UNITED STATES COPYRIGHT OFFICE

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

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ITEM A: COMMENTER INFORMATION

This comment is submitted on behalf of Brigham Young University ("BYU") and Brigham Young University-Idaho ("BYU-Idaho") (collectively, "Commenters").

BYU is a private research university affiliated with The Church of Jesus Christ of Latter-day Saints. Founded in 1875 as Brigham Young Academy, the university currently serves more than 33,500 students from all 50 states and 105 countries. BYU seeks to develop students of faith, intellect, and character who have the skills and the desire to continue learning and to serve others throughout their lives.

BYU-Idaho is a private, four-year university affiliated with The Church of Jesus Christ of Latter-day Saints. Originally founded as a regional school in 1888, it was named Ricks College in 1923 and became the four-year university BYU-Idaho in 2001. BYU-Idaho seeks to create a wholesome learning environment in which students can strengthen their commitment to their faith and receive a quality education that prepares them for leadership in the home, the community, and the workplace.

This Comment was prepared by the BYU Copyright Licensing Office, which provides the university's faculty, staff, and students with services and resources relating to copyright issues that arise on campus.

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ITEM B: PROPOSED CLASS ADDRESSED

This Comment relates to the following proposed exemption previously submitted by Commenters:

> Motion pictures (including television shows and videos), as defined in 17 U.S.C. 101, where the motion picture is lawfully made and acquired on a DVD protected by the Content Scramble System, on a Blu-ray disc protected by the Advanced Access Content System, or via a digital transmission protected by a technological measure, where circumvention is undertaken by college and university employees or students or by kindergarten through twelfth-grade (K-12) educators or students (where the K-12 student is circumventing under the direct supervision of an educator), including of accredited general educational development (GED) programs, for a noninfringing use under 17 U.S.C. §§ 107, 110(1), 110(2), or 112(f).

In the October 15, 2020 Notice of Proposed Rulemaking ("2020 Notice"), the Register grouped Commenters' proposal with several others under "Proposed Class 1: Audiovisual Works—Criticism and Comment."[1] However, Commenters respectfully submit that their proposal should be classified under a separate, independent class, such as "Audiovisual Works—Educational Uses."

The purpose of copyright is "to promote the progress of science and useful arts."[2] Recognizing that there is perhaps no better way to promote the progress of science and useful arts than by ensuring the quality of education, Congress has given special consideration to the needs of educational users throughout the Copyright Act, including in the context of this rulemaking.[3] Congress has expressly directed the Register to give special attention to "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*."[4] Despite this Congressional mandate, the Register has identified the following 17 proposed classes, *none* of which identifies education as the primary use case:

1. Audiovisual Works—Criticism and Comment
2. Audiovisual Works—Texting
3. Audiovisual Works—Accessibility
4. Audiovisual Works—Livestream Recording
5. Audiovisual Works—Preservation
6. Audiovisual Works—Space-Shifting

7a. Motion Pictures—Text and Data Mining
7b. Literary Works—Text and Data Mining
8. Literary Works—Accessibility
9. Literary Works—Medical Device Data
10. Computer Programs—Unlocking
11. Computer Programs—Jailbreaking

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[1] Exemptions To Permit Circumvention of Access Controls on Copyrighted Works, 85 Fed. Reg. 65,302 (Oct. 15, 2020) ("2020 Notice").
[2] U.S. Const. Article I, Section 8, Clause 8.
[3] *See, e.g.*, 17 U.S.C. §§ 107(1), 108(h)(1), 109(b)(1)(A), 110(1), 110(2), 110(8), 112(f)(1), 114(b), 504(c)(2), 512(e), 1201(d), 1203(c)(5)(B), 1204(b).
[4] 17 U.S.C. §§ 1201(a)(1)(C)(ii)-(iii).

12. Computer Programs—Repair
13. Computer Programs—Security Research
14a. Computer Programs—Preservation
14b. Video Games—Preservation
15. Computer Programs—3D Printing
16. Computer Programs—Copyright License Investigation
17. All Works—Accessibility Uses

While all of these other uses are important, only the criticism and comment class has the same statutory recognition as educational use. And while educational uses may frequently involve criticism or comment, they are not limited only to situations involving criticism or comment.[5] Accordingly, the Register should not group these uses together. Given the statute's focus on educational uses—including the factors the Register must consider in this rulemaking—the Register should give as much if not more consideration to education than all of the proposed classes identified in the 2020 Notice.

ITEM C: OVERVIEW

Educational uses of copyrighted works are integral to promoting the progress of science and the useful arts. Motion pictures have long been a central part of education.[6] Under Title 17, educators have been granted broad rights to use motion pictures. Over the years, many educational institutions have invested heavily in large collections of motion pictures on DVDs and Blu-ray discs, with the reasonable expectation that the copies they purchased could be used for educational purposes.

But just as Congress predicted when instituting this rulemaking proceeding,[7] over the last 20 years technology has changed dramatically. Today, educators lack almost any realistic ability to exercise their rights to use motion pictures their institutions have acquired. As a practical matter, optical discs and players are becoming increasingly difficult to use for educational purposes. Such difficulties have been exacerbated by the large-scale shift to remote instruction caused by the COVID-19 pandemic. And unfortunately, the current market for licensing or purchasing digital copies of motion pictures does not meet the needs of educational institutions.

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[5] *See* Register of Copyrights, Section 1201 Rulemaking: Seventh Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights, at 51 (2018) ("2018 Recommendation") (finding that certain favored teaching and scholarship activities may not qualify under the "comment or criticism" exemption). *See also* 17 U.S.C. §§ 110(1), 110(2), 112(f) (defining educational exemptions without any references to criticism or comment).

[6] Elizabeth L. Stadtlander, *Relative Importance of Placement of Motion Pictures in Class-Room Instruction*, 40 THE ELEMENTARY SCH. JOURNAL 284 (1939).

[7] H.R. Rep No. 105-551, pt. 1, at 36 (1998).

Candidly, Commenters and many other educational institutions would prefer it if they could simply purchase digital copies of motion pictures that could actually be used for educational purposes. But no such market exists today, nor does it appear likely to exist anytime in the foreseeable future. Confronted with this profound market failure, Commenters are unfortunately left with no other choice but to seek an expanded exemption for educational uses through this rulemaking. Without such an expanded exemption, it will be increasingly difficult for Commenters and other institutions to continue using motion pictures for educational purposes.

Commenters' proposed exemption seeks nothing more than a restoration of educators' ability to actually use the motion pictures their institutions have acquired. While the proposed exemption may represent a departure from the approach followed in previous rulemakings, it should not be viewed as a radical "expansion" of educators' rights. To the contrary, the exemption will merely restore the status quo ante: educators will be able to use the motion pictures their institutions have purchased for educational purposes—nothing more, nothing less. That should not be treated as an especially remarkable or controversial proposition.

The purpose of the rulemaking is not to pit copyright holders against copyright users, especially educational users. We are all on the same team. When it comes to educational uses, everyone benefits from better education. Commenters' proposal represents a good faith effort to establish an appropriate balance between the legitimate interests of rightsholders and the practical needs of educational users. To the extent rightsholders or the Register have concerns about particular aspects of the proposal, Commenters look forward to working together during this rulemaking to craft an exemption that will actually meet the needs of *all* interested stakeholders.

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

Commenters' proposed exemption relates to TPMs employed on DVDs, Blu-ray discs, Ultra HD Blu-ray discs, and by various online streaming services. For example, the proposed class of works includes motion pictures on DVDs protected by the Content Scramble System (CSS) and on Blu-ray discs protected by the Advanced Access Content System (AACS), including Ultra HD Blu-ray discs protected by AACS2 technology. In addition, the proposed class of works includes motion pictures distributed via a digital transmission protected by any

digital rights management (DRM) technology that acts as a TPM controlling access to the motion picture.

ITEM E: ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

As in previous rulemakings, the 2020 Notice indicates that, when evaluating possible exemptions, the Register will consider the following four requirements:

1. The proposed class includes at least some works protected by copyright.
2. The uses at issue are noninfringing under Title 17.
3. Users are adversely affected in their ability to make such noninfringing uses or, alternatively, users are likely to be adversely affected in their ability to make such noninfringing uses during the next three years. This element is analyzed in reference to Section 1201(a)(1)(C)'s five statutory factors.
4. The statutory prohibition on circumventing access controls is the cause of the adverse effects.[8]

As discussed below, each of these elements supports the conclusion that the Register should approve Commenters' proposed class for an exemption.

COMMENT SUMMARY

[8] 2020 Notice, 85 Fed. Reg. at 65,294.

I. The Proposed Class Includes At Least Some Works Protected by Copyright

The first requirement for an exemption is that the class includes at least some works protected by copyright. Here, Commenters' proposed exemption relates to "motion pictures (including television shows and videos), as defined in 17 U.S.C. 101. . . ." The Copyright Act

lists motion pictures as an example category of works of authorship eligible for copyright protection.[9] Indeed, the language of the proposed exemption mirrors the current exemption, which the Register has found to include works protected by copyright in previous rulemakings.[10]

II. The Proposed Uses Must Be Noninfringing Under Title 17

The second requirement is that the proposed uses are noninfringing under Title 17. Here, Commenters' proposed exemption applies only when circumvention is undertaken "for a *noninfringing use* under 17 U.S.C. §§ 107, 110(1), 110(2), or 112(f)." Accordingly, the proposed uses must, by definition, be noninfringing. If circumvention is undertaken for any use deemed to be infringing, the proposed exemption will not apply, and the user will be liable for possibly violating Section 1201, in addition to any copyright infringement liability.

A. Statutory Definitions of Noninfringing Educational Uses Are Not "Overbroad"

In the 2020 Notice, the Office characterizes Commenters' proposed exemption as "a request to expand the types of permitted uses," and notes that it has "previously rejected similar proposed classes as overbroad."[11] Respectfully, Commenters request that the Register reconsider the approach used in past rulemakings to evaluate proposed noninfringing uses, especially for educational uses.

As the Office found after conducting a comprehensive study of Section 1201, the rulemaking is not an appropriate venue for deciding unresolved questions of noninfringement, such as novel fair use questions:

> Moreover, the rulemaking is not an appropriate venue for breaking new ground in fair use jurisprudence, and the Office is hesitant to place itself in the position of making fair use findings in a rulemaking context . . . . Congress did not intend for the Office to expand or contract the contours of fair use through the rulemaking proceeding.[12]

To the best of Commenters' knowledge, no court has ever conducted a fair use analysis in a case involving an educational institution's use of motion pictures in its collection. Nor has any of the educational use exemptions set forth in Sections 110(1), 110(2) or 112(f) ever been

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[9] *See* 17 U.S.C. § 102(a)(6).
[10] 2018 Recommendation, at 45.
[11] 2020 Notice, 85 Fed. Reg. at 65,303.
[12] U.S. Copyright Office, Section 1201 of Title 17, at 117 (2017), https://www.copyright.gov/policy/1201/section1201-full-report.pdf ("Section 1201 Study").

litigated substantively. Accordingly, Commenters' proposed exemption presents many unresolved questions of first impression, which the Register should not attempt to resolve for the first time in this rulemaking.

For example, a court has never been asked to decide the meaning of the term "classroom or similar place devoted to instruction" in Section 110(1). Even so, educational institutions everywhere have been forced to grapple with how the term "classroom" should be understood in relation to myriad variations of synchronous and asynchronous online instruction models that have been implemented across the country, especially in response to the COVID-19 pandemic. Different institutions may adopt different understandings of the term "classroom," and a rightsholder may, of course, disagree with a particular institution's understanding. If such a disagreement arose, however, Commenters respectfully submit that the proper venue to decide the issue would be in court, *not* in this rulemaking.

Rather than attempt to define the term "classroom" or address a host of other questions of first impression, the Register should simply incorporate the relevant statutory provisions by reference, as Commenters have proposed. The Register has correctly recognized the utility of incorporating by reference applicable statutory provisions elsewhere in defining classes of works and noninfringing uses.[13] Such an approach will not result in an "overbroad" class of works. Rather, Commenters' proposed exemption defines an appropriately "narrow and focused"[14] subset of works and noninfringing uses, because is it limited to circumvention undertaken by college and university employees or students or by K-12 educators or students, for a noninfringing educational use satisfying all of the statutory conditions established by Congress. The ultimate question of noninfringement—and hence, applicability of the exemption—will be deferred until a live case or controversy is presented to a court, which is the proper venue for adjudicating infringement disputes.

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[13] *See, e.g.*, 37 C.F.R. 201.40(b)(1) (referencing 17 U.S.C. 101); 37 C.F.R. 201.40(b)(2) (referencing the Americans With Disabilities Act, the Individuals with Disabilities Education Act, and Section 504 of the Rehabilitation Act); 37 C.F.R. 201.40(b)(3) (referencing 17 U.S.C. 121); 37 C.F.R. 201.40(b)(4) (referencing the Health Insurance Portability and Accountability Act, the Computer Fraud and Abuse Act, and regulations of the Food and Drug Administration).
[14] H.R. Rep. No. 105-551, pt. 2, at 38.

Importantly, Commenters are *not* advocating an exemption that would allow users to circumvent TPMs to create complete copies of motion pictures "'in the clear,' to be circulated around campuses, perhaps online."[15] Although possible infringement by rogue actors is surely a valid concern—one shared by Commenters—it has nothing to do with the proposed exemption. The statutory provisions incorporated by reference in the exemption do not permit wanton distribution of copies around campus or online, so if any such behavior should occur, it will not be covered by the exemption.

Educational institutions are uniquely positioned to ensure that any copies they make are used only for noninfringing educational purposes. If the exemption is adopted, the interests of educational institutions will be perfectly aligned with the interests of rightsholders in preventing unsanctioned infringement. Institutions will have no incentive whatsoever to encourage infringing behavior, which would expose them to potential liability. Rather, educational institutions will be incentivized to implement policies and procedures designed to prevent infringement by rogue actors and to encourage responsible behavior by instructors and students.

B. At A Minimum, The Current Exemption Should Be Expanded To Encompass Noninfringing Uses Beyond "Short Portions"

The current exemption for educational purposes applies only "where circumvention is undertaken solely in order to make use of *short portions* of the motion pictures . . . ."[16] The "short portions" limitation improperly constrains educators' ability to circumvent TPMs based on a seemingly arbitrary definition of noninfringing use for educational purposes. As discussed above, Commenters propose that noninfringing uses be defined by referencing specific statutory provisions rather than by attempting to summarize or paraphrase selected elements of statutory provisions in the exemption. But even if the Register rejects Commenters' proposed approach, the current exemption should, at a minimum, be expanded to encompass noninfringing educational uses beyond "short portions."

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[15] 2018 Recommendation, at 53.
[16] 37 C.F.R. 201.40(b)(1) (emphasis added).

1. The "Short Portions" Limitation Is Not A Valid Substitute For The "Reasonable And Limited Portions" Provision Of The TEACH Act

Commenters are unsure of the source of the term "short portions." One possibility is that it was meant to serve a similar purpose to the phrase "reasonable and limited portions" in Section 110(2) (the "TEACH Act").[17] But if so, it is unclear why the exemption should use the term "short portions," instead of the actual statutory language, "reasonable and limited portions." While the differences between these two phrases may appear subtle and unimportant at first, upon reflection, it is not hard to contemplate situations in which a noninfringing transmission of a "reasonable and limited portion" of a motion picture under the TEACH Act may involve more than a so-called "short portion" of the motion picture. For example, in its 2006 report on the TEACH Act, the Congressional Research Service found:

> Although what constitutes a "reasonable and limited portion" of a work is not defined in the statute, the legislative history of the Act suggests that determining what amount is permissible should take into account the nature of the market for that type of work and the instructional purposes of the performance. For example, *the exhibition of an entire film may possibly constitute a "reasonable and limited" demonstration* if the film's entire viewing is exceedingly relevant toward achieving a [sic] educational goal. [18]

Thus, if the "short portions" limitation of the current exemption was meant to be used synonymously with the phrase "reasonable and limited portions" in the TEACH Act, then a number of valid, noninfringing uses—including transmissions of entire motion pictures in at least some cases, albeit rarely—may have been excluded inadvertently from the scope of the current exemption. If such an oversight occurred in a previous rulemaking cycle, it should be corrected in this cycle. On the other hand, if certain noninfringing uses of "reasonable and limited portions" under the TEACH Act were purposely excluded from the exemption, then Commenters respectfully request that the Register clarify the reason that these noninfringing uses should continue to be excluded.

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[17] 2018 Final Rule, at 46 (referencing "performances of full-length motion pictures under section 110(1) and *short portions* thereof under section 110(2) for nonprofit educational purposes" (emphasis added)).

[18] JARED HUBER, BRIAN T. YEH & ROBIN JEWELER, CONG. RESEARCH SERV., RL 33516, COPYRIGHT EXEMPTIONS FOR DISTANCE EDUCATION: 17 U.S.C. § 110(2), THE TECHNOLOGY, EDUCATION, AND COPYRIGHT HARMONIZATION ACT OF 2002 (2006) (citing S. Rept. No. 107-31, 107th Cong., 1st Sess. 7-8 (2001)).

2. The "Short Portions" Limitation Is Not A Valid Substitute For The Third Statutory Fair Use Factor

Another possible source of the term "short portions" is the third statutory fair use factor, *i.e.*, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[19] For example, in the last rulemaking, the Register found that "because only 'short portions' are involved, they are more likely to be fair use."[20] The Register described this finding as "critical" in recommending the current exemption for educational purposes.[21]

To the extent the term "short portions" was meant to serve as a stand-in for the third fair use factor, Commenters respectfully submit that such an approach was both imprecise and improper. The term "short portions" is not well-defined; it provides little practical guidance to educational users wondering just how much of a motion picture they can use without exceeding the scope of the current exemption. And because the term "short portions" does not appear anywhere in Title 17, there are no judicial opinions to which educational users can refer for additional clarity or guidance.

In addition, while it may be true that uses of "short portions" of a work are more likely to qualify as fair use than other uses, that unremarkable truism offers limited help when attempting to define the contours of noninfringing fair uses for educational purposes, which should be the goal of this inquiry. Numerous other factors aside from the amount used may influence a proper fair use analysis. Of all the relevant factors, it is not clear why the Register's 2018 Recommendation elevated the "short portions" factor to a position of such prominence, describing it as "critical" to the evaluation of proposed classes.[22]

As the Office is well aware, when making fair use determinations, all of the statutory factors must be analyzed and "weighed together."[23] No one factor, such as "short portions," is

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[19] 17 U.S.C. 107(3).
[20] 2018 Recommendation, at 51.
[21] *Id.*, at 52.
[22] Empirical studies suggest that the third statutory factor often has limited influence on the ultimate outcome of fair use determinations. *See, e.g.*, Clark D. Asay, Arielle Sloan & Dean Sobczak, *Is Transformative Use Eating the World?*, 61 B.C. L. Rev. 905 (2020); Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law*, 22 Stan. Tech. L. Rev. 163 (2019); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. Pa. L. Rev. 549 (2008).
[23] *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

controlling or determinative in the analysis. Thus, it is not surprising that in numerous cases, courts have held that use of *more* than short portions qualified as fair use.[24] Conversely, in other cases, courts have held that even use of short portions did *not* qualify as fair use.[25] Manifestly, "short portions" is, at best, a blunt tool for predicting how a court might decide a contested fair use question. Nevertheless, in the last rulemaking, the "short portions" limitation seemed to be viewed as some sort of fair use litmus test—precisely the kind of inappropriate "bright-line rule" that the Supreme Court and other courts have repeatedly cautioned against in deciding fair use questions.

It is highly unlikely that Congress intended the DMCA to act as a wholesale prohibition against broad categories of noninfringing uses, especially for educational users. To the contrary, at the time the DMCA was enacted, Congress was concerned that the prohibition on circumvention of TPMs "would undermine Congress' long-standing commitment to the concept of fair use."[26] This rulemaking process was instituted in part to ensure that the prevalence of TPMs would not adversely affect users' ability to make noninfringing uses. To emphasize the point, Congress codified into the DMCA the following mandate, "*Nothing* in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, *including fair use*, under this title."[27]

Accordingly, it was improper to preemptively exclude from the scope of the current exemption a broad category of noninfringing fair uses, *i.e.*, those involving more than "short portions." Whatever the reasons might have been in previous rulemakings for limiting the

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[24] *See, e.g.*, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449-50 (1984); *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 693 (7th Cir. 2012); *A.V. v. iParadigms, LLC*, 562 F.3d 630, 642 (4th Cir. 2009); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1167-68 (9th Cir. 2007); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 614 (2d Cir. 2006); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 821 (9th Cir. 2003); *Bond v. Blum*, 317 F.3d 385, 396 (4th Cir. 2003); *Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 24 (1st Cir. 2000); *Sundeman v. Seajay Soc'y, Inc.*, 142 F.3d 194, 207 (4th Cir. 1998).
[25] *See, e.g.*, *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564-66 (1985); *Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 630 (9th Cir. 2003); *Roy Export Co. Establishment v. Columbia Broadcasting Sys., Inc.*, 503 F. Supp. 1137, 1145 (S.D.N.Y. 1980).
[26] H.R. Rep No. 105-551, pt. 1, at 26 (1998).
[27] 17 U.S.C. 1201(c)(1) (emphases added).

exemption only to "short portions," the Register should no longer include this imprecise and improper limitation when defining noninfringing educational uses.

C. Copying Full Motion Pictures For Educational Purposes Constitutes A Noninfringing Use

Curiously, the current exemption for educational purposes does not refer directly to the any of the exclusive rights of the copyright holder. Rather, the exemption applies "where circumvention is undertaken solely in order to *make use* of short portions of the motion pictures . . . ."[28] Although the meaning of "make use" is somewhat ambiguous, Commenters presume that the current exemption encompasses both the reproduction right and the public performance right, which were discussed extensively in the last rulemaking.[29]

Commenters' proposed exemption resolves this ambiguity by incorporating four specific statutory provisions by reference. If the proposed exemption is accepted, educational users will be able to refer to the appropriate statutory provisions to determine which exclusive rights are implicated and which uses are permitted. But even if the Register rejects Commenters' proposed approach, the current exemption should, at a minimum, be revised to clarify that, in appropriate circumstances, copying full motion pictures for educational purposes constitutes a noninfringing use.[30]

1. Copying Full Motion Pictures Is A Noninfringing Use Under Section 112(f)

Under the TEACH Act, nonprofit educational institutions can make transmissions of "reasonable and limited portions" of motion pictures, provided that all of the statutory conditions are satisfied. But the companion section, 17 U.S.C. § 112(f), allows for a *use* of more than "reasonable and limited portions" (and *certainly* more than "short portions"). Section 112(f) allows for a *copy* of a motion picture to facilitate qualifying TEACH Act performances. While the performance can be of no more than reasonable and limited portions of the work, due to the

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[28] 37 C.F.R. 201.40(b)(1) (emphasis added).
[29] 2018 Recommendation, at 45-53, 67-71.
[30] The purpose of this rulemaking is limited to considering exemptions to the prohibition on circumventing "access control" TPMs, which are defined under Section 1201(a)(3). To the extent the TPMs on optical discs comprise copy controls, as opposed to access controls, they are beyond the scope of this rulemaking. Thus, the Register should not give too much weight, in general, to the implication of the reproduction right.

nature of the technology, the copy must necessarily be of the entire work. The Register appeared to agree with this conclusion in the last rulemaking:

> Section 112(f) does support a conclusion that making and temporarily storing digital copies of motion pictures to perform "reasonable and limited portions" in distance teaching would be noninfringing, assuming the other requirements of section 110(2) are met. This appears already covered, however, by the existing exemption.[31]

Yet despite this finding by the Register, the current exemption seems to limit *all* uses, presumably including copying, to "short portions."[32] If the current exemption inadvertently excluded copying full motion pictures under Section 112(f) due to an oversight, it should be corrected in this rulemaking cycle. On the other hand, if such noninfringing copies were purposely excluded from the exemption, then Commenters respectfully request that the Register clarify the reason that these noninfringing uses should continue to be excluded.

2. Space-Shifting Motion Pictures For Educational Purposes Is Likely A Noninfringing Fair Use

As the Register found in the last rulemaking, "'[s]pace-shifting' occurs when a work is transferred from one storage medium to another, such as from a DVD to a computer hard drive."[33] The Register rejected an argument to treat space-shifting for educational purposes (although it was not labeled as such) as a likely noninfringing fair use.[34] Commenters continue to advocate that this rulemaking is not an appropriate venue for resolving disputed questions of noninfringement, especially those involving fair use. But if the current Register disagrees and remains inclined to weigh in on unresolved fair use issues, she should decide that space-shifting for educational purposes is, at the very least, *likely* to be a fair use.

Commenters acknowledge that they are not aware of any judicial precedent exactly on point. Despite repeated opposition to exemptions for educational uses in these rulemakings, to the best of Commenters' knowledge, no rightsholder has actually sued an educational institution for space-shifting motion pictures in its collection to facilitate noninfringing educational uses.

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[31] 2018 Recommendation, at 50.
[32] 37 C.F.R. 201.40(b)(1).
[33] 2018 Recommendation, at 111.
[34] *Id.*, at 53 ("Based on the relevant case law, the Acting Register cannot conclude as a general matter that the contemplated uses of full length motion pictures are likely to be fair use.").

Such a notable absence of cases is itself an indication that rightsholders are not overly concerned about the practice of space-shifting motion pictures by educational institutions, at least not concerned enough to file any lawsuits about it.

Even so, the standard for assessing proposed noninfringing uses in the rulemaking context does not require "any controlling precedent directly on point."[35] The Register should neither "expand [nor] contract the contours of fair use through the rulemaking proceeding."[36] Although the Register has emphasized a reluctance to *expand* the scope of fair use in past rulemakings, it is equally improper for the Register to *contract* the boundaries of fair use law. A commenter proposing an exemption involving a use that a court would *likely* decide is fair use should not be penalized simply because a rightsholder has not yet chosen to pursue litigation in which a court could decide the precise question presented.

In the last rulemaking, the Register noted that opponents of an exemption similar to the one presented by Commenters argued that "no court has held that space-shifting constitutes fair use."[37] That argument is (and was) incorrect. In *Fox Broadcast v. DISH Network*, the court conducted a fair use evaluation of a DISH Network feature called Hopper Transfers, which "allow[ed] DISH subscribers . . . to copy recordings that are saved on their Hopper DVRs to their mobile devices and play them back at any location . . . ."[38] The court held, "Hopper Transfers is a technology that permits non-commercial time- and place-shifting of recordings already validly possessed by subscribers, which is *paradigmatic fair use* under existing law."[39]

Here, Commenters are seeking an exemption that will allow educational institutions to engage in non-commercial space-shifting of motion pictures they already validly possess—the exact same kind of use that the court in *Fox Broadcast* characterized as "paradigmatic fair use." And to the best of Commenters' knowledge, no court has held that space-shifting motion pictures for noninfringing educational uses does *not* constitute fair use. Accordingly, the Register should

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[35] Section 1201 Study, at 28.
[36] *Id.*, at 117.
[37] 2018 Recommendation, at 50 (quoting Joint Creators II Class 1 Opp'n at 21).
[38] *Fox Broadcast Co. v. DISH Network LLC*, 160 F. Supp. 3d 1139, 1177-78 (C.D. Cal. 2015)
[39] *Id.* at 1178 (citing *Recording Industry Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999)) (emphasis added).

conclude that Commenters' proposed use is, at the very least, likely to be a fair use. As discussed below, the four statutory fair use factors would likely favor a finding of fair use.

a) Space-Shifting Motion Pictures For Educational Purposes Is Likely A Transformative Use

The first statutory fair use factor asks courts to consider, "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."[40] Manifestly, Commenters' proposed use is for educational purposes, which are expressly favored under the statute.

In addition, the resolution of this first factor often hinges on "whether and to what extent the new work is 'transformative.'"[41] In the last rulemaking, proponents of an exemption similar to the one proposed by Commenters argued that copying full motion pictures for educational performances was a noninfringing fair use by analogizing it to *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014) ("*HathiTrust*"), and *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015) ("*Google Books*"). The defendants in those cases copied millions of full textual works to create large databases with full-text searching capabilities—a use that the courts described as "quintessentially transformative."[42] But the Register distinguished *HathiTrust* and *Google Books*, essentially concluding that a court would be unlikely to extend the same reasoning to the practice of space-shifting a large collection of motion pictures to facilitate performances of the motion pictures.[43]

In *Fox News Network v. TVEyes*, however, the court evaluated a service offered by TVEyes, which enabled "clients to easily locate and view segments of televised video programming . . . by continuously *recording vast quantities* of television programming, compiling the recorded broadcasts into a database that is text-searchable . . . and allowing its clients to search for and watch (up to) ten-minute video clips that mention terms of interest to the

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[40] 17 U.S.C. 107(1).
[41] *Acuff-Rose*, 510 U.S. at 580.
[42] *HathiTrust*, 755 F.3d at 97.
[43] 2018 Recommendation, at 52.

clients."[44] Applying the *HathiTrust* and *Google Books* precedents, the court held, "TVEyes's *copying* of Fox's content . . . *is similarly transformative* . . . ."[45]

In reaching this holding, the court was persuaded by the following rationale of the Supreme Court in *Sony Corporation of America v. Universal City Studios, Inc*:

> While *Sony* was decided before "transformative" became a term of art, the apparent reasoning was that a secondary use may be a fair use if it utilizes technology to achieve the *transformative purpose of improving the efficiency of delivering content* without unreasonably encroaching on the commercial entitlements of the rights holder.[46]

TVEyes's service, the court held, "qualifies as technology that achieves the *transformative purpose of enhancing efficiency* . . . ."[47]

Here, Commenters are seeking an exemption that will allow educational institutions to make copies of motion pictures in their collections for the same purpose as the systems at issue in *Sony* and *TVEyes*, *i.e.*, enhancing efficiency of delivering content. Accordingly, for the same reasons articulated in those cases, a court would be likely to conclude that Commenters' proposed use is transformative, and that the first statutory factor would favor a finding of fair use.[48]

b) The Nature Of The Copyrighted Work Is Likely Not Especially Relevant

The second statutory fair use factor considers, "the nature of the copyrighted work."[49] Although motion pictures are unquestionably creative works, this consideration "may be of relatively limited assistance to evaluate whether a use is fair."[50] Accordingly, for the same

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[44] *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169, 173-74 (2d Cir. 2018) (emphasis added).
[45] *Id.*, at 177 (emphasis added).
[46] *Id.* (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)) (emphasis added).
[47] *Id.* (emphasis added).
[48] *Id.* at 178 (concluding that the first factor favored TVEyes, even though its service had "only a modest transformative character because, notwithstanding the transformative manner in which it delivers content, it essentially republishes that content unaltered from its original form, with no 'new expression, meaning or message.'")
[49] 17 U.S.C. § 107(2).
[50] 2018 Recommendation, at 45.

reasons set forth in previous rulemakings, the Register should conclude that the second fair use factor "is not especially relevant" to Commenters' proposed uses.[51]

c) Space-Shifting Full Motion Pictures For Educational Purposes Will Likely Use Only The Amount Necessary To Facilitate Secondary Noninfringing Uses

The third statutory fair use factor is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[52] In the last rulemaking, the Register found that "the 'short portions' limitation provides useful guidance as to what is generally likely to be a fair use without imposing a wholly inflexible rule as to length."[53] For the reasons discussed above, however, Commenters respectfully submit that the reliance on the "short portions" limitation in previous rulemakings was improper.[54]

In cases in which full copies of works are made to facilitate secondary noninfringing uses, courts have instructed, "The relevant consideration is the amount of copyrighted material *made available to the public* rather than the amount of material *used by the copier*."[55] If the secondary use is noninfringing, the full copy made to facilitate the secondary use is not relevant to the fair use analysis. In *Sony*, for example, the Supreme Court found that because "time-shifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge, the fact that the *entire work is reproduced* . . . does not have its ordinary effect of militating against a finding of fair use."[56]

Here, Commenters are proposing an exemption in which *no* copyrighted material would be made available to the general public. Rather, if the Register recommends the exemption, educational institutions will be enabled to make copies available *only* to qualified recipients—such as "instructors," "pupils," or "students officially enrolled in [a] course"—in the amounts and under the conditions set forth in Sections 110(1) or 110(2). Because such secondary uses will, by definition, be noninfringing, a court will likely find that the full copies necessary to facilitate the secondary uses will not weigh against a finding of fair use.

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[51] *Id.*
[52] 17 U.S.C. § 107(3).
[53] 2018 Recommendation, at 46.
[54] *See* Section II.B.2, *supra*.
[55] *TVEyes*, 883 F.3d at 179 (citing *Google Books*, 804 F.3d at 222) (emphases in original).
[56] *Sony*, 464 U.S. at 449-50 (emphasis added).

d) Space-Shifting Motion Pictures For Educational Purposes Will Likely Not Harm The Market For Motion Pictures

The fourth and final statutory fair use factor is, "the effect of the use upon the potential market for or value of the copyrighted work."[57] In the last rulemaking, the Register expressed concern that space-shifting motion pictures for educational purposes may harm the market. For example, in distinguishing *HathiTrust* and *Google Books*, the Register stated:

> Those opinions . . . distinguished the proposed uses of indexing and data analysis, from performing the works themselves, and carefully considered the risk that those circumscribed uses might act as market substitutes. In this case, however, full length copies of motion pictures to facilitate performances under section 110(1) are *supposed* to substitute for the original works in disc form.[58]

Respectfully, Commenters submit that copies made under their proposed exemption would *not* serve as substitutes for purchases of motion pictures.

In analyzing any potential market impact, it is important to differentiate between the market for purchasing *copies* of motion pictures and the market for licensing *performances* of motion pictures. Under the first sale doctrine, when a rightsholder decides to sell a copy of a motion picture on DVD or Blu-ray disc, the rightsholder is entitled to receive a one-time payment from the purchaser, who is then free to reuse, resell or otherwise dispose of the copy "without the authority of the copyright holder."[59] By contrast, when a rightsholder authorizes public performances of a motion picture, the rightsholder is often entitled to receive payment for every public performance, which can result in lucrative, recurring royalty payments.

While commercial movie theaters and commercial streaming services may need certain public performance licenses to lawfully facilitate their many performances, educational institutions generally have no such need for public performance licenses to facilitate educational performances under Section 110(1) or 110(2). Accordingly, once an educational institution has lawfully acquired a *single copy* of a motion picture on DVD or Blu-ray disc, that one copy can enable numerous educational performances to countless instructors and students, without requiring a license fee or payment of any other kind to the rightsholder.

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[57] 17 U.S.C. § 107(4).
[58] 2018 Recommendation, at 52 (emphasis in original).
[59] 17 U.S.C. § 109.

To provide just one example, BYU purchased a copy of *Mr. Smith Goes to Washington* on DVD in 2003. At the time, the rightsholder (Columbia Pictures) presumably received a one-time payment when it initially sold the DVD. One professor of a general education course at BYU has included *Mr. Smith Goes to Washington* in the course curriculum. Over the years, BYU estimates that the film has been screened to at least 7,000 students in just this professor's class, all from a single DVD copy owned by BYU. Aside from the initial one-time payment, the rightsholder has not received any additional license fees or royalty payments for any of these screenings.

Accordingly, it is not surprising that many colleges, universities and other educational institutions have historically purchased large numbers of motion pictures on DVDs and Blu-ray discs. For example, Commenters alone have acquired collections of more than 19,000 DVDs and more than 900 Blu-ray discs. While some of these items have been donated or transferred to Commenters, most have been purchased in the retail marketplace, and rightsholders have presumably received the one-time payments to which they are entitled for each such purchase.

In many cases, educational institutions have made substantial investments in purchasing motion pictures for the precise purpose of facilitating educational performances for their students. But it is increasingly difficult for institutions to fully realize the value of their motion picture collections, due to the unmistakable shift in the motion picture industry away from optical discs and toward streaming platforms. Commenters' proposed exemption will simply enable educational institutions to use the motion pictures in their collections, by space-shifting their DVD and Blu-ray collections to a more usable format, such as a secure media server. Under the proposed exemption, server copies of motion pictures can be made only for the limited purpose of facilitating educational performances—the very purpose that likely motivated the original decision to buy the motion pictures in the first place.

Thus, recommending the exemption will not harm the market for purchasing copies of motion pictures by educational institutions. To the contrary, once institutions have confidence that they can actually use the motion pictures they purchase for educational performances, they will almost certainly buy *more* DVDs and Blu-ray discs, not less. And every time an educational institution acquires a copy of a motion picture, the rightsholders will still receive their one-time payment to which they are entitled. Nothing in Commenters' proposed exemption will deprive

rightsholders of payments for purchased copies of motion pictures nor will it reduce the amount rightsholders receive when such purchases are made.

III. Educational Users Are Adversely Affected In Their Ability To Make Noninfringing Uses

The third requirement for an exemption is a determination that users are adversely affected in their ability to make noninfringing uses or, alternatively, users are likely to be adversely affected in their ability to make noninfringing uses during the next three years. Congress has recognized that "the primary goal of the rulemaking proceeding is to assess whether the prevalence of these technological protections . . . is diminishing the ability of individuals to use these works in ways that are otherwise lawful."[60] Nevertheless, in the Section 1201 Study, the Register suggested a different approach to the rulemaking:

> [U]ltimately, the task [of the] rulemaking proceeding is to balance the benefits of technological measures that control access to copyrighted works against the harm caused to users of those works and to determine, with respect to any particular class of works, whether an exemption is warranted because users of that class of works have suffered significant harm in their ability to engage in noninfringing uses.[61]

Respectfully, Commenters submit that this approach is both unsupported and improper. While balancing harms may be a worthwhile effort, Section 1201 never speaks of the "benefits" of TPMs. Instead, "the focus must remain on whether the implementation of technological protection measures . . . has caused adverse impact on the ability of users to make lawful uses."[62]

In determining whether users have been adversely impacted, Congress has directed the Register to consider the following five statutory factors:

> (i) the availability for use of copyrighted works;
>
> (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes;
>
> (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;

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[60] H.R. Rep No. 105-551, pt. 1, at 37 (1998).
[61] Section 1201 Study, at 118.
[62] H.R. Rep No. 105-551, pt. 1, at 37 (1998).

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

(v) such other factors as the Librarian considers appropriate.[63]

As discussed below, each of these factors supports Commenters' proposed exemption.

A. Motion Pictures Are Not Generally Available For Use Without Restrictive TPMs

Regarding the first statutory rulemaking factor, although motion pictures are widely available, access to the motion pictures is almost always controlled by restrictive TPMs put in place by rightsholders. The proliferation of TPMs on motion pictures has caused the exact kind of adverse effects that Congress contemplated when initiating this rulemaking process.

When Congress was drafting the DMCA, the world was quite different than it is today. The Internet in its infancy provided nearly unfettered access to all sorts of copyrighted materials. Concerned that "marketplace realities [could] someday dictate a different outcome, resulting in less access, rather than more, to copyrighted materials that are important to education [and] scholarship,"[64] Congress created this rulemaking proceeding. Congress envisioned a day where noninfringing uses are "unjustifiably diminished" due to "a confluence of factors, including the elimination of print or other hard-copy versions, the permanent encryption of all electronic copies, and the adoption of business models that depend upon restricting distribution and availability."[65]

For educators, this day is today. Not only are physical discs becoming less and less common and practical, but many motion pictures are also now exclusively distributed through streaming services. Virtually all motion pictures are locked with TPMs. As discussed below, there are no viable alternatives to circumvention that can provide adequate access to motion pictures for educational purposes. Accordingly, the first statutory factor favors Commenters' proposed exemption.

B. Many Motion Pictures Are Not Available For Nonprofit Educational Uses

While the first statutory rulemaking factor instructs the Register to consider "the availability for use of copyrighted works" generally, the second factor reinforces the same point,

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[63] 17 U.S.C. § 1201(A)(1)(C).
[64] H.R. Rep No. 105-551, pt. 1, at 36 (1998).
[65] *Id*.

while emphasizing that the Register must consider "the availability for use of works *for nonprofit archival, preservation, and* ***educational*** *purposes*." Clearly, Congress has directed the Register to give special attention and priority to the needs of educational users throughout this rulemaking.

Yet despite this Congressional mandate, the current exemption for educational purposes is too restrictive and narrow, effectively making motion pictures unavailable for many noninfringing educational uses. As discussed below, none of the alternatives to circumvention suggested in previous rulemakings are viable options for making motion pictures widely available for educational uses.

1. Screen Capture Is Not a Viable Alternative to Circumvention

Screen capture technologies are rarely a viable solution for educational uses for a variety of reasons: they do not provide high-quality copies; the copies made are static; metadata including closed captioning, different language subtitles and dubs are lost; and the time needed to create these copies is overly burdensome. In previous rulemakings, the Register has acknowledged many of the limitations of screen capture technologies.[66]

Even so, the current exemption still includes a reference to screen capture technology that is not only confusing, but also unnecessary and overly restrictive. The obligation to use screen capture technologies neither contributes to preventing infringing uses nor does it benefit rightsholders in any way. Either screen capture technologies can create truly satisfactory copies of motion pictures, or they cannot. If a satisfactory copy can actually be made, the use of screen capture does not preserve any legitimate rights of rightsholders, but it punitively burdens users with a process that is far more complex and time-consuming than circumvention. On the other hand, if screen capture technologies cannot really make satisfactory copies, it is unclear why rightsholders have persisted in advocating for such a limitation past rulemakings, other than as a veiled attempt to prevent noninfringing uses.

Either way, the screen capture limitation of the current exemption neither benefits rightsholders nor educational users. Therefore, even if the Register does not recommend Commenters' proposed exemption, the Register should, at a minimum, remove the screen capture limitation from the exemption.

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[66] *See* e.g., 2018 Recommendation at 35, 68-69, 73.

2. Streaming Services Are Not a Viable Alternative to Circumvention

Although numerous motion pictures are available through various streaming services, frequently such streaming services do not meet the needs of educational users. For example, many popular streaming providers, such as Netflix and Disney+, offer their services exclusively to individuals and do not even accept organizations, including educational institutions, as customers. [67] Other streaming providers, such as Swank, Kanopy and Alexander Street, offer services designed for and targeted at academic users, such as colleges, universities and other educational institutions.

Although many institutions subscribe to such academic streaming services, their catalogs are often missing motion pictures that are needed for particular courses or lessons. Given the vast diversity of educational institutions and course offerings, it is simply not realistic for *any* streaming provider to maintain a catalog including every possible film that every educational institution might need. Each institution is unique, and each institution is uniquely positioned to determine which motion pictures will best meet the needs of its faculty and student body. That is why so many institutions, including Commenters, have made substantial investments in their own collections of motion pictures.

As an example, Commenters' collection of motion pictures on DVDs and Blu-ray discs alone comprises almost 16,000 unique titles. The catalog available through Swank Digital Campus, by comparison, includes more than 25,000 unique titles. While the Swank Digital Campus catalog may seem impressive, it includes less than 1,000 titles available in Commenters' motion picture collection. Thus, more than 90% of Commenters' collection is unavailable for streaming through Swank Digital Campus. The catalogs of other streaming providers for academic users have similar gaps and deficiencies. Accordingly, the Register should again conclude, as she has in previous rulemakings, that streaming services are not a viable alternative to circumvention.

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[67] *See* Netflix Terms of Use, ¶ 4.2 ("The Netflix service [is] for your personal and non-commercial use only . . . .") https://help.netflix.com/legal/termsofuse; Disney+ and ESPN+ Subscriber Agreement, ¶ 1.a. ("The Disney+ Service [is] provided to individuals for their personal, noncommercial use only. Companies, associations and other groups may not register for a Disney+ . . . account or use the Disney+ Service . . . .") https://www.disneyplus.com/legal/subscriber-agreement.

3. Using Only Optical Discs and Players For Educational Performances Is Not a Viable Alternative to Circumvention

Previously, opponents to a similar exemption proposed equipping all classrooms with DVD and Blu-ray players as an alternative to circumvention.[68] Candidly, this proposal never seemed realistic, let alone practical. But after the sweeping changes made necessary by the COVID-19 pandemic, Commenters doubt that any opponent could seriously renew such a proposal in this rulemaking.

Before the COVID-19 outbreak, instructors and students may have found it inconvenient and irritating to have to use physical optical discs and players for educational performances. After the outbreak, however, what was previously inconvenient and irritating has become downright impossible in many cases. Countless instructors and students simply no longer have access to physical discs and players owned by their institutions. Many schools and libraries have been closed completely for long stretches of time. Although the BYU library has remained open, it now quarantines materials for a specified time period after being checked out.[69] Such measures, while important for protecting student health, severely limit access to physical copies of motion pictures, as well as optical disc players. Accordingly, any suggestion that optical discs and players alone are a viable alternative to circumvention—if made—should be rejected immediately by the Register.

C. The Prohibition on the Circumvention of TPMs Applied to Motion Pictures Has a Substantial Adverse Impact on Education

The third statutory rulemaking factor requires the Register to consider "the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on . . . teaching, scholarship, or research." To evaluate this factor, one must compare a hypothetical world with no prohibition against circumventing TPMs with the world as it is now with its current regulatory scheme. In a world without the prohibition against circumventing TPMs, an educator or institution could make copies of motion pictures to facilitate noninfringing performances. As discussed above, Commenters expect that many educational institutions would likely make copies of motion pictures to store in a secure media server to facilitate educational

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[68] *See e.g.,* DVD CCA and AACS LA, Class 1 Opposition Comments at 9, 11 (Feb. 12, 2018).
[69] Kenzie Holbrook, *What will the library look like this Fall?*, THE DAILY UNIVERSE, (Aug. 18, 2020) https://universe.byu.edu/2020/08/18/what-will-the-library-look-like-this-fall.

performances. In this hypothetical world, educators could easily integrate motion pictures into their curriculum—a stark contrast form the current reality.

In today's reality, using optical discs as part of teaching is an unrealistic task. Instead of taking extraordinary measures to overcome these challenges, educators have undoubtedly reduced the number of lawful performances of motion pictures, diminishing the quality of their teaching. Due to limited access to optical discs and drives and formats which contain content needed by educators, copies of motion pictures made from circumventing TPMs have become the only realistic method to make lawful educational performances in many cases. If educators could use copies made from circumvention, educators would no longer be subject to the adverse effects described in this Comment.

1. Classroom Formats Have Changed, Exacerbating The Current Difficulties And Creating New Difficulties In Using And Accessing Optical Discs

Over the last several years, the ways that classes have been taught has changed significantly. Almost all schools offer online classes and many schools provide completely online programs. This trend towards remote instruction has only been accelerated by COVID-19. For example, a national survey of classroom formats of K-12 schools shows that only around 16% of classes are completely in person and around 74% of classes are hybrid classes.[70] There have been many approaches implemented to address COVID-19 including live remote delivery classes; on-demand delivery classes; classes where teachers are at home, but students watch from the classroom; occasional two-week periods of online teaching when someone gets sick; etc. Some of these changes may be permanent. This shift towards online learning approach has increased the difficulty in accessing physical copies of optical discs and using them in class.

To provide one specific example, BYU's "Introduction to Film" class has, in the past, proven to be a popular class with about 300 to 400 students enrolled each semester. The class has a mandatory weekly lab in which students are required to view films comprising an integral part of the curriculum. Historically, this lab took place in a large auditorium on campus, and the films were shown from DVD or Blu-ray disc copies owned by BYU. In Fall 2020, however, the class was required to be taught remotely. Due to obvious public health concerns, students were not required to attend lectures or film screenings in crowded auditoriums.

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[70] COVID-19 School Response Dashboard, https://covidschooldashboard.com (last visited Dec. 14, 2020).

The instructors had originally planned to show twelve films during the weekly mandatory labs. Naturally, BYU had purchased copies of each of these films on DVD or Blu-ray disc. But due to the necessary change in class format, the DVDs and Blu-ray discs could not be used to show the films to the students enrolled. And the films were not available for institutional licensing through Swank, Kanopy, Alexander Street or other academic streaming providers.

Instead, the instructors had to investigate alternative options for the students to purchase or rent digital copies of the films, or purchase personal subscriptions to streaming services with the films in their current catalogs. Given the variety of assigned films, students would have been required to subscribe to at least four different streaming services and still have to purchase or rent some films independently to view all twelve of the films. This would have been cost-prohibitive for the students. As a result, the instructors were forced to change their curriculum, selecting films available in the catalog of a single streaming service, to provide a practical, cost-effective way for the students to view all twelve assigned films. This change required a complete overhaul of the curriculum, in which seven of the original twelve assigned films had to be replaced with alternative titles.

This adverse impact would not have occurred if the TPMs could have been circumvented in order to make noninfringing performances to the students enrolled in the course. Many similar examples could be cited.

2. Educational Institutions Are Adversely Affected By the Reference to "College and University Faculty" In The Current Exemption

Commenters propose changing the reference to "college and university faculty" in the current exemption to "college and university employees." In the current Notice, the Office invited comment on this proposed change, particularly "examples where the presence of TPMs is resulting in an adverse effect on users who are not already included in the existing regulatory language."[71]

The minor proposed revision is not intended to change the fundamental analysis of noninfringement or use. Rather, it is intended merely to clarify the scope of the current exemption, to acknowledge the logistical realities on many college and university campuses. For example, many faculty members wishing to use motion pictures in accordance with the current

[71] 2020 Notice, 85 Fed. Reg. at 65,303.

exemption may lack the requisite technical experience or training to circumvent TPMs on DVDs or Blu-ray discs personally. In such cases, it may be necessary for a staff employee in a university library or in an IT department to undertake the circumvention on behalf of the faculty member. While such circumvention may already be covered by the current exemption, the regulatory language is somewhat ambiguous in this regard.

If the current exemption purposely excludes circumvention undertaken by college and university employees other than faculty members (which seems unlikely), then educational institutions are adversely impacted by this undue restriction, and Commenters respectfully request the Register to clarify why the restriction should continue. On the other hand, if the current exemption is meant to cover circumvention undertaken by college and university employees on behalf of faculty members (which seems more likely), then educational institutions are adversely impacted by the ambiguity of the current regulatory language, and Commenters respectfully request the Register to revise the language to remove the ambiguity.

D. The Proposed Exemption Allowing Circumvention of TPMs for Educational Purposes Would Not Harm the Market For or Value of Motion Pictures

The fourth statutory rulemaking factor requires the Register to consider "the effect of circumvention of technological measures on the market for or value of copyrighted works." As discussed above, copies made under Commenters' proposed exemption would not serve as substitutes for purchases of DVDs or Blu-ray discs by educational institutions.[72] Therefore, the proposed exemption cannot possibly harm the market for motion pictures. If anything, it will likely *improve* the market for motion pictures. Accordingly, as discussed in more detail below, this factor favors recommending Commenters' proposed exemption.

1. The Register Must Consider Only the Market For Copyrighted Works

In evaluating the fourth statutory factor, the Register must focus on the market for *copyrighted works*, not on ancillary markets such as the market for DVD or Blu-ray players, or the public performance licensing market. Nevertheless, in past rulemakings, opponents have argued that, in lieu of an exemption, educational institutions should simply purchase more disc players or secure public performance or streaming licenses.

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[72] *See* Section II.C.2.d, *supra*.

Opponents to Commenters' proposed exemption may object because the numerous performances needed by educators could represent a lucrative opportunity to receive more licensing fees through streaming services. Any such objection would be an attempted workaround of the statutory exemptions for educational performances set forth in Sections 107, 110(1) and 110(2). Educational institutions do not generally need a "pay-per-use"[73] license for each performance of a motion picture made for educational purposes—they only need a lawful copy. The primary roadblock facing institutions seeking to create server copies to facilitate such performances is the prohibition against circumvention of TPMs. Considering all the noninfringing performances that a single DVD or Blu-ray disc enables, Commenters' proposed exemption cannot possibly harm any legitimate market for public performance licenses or streaming licenses. As noted in the recent Section 1201 study, "The Office also agrees that the effect of noninfringing uses on licensing markets should be excluded . . . ."[74]

The only relevant market that could possibly be impacted by the proposed exemption would be a hypothetical market in which rightsholders offered unrestricted digital copies of motion pictures for sale to educational institutions. To qualify as a relevant market, such copies would have to be made available for outright purchase, without any TPMs inhibiting the owner's ability to use the copies for educational purposes in perpetuity. No such market exists today, nor does it appear likely to exist anytime in the foreseeable future.

Currently, to the best of Commenters' knowledge, the only thing a purchaser can "buy" in the digital motion picture market is a limited license to access a digital copy of the motion picture, which is owned by the copyright holder. For example, although Vudu's "Disc to Digital" service suggests that individual users can "get digital movies from the discs you own," the terms of service clarify that, "All Content is licensed to you, and is not sold, transferred or assigned to you."[75] As another example, a major motion picture studio recently argued in court (successfully) that purchasing DVD and Blu-ray disc "combo packs" with digital download

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[73] One important purpose Congress articulated in creating this rulemaking process was to mitigate against the risk of becoming this kind of ''pay-per-use'' society. H.R. Rep No. 105-551, pt. 1, at 26 (1998).
[74] Register Report at 122.
[75] Vudu Terms of Service, p. 4. https://www.vudu.com/docs/VUDU-EULA.pdf.

codes did not confer any ownership rights to digital copies of the motion pictures.[76] While limited licenses to access motion pictures owned by the rightsholders may be useful for individual customers, such licenses do not meet the needs of educational institutions.

In short, current market failures have made it virtually impossible for educational institutions to purchase digital copies of motion pictures that can actually be used for educational purposes. Until such a market exists, the Register cannot consider mere speculation about a hypothetical market that is not reasonably foreseeable. In the meantime, the Register should conclude that Commenters' proposed exemption will not harm any existing or realistic markets for purchases of motion pictures, but it will appropriately address the current market failure.

2. Educational Uses of Motion Pictures Often Improve the Market for the Works

Not only will the proposed exemption not harm the market for motion pictures, if the exemption is adopted, it will very likely *improve* the market. Due to the onerous requirements of the current exemption, educators have undoubtedly decreased the number of lawful performances of motion pictures during class rather than dealing with the hassle of using physical discs, players, etc. As a result, educational institutions have almost certainly decreased the number of motion pictures purchased per capita student.

Simply put, even though there are no alternatives which provide the variety of motion pictures needed in classroom settings, there is less and less classroom demand for DVDs and Blu-ray discs. Teachers likely choose to let their pedagogy suffer by not using motion pictures. Thus, schools purchase fewer motion pictures. In this current situation, both rightsholders and students are the losers. If institutions were allowed to circumvent TPMs for the full range of noninfringing uses, educators could realistically use motion pictures in class. This would motivate institutions to purchase more copies of motion pictures because they could actually be used. This would revitalize and strengthen the demand for motion pictures creating a win-win situation for students, educators, and rightsholders.

Further, educational performances generally have a positive effect on the market. The purpose of many of these performances is to expose students to works they would not otherwise

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[76] *See Disney Enters., Inc. v. Redbox Automated Retail, LLC*, 336 F.Supp.3d 1146, 1150 (C.D. Cal. 2018) ("The purchase of a license to stream or download any Movies Anywhere Content does not create an ownership interest in the licensed Content.")

encounter. These performances serve as pseudo-advertisements of copyrighted works. Students often purchase the motion pictures they see in class or other similar motion pictures. The more motion pictures are used in classroom settings, the more educators and rightsholders benefit.

E. Other Factors Do Not Affect the Analysis

The fifth statutory rulemaking factor instructs the Register to consider "such other factors as the Librarian considers appropriate." To the best of Commenters' knowledge, the Register has not considered any other factors when evaluating the exemption for educational uses in previous rulemakings. Commenters are not aware of any additional factors that have arisen since the last rulemaking that would affect the analysis. Accordingly, the Register should conclude that the five statutory factors, taken as a whole, indicate that educational users have been adversely affected by the prohibition against circumvention of TPMs on motion pictures.

IV. The Statutory Prohibition Against Circumvention Is the Cause of the Adverse Effects On Educational Users

The fourth and final requirement for an exemption is a determination that "the statutory prohibition on circumventing access controls is the cause of the adverse effects." As the Register has found in prior rulemakings, the prohibition against circumventing TPMs on motion pictures is a but-for cause of the adverse effects on educational users.[77] Unfortunately, though, the current exemption for educational purposes does not fully alleviate the adverse impacts felt by educational users.

As discussed above, Commenters propose revising the exemption to define noninfringing uses through incorporation by reference of four specific statutory provisions applicable to educational users, *i.e.*, Sections 107, 110(1), 110(2) and 112(f). Because these provisions present many unresolved questions of first impression, it is perfectly understandable and to be expected that rightsholders may have differing views than educational institutions about what uses a court would likely find to be noninfringing. Such differences are often resolved through litigation. But before relevant litigation arises, stakeholders must interpret the statutory language on their own, without any judicial precedents to guide them.

Against this backdrop, educational institutions should be free to determine their own policies and procedures consistent with their good faith interpretations of noninfringement under

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[77] 2018 Recommendation, at 67.

Sections 107, 110(1), 110(2) and 112(f). Institutions routinely make such determinations after carefully weighing and balancing the risks and benefits associated with various possible interpretations. For example, a given educational institution may decide, after conducting a good faith analysis, that it believes copying full works in its collection for educational purposes will likely qualify as fair use. As part of its decision, the institution may consider the benefits of its proposed use weighed against the risk that a given rightsholder will disagree with its fair use analysis and possibly pursue litigation. If the perceived benefits outweigh the risks, the institution will likely proceed with its proposed use, understanding that its fair use analysis may end up being challenged in court should a rightsholder decide to file a lawsuit.

While institutions are accustomed to conducting such risk-benefit analyses in many legal settings, including questions of possible copyright infringement, this normal pattern of institutional decision-making is disrupted for uses of motion pictures involving circumvention of TPMs. In such cases, educational institutions cannot conduct meaningful risk-benefit analyses because a whole swath of potentially noninfringing uses has been preemptively excluded from the scope of the current exemption. Thus, even if an educational institution believes that copying full motion pictures in its collection for educational purposes will likely qualify as fair use, the institution may be precluded from making such copies because the current exemption applies only when circumvention is undertaken solely to make use of short portions of motion pictures.

The adverse impacts of the broad prohibition against circumvention of TPMs and the deficiencies of the current exemption were felt acutely by educational institutions in the early spring of 2020, shortly after the COVID-19 outbreak. At the time, educational institutions across the country were in a state of upheaval and turmoil. With virtually no warning, numerous educators were forced to shift rapidly to remote instruction, presenting a host of unprecedented pedagogical challenges. Almost immediately, countless questions began to arise about permissible uses of copyrighted works, including motion pictures, in remote education settings.

Amidst this sea of uncertainty, a group of library copyright specialists crafted a public statement "meant to provide clarity for U.S. colleges and universities about how copyright law applies to the many facets of remote teaching and research in the wake of the COVID-19

outbreak."[78] In the section entitled "DMCA and Video," the public statement lamented that "the current exemptions extend only to copying 'short portions' of motion pictures for use in certain types of teaching, not to copying entire works, even when doing so is clearly fair use."[79] Accordingly, the statement advised, "Individual institutions will need to make their own assessments of this issue in consultation with their legal counsel or administration."[80]

Commenters acknowledge that the COVID-19 pandemic was not foreseeable at the time of the last rulemaking. But it certainly *was* foreseeable that the current exemption would exclude at least some noninfringing uses of motion pictures for educational purposes. Even worse, by preemptively disqualifying a whole swath of potentially noninfringing uses, it was foreseeable that the current exemption would make it very difficult for educational institutions to conduct their own risk-benefit analyses and decide for themselves whether to make full copies of motion pictures in their collections, despite any potential risks involved.

When confronted with the biggest crisis affecting education in more than a century, many institutions were stymied in their efforts to remediate the effects of the crisis due in part to the prohibition against circumventing TPMs and the unduly restrictive exemption for educational uses. While institutions felt the adverse impacts caused by the limitations of the current exemption most acutely in the immediate aftermath of the COVID-19 outbreak, these adverse impacts are still felt today and will continue to linger for the next three years unless the Register expands the exemption such that institutions can at least *consider* the full range of noninfringing educational uses permitted under Title 17.

In practice, the ways in which educational institutions may rely on the proposed exemption to facilitate noninfringing uses will vary widely based on their individual risk-benefit analyses. But the exemption will no longer act as a barrier to prevent noninfringing uses, particularly during critical times such as these. In short, if the proposed exemption is adopted, educational institutions will no longer be "adversely affected by the prohibition [of circumvention] in their ability to make noninfringing uses . . . ."[81]

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[78] *See* Public Statement of Library Copyright Specialists: Fair Use & Emergency Remote Teaching & Research (March 13, 2020), https://tinyurl.com/tvnty3a.
[79] *Id.*
[80] *Id.*
[81] 17 U.S.C. 1201(C).

Accordingly, for all of the reasons set forth above, Commenters respectfully request the Register to recommend their proposed exemption.