



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, 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 (215-746-3156) hereinafter known as “Joint Educators.”

ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 1: Audiovisual Works – Criticism and Comment

ITEM C. OVERVIEW

We 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.¹ The Librarian understood the benefits of

¹ 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.

extending the exemption to audiovisual materials of all kinds, whether found on DVD's, Blu-ray discs, or streaming services.² Today, three years later, the exemption needs extension to accommodate more of the online education ecosystem. Specifically, the circumvention exemption should be expanded in light of the new and vast variety of online learning and digital education opportunities available.

The MOOCs recognized in the last triennial rulemaking are non-credit bearing open courses. Specifically, as defined by Joint Educators' comments in the last triennial review, MOOCs are free online versions of college and university courses open to anyone, with essentially unlimited enrollment.³ MOOCs, however, represent only a small part of the overall landscape of online learning opportunities that we urge the Librarian to consider including under a new expanded exemption. Today's digital education opportunities take a wide variety of forms, including, but not limited to:

- **For-credit, online-only courses offered by accredited non-profit institutions**, which are offered to enrolled students at their own institutions, or may be recognized as credit-worthy at others.
- **For-credit, online-only courses offered by accredited for-profit institutions.** These courses are like those offered by non-profit counterparts, except unlike non-profit institutions many for-profit institutions do not offer an in-person option for the course. In fact, at two of the largest for-profit online course providers, the University of Phoenix and Strayer University, a majority of their students take all their courses online.
- **Blended online courses**, which combine face-to-face teaching by a teacher in a physical classroom with related lessons taught in an online learning environment. These may be provided by non-profit or for-profit, and at unaccredited or accredited institutions.
- **Modular online education**, which, unlike a traditional lecture series, offers online education that allows students to select lessons on topics that address their particular needs. For instance, Khan Academy provides free educational videos on a wide range of topics on everything from all levels of math to career skills.
- **Continuing skills courses**, which are offered both for and not for profit and provide opportunities for professionals to receive continuing education and training. This category includes continuing education courses offered to lawyers, accountants, and others, as well as offerings intended to allow students to gain certification in a certain skill area, such as CLEs for legal professionals or other professionals such as accountants or teachers.

The Copyright Office's endorsement of a MOOC exemption three years ago was a visionary step forward in advancing online learning; however, since then, other forms of online education have assumed more prominence and are worthy of the same exemption granted to MOOCs. The Joint Educators propose conferring on *all* of these online learning opportunities – in addition to other variations – the same access to audiovisual works for educational purposes

² *Id.*

³ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 80 Fed. Reg. 65,944, 65,947 (Oct. 28, 2015) (codified at 37 C.F.R. pt. 201).

that MOOCs currently enjoy. Some of these offerings, such as blended courses or for-credit online courses by colleges and universities, may already be covered under other existing exemptions. Other offerings, like modular online education, continuing skills course or MOOCs offered by for-profit, accredited institutions may not fall within the existing MOOC or educational exemptions. We ask the Librarian to expand the MOOC exemption to cover all online courses, which should have access to audiovisual clips for educational purposes. The result will be 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, to current and potential employees enhancing their skills, to professionals continuing their education.

Additionally, the Joint Educators urge the Librarian to reconsider the TEACH Act restrictions placed on the MOOC exemption, which limit it to online courses offered by accredited and non-profit institutions. These comments suggest that the Librarian remove these restrictions for two reasons (1) the purpose of the TEACH Act is distinctly different than the purpose of the circumvention proceedings; and (2) the TEACH Act restrictions were founded on a now outdated (and arguably outdated even then) online education model.

First, during the last triennial rulemaking, the Copyright Office justified placing TEACH Act-based restrictions on the MOOC exemptions by analogy, stating that both Sec. 110(2) and Sec. 1201(a)(1), were designed to balance the interests of copyright holders and of educators.⁴ While both mechanisms promote certain educational fair uses, the true purposes of the two mechanisms are vastly different. The TEACH Act’s restrictions to non-profit and accredited institutions were implemented as part of a bright line safe harbor designed to make it easier for educators to know they can safely and without fear of litigation use audiovisual materials for educational purposes with absolute certainty. (Notably, the Act did not purport to limit the application of fair use to educational activities, physical or virtual.) By contrast, 17 U.S.C. Sec. 1201 contemplates exemptions that enable a wider range of lawful uses (including fair uses) that may be frustrated by technological protection measures (“TPM’s”).⁵ The triennial rulemaking process should recognize that the actual, legitimate practice of online education has moved far beyond the TEACH Act safe harbor, and help to enable greater access for all people to the benefits of new educational approaches.

Second, the TEACH Act is outdated as a model, as it is almost twenty years old and many cycles behind the rapid advances of today’s educational technology. As the legislative history reveals, even during the discussion of the TEACH Act, there was concern that the reports

⁴ See Section 1201 Rulemaking: Sixth Triennial Proceeding, Recommendations of the Register of Copyright, October 2015 at 102 (noting that while “an imprecise fit for the rapid emergence of the MOOC model, section 110(2) nonetheless offers important and meaningful guidance concerning Congress’s desire to balance pedagogical needs in distance learning with copyright owners’ concerns of harmful impact”).

⁵ See generally 17 U.S.C. § 1201 (2012) (providing exemptions for the circumvention of TPMs for users who use is non-infringing, fair use as decided by the Librarian of Congress through the triennial rulemaking process).

it was based on were already outdated.⁶ Therefore, the restrictions on for-profit and unaccredited institutions embedded in the TEACH Act should not be used as a basis to continue limiting today's learners from enjoying the benefits that online learning opportunities of all kinds can offer.

We respectfully request the Librarian to recognize that all online learners and teachers should have the same access to effective educational methods. 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.

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

Access to motion pictures and other audiovisual works is controlled by numerous technological protection measures. For instance, digital video disks (DVDs) are protected by entirely different TPMs than those that protect Blu-Ray Discs, and audiovisual works streamed online are protected by almost as many TPMs as there are online distribution platforms, from Amazon to iTunes to Netflix.

Many commercial DVDs employ the Content Scramble System (CSS), for which the Librarian of Congress ultimately granted exemptions, on the recommendation of the Copyright Office, in the previous iterations of this proceeding. The encryption scheme in CSS employs an algorithm configured by a set of security "locks" to encrypt a DVD's contents. The video content is rendered unusable and unplayable unless the content is decrypted with CSS "keys." Manufacturers of DVD players are authorized to utilize CSS technology under the CSS License Agreement. Millions of DVD players and computers worldwide implement CSS technology, and it is used to protect the content on hundreds of millions of DVDs.

The Advanced Access Content System (AACS) is the successor to CSS and is the standard TPM on Blu-Ray Discs. AACS encrypts discs using title locks. These title locks can only be decrypted using a media key in combination with the Volume ID of the media itself. Decryption keys are distributed over a broadcast channel, which enables licensors to "revoke" access to individual Blu-Ray players. AACS also incorporates "traitor tracing" techniques, which allow short sections of movies to be encrypted with different keys so that if a key is compromised, it can be identified and revoked without disrupting access completely.

A variety of entirely different TPMs protect audiovisual works distributed online through distribution services or streaming media. For example, Protected Streaming is a TPM developed by Adobe and employed by various online distribution services. Protected Streaming utilizes both encryption and Small Web Format (SWF) Verification to protect audiovisual works. Other examples include Microsoft PlayReady and Apple's FairPlay.

Circumvention, in turn, is accomplished in a variety of ways. The most common method of circumvention for educational use is through software programs that disable the various TPMs

⁶ See generally *Technology, Education and Copyright Harmonization ("TEACH") Act: Hearing on S. 487 Before Senate Comm. on the Judiciary, 107th Cong. 1, 24* (Mar. 13, 2001), <https://copyright.gov/docs/regstat031301.html>.

referenced above. These programs are able to rewrite the desired portion of a protected work with the exact same frame rate, preserving content and maintaining the same resolution. The techniques used may differ widely based on the experience and sophistication of the learner or teacher attempting to use the copyrighted work for any of the fair uses described below.

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGEMENT USES

The current exemption for MOOCs was a well-received step forward by the Librarian in recognizing the benefits of online education and has enabled professors and students of all kinds to benefit. Joint Educators appreciate the recommendation for renewal of the current exemption in the most recent NPRM. However, as the current exemption only provides benefits for one kind of online educational offering from one kind of provider, Section 1201 continues to slow educational innovation, limit the quality and variety of online educational opportunities, and decrease affordable educational opportunities for both conventional students and lifelong learners who would benefit from other kinds of online learning.

Expanding the exemption to cover all online offerings, regardless of the provider and format, and regardless of whether the course is for-credit will help assure that all online learners and teachers have the same access to effective educational methods as the privileged minority who can learn via traditional providers of higher education. By expanding the exemption, the Librarian can establish a new exemption that mitigates the adverse effects discussed in greater detail below.

The Anti-Circumvention Provisions Limit Access to Education and Choice in Modes of Learning

Many learners have benefitted from the MOOC exemption in the three years since it was granted, but many others have been left behind because they seek other kinds of online learning experiences. There are, for example, online courses offered by a wide variety of organizations that are not “accredited, non-profit educational institutions.” There are MOOCs offered by accredited *for-profit* educational institutions. There are short skills-based courses offered by professional associations, such as continuing legal education courses offered by bar associations. Also, there are educational modules offered by unaccredited organizations such as the non-profit Khan Academy and Microsoft’s Lynda.

The growth trend across the whole range of online education is apparent. As of 2016 more than 5.8 million students were enrolled in an online class and enrollment numbers are expected to increase steadily for the foreseeable future.⁷ The number of students enrolled in online courses increases from year to year at an accelerating rate: between fall 2014 and fall

⁷ See ONLINE LEARNING CONSORTIUM, A YEAR OF ACCELERATION & GROWTH IN ONLINE LEARNING: 2016 YEAR IN REVIEW REPORT 2 (2016), <http://info2.onlinelearningconsortium.org/rs/897-CSM305/images/2016%20OLC%20Year%20in%20Review.pdf>.

2015 it rose 3.9 percent.⁸ As online education has increased in popularity there has been a rise in non-traditional educational institutions providing valuable learning opportunities.⁹

While online education is growing, it is specifically growing as an *affordable* educational opportunity in an environment where costs often exceed learners' ability to pay. According to U.S. News and World Report, "a flowering of [online education] competition promises to dramatically drive down prices and raise the quality of online college courses."¹⁰ The online sector is booming and traditional universities as well as internet entrepreneurs are planning on offering courses for as low as a few hundred dollars.¹¹ Some experts estimate that online students enjoy a cost savings of 35% over their brick-and-mortar counterparts.¹² These affordable online education offerings should have the same benefits as MOOCs to ensure the best access and choice for students.

A broader exemption would foster access to the best quality and most affordable courses for students seeking a degree, benefiting all types of learners, including lifelong learners and those seeking continuing professional education. For example, a copyright lawyer who wants to learn about recent developments in the law of infringement through a reasonably-priced online CLE course offered by the state bar association, in comparison with a more expensive program offered by the local law school, would receive better training if the instructor could circumvent TPMs as necessary to employ fair use in illustrating his presentation.

Extending the Current Exemption Beyond MOOCs Would Enable Innovative, High Quality Online Teaching

Expanding the MOOC exemption to cover courses from a variety of formats (whether a single module or series of courses), offered from a variety of institutions (for-profit or unaccredited included), would continue to encourage the innovative, high quality online teaching that continues to evolve at a rapid pace. In a society where more than sixty-five percent of people are visual learners, teachers increasingly employ audiovisual material in their courses.¹³ Decades of research conducted around the world has shown that integrating

⁸ See ELAINE ALLEN & JEFF SEAMAN, DIGITAL LEARNING COMPASS: DISTANCE EDUCATION ENROLLMENT REPORT 4 (May 2017),

<https://onlinelearningsurvey.com/reports/digitallearningcompassenrollment2017.pdf>.

⁹ See Clayton M. Christensen & Michael B. Horn, *The rise of online education*, THE WASH. POST. (Oct. 11, 2011), https://www.washingtonpost.com/national/on-innovations/the-rise-of-online-education/2011/09/14/gIQA8e2AdL_story.html?utm_term=.3a84fad68235.

¹⁰ Kim Clark, *Online Education Offers Access and Affordability*, U.S. NEWS (Apr. 2, 2009), <https://www.usnews.com/education/online-education/articles/2009/04/02/online-education-offers-access-and-affordability>.

¹¹ *Id.*

¹² Tom Vander Ark, *Is Online Learning One Third Cheaper?*, HUFFPOST (Aug. 15, 2003), https://www.huffingtonpost.com/tom-vander-ark/is-online-learning-one-th_b_1198033.html

¹³ 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.

audiovisual content helps learners master problem solving and critical thinking and understand complex concepts and procedures. It also inspires learners to engage with their learning experiences and to further develop their knowledge and skills outside the classroom.¹⁴

The incorporation of audiovisual materials into a course can provide benefits regardless of the subject matter of the course. As an example, Harvard University, a non-profit, accredited institution, employs videos to teach math concepts. Professor Oliver Knill of the Harvard University Department of Mathematics, created a webpage entitled “MathMovies,” which contains a collection of YouTube clips of popular movies and television episodes that illustrate complex mathematical concepts in an approachable way, through popular culture.¹⁵ The collection includes hundreds of videos from movies such as *Alice in Wonderland* and television shows like *the Simpsons*, as well as movies with explicit math-related scenes like *A Beautiful Mind* and *Good Will Hunting*.¹⁶ Additionally, Princeton Professor, Uriel Abulor is in the process of creating a MOOC entitled *Human Odyssey of Political Existentialism* that relies heavily on the current exemption to incorporate clips from popular shows such as *Game of Thrones* and *House of Cards* to illustrate what humans think of when they think about politics.

Professor Decherney, as a Professor at University of Pennsylvania, an accredited, non-profit institution has been able to use the existing MOOC exemption to offer effective clips in his *Hollywood: History, Industry, Art* online course. However, Professor Decherney is prevented from offering this same exact MOOC as part of a film society website or through another unaccredited or for-profit institution. Students are unable to access this MOOC if it was offered by University of Phoenix or Strayer University for example. Other professors, like Professor Decherney, are offering MOOCs or plan on creating a MOOC that relies on audiovisual clips but they are limited in how they can provide their educational offering to students. These limitations decrease access to high quality education for students and undermines opportunities for professors to collaborate and innovate with varied institutions that do not meet the qualifications of the existing MOOC exemption. For example, if Professor Abulor was to offer his *Human Odyssey* course as part of a collaborative effort with an unaccredited organization or institution – he would be prevented from using the MOOC circumvention exemption, *even though it is the same exact course offered by Princeton*.

Moreover, unaccredited, non-profit entities such as Khan Academy show that employing audio and visuals in educational platforms increases retention and understanding of a variety of subject matter for learners of all kinds and ages everywhere. In his 2011 TED Talk, Salman Khan, the founder of Khan Academy, encouraged the world to use videos to reinvent education in a digital classroom environment.¹⁷ Khan Academy is an unaccredited, non-profit educational

¹⁴ Macquarie University, *Pedagogical benefits of video for teaching and learning*, THE UNIVERSITY OF QUEENSLAND, AUSTRALIA, <http://www.uq.edu.au/teach/video-teach-learn/ped-benefits.html>.

¹⁵ Oliver Knill, *Mathematics in Movies*, HARVARD, Mar. 2013, <http://www.math.harvard.edu/~knill/mathmovies/index.html>.

¹⁶ *Id.*

¹⁷ Sal Khan, *Let's use video to reinvent education*, TED (Mar. 2011), https://www.ted.com/talks/salman_khan_let_s_use_video_to_reinvent_education.

institution that has over 42 million registered users from 190 countries.¹⁸ While it is not a traditional educational provider, in the thirteen years since its inception, Khan Academy has grown to include educational videos on every academic topic, as well as career, personal finance, and general life advice.¹⁹ Its educational videos are world renowned for quality and accessibility.²⁰ Nevertheless, Khan Academy is not eligible for the current exemption because it is a non-profit, unaccredited educational entity. Therefore, instead of incorporating video clips into its lectures and providing cutting-edge effective offerings, Khan Academy relies on still images from the public domain to enhance lectures on history and art. The actual and potential learners who rely on Khan Academy are the losers.

Full Sail University provides another example. It is an accredited, for-profit institution that offers its students on campus and online degrees in specializations such as Entertainment, Media, Arts, and Technology, relying on a media-rich learning environment.²¹ Because of its for-profit status, any potential MOOC online offerings would not qualify for the current exemption. Again, it is the learners who would lose out. Like those who teach film production and analysis in other settings, Full Sail's Film Program instructors must analyze and critique short portions of movies when teaching their film criticism courses.²² Today, however, they are limited in how they provide effective and innovative offerings.²³

The TEACH ACT Restrictions are Misplaced

The benefits of the current MOOC exception are restricted because it was designed to track the provisions of Title 17 Sec. 110(2), which codifies the TEACH Act of 2001. Whatever the merits of those restrictions, they were originally intended to create a limited safe harbor for certain educational practices, not to place outer limits on educational fair use. We are not arguing here against the TEACH Act, which has value in upholding a clear bright-line for online educational uses. However, 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.

The TEACH Act is not a description of educational fair use.

The TEACH Act is a safe harbor legislation and is not a description of what should be considered fair use of education materials, and therefore, it should not be interpreted as such in any implementation of a circumvention exemption. There is no suggestion in the language or

¹⁸ *Id.*

¹⁹ See generally Khan Academy, <https://www.khanacademy.org/>.

²⁰ See Heinz Family Foundation, *The Heinz Family Foundation Honors Recipients of the 19th Heinz Awards*, PR NEWSWIRE, April 4, 2014, <https://www.prnewswire.com/news-releases/the-heinz-family-foundation-honors-recipients-of-the-19th-heinz-awards-253923581.html>.

²¹ See generally Full Sail University, <https://www.fullsail.edu/>.

²² See generally Full Sail Course Catalogue, <https://www.fullsail.edu/resources/brochure-file/full-sail-catalog.pdf>.

²³ See Current Exemption (restricting beneficiaries of the exemption to instructors of MOOCs offered by accredited, non-profit institutions).

legislative history of the TEACH Act that its provisions were intended to limit the development of educational practice and educational opportunity in the digital space.

As is noted several times in the legislative history of the TEACH Act, the fair use doctrine is technology-neutral and applies to activities in the digital environment, and the provisions of the Act itself are not supposed to supersede or constrain fair use analysis.²⁴ The Registrar’s Report recommending the passage of the TEACH Act noted that the continued availability of the fair use doctrine was “critical.”²⁵ Further, the report clearly states, “nothing in the [TEACH] Act is intended to limit the scope of the fair use doctrine.”²⁶ However, the incorporation of its restrictions in the online education exemption to Sec. 1201(a) has precisely that effect.

The non-profit, accredited restrictions in the TEACH Act are outdated.

In 2001, Senator Patrick Leahy noted that a decade previously no one could have imagined what digital education would become. In the fifteen years that followed, the field has again grown beyond all expectations in importance and potential. When the TEACH Act was passed, few educational institutions offered online learning programs. Today, in contrast, there are hundreds of educational institutions, including for-profit and unaccredited institutions, offering online educational opportunities to millions of students. The TEACH Act may have failed to reflect the state of digital education even in 2001, and it is even more significantly out-of-step with the realities and possibilities of today.²⁷

When the TEACH Act was passed, accreditation may have been seen as a rational sorting criterion for conventional schools and universities. However, understandably, the TEACH Act failed to anticipate the explosion of other models for the delivery of digital educational experiences to learners. While including the limitation based on accreditation may have been reasonable “training wheels” for a new exemption granted three years ago, removing these limitations now would allow the field of online education to continue to grow and innovate.

With respect to its restriction to non-profit institutions, the TEACH Act clings to the outmoded notion that where the regulation of educational content is concerned, for-profit entities

²⁴ H.R. Rep. No. 107-687, at 16 (2002); S. Rep. No. 107-31, at 15 (2001); *see also Technology, Education and Copyright Harmonization (“TEACH”) Act: Hearing on S. 487 Before Senate Comm. on the Judiciary, 107th Cong. 1, 15* (Mar. 13, 2001) (statement of Marybeth Peters, The Register of Copyrights), <https://copyright.gov/docs/regstat031301.html>.

²⁵ S. Rep. No. 107-31, at 14-5 (2001).

²⁶ *Id.*

²⁷ *See generally Technology, Education and Copyright Harmonization (“TEACH”) Act: Hearing on S. 487 Before Senate Comm. on the Judiciary, 107th Cong. 1, 24* (Mar. 13, 2001), <https://copyright.gov/docs/regstat031301.html> (During the Congressional hearings for the TEACH Act, several parties expressed the outdated nature of the information on which the legislation is based. The TEACH Act legislation is primarily based on two reports commissioned almost twenty years ago on distance education: The Copyright Office’s 1999 Report on Copyright and Digital Distance Education, and Senator Bob Kerrey’s Web-Based Education Commission Report to the President and the Congress of the United States, published in 2000.)

should be treated differently than non-profit educational institutions.²⁸ Indeed, the legislative history of the TEACH Act fails to offer a conclusive answer as to why this limitation was imposed. The Copyright Office itself had expressly found that the lines between for-profit and non-profit educational institutions are blurred if not obliterated completely because they no longer denote a distinction between for-profit and non-profit activities, and it also expressed that the qualifiers were not sufficient.²⁹ Professor Carpentier, an adjunct professor at the American University Washington College of Law, testified that “Bona fide educational institutions are no longer limited to ‘non-profits;’” and that non-profits are subject to unfair advantage: due to their exclusive eligibility for TEACH Act safe harbor, non-profits would be able to avoid costs for certain uses that would require payment by for-profits even though the use is identical.³⁰

In sum, innovation in the provision of online learning opportunities to a range of learners should not be held by restrictions that were created based on a limited vision of education. To continue to do so would be contrary to the triennial rulemaking’s purpose of keeping the circumvention exemptions up to date with current technological and social advances. The proposed exemption would eliminate these restrictions and lead to greater access, higher quality, and more innovative online learning offerings for all types of learners from traditional students to lifelong or professional learners.

NONINFRINGEMENT USES

During the last triennial rulemaking, the Librarian was persuaded that Professor Decherney’s employment of short portions of film clips in a MOOC, for the educational purposes of criticism and comment, was noninfringing fair use. The proposed uses of audiovisual materials in this comment proceeding are the same as those already accepted as qualifying fair use in that previous rulemaking. Through this exemption proposal we are not attempting to change the types of educational uses that are being exempted. Instead, we only seek an expansion of the users whose identical, educational uses would likewise qualify as fair use.

An examination of the four factors of fair use explains how these educational uses, irrespective of the users, are noninfringing fair uses. Under Section 107, courts evaluate four factors on a case-by-case basis to determine whether a use is fair: (1) the purpose and character

²⁸ U.S. COPYRIGHT OFFICE, REPORT ON COPYRIGHT AND DIGITAL DISTANCE EDUCATION XIX (May 1999) (justifying the TEACH Act eligibility standards by stating that the law should not change because of the policy implications of permitting commercial entities to profit from activities using copyrighted works without compensating the owners of those works; the potential inconsistency with other provisions of the Act, including section 110(1), that refer to “non-profit educational institutions”; and the DMCA mandate to consult specifically with non-profit educational institutions and non-profit libraries and archives).

²⁹ *Technology, Education and Copyright Harmonization (“TEACH”) Act: Hearing on S. 487 Before Senate Comm. on the Judiciary, 107th Cong.* 1, 58 (Mar. 13, 2001) (statement of Marybeth Peters, The Register of Copyrights), <https://copyright.gov/docs/regstat031301.html> (Ms. Peters, acknowledged that “a non-profit qualifier [for eligibility] is not sufficient,” and that “the lines between for-profit and non-profit institutions were becoming blurred.”).

³⁰ *Id.* at 51 (statement of Professor Carpentier) (expressing that the distinction between non-profit and for-profit institutions in the education industry had been obliterated).

of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.³¹

Under the first factor, our proposed use of audiovisual materials for a variety of online educational offerings would likely weigh in favor of finding fair use. The purpose of any use under the exemption would be to educate rather than to entertain, which transforms the purpose of the used clip. While there may be a collateral commercial benefit to the use of the clip, that does not turn this factor against the user.³² Even expressly for-profit activities can be shielded by fair use. As the Supreme Court noted in *Campbell*, nearly all of the activities listed in the preamble to Section 107 are carried out on a for-profit basis in this country.³³

Teachers of online courses, like Professor Decherney, incorporate short clips to illustrate concepts, or critique and analyze films, core examples of fair use that the Librarian has recognized repeatedly in prior exemption cycles. Through pointed discussion of the specific scenes of a film and their commentary on elements of it, the teachers are adding value to short portions of the audiovisual works and repurposing them into an educational tool in a way that is highly transformative. Also, educational uses are typically favored under the first factor in a finding of transformative use.

As a result, factor two, which considers the nature of the copyrighted work, would also weigh in favor of fair use in the educational context. While, unlike biographies, movies are creative fictional works intended to entertain audiences for a profit, popular culture is an important source of information in a digital society.³⁴ In the context of education, popular culture is often used to engage students with certain concepts by drawing connections between something they know and something they might not know so that they can build on prior knowledge and establish a meaningful connection to the material. Factor three would likewise

³¹ 17 U.S.C. § 107 (2012).

³² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (holding that the fact that money is made by a work does not make it impossible for fair use to apply, “The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”).

³³ *See id.* (“The language of the statute makes clear that the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character.... If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities “are generally conducted for profit in this country.”); *see Authors Guild v. Google, Inc.*, 804 F.3d 202, 229 (2d Cir. 2015) (concluding that Google’s commercial nature and profit seeking motivations do not justify a denial of fair use).

³⁴ *See Measuring Fair Use*, STANFORD UNIVERSITY LIBRARIES, <https://fairuse.stanford.edu/overview/fair-use/four-factors/>.

weigh in favor of finding fair use since the exemption only allows for the use of short portions of audiovisual works, which is likely not substantial.³⁵

Finally, under the fourth factor, the effect of the use of educational clips upon the potential licensing market of those clips is limited at best. The educational use of clips is “non-substitutional” by nature. Consumers do not watch movie clips in an educational setting as a substitute for renting a whole DVD or watching a stream. The two markets – entertainment and educational analysis and illustration – are so different that using clips in the manner we described does not substitute the market. More importantly, legal precedent shows that transformative educational uses do not substitute the work in the marketplace.³⁶ Further, since the exemption limits use to a *short* portion of the audiovisual works and the use is highly transformative, it is likewise very unlikely that employing a short clip in an online educational module would be a sufficient substitute for a full-length movie. Therefore, given that all factors lean towards a finding of fair use, use of audiovisual clips in all online educational offerings would likewise qualify as non-infringing uses.

STATUTORY FACTORS

The proposed exemption meets the statutory factors enumerated in §1201(a)(1)(C). The adverse effects mentioned above are not hypothetical. The evidence has revealed that there is a trend toward increased participation in online education, and the development of new and innovative educational opportunities is currently and will continue to be constrained if learners cannot access a full range of online education settings that can access the same audiovisual content that is now available in the conventional classroom and in qualifying MOOCs. Below is an analysis of the statutory factors.

i. The availability for use of copyrighted works

This comment and request for exemption is not premised upon a general lack of availability of works, but rather on the unavailability of works stored on certain TPM-encumbered formats for specific educational uses benefitting learners in all kinds of online education settings.

ii. The availability for use of works for non-profit archival, preservation, and educational purposes

Today, online education is available across a wide variety of disciplines as varied in subject matter as courses in the traditional college and university setting. The same college and university professors that teach those courses in-person at institutions across the country teach

³⁵ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 80 Fed. Reg. 65,944, 65,962 (Oct. 28, 2015).

³⁶ See *Authors Guild v. Google, Inc.*, 804 F.3d 202, 229 (2nd Cir. 2015); *Bill Graham Archives, LLC v. Dorling Kindersley Ltd.*, 386 F. Supp. 2d 324, 333 (S.D.N.Y. May 11, 2005) (concluding that including thumbnail images of Grateful Dead concert posters in a biography about the Grateful Dead did not cause market harm).

most online courses. As a result, they use the same resources they use for their in-person courses to create online courses. The audiovisual works retained by their respective libraries are selected on the basis of their educational value and by their relevance to courses in the curriculum. College and university libraries across the country have developed extensive collections of audiovisual works in DVD and Blu-ray formats, as well as subscribing to TPM-protected online distribution services. However, because of the DMCA's ban on the circumvention of TPMs, the works are not "available" for the uses described in this proposed class.

As of now, there is no ability for unaccredited, for-profit, or for-credit online educational offerings to embed noninfringing audiovisual works into their courses or modules without licensing from the copyright owner. We are not aware of any market offerings that provide educators with access to the clips they need. As a result, these teachers of online courses will not be able to use the same audiovisual materials that their in-person courses and MOOC counterparts can use.³⁷

iii. The impact that the prohibition and circumvention of TPMs applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research

As discussed previously in this Comment, the DMCA's prohibition on circumvention of TPMs severely limits educators' ability to prepare and deliver effective and quality online opportunities to learners. Without an exemption, the gap between the quality of in-person courses and non-credit MOOC's, on the one hand and all other online offerings on the other, will continue to widen needlessly. Broadening the exemption will help enable online education to achieve the goal of making learning opportunities available to anyone with access to the internet.

iv. The effect of circumvention of TPMs on the market for or value of copyrighted works

The use of this form of circumvention, should an exemption be granted, would be strictly limited to minimize the potential effect on the market or value of copyrighted works. The exemption is limited to the educational uses outlined above, which are fair uses that require no payment or permission. Clips copied from works in this context are to be used exclusively for educational purposes, and it is unlikely that those accessing them for other purposes would reuse them. Should it occur, however, reuse of short clips would be unlikely to affect the value of the work from which the clip was sampled, as the clips are limited in duration and not likely to serve as a substitute for the entire work. Additionally, the incorporation of audiovisual clips into online education could inspire students to seek out the full works leading to a boost in the market for the copyrighted works utilized.

Conclusion

Three years ago, the Librarian recognized the merits of online education needing a circumvention exemption and recently renewed the MOOC exemption. However, the current

³⁷ See *supra* Asserted Adverse Effect (providing examples of courses that would not be permitted to circumvent TPMs under the current exemptions).

MOOC exemption does not meet the technological advances and innovation of today's online educational offerings that take a variety of shapes and forms, and that are offered from different institutions and platforms and technological formats. Additionally, the TEACH Act limitations, to non-profit and accredited institutions, in the current MOOC exemption are discriminatory, misplaced, outdated, and detrimentally inhibit the growth of online education and limits access to and the quality of educational opportunities.

We propose modifying the current Massive Open Online Course "MOOC" circumvention exemption to include *all* types of online learning opportunities. This expansion would provide access to innovative and varied educational offerings, level the online educational playing field, and ensure more affordable choices for not just conventional students but lifelong learners.