking ("NPRM") Joint Educators are entitled to assert that the unnecessary restrictions on circumvention, which are intended to support lawful online education, operate irrationally and unfairly to disadvantage some learners.<sup>33</sup> The NPRM provides that "[i]nterested parties are invited to make full legal and evidentiary submissions in support of or in opposition to the proposed exemptions."<sup>34</sup> Within a conventional understanding of the concept of "interest,"<sup>35</sup> Joint Educators clearly have the right to advocate on behalf of all educators for the benefit of all learners.

Moreover, Joint Educators not only have shown that they themselves are specifically harmed by not being able to collaborate with for-profit, accredited institutions; they also have put forward additional specific claims of harm related to the activities of for-profit, unaccredited institutions.<sup>36</sup> DVD CCA & AACCS LA incorrectly try to introduce a non-statutory standing requirement into this proceeding.<sup>37</sup> In fact, there is no requirement that a unaccredited, for-profit

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<sup>32</sup> DVD CCA & AACCS LA Class 1 Opp'n at 35 ("our investigation raises concerns that Decherney's own MOOC actually contains no such technological protection measures.").

<sup>33</sup> Joint Educators Comment at 2, 5-8.

<sup>34</sup> NPRM at 49551.

<sup>35</sup> 5 U.S.C § 553(c) (providing that during a notice and comment public rulemaking "the agency shall give *interested* persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation").

<sup>36</sup> Joint Educators Comment at 2, 5-10.

<sup>37</sup> DVD CCA & AACCS LA Class 1 Opp'n at 31 ("DVD CCA and AACCS LA would first observe that none of the institutions named by the proponents as supposedly harmed are actually present in this proceeding. No for-profit accredited educational institution – University of Phoenix, Full Sale University, Strayer College, or any other such institution – has come forward to provide evidence that any of its activities is harmed by the circumvention prohibition. Similarly, neither of the two major unaccredited education systems, the Khan Academy and Lynda (by LinkedIn/Microsoft), have put forward any support for the proposal that is before the Copyright Office. Nor has any state bar association or other professional organization offering online courses suggested that they would like to circumvent DVDs or Blu-ray discs protected with CSS or AACCS, respectively, in any of their online educational offerings.").

institution must come forward in order for the Librarian to consider issues affecting this sector of educators. Contrary to the opponents' suggestion, a lack of formal participation by such institutions does not indicate that they disagree with Joint Educators' advocacy for fairer access to illustrative excerpts from audiovisual works, regardless of the offering institution. "The absence of evidence is not evidence of absence."<sup>38</sup> Likewise, the assertion that because for-profit, unaccredited institutions are not present in this rulemaking they are not actually harmed is illogical and potentially misleading.

## V. This Rulemaking Should Consider All Relevant Technological Protection Measures That Are Used to Prevent Circumvention

Joint Educators do not agree that AACS2 should be excluded from any new or expanded exemptions. In its opposition comment, AACS LA incorrectly asserts that (1) statements made by EFF and Joint Filmmakers during the last rulemaking show that *all* Class 1 proponents agree AACS2 should be excluded from the new exemption; and (2) since Joint Educators did not specifically seek an exemption to circumvent AACS2, the Librarian is precluded from including the circumvention of AACS2 in the new exemption.<sup>39</sup> AACS LA misunderstands that the scope of Joint Educators' proposed exemption covers a class of works – not a specific set of technological protection measures.

AACS LA mischaracterizes statements made by Class 01 Proponents in the last rulemaking. Proponents *did not* generally agree that AACS2 should be excluded from consideration as a new technology that raises new issues.<sup>40</sup> As the transcript from the 2015 hearings illustrates, there was agreement that AACS2 would not be considered in the 2015 exemption *because it was not "out yet"* at the time of the hearing.<sup>41</sup> Even if proponents had agreed that AACS2 should not be included in the *last* rulemaking in 2015, this would be of no relevance to the *current* rulemaking process.<sup>42</sup> The triennial rulemaking is a forward-looking process,<sup>43</sup> and the record of former rulemakings has only limited significance.<sup>44</sup> Thus, positions taken in the last rulemaking do not determine whether the Librarian should include a *new* and *significant* technology that is being used today or will be used in the next three years.

AACS LA's proposition to not include AACS2 is also contrary to public policy and the purpose of this rulemaking, which is to mitigate the adverse effects of the circumvention prohibition.<sup>45</sup> Limiting consideration to only specific TPMs mentioned in exemptions

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<sup>38</sup> See Lawrence I. Bonchek, *Absence of Evidence Is Not Evidence of Absence*, 11 J. OF LANCASTER GEN. HOSP. 65 (2016) (quoting philosopher and mathematician Bertrand Russell whose distinction between what is falsifiable and unfalsifiable has become widely accepted across disciplines).

<sup>39</sup> AACS LA Class 1 Opp'n at 10.

<sup>40</sup> *Id.* at 5 ("MS. McSHERRY [EFF]: I'm not sure of the technical difference between ultra-HD, Blu-ray and regular Blu-ray;" . . . "Thank you. I think the way we've crafted it is that it covers Blu-ray in all of its forms." . . .").

<sup>41</sup> *Id.* at 4-5.

<sup>42</sup> *Id.* at 4-6 (demonstrating that during the public hearings of the 2015 rulemaking in both L.A. and Washington, D.C. representatives of both Joint Filmmakers and EFF agreed with AACS LA that the exemption would not apply to Ultra HD Blu-ray disc which were not being sold yet at the time of the hearing).

<sup>43</sup> See generally 17 U.S.C. § 1201(a)(1)(C) (providing that the rulemaking considers "persons who are users of a copyrighted work *are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition.*").

<sup>44</sup> See generally NPRM at 49551-52.

<sup>45</sup> See *id.* at 49551 (considering adverse effects caused by the circumvention prohibition).



incentivizes copyright owners to develop new technologies not named in an exemption in order to fall outside the scope of the exemption.

Compared to other TPMs, AACCS2 is different in form but it is fundamentally the same in function. It is an access control that is currently employed or is likely to be employed by copyright owners in the next three years to prevent users from accessing a copyrighted work. Since the exemption is intended to give specific users the ability to access TPM protected copyrighted works for their non-infringing activities, it would be counterintuitive to preclude the inclusion of current technologies in this rulemaking.

## **VI. Alternatives to Circumvention are Insufficient and Do Not Recognize that the Distinction Between In-person and Online Courses is No Longer Meaningful.**

Joint Creators argue that screen-capture technology is sufficient for many uses covered by the proposed Class 1 exemptions; additionally, they specifically urge educators to employ authorized, digital copies of motion pictures, pausing them at the scenes they wish to show to students, or – alternatively – to utilize licensed clip services.<sup>46</sup> Joint Educators note, however, that the pedagogical reasons for employing audiovisual works in a course do not change when the course is offered online rather than in person. Not only do these suggestions by Joint Creators ignore the actual process used to deliver online courses, but they also fail to address why instructors and students in online courses should not have the same privileges as those who teach and learn in-person.

In-person courses have been granted an exemption to circumvent TPMs in order to use short clips for teaching concepts and keeping students engaged in the course content.<sup>47</sup> Joint Creators fail to justify the loss of image quality, unproductive investment of staff time, and unjustified expense using any of these alternatives would impose on institutions and educators. Further, Joint Creators do not recognize the costs in terms of forgone educational opportunities for learners.

Therefore, Joint Educators encourage the Librarian to create an exemption closing the gap between online and in-person educational opportunities for the betterment of society as a whole. Expanding the MOOC exemption to cover *all* online educational offerings will provide greater access to innovative and varied educational offerings, level the online educational playing field, and ensure that there are more affordable choices, not just for conventional students but also for lifelong learners.

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<sup>46</sup> Joint Creators Opp'n at 27.

<sup>47</sup> 37 C.F.R. § 201.40(b)(1)(iv) (codifying the 2015 class 1 in-class education exemption).