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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, 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/1201/2021>.

ITEM A. COMMENTER INFORMATION

Identify the commenter and provide a means to contact the commenter and/or the commenter’s representatives, if any.

This petition is submitted by Peter Decherney, Professor of Cinema and Media Studies and English at the University of Pennsylvania, and Professor Katherine Sender, Department of Communication, Cornell University on behalf of themselves and John L. Jackson, Jr., Professor and Dean, Annenberg School of Communication, University of Pennsylvania; Rebecca Stein, PhD, Executive Director, Online Learning Initiative, University of Pennsylvania; the International Communication Association (ICA); the Society for Cinema and Media Studies (SCMS); Console-ing Passions; the Library Copyright Alliance (LCA), Shiv Gaglani, CEO and Co-Founder, Osmosis.org; Stefan Wisbauer, Managing Director, Lecturio; Andrew Berg, MD, Co-Founder, SketchyMedical, Saud Siddiqui, MD, Co-founder, SketchyMedical; Ken Robertson, COO, Picmonic Inc.; and Ruthe Farmer, Chief Evangelist, CSforAll.

ITEM B. PROPOSED CLASS ADDRESSED

Identify the proposed exemption that the comment addresses by the number and name of the class set forth in the Notice of Proposed Rulemaking (e.g., “Proposed Class 1: Audiovisual Works—Criticism and Comment”).

Proposed Class 1: Audiovisual Works—Criticism and Comment

ITEM C. OVERVIEW

Provide a brief summary of the circumvention activity sought to be exempted or opposed and why.

Over the last two decades, the meteoric rise of the Internet has changed almost every facet of our lives. It has revolutionized how people work, communicate, create, teach, and learn. Therefore, to accommodate more of the online education ecosystem, we propose to add a new educational exemption under 17 U.S.C. § 1201. The Digital Millennium Copyright Act's (DMCA) prohibition on the circumvention of technological measures continues to be a barrier to what would otherwise be the lawful fair use of audiovisual works for educational purposes. As such, we propose an exemption that would allow educators and preparers of online learning materials to use short portions of motion pictures (including TV shows and videos), as defined in 17 U.S.C. 101, for the purpose of criticism, comment, illustration and explanation in offerings for registered learners of online learning platforms when the use of film and media excerpts will contribute significantly to learning.

Though the Copyright Office's endorsements of existing educational circumvention exemptions – kindergarten through 12th grade (K-12), college and universities, and Massive Open Online Courses (MOOCs) – were visionary steps towards the advancement of education and online learning, those exemptions only apply to a limited number of learning settings. Since the adoption of these exemptions in previous Triennial Rulemaking Proceedings, online learning platforms have assumed a more prominent role in education. In fact, the U.S. is one of the world's leaders in the online education market.¹ Even prior to the coronavirus pandemic, the U.S. online learning market was projected to reach \$6.22 billion between 2017 and 2022.²

Online learning has modernized the education field, and in doing so created a global learning society. If you have an Internet connection and a computer, you can easily enroll in an online education program – often times at a significantly cheaper cost than traditional face-to-face offerings. Advancements in education and the Internet help bridge inequality gaps in access to high-quality education. As such, many believe that online learning is the future and may someday replace aspects of in-person learning.³

Furthermore, online learning has shown significant growth over the last decade, providing people with maximum opportunities to retrain, gain new skills, and supplement their

¹ *Online Education Market & Global Forecast, by End User, Learning Mode, Technology, Country, Company*, [https://www.researchandmarkets.com/reports/4876815/online-education-market-and-global-forecast-by?utm_source=dynamic&utm_medium=BW&utm_code=nvzl68&utm_campaign=1334853+-+%24350+Billion+Online+Education+Market%3a+Global+Forecast+to+2025+by+End+User%2c+Learning+Mode+\(Self-Paced%2c+Instructor+Led\)%2c+Technology%2c+Country%2c+Company&utm_exec=chdo54bwd](https://www.researchandmarkets.com/reports/4876815/online-education-market-and-global-forecast-by?utm_source=dynamic&utm_medium=BW&utm_code=nvzl68&utm_campaign=1334853+-+%24350+Billion+Online+Education+Market%3a+Global+Forecast+to+2025+by+End+User%2c+Learning+Mode+(Self-Paced%2c+Instructor+Led)%2c+Technology%2c+Country%2c+Company&utm_exec=chdo54bwd) (Dec. 2019) [hereinafter Online Education Market].

² Technavio, *E-Learning Market in US by Product and End-user-Forecast and Analysis 2020-2024*, <https://www.technavio.com/report/e-learning-market-in-us-industry-analysis> (Jul. 2020).

³ Ilker Koksall, *The Rise of Online Learning*, <https://www.forbes.com/sites/ilkerkoksall/2020/05/02/the-rise-of-online-learning/?sh=689d7fed72f3> (May 2020).

education.⁴ Today's digital education opportunities consist of thousands of online learning platforms, such as Osmosis.org, Picmonic Inc., CSforALL, Lecturio, and SketchyMedical, who have joined us in this comment. Additionally, online learning platforms offer high-quality courses and content covering an array of subject matter, including medicine, music instruction, professional development, STEM, and business certifications.

Congressional legislative history asserts that the DMCA was "designed to facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age."⁵ Yet, approximately 20 years since the DMCA went into effect, educators and preparers of educational materials for online learning platforms are being encumbered by the very act that was created to keep copyright law on pace with emerging technologies.⁶ In this 8th Triennial Rulemaking Proceeding, we ask that the Copyright Office seize this opportunity to provide clarity to the educational practice of online instructional learning.

We ask the Copyright Office to allow educators and preparers of educational materials for online learning platforms, irrespective of their educational accreditation or for-profit status, to incorporate short portions of motion pictures into their courses. Failure to allow this will significantly diminish the advantages of their instructional content. Adopting an exemption for educators and preparers of educational materials for online learning platforms will inevitably help break down existing barriers to education posed by social and economic inequality. Online learning levels the educational playing field for public and private school pupils, home-schooled students, and part-time learners of all kinds by providing equal access to education.

The incorporation of short portions of motion pictures into online educational material would also enable the continued advancement of innovative educational methods. Integrating audiovisual content helps learners understand complex concepts and procedures. Without it, educators and preparers of educational materials for online learning platforms lose the ability to meet learners where they are by using clear and inspiring visual examples.

Moreover, as we struggle to respond to the challenging times presented by the coronavirus, it is essential that online learners can access the same quality of education as they would in person – especially during a time where students cannot access traditional in-person instruction. Due to the abrupt and mandatory transition from in-person to online learning, the demand for online learning materials have increased. However, educators and preparers of online learning materials are prevented from meeting that demand with the same quality learning experiences as in-person instruction due to the DMCA's anti-circumvention provisions.

⁴ Online Education Market, *supra* note 1.

⁵ Committee on the Judiciary's Report for The Digital Millennium Copyright Act, S. Rep. No. 105-190, at 1-2 (1998).

⁶ *Id.* at 2 ("Copyright laws have struggled through the years to keep pace with emerging technology from the struggle over music played on a player piano roll in the 1900's to the introduction of the VCR in the 1980's. With this constant evolution in technology, the law must adapt in order to make digital networks safe places to disseminate and exploit copyrighted materials.").

Further, the shift online has not only impacted education but it has also displaced millions of people in the workforce. Given the volatility of the economy, professionals have turned to online learning platforms to sharpen and gain skills that will be required in a post-pandemic world. Overall, whether you're a student whose education has been shifted online or a blue-collar worker trying to find your next job, it is clear that whenever the pandemic recedes, the value of online learning will remain.

Additionally, our exemption embraces the spirit of Congress' goals for the Internet and education as expressed in the TEACH Act while also limiting risk to copyright owners when working in an online medium. As discussed in Item E, the TEACH Act envisioned a need to extend education's reach to include more than just children and young adults, but also lifelong learners. By allowing learners to integrate educational activities into their daily work lives, online learning platforms fulfil the vision of the TEACH Act. The exemption we request in this Triennial proceeding will support educational quality that foster 21st century skills.

Lastly, we note that the creation of this exception is fully consistent with § 107 of the Copyright Act. The proposed uses of audiovisual materials in this comment are the same as those already accepted as qualifying fair use in previous rulemaking proceedings. The proposed exemption is 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. We would also like to note that our new exemption calls for online learning platforms with instructional materials using short clips of motion pictures to use technological protection measures analogous to those used by Massive Open Online Course (MOOC) providers, for which the Copyright Office has already granted an exemption.

For the aforementioned reasons, we respectfully request the Librarian to allow online learners and educators to have the same access to effective educational methods as their K-12, college and university, and MOOC counterparts.

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 technical protection measures (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.

Although less common, another form of copy protection that protects access to some commercial DVDs is disc corruption. This method makes the disc content “unreadable” by corrupting sections of the DVD so that some of the content is skipped when trying to copy it. Many companies that implement this form of encryption do so under different names. For example, Disney utilizes this form of technology under the name Disney X.⁷

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 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 platform, the instructor, or the learner attempting to use the copyrighted work for any of the fair uses described below.

In addition, we note that our petition calls for online learning platforms to protect their content that contains copyrighted clips by implementing reasonable technological protection measures to prevent circumvention consistent with the previously granted MOOC exemption. We discuss further in Item E.

⁷ *Learning Center*, Miraizon, http://www.miraizon.com/support/info_copyprotection.html (last visited Dec. 9, 2020).

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGEMENT USES

Educators and preparers of online learning materials need to be able to use short portions of motion pictures (including TV shows and videos), as defined in 17 U.S.C. 101, for the purpose of criticism, comment, illustration and explanation in offerings for registered learners on online learning platforms when use of the film and media excerpts will contribute significantly to learning. Educators teaching in-person classes, educators teaching for-credit online classes, and educators teaching Massive Open Online Courses (MOOCs) already may take advantage of these types of powerful instructional illustrations to make their lessons as effective as possible. In granting the exemptions that allow educators teaching for-credit online classes and educators teaching MOOCs, the Copyright Office recognized the undeniable value the use of these clips adds to the quality of online education.

The demand for online education has skyrocketed in the last three years. Online education became the new standard when Americans adapted to a changing world amidst the coronavirus pandemic. Millions of Americans registered on online learning platforms seeking educational opportunities online.⁸ This demand will continue in a post-pandemic society. Americans are now accustomed to online education, and will rely on it to supplement their skills in a transforming economy. It is in our collective interest to make that learning as effective as possible.

Opportunities to Advance Educational Equity are Hindered by the Anti-Circumvention Provisions

The national protests in 2020 over racial inequalities in society sparked increased focus in addressing all social inequalities within American culture, including those within the educational system. Fortunately, as Internet access increases and technology improves, gaps in access to high-quality education will decrease as people can utilize online sources for education that were previously unobtainable because of cost or under-funded schools. It is vitally important that the online learning experience matches the in-person learning experience so those that use online learning sources to supplement their less-than equal in-person education opportunities can actually obtain on par education.

Education for many exists outside of the four corners of a K-12 or university classroom. Students must supplement their education with additional resources online when their own school-systems fail to adequately support their needs. For example, in recognition of deficient access to computer science education in most school districts, CSforALL formed as a central hub of computer science education for U.S. youth in and out of school.⁹ An online coding course under this umbrella aimed at girls who aspire to STEM and computing careers cannot share the inspiring stories of role models like Katherine Johnson and Mary Jackson through short clips

⁸ Dan Brodnitz, *The 20 Most Popular LinkedIn Learning Courses of the Year*, LinkedIn (Sept. 28, 2020) <https://www.linkedin.com/business/learning/blog/top-skills-and-courses/fy20-most-popular-courses-of-the-year-hero>.

⁹ *About CSforALL*, CSforALL, <https://www.csforall.org/about> (last visited Dec. 10, 2020).

from the Academy Award-nominated movie "Hidden Figures" under the current anti-circumvention provisions. Of course, well-funded schools with STEM programs can freely share this clip in the classroom.

Screen capture, a technology that allows for the use of encrypted works without requiring the legal right to decrypt them through an exemption, would perpetuate educational inequalities if it were to be the only tool that supplemental educational platforms could use to incorporate short clips from motion pictures in their educational materials. The image resolution, audio synchronization, and frame coherence of screen capture can degrade picture quality, create distortions in image and audio, and drop frames at critical moments. Reserving access to the highest quality materials furthers disparities in educational privileges which must be remedied to close the social inequalities that society has deemed unacceptable.

Ruthe Farmer, former senior policy advisor for tech inclusion at the White House Office of Science and Technology Policy and current Chief Evangelist for CSforALL, believes that the use of motion picture clips in educational materials is necessary for today's youth. Ms. Farmer describes current K-12 students as the "YouTube generation," meaning that kids today learn through the use of videos. Preventing organizations like CSforALL and its member organizations from providing young students content that speaks to their mode of learning lessens the value of educational content made for kids. Restrictions on online classes also "disparately impact less-affluent children" who rely on extracurricular education sources outside of school and often online because their schools are underfunded, which is especially common in STEM education.¹⁰

Expanding the Current Exemption Would Enable Innovative Educational Methods

The use of short portions of motion pictures in offerings by educators and preparers of educational materials for online learning platforms allows for innovative teaching methods that enhance education. Osmosis.org, a health education platform, has found that the use of clips can expand how health professionals, medical students, and patients understand medical conditions. For example, enhanced understanding of achondroplasia is gained when Osmosis can incorporate in its online instructional materials a powerful scene in which Peter Dinklage, in character as "Game of Thrones" Tyrion Lannister, shared the isolation and pain sometimes experienced by those with dwarfism. The presentation of the emotional scene for an educational rather than entertaining purpose provides unique insight for health professionals and students into the mental impacts of the condition that would not be gained if the online learning platform could not use short motion picture clips in its materials.¹¹ Further, the emotional resonance of the scene is enhanced by the careful stitching of sound and image frame by frame. A distorted version, as could arise from screen capture, would potentially be humorous rather than moving, undercutting the purpose of using this clip as an educational example.

¹⁰ Interview with Ruthe Farmer, Chief Evangelist of CSforALL, (Nov. 24, 2020) by Student Attorneys of the Glushko-Samuelsan Intellectual Property Law Clinic at American University Washington College of Law.

¹¹ Interview with Max Harris, Chief of Staff of Osmosis, (Dec 1, 2020) by Student Attorneys of the Glushko-Samuelsan Intellectual Property Law Clinic at American University Washington College of Law.

Teachers, as well as college and university professors, also use online learning platforms to supplement their accredited courses. For example, some medical school professors use Osmosis to curate a list of pre-recorded videos tailored to match specific topics covered in their course syllabi. Students then watch the videos alongside their course materials. Unaccredited courses on online learning platforms like Osmosis have become unofficial extensions of accredited courses that instructors and students use to improve their learning materials.¹²

Osmosis also believes that incorporating short portions of motion pictures in its online materials will enhance how patients understand medical diagnoses. For example, both the character Dustin on the Netflix TV series “Stranger Things” and his real-life counterpart, actor Gaten Matarazzo, have a rare genetic condition called cleidocranial dysplasia. Medical patients, especially children and their parents, may have difficulty grasping common symptoms including the underdevelopment of facial bones and teeth that this rare condition causes. Osmosis seeks to use a clip from the show displaying the details of the actor’s face so that the patients have a familiar reference to comprehend the otherwise unrelatable technical medical language. Not only does the clip help the family learn about the medical condition, but a young patient who may be struggling with self-image issues because of the condition now has a popular character with which he or she can relate and identify.¹³

If online platforms like Osmosis cannot incorporate these kinds of clips in its materials because of the anti-circumvention measures, instructors and healthcare professionals would merely be able to describe the character to the patient. Instead, short clips can visually display information – as in-person instructions are able to – in order to demonstrate the details of a disease. Using this clip from popular culture also introduces a young patient to an on-screen hero like actor Gaten Matarazzo who may inspire the child to watch the full “Stranger Things” series from which the clip was taken.

Were the educators and preparers of educational materials for Osmosis and other similar online learning platforms like SketchyMedical, Lecturio, and Picmonic, to have the clear right to use short clips, these are types of uses they would employ to enhance the quality of their educational materials.¹⁴ However, because they do not currently fall within an existing exemption, the richness of their instructional materials is diminished. Professionals, students, and patients on these platforms should be able to enjoy the benefits that the use of these clips would create.

The Anti-Circumvention Provisions Lessen the Quality of Learning Experiences that are Only Available Online During the Coronavirus Pandemic

The coronavirus pandemic has forced traditional in-person learning experiences to shift online. Online learning is the exclusive way in which people can teach and learn when public safety measures like lockdowns and stay-at-home orders are in place. Forbidding the use of short

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

motion picture clips restrains the educational experience unfairly when students would be able to enjoy critiquing the clips under normal circumstances.

Private music study is an example of a form of education that was forced to shift online during the coronavirus pandemic. Lessons are traditionally taught at music stores or studios that have had to close under stay-at-home orders. In-home lessons have also been halted because of the accompanied safety concerns. Students are now using online learning platforms for their musical studies. Jared Falk, President and CEO of Musora Media, Inc., which includes the popular online music instructional platforms Drumeo, Guitareo, and Pianote under its umbrella, recognizes that the anticircumvention provisions “lower the quality of education and the value of the learning experience” for music students that are now studying online.¹⁵

Students want to learn how to play like their favorite musicians, and instructors help students reach this goal by teaching specific techniques after studying clips of performances from DVDs together in the lesson. Musora Media’s instructional videos, which often likewise will focus entirely on how to play a specific musical part, are blocked from incorporating the necessary short clips from DVDs in its instructional materials by the anti-circumvention measures.

Merely describing or mimicking the performance to a student fails as an adequate demonstration because an instructor cannot possibly convey the same bravado as the performer who inspired the student to want to learn in the first place. Instructors can recommend that students watch the chosen clips on a third-party source, but this breaks the flow of a lesson. There is also no guarantee that the clip will be available elsewhere. Students are thus robbed of this critical component of music learning.

Screen capture is not a suitable alternative. Screen capturing jumbles audio synchronization, skips frames, and reduces resolution. The benefit of studying a musical performance is lost if the audio cannot be heard perfectly because of either desynchronization or a broken linearity from skipping frames. Likewise, using a clip of a musical performance to study what are often fine and nuanced techniques requires best-quality images so that these details can be easily scrutinized.

Mr. Falk believes that “the goal should be to equalize the online and classroom experience with the student.”¹⁶ The outlet that music provides is perhaps more valuable than ever during the challenging times of a pandemic. It is therefore essential that students can access the same quality of music education online as in-person at a time where students cannot access traditional in-person music instruction.

Workforce Displacement Has Forced a Reliance on Online Learning for Skills Training

Millions of displaced workers from the pandemic are in urgent need of skills retraining as shifting market needs have rapidly accelerated. Online education is at the forefront of helping

¹⁵ Interview with Jared Falk, President and CEO of Musora Media, Inc., (Nov. 13, 2020) by Student Attorneys of the Glushko-Samuelsan Intellectual Property Law Clinic at American University Washington College of Law.

¹⁶ *Id.*

revitalize America’s workforce. For example, LinkedIn Learning reports a tripling of time spent on its platform over the last year, and over 3 million users watched its top twenty courses.¹⁷

The economy is changing, and professionals are turning to online learning platforms like LinkedIn Learning to learn the skills that the post-pandemic market will require. America needs these professionals to adapt to the demands of a new economy. The Copyright Office should enable these millions of learners to enjoy the same benefits as learners enrolled in settings already covered by existing exemptions to the anti-circumvention provisions.

Samara Iodice, Supervisor, Assets with LinkedIn Learning, notes the importance of using short motion picture clips in LinkedIn Learning’s education materials. For example, instructors teaching ethics in coding can find it challenging to demonstrate the lines between ethical and unethical coding effectively without replicating or creating unethical code themselves. Without short clips, instructors can merely describe the behaviors they consider unethical. With short clips, instructors can illustrate illegal hacking using fictional scenarios. For example, clips from the USA Network TV show “Mr. Robot” can show the illegal acts of a fictional cyber-vigilante who leads a global criminal hacking scheme.¹⁸ This is clearly a transformative use. Further, as in the previous example, a screen capture will potentially distort the impact of the example, inserting humor where the instructor wants to emphasize the seriousness of the situation.

Now and within the next three years, enabling instructors of all types to benefit from tools to enhance how they teach millions of displaced workers new skills will be a service to America if the Librarian chooses to allow it.

**Congress Had a Broad and Encompassing Vision of Education, Learners, and
The Role of Online Learning in Developing “Our Nation’s Human Resources”
When It Crafted the TEACH Act**

Our new exemption for educators and preparers of educational materials for online learning platforms seeks to update DMCA exemptions to reflect the Internet of today for the broad range of education, learners, and national opportunities that Senate Judiciary Chair Orrin Hatch hoped to reach. He, the Senate, and Congress, saw modern technological advances as an opportunity for the country to offer breadth and equity in education, including for those far from classrooms or otherwise unable to participate in traditional educational systems.

The legislative history of the TEACH Act is visionary in its anticipation of the reach of technology and the Internet to help us address broad national challenges, if we allow it. It envisions the Internet as a place for learners without normal schedules and for flexibly addressing national

¹⁷ Dan Brodnitz, *The 20 Most Popular LinkedIn Learning Courses of the Year*, LinkedIn (Sept. 28, 2020) <https://www.linkedin.com/business/learning/blog/top-skills-and-courses/fy20-most-popular-courses-of-the-year-hero>.

¹⁸ Interview with Samara Iodice, Supervisor, Assets for LinkedIn Learning, (Dec. 4, 2020) by Student Attorneys of the Glushko-Samuelson Intellectual Property Law Clinic at American University Washington College of Law.

needs (and crises) for increasing access and opportunities. The TEACH Act holds the vision of the type of learning our signatories provide and for the type of exemption we request in this Triennial proceeding.

Specifically, in his report to the Committee on the Judiciary on the Teach Act, Senator Hatch and the Senate Judiciary Committee laid out a broad vision for online education:

“For our nation to maintain its competitive edge, it will need to extend education beyond children and young adults to lifelong learning for working adults, and to reach all students of all income levels, in cities and rural settings, in schools and on campuses, in the workplace, at home, and at times selected by students to meet their needs.”¹⁹

This vision emphasizes the importance of providing education not only to those traditional learners in the K-12 and college and university systems, but also nontraditional learners who are not a part of that system. It is only by extending educational opportunities to the often-looked-over class of nontraditional learners that the vision of Congress can be adequately fulfilled. Our signatories strive to achieve just that.

Our exemption stays true to the original ideals Senator Hatch sought the Teach Act to have and falls in line with Congress’ intent to reach all learners and ensure that online educational institutions are permitted to deliver invaluable education to traditional and nontraditional students, both in the era of today’s crisis and beyond.

Our Exemption Embraces Congress’ Broad Goals for the Internet and Education in the United States by Extending Education Outside the Classroom to Both Traditional and Nontraditional Learners

With the TEACH Act, Congress envisioned the development of this nation’s workforce; as Senator Hatch said eloquently in his report to the Senate Judiciary Committee, “Education is the means by which we develop our nation’s human resources.”²⁰ Our exemption aligns with this vision and provides what Congress sought as demonstrated through our signatories.

Our signatories provide flexible, around-the-clock supplemental educational programs to support students training either to enter the workforce for the first time or reenter the workforce. Some examples are those training to be doctors, nurses, physician’s assistants, and surgical aides through the use of Osmosis.org. Specifically, in the medical field, many of these programs are affiliated with, but not offered through, medical schools throughout the United States. They help students of all backgrounds better understand their courses, master the material and prepare for exams. These courses help to expedite the pipeline for our frontline responders and heroic medical staff who are saving lives during this pandemic and will be

¹⁹ (Committee on the Judiciary Report on Technology, Education and Copyright Harmonization Act of 2001) S. Rep. No. 107-31, at 4 (2001).

²⁰ *Id.* at 3.

spending the coming years helping those who survive the virus recover from accompanying problems.

Additionally, our signatories provide vibrant and engaging after-school, evening, weekend and summer programs. These programs include courses that help students learn to code, program robots, play math games and conduct science experiments as seen through CSforAll. Clips of films and TV shows would help make this online content accessible, showing, for example, science experiments that cannot now be done because the laboratories are not open. These clips would also be especially engaging and meaningful when women, African Americans and Latinos are shown as engineers, programmers, scientists and mathematicians because it would inspire younger generations to believe that their goals are achievable.

The aforementioned examples are specific to a particular field, but educators and preparers of educational materials for online learning platforms provide supplemental education to much broader areas of practice. They are also pivotal in teaching new and emerging skills to millions of unemployed and displaced workers to find new skills and help them revitalize our economy as we recover, not only from the pandemic but from the displacement of workers by technology. This includes automation and the substitution of online delivery for brick-and-mortar stores. The need for these online instructional opportunities has become crucial in the last six months and will be necessary for years to come.

Our Exemption Limits the Risk for Copyright Owners by Calling on Educators and Preparers of Educational Materials for Online Learning Platforms to Take the Same Measures as MOOCs Using this Exemption Today

The Register of Copyrights said the TEACH Act was meant to be “useful and important guidance” for this exemption.²¹ We have followed that approach and incorporated the Register’s recommendation in the filing of this petition.

Specifically, educators and preparers of educational materials using short clips of films and TV shows with online learning platforms will adhere to the same types of commitments made by MOOCs covered by the exemption today. Our petition states:

- “The online provider will limit these online learning materials, to the extent technologically feasible, to registered learners of the online learning platform, institute copyright policies, and provide copyright information to educators and preparers of online learning materials, learners, and relevant staff members.”
- “Further, the online provider, to the extent technologically feasible, will work to reasonably prevent unauthorized further dissemination of online learning materials in accessible form to others, including after the registration period ends.”

²¹ Register of Copyrights, Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights (Oct. 8, 2015) (“2015 Recommendation”) at 74.

Like other exemption holders, educators and preparers of educational materials for online learning platforms will limit access to their courses, create policies and provide them to those who prepare the online materials, and build protections into their platforms and practices to prevent “unauthorized further dissemination” of the course materials. We note that because online learning platforms specialize in the use of Internet technology, the protections they offer may exceed the commitments offered in our petition.

We trust that, in following the recommendation of the Register of Copyrights, the Copyright Office should construe the DMCA exemptions for online learning in a way that continues the same vision for learners and protections for copyright owners that the TEACH Act did in 2002, but not limit, stifle, or freeze online learning to a 1999 or 2002 world.

The Use of Non-Profit, Accredited Restrictions from the TEACH Act are Outdated Due to the Advancement of the Internet

When the TEACH Act was passed, the accreditation and non-profit categorization may have been seen as a rational sorting criterion for conventional schools and universities. However, the TEACH Act did not anticipate the exponential growth of other models for the delivery of what it considered a “digital educational” experience to our nationwide learners. As it has become apparent, with the almost complete shift from in-person to online learning in 2020, the requirement for an institution to be either accredited or nonprofit to be able to deliver a quality education equal to that of in-person learning is outdated. While including the limitation of non-profit and accreditation may have been reasonable several years ago, removing these limitations now is essential to allow our educators and preparers of educational materials for online learning platforms to provide equitable learning conditions to our future doctors, nurses, computer scientists, chemists, biologists, and musicians. The consequences of not removing these limitations would be extremely detrimental to our recovery as a nation from this pandemic.

Our Exemption Falls Squarely Within Fair Use Under the Copyright Act

As noted earlier, the proposed uses of audiovisual materials are the same as those already accepted as qualifying fair use in the 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.

Our signatories make use of noncommercial speech in their course offerings. As cited in “Our Proposed Uses are Noninfringing Under Title 17”, noncommercial speech is inherent in learning and education, and our signatories exercise it when they teach medicine and coding and more. Noncommercial speech is not exclusive to nonprofit or accredited institutions.

The limitations imposed regarding an institution’s status as being nonprofit or accredited stem from a concern that, absent any requirements, there would be potential harm to copyright

holders. This concern can be found in the 1999 Report on Copyright and Digital Distance Education. The report stated:

“At the same time, it is important to retain meaningful limitations on the eligible recipients; the performances or displays should not be made available to the general public. We recommend permitting transmissions to be made to students officially enrolled in the course, regardless of their physical location. Since today's digital and scrambling technologies allow transmissions to be targeted more precisely, the requirement should be added that the transmission must be made solely, to the extent technologically feasible, for reception by the defined class of eligible recipients.”²²

Our exemption stays true to the sentiment expressed by the Copyright Office. Our signatories do not make their library of content available to the “general public”, but rather limit access to users who have the required account and password. This holds true for our online learning platform signatories Lecturio, Osmosis, Picmonic, and SketchyMedical which offer no access or extremely limited access to non-account holders.

Our Exemption is in Line With the Broad Vision of the Copyright Office in 1999, Including a Focus on the Learner, Not the Educator

In its 1999 Report on Copyright and Digital Distance Education, the Copyright Office emphasized the importance of the learner and the growing needs of citizens around the country with the advancement of technology and need for distance education. Specifically, the Report acknowledges:

“Distance education is reaching wider audiences, covering all segments of the population. The college audience is increasing particularly rapidly, in part due to responsiveness to the needs of an older, non-traditional student population, as well as students in other countries. Students also include professionals engaging in professional development or training, and retirees. The expansion of the field has led to changes among providers, with courses offered by both nonprofit and for-profit entities, on both a nonprofit and for-profit basis, and through varieties of partnerships among educational institutions and corporations.”²³

Here, the Copyright Office emphasizes the evolution of online learning extending beyond the traditional student with the ideal of how online education policy can truly be improved to serve nontraditional students in the way it has already been serving traditional students.

This Report was visionary, in its day, for the embrace of new technologies for education. Specifically, the Report advocated:

²² U.S. Copyright Office, Report on Copyright and Digital Distance Education (1999), available at http://www.copyright.gov/reports/de_rprt.pdf at xviii.

²³ *Id.* at ii.

“The desire to let markets evolve does not mean that the law must remain frozen. Where a statutory provision intended to implement a particular policy is written in such a way that it becomes obsolete due to changes in technology, the provision may require updating if that policy is to continue. Doing so may be seen not as preempting a new market, but as accommodating existing markets that are being tapped by new methods. In the view of the Copyright Office, section 110(2) represents an example of this phenomenon.”²⁴

Given that our exemption is consistent with the 1999 Report’s vision of the Internet as a medium for instruction and learning, we now implore the Copyright Office to also remain consistent with their vision in this Report. There have been not only great changes in technology but also extreme changes in the livelihoods of all Americans which has put online education at the forefront of saving lives and careers. To move forward as a country, especially now, online education and this exemption are pivotal.

Our Proposed Uses are Noninfringing Under Title 17

“Fair use is a key part of the social bargain at the heart of copyright law, in which as a society we concede certain limited individual property rights to ensure the benefits of creativity to a living culture. We have chosen to encourage creators by rewarding their efforts with copyright. To promote new cultural production, however, it also is important to give other creators opportunities to use copyrighted material when they are making something new that incorporates or depends on such material.”²⁵

As a society, we have chosen to make education and innovation priorities. To do so, we need the tools to provide learners of all kinds with equal access to education. Even those offering their lessons for a fee, including some educators and music instruction courses with online learning platforms, clearly fall under fair use protections and this special right provided by copyright law.

Under § 107 of the Copyright Act, courts evaluate four factors on a case-by-case basis to determine whether a use constitutes fair use: (1) the purpose and character 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.²⁶

The first factor heavily weighs in favor of a fair use finding. The proposed class of uses is strictly for educational purposes, which is one of the acceptable fair use examples explicitly listed in

²⁴ *Id.* at 144.

²⁵ Association of Independent Video and Filmmakers, et al., *Documentary Filmmakers’ Statement of Best Practices in Fair Use*, http://archive.cmsimpact.org/sites/default/files/fair_use_final.pdf (Nov. 2005).

²⁶ 17 U.S.C. § 107 (2018).

the preamble to § 107.²⁷ Specifically, the purpose of any use under this exemption would be to educate online learners rather than merely replace the entertainment purpose of the original audiovisual work. Through the tailored discussion of short specific scenes in movies and TV shows, educators and preparers of online learning materials repurpose the short clips into an educational tool for learners in a way that is highly transformative.²⁸

Additionally, commercial use does not serve as a bar to fair use. We know that fair use is “healthy and vigorous in broadcast news and other commercial media, where references to popular films, classic TV programs, archival images, and popular songs are frequently unlicensed. Trade and academic publishers regularly rely on fair use to justify the incorporation of third-party material into books they produce.”²⁹ Those educators and preparers of educational materials for online learning platforms, both non-profit and for-profit, are likewise engaged in a fair use of multimedia materials, and further, use them to further their mission of teaching and robust learning.

The second factor, the nature of the copyrighted work, weighs heavily in favor of finding fair use. Movies and TV shows are created for mass audiences, in the U.S. and globally. In contrast, most online learning is created for specific and much smaller audiences, including students in a medical school class who need supplemental materials to master a concept or understand the feelings of a prospective patient. A short clip can help them see through a news source how a celebrity responds to a particular disease, through a movie how a virus is transmitted across continents, and through a fictional prince’s eyes how his short stature changes every interaction of his life. Courts have found that the second factor “may be of limited usefulness where the creative work of art is being used for a transformative purpose.”³⁰ Our use is highly transformative.

Moreover, the third factor weighs in favor of fair use based on the prerecorded structure of online learning materials. The circumvention of audiovisual works is necessary to allow preparers of online materials to seamlessly incorporate portions of such works directly into pre-planned and prerecorded content. Under our exemption, short excerpts of motion pictures and including television shows would only be incorporated by educators and preparers of educational materials for online learning platforms for the purpose of criticism, comment, illustration and explanation for registered learners of online learning platforms. Therefore, any

²⁷ *Id.*

²⁸ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994) (stating that the central purpose of the first factor in a fair use enquiry is to see whether the new work merely “supersede[s] the objects” of the original creation, or instead adds something new, with a further purpose of different character); see *Authors Guild v. Google, Inc.*, 804 F.3d 202, 214 (2d Cir. 2015) (“[A] transformative use is one that communicates something new and different from the original or expands its utility, thus serving copyright’s overall objective of contributing to public knowledge.”).

²⁹ American University School of Communication Center for Social Media, et al., *Code of Best Practices in Fair Use for Academic and Research Libraries*, https://cmsimpact.org/wp-content/uploads/2016/01/code_of_best_practices_in_fair_use_for_arl_final.pdf (Jan. 2012).

³⁰ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006).

use of excerpts from audiovisual works would be concise and limited only to the extent necessary for such purposes.³¹

Lastly, the fourth factor heavily weighs in favor of finding fair use. The proposed use under this exemption is identical to the uses found in the K-12, university, and MOOC educational exemptions. Therefore, the Copyright Office has already acknowledged that the effect of the use of educational clips upon the potential market of such clips is minimal at best. More importantly, legal precedent shows that transformative uses do not substitute the work in the marketplace.³² The educational use of clips is inherently “non-substitutional” by nature. The two markets – entertainment and online education – are so different that using clips in the manner proposed in this exemption does not substitute the market for TV shows and movies. Since our proposed exemption would limit use to *short* portions of audiovisual works for educational purposes and the use is highly transformative, it is very unlikely that employing a short clip in an online course would be a sufficient substitute to watching a full-length movie for entertainment.

In fact, the proposed use of short portions of motion pictures arguably increases the market or value of the copyrighted work that was excerpted. For instance, Ruthe Farmer, Chief Evangelist for CSforALL, and other STEM leaders have increasingly urged Hollywood producers to cast more diverse representation for the roles of scientists, technologists, and surgeons.³³

In response to the passionate advocacy for diversity, TV shows and movies have begun to routinely cast women and minority actors in an effort to provide the audience with role models they could aspire to emulate. For young Latina STEM scholars, it is very likely that seeing a short clip of Mariana Foster, a main character in Freeform’s “Good Trouble”, navigate her way as a Latina female software engineer in a male dominated profession may inspire them to continue to study computer science, as their online STEM instructors seek. It is also very likely that these same students will rush to their televisions and streaming services to see the entire series, thus increasing the market for the show. We note that there is a phenomenon of youth programming featuring aspirational role models for underrepresented students, including Disney’s “Doc McStuffins”, “Girl Meets World”, Freeforms’ “The Fosters”, and ABC’s “Blackish”, which online learners may well discover from educational short clips.

Given that all factors lean towards a finding of fair use, the use of audiovisual clips in online learning materials would qualify as a non-infringing use.

³¹ See *Tresona Multimedia v. Burbank High Sch. Vocal*, 953 F.3d 638 (9th Cir. 2020) (citing *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820-21 (9th Cir. 2003) (“If the secondary user only copies as much as is necessary for his or her intended use, then this factor will not weigh against’ fair use.”)).

³² See *Campbell*, 510 U.S. at 591 (“cognizable market harm” is limited to “market substitution”); *Author’s Guild, Inc. v. HathiTrust*, 755 F.3d 87, 99 (2d Cir. 2014) (“[A]ny economic ‘harm’ caused by transformative uses does not count because such uses, by definition, do not serve as substitutes for the original work”).

³³ Interview with Ruthe Farmer, Chief Evangelist of CSforALL (Nov. 24, 2020).

Our TPMs are Strong

We would like to note that our new exemption calls for educators and preparers of educational materials and their online learning platforms to use technological protection measures analogous to those used by MOOCs, for which the Copyright Office has already granted an exemption. As stated in our petition, they will, to the extent technologically feasible, work to reasonably prevent unauthorized further dissemination of online educational materials using short clips of movies and TV shows. These protections are meant to acknowledge the importance of protecting the copyright owners' works.

As we presented in our 9/8/2020 petition, "To provide clarity to the educational practice of online instructional learning, in this 8th Triennial Rulemaking of the U.S. Copyright Office, we seek to add a new educational exemption under 17 U.S.C. § 1201:

To allow educators and preparers of online learning materials to use short portions of motion pictures (including television shows and videos), as defined in 17 U.S.C. 101, for the purpose of criticism, comment, illustration and explanation in offerings for registered learners on online learning platforms when use of the film and media excerpts will contribute significantly to learning.

The online provider will limit these online learning materials, to the extent technologically feasible, to registered learners of the online learning platform, institute copyright policies, and provide copyright information to educators and preparers of online learning materials, learners, and relevant staff members.

Further, the online provider, to the extent technologically feasible, will work to reasonably prevent unauthorized further dissemination of online learning materials in accessible form to others, including after the registration period ends."

Statutory Factors Favor Allowing Short Clips As Set Out Above

We know without doubt that education is moving online, and that the movement has been greatly accelerated due to the pandemic.³⁴ We submit with the certainty of research and investigations of the last three months that our nation's learners, young and old, virtually all online now, will be adversely affected by the prohibition under subparagraph (A) if educators and preparers of educational materials for online learning platforms, as defined within this proposed exemption, are not allowed to make noninfringing uses of copyrighted works as discussed here. The upcoming three years, which will encompass our nation's recovery period and transition to a new economy and way of life, similarly depend on these resources. Accordingly, and as requested, we evaluate the five statutory factors enumerated in §1201(a)(1)(C) and submit that our proposed exemption exceeds the statutory requirements.

³⁴ Laura Meckler & Hannah Natanson, *Remote learning widens equity gap*, Washington Post, Dec. 7, 2020, at A1.

(i) the availability for use of the 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-protected formats for specific educational uses that could benefit learners using online learning platforms. There are a number of sources that educators and preparers of educational materials for online learning platforms may excerpt clips from, including DVDs, Blu-Ray discs, and online streaming sources. Despite the availability of works, the DCMA's ban on circumventing technological measures on copyrighted works prevents many online learning platforms from accessing these sources to incorporate short clips into their courses.

(ii) the availability for use of works for nonprofit archival, preservation, and educational purposes:

As discussed above, the courses of online learning platforms supplement and augment traditional education. That is why the Joint Educators, so often before this forum in these Triennial Proceedings, come again to seek this new exemption. Professor Peter Decherney wants his children, and all children, to have access to engaging online instruction material in piano, percussion and guitar. Seeing a riff by Eddie Van Halen may inspire them to continue practicing the guitar and showing a few moments of how the great drummer Jeff Porcaro bends his wrists to achieve the "shuffle" sound in his famous "Rosanna" shuffle is a fair use that should be available to all aspiring musicians. Further, even before the coronavirus, many schools were cutting their music and arts programs for lack of funding. The instructional materials of online learning platforms, non-profit and for-profit, "fill the gap" to supplement and augment non-profit educational offerings.

Osmosis.org aligns with medical schools across the U.S. and medical school professors choose their students' Osmosis courses alongside the medical course curricula. The Osmosis materials provide educational supplements, drills for the intense memorization requirement, and examples to help drive concepts home. Their online learning materials help a range of other learnings, including nursing and physician's assistant students, to see difficult materials in new and illustrative ways. CSforAll has 104 member organizations dedicated to offering K-12 STEM education at places like the Boys and Girls Clubs, Girl Scouts, 4-H and other community locations just outside of school doors when the communities cannot support the technology or teachers themselves.

Whether for-profit or non-profit, accredited or unaccredited, the online education system has stepped forward to work together with traditional educational institutions and educators to seek the use of short clips for educational purposes that are clearly protected under fair use. We note that currently educators and preparers of educational materials for unaccredited and for-profit online learning platforms may not embed noninfringing audiovisual works into their courses without a license from the copyright owner, but we are not aware of any market offerings that provide educators and preparers of educational materials for online learning platforms with the clips they need. As a result, educators and preparers of educational

materials for online learning platforms have shared with us that many opportunities are lost: rich content and examples are left unshared. It is a matter of grave concern and fundamental equity to Professor Decherney, Professor Sender, Dr. Stein, and the other Joint Educators that online learning platforms, as defined and limited in this petition, are unable to use the same audiovisual materials that in-person educators and MOOC providers can use and thus, cannot provide the same quality educational experience.

(iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research

As illustrated extensively above, the inability of educators and preparers of educational materials for online learning platforms to legally circumvent TPMs significantly undermines their ability to provide a well-rounded and enhanced educational experience. Including short clips of movies and television shows in online courses has the ability to capture students' attention and get them to engage more actively with the material. Short clips serve many potential functions, including providing visual examples of a concept being taught, encouraging commentary and critique of the work, inspiring students to think bigger, and allowing them to engage with the shared experiences of the characters depicted onscreen.

With a significant part of the population now turning to the Internet for educational opportunities, there is an expectation that they will have high-quality options to choose from. Our national learners, of all ages and for all professions and purposes, are at a serious disadvantage if educators and preparers of educational materials for online learning platforms cannot provide the same quality educational experience as more traditional teaching environments. Prohibiting these educators and preparers from using these clips at the same audiovisual quality will only serve to heighten the unequal access issues that already pervade the educational system.

(iv) the effect of circumvention of technological measures on the market for or value of copyrighted works

The circumvention of technological measures by educators and preparers of educational materials for online learning platforms would be strictly limited to minimize the potential effect on the market or value of copyrighted works. The exemption requires online learning providers to limit access to the materials to registered learners, implement copyright policies, provide copyright information, and work to reasonably prevent unauthorized sharing of the online learning materials. The clips being excerpted are meant for the limited purpose of educating students by emphasizing or illustrating a concept as part of the learning experience, so it is unlikely that those accessing the clips would reuse them. However, should this occur, reuse of short clips would be unlikely to affect the value of the copyrighted work from which it was sampled, as the clips are short in duration and not meant to replace the experience of viewing the work in its entirety. In fact, if the incorporated clips serve their intended purpose of engaging students more fully, students may choose to seek out the full version of the work, thereby increasing the market or value of the copyrighted work that was excerpted.

(v) such other factors as the Librarian considers appropriate

On December 7, 2020, the front page of the Washington Post shared the upsetting news, “*Remote learning widens equity gap.*” The inability for students to attend school because of the coronavirus pandemic has had dire consequences for their education.³⁵ A new study shows that students have lost months’ worth of math skills during the pandemic, with students of color being affected most significantly.³⁶ The shift to online learning has posed many difficulties for students and is resulting in many students being left behind.³⁷ This learning deficit demonstrates that there is a stronger need than ever for quality online learning content that can replicate the in-person learning environment as closely as possible. To allow educators and preparers of educational materials for online learning platforms to use short clips in their materials will help bridge this gap by engaging students more fully and illustrating concepts in more relatable ways.

Conclusion

Desire for knowledge and belief in education as a tool for self-improvement run deep in the culture of the United States. This is reflected in the familiar language of Article I, Section 8, Clause 8 of our Constitution, which exemplifies our shared belief in the “Progress of Science and useful Arts.”

We ask only for clarification that educators and preparers of educational materials for online learning platforms may use short quotations of motion pictures including TV shows to bring the most vivid, exciting, and inspiring examples to their lessons.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*