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June 11, 2018

Ms. Regan Smith  
General Counsel and Associate Register of Copyrights  
United States Copyright Office  
101 Independence Avenue, S.E.  
Washington, D.C. 20540-1000

Re: Docket No. 2017-10  
Exemptions to Prohibition Against Circumvention of Technological Measures Protecting  
Copyrighted Works

Dear Ms. Smith:

Thank you for the invitation to participate in the recent Section 1201 rulemaking hearings, and for the opportunity to provide additional written responses. The attached written response is submitted on behalf of Brigham Young University (“BYU”) and Brigham Young University-Idaho (“BYU-Idaho”) with respect to Proposed Class 1: Audiovisual Works—Criticism and Comment.

Please feel free to contact me with any additional questions or comments.

Sincerely,

*Peter Midgley*

Peter M. Midgley  
Director, Copyright Licensing Office  
Brigham Young University

Transmitted via e-mail ([resm@loc.gov](mailto:resm@loc.gov))  
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UNITED STATES COPYRIGHT OFFICE

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

Following the recent Section 1201 rulemaking hearings related to Proposed Class 1: Audiovisual Works—Criticism and Comment, the Copyright Office offered hearing participants the opportunity to submit written responses to the following question:

1. At the hearings, participants gave multiple presentations on whether screen capture is or is not a sufficient alternative to circumvention. Based on these presentations, the Office is interested in understanding whether screen capture is a sufficient alternative to circumvention for educational uses of “short portions of the motion pictures” beyond film studies or other courses requiring close analysis of film and media excerpts. Please provide illustrative examples of whether screen capture is or is not a sufficient alternative to circumvention for use of “short portions of the motion pictures,” for educational purposes. In responding, please consider or reference any specific needs of current exemption beneficiaries, such as university faculty and students; faculty of massive open online courses; kindergarten through twelfth-grade educators, including of accredited general educational development (GED) programs; and/or educators and participants in nonprofit digital and media literacy programs offered by libraries, museums and other nonprofit entities with an educational mission, in the course of face-to-face instructional activities.

The following response is submitted on behalf of Brigham Young University (“BYU”) and Brigham Young University-Idaho (“BYU-Idaho”), (collectively, “Commenters”), with respect to Proposed Class 1: Audiovisual Works—Criticism and Comment. For the reasons set forth below, screen capture is not a sufficient alternative to circumvention for many educational uses of motion pictures and other audiovisual works.

### **I. Screen Capture Cannot Provide Direct Access to Encrypted Content Protected By TPMs, Such As Subtitles or Closed Captioning**

Since the 2006 rulemaking, most of the discussion about screen capture technology has focused on the quality of video files created using screen capture. As a result, the Section 1201 exemptions since 2006 have drawn a distinction between film studies courses and all other

courses. This artificial distinction appears to have arisen from an undue focus on the issue of video quality, while disregarding other important limitations of screen capture technology that make it inadequate as an alternative to circumvention in a wide range of educational settings, well beyond film studies courses.

For example, despite advances in screen capture technology relating to video quality, such technology cannot provide direct access to encrypted content on DVDs or Blu-ray discs, such as subtitles or closed captioning. This encrypted content is often protected by Technological Protection Measures (TPMs), which make it difficult for instructors and students to take advantage of interactive tools designed to facilitate and enhance learning.

## **II. Direct Access to Encrypted Subtitles and Closed Captioning Is Required to Enable Interactive Tools Developed to Facilitate Foreign Language Instruction**

At the hearing conducted on April 11, 2018 in Washington, D.C., Commenters presented a video demonstration showing the use of such interactive tools in an advanced media player developed at BYU to facilitate foreign language instruction. The video demonstration was entered into the record.

As set forth in the demonstration, circumvention is necessary to gain direct access to the text of encrypted subtitles, which enables a number of key features to facilitate learning. Such features include:

- Ability to display subtitles selectively in one or more languages during playback, at the direction of a user. The subtitles can be turned on or off as needed to facilitate learning.
- Ability to select specific words or phrases of dialog during playback and interact with the selected text as needed to facilitate learning. For example, the selected text can be used to interact with web services, such as online translation tools.
- Ability to view a full transcript of a motion picture's dialog and control playback from a frame that is synchronized with the video. A viewer can jump directly to any scene in the film, simply by selecting a section of the transcript. This feature

significantly enhances learning by allowing instructors and students to navigate quickly and easily to the most relevant portion(s) of a motion picture.

These features cannot be enabled using screen capture technology, which simply records subtitles as images permanently fixed on the resulting video file. Such images cannot be turned on or off selectively, nor can viewers interact with the underlying dialog text to access web services or navigate to desired scenes. This is true regardless of the quality at which the video is recorded using screen capture. Even using the most current software available at the highest possible quality level, screen capture technology simply cannot provide direct access to encrypted subtitles or closed captioning protected by TPMs. This limitation makes screen capture technology insufficient as an alternative to circumventing TPMs on DVDs and Blu-ray discs to facilitate foreign language instruction.

### **III. The Inherent Limitations of Screen Capture Technology Have an Adverse Impact on Instructors and Students in a Wide Variety of Disciplines**

The inability of screen capture to provide direct access to encrypted content adversely affects instructors and students in a wide variety of fields, well beyond film studies courses or foreign language courses. For example, an instructor in a highly technical or scientific field may wish to enable students to access web services to look up definitions or illustrative examples of complex technical words or phrases used in a motion picture. As another example, an instructor engaged in face-to-face teaching in just about any field may wish to illustrate or emphasize a particular point by navigating quickly in real time to a relevant scene, by selecting a word or phrase of dialog. The possibilities are virtually endless.

### **IV. Display of Subtitles or Closed Captioning Makes Educational Videos Accessible To Students with Disabilities**

In addition to enabling the interactive teaching tools described above, direct access to encrypted subtitles or closed captioning enables educational institutions to make videos

accessible to students who are deaf or hard of hearing. In several recent high-profile cases involving Harvard University,<sup>1</sup> Massachusetts Institute of Technology<sup>2</sup> and the University of California at Berkeley,<sup>3</sup> the United States Department of Justice has argued that publishing online courses with video content that lacks suitable captioning may violate the Americans with Disabilities Act (ADA).<sup>4</sup>

Like many other educational institutions, Commenters offer online courses including video content with closed captioning to accommodate students who are deaf or hard of hearing. In some cases, such courses include reasonable and limited portions of copyrighted motion pictures or other audiovisual works. The performance of such works in qualifying courses is exempt from copyright infringement, provided that the conditions set forth in 17 U.S.C. § 110(2) are satisfied. This exemption is not limited to film studies courses; it applies to qualifying courses in *any* field of study.

When a qualifying course includes reasonable and limited portions of one or more copyrighted works, which satisfy the conditions of Section 110(2), educational institutions need access to the subtitles or closed captioning to make such works accessible to students who are deaf or hard of hearing. Because screen capture technology cannot provide direct access to encrypted subtitles or closed captioning, it is not a sufficient alternative to circumvention for

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<sup>1</sup> *National Ass'n of the Deaf v. Harvard Univ.*, (D. Mass. 2015) (No. 3:15-cv-30023).

<sup>2</sup> *National Ass'n of the Deaf v. Massachusetts Inst. of Technology*, (D. Mass. 2015) (No. 3:15-cv-300024).

<sup>3</sup> UC Berkeley C. Off., No. 204-11-309, Office for Civ. Rts. Ltr. of Finding (U.S. Dep't of Justice Aug. 30, 2016), [https://www.ada.gov/briefs/uc\\_berkeley\\_lof.pdf](https://www.ada.gov/briefs/uc_berkeley_lof.pdf).

<sup>4</sup> U.S. Atty's Off. D. Mass. (2015). *United States Reaches Settlement with Provider of Massive Open Online Courses to Make its Content Accessible to the Disabled*.

<https://www.justice.gov/usao-ma/pr/united-states-reaches-settlement-provider-massive-open-online-courses-make-its-content>.

making videos accessible to such students. Again, this is true for qualifying courses in *any* field of study, well beyond film studies courses.

## **V. Conclusion**

For the reasons set forth above, screen capture technology suffers from a number of inherent deficiencies, which make it inadequate as an alternative to circumvention for many educational uses of motion pictures and other audiovisual works. The adverse impacts caused by the inherent deficiencies of screen capture technology are not limited to film studies courses; they affect instructors and students in every academic discipline, and cannot be cured by alleged improvements in video quality due to recent advances in technology.

Educational institutions need direct access to encrypted content protected by TPMs on DVDs and Blu-ray discs, such as subtitles and closed captioning, to make legitimate, noninfringing uses of motion pictures and other audiovisual works. Accordingly, Commenters reiterate their previous recommendation to revise the current DMCA exemptions to include the following class of works:

Motion Pictures (including television shows and videos), as defined in 17 U.S.C. § 101, where circumvention is undertaken solely in order to facilitate noninfringing performances of the works for nonprofit educational purposes, in accordance with 17 U.S.C. § 110(1) or § 110(2).

This revision would simplify the exemption and align it with the statutory conditions for noninfringing educational performances, which inherently reflect an appropriate balance between copyright holders and educational users.