



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

Please submit a separate comment for each proposed class.

[x] Check here if multimedia evidence is being provided in connection with this comment

Item A. Commenter Information

DVD Copy Control Association

The DVD Copy Control Association (“DVD CCA”), a not-for-profit corporation with its principal office in Morgan Hill, California, licenses the Content Scramble System (“CSS”) for use in protecting against unauthorized access to or use of prerecorded video content distributed on DVD discs. Its licensees include the owners of such content and the related authoring and disc replicating companies; producers of encryption engines, hardware and software decrypters; and manufacturers of DVD players and DVD-ROM drives.

Advanced Access Content System Licensing Administrator

The Advanced Access Content System Licensing Administrator, LLC (“AACSLA”), is a cross-industry limited liability company with its principal offices in Beaverton, Oregon. The Founders of AACSLA are Warner Bros., Disney, Microsoft, Intel, Toshiba, Panasonic, Sony, and IBM. AACSLA licenses the Advanced Access Content System (“AACSLA”) technology that it developed for the protection of high definition audiovisual content distributed on optical media. That technology is associated with Blu-ray Discs. AACSLA’s licensees include the owners of such content and the related authoring and disc replicating companies; producers of encryption engines, hardware and software decrypters; and manufacturers of Blu-ray disc players and Blu-ray disc drives.

As ultra-high definition products are entering the marketplace, AACCS LA has developed a separate technology for the distribution of audiovisual content in ultra-high definition digital format. This technology is identified as AACCS2, and not AACCS 2.0. This distinction in nomenclature is significant, as the latter would suggest that it replaced AACCS distributed on Blu-ray. It has not. AACCS2 is a distinct technology that protects audiovisual content distributed on Ultra HD (UHD) Blu-ray discs, a distinct optical disc format which will not play on legacy (HD) Blu-ray players. To the extent a proposal mentions CSS and/or AACCS, but does not explicitly include AACCS2, such mention should not be inferred to include AACCS2. While proponents suggest that they want to circumvent UHD Blu-ray discs protected by AACCS2, they have not demonstrated that they need UHD Blu-ray content any more than they have demonstrated that they need any other high quality content distributed on DVD or Blu-ray discs.

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Item B. Proposed Class Addressed

Proposed Class 1: Audiovisual Works — Criticism and Comment

Item C. Overview

For the reasons stated below, DVD CCA and AACS LA object to the proposals.

Item D. Technological Protection Measure(s) and Method(s) of Circumvention

The TPMs of concern to DVD CCA and AACS LA are the Content Scramble System (“CSS”), used to protect copyright motion picture content on DVDs, and the Advanced Access Content System (“AACS”), used to protect copyrighted motion picture content on Blu-ray Discs.

Item E. Asserted Adverse Effects on Noninfringing Uses

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I. Introduction

Class 1 presents several uses that raise different issues due to the nature of the proponents' requests. Fortunately, the underlying uses are well known to this proceeding, as the proponents, in part, advance proposed uses which would constitute expansions of the current exemptions that facilitate those uses, namely proponents for noncommercial videos and MOOCs, while BYU and MOOCs recycle proposals that were previously rejected in past proceedings. The expansion sought for noncommercial videos, expanding the MOOC exemption to any online learning platform, and the creation of an exemption to permit space-shifting for education purposes, are simply not warranted.

II. Expansion of Exemption to UHD Blu-rays Is Not Warranted

The current exemption should not be expanded to permit the circumvention of AACS2 employed to protect copies of motion pictures disturbed on UHD Blu-rays. Brigham Young University and Brigham Young University-Idaho (collectively, "BYU") are the only proponents to explicitly raise the possibility of circumventing AACS2 employed to protect UHD Blu-rays, and they do so only in Item D, which requests commentators to identify the relevant technological protection measure(s) and method(s) of circumvention of the proposed class.¹ As their primary focus is space-shifting their entire collection of copies of motions pictures, they make no specific

¹ The proposed language of the Organization for Transformative Works ("OTW") could be read to extend to UHD Blu-ray discs as it would provide for circumvention of motion pictures generally (*i.e.*, the exemption is not limited to any particular format or distribution method). OTW however states that the relevant TPM and methods of circumvention "are the same in the existing exemption." OTW, Initial Comments at 2 (Item D.).

Similarly, the Joint Educators do not discuss either a need to make use of UHD content or identify AACS2 in Item D of their Initial Comments. *See* Joint Educators, Initial Commons at 4-5 (Item D.).

case for why any other use would need UHD Blu-ray quality.

In the last rulemaking, the Acting Register excluded UHD Blu-ray (AAC2) from the scope of the current exemption permitting circumvention of motion pictures in certain instances. After she explained that exemptions permitting the circumvention of CSS and AAC2 have been granted upon a demonstration of need,² she found

Here, in contrast to the detailed record regarding CSS, AAC2, and access controls on digitally transmitted content, there is very little in the record regarding AAC2;

...

Accordingly, the Acting Register finds the record insufficient to support extending the proposed class to AAC2. None of the petitions expressly seek expansion to AAC2, and the record does not support a finding that such technology is adversely affecting noninfringing uses or that it is sufficiently similar to AAC1 to be covered by the current exemption.³

In light of the fact that the proponents have proffered even less information about the need to make use of ultra-high definition content distributed on UHD Blu-ray discs protected by AAC2, there is no basis now to expand the exemption to AAC2 and UHD Blu-ray content.

III. None of the Proposed Uses Constitutes a Valid Class

1. Noncommercial Video

The Organization for Transformative Works (“OTW”) seeks to remove the current limitation that provides reasonable boundaries for the exemption that its constituency has enjoyed since the 2010 Librarian Determination. The current limitation, which was imposed in 2012, requires exemption beneficiaries to consider whether, for the planned use, the beneficiary truly needs DVD or Blu-ray quality before the beneficiary engages in circumvention of CSS or AAC2

² Section 1201 Rulemaking: Seventh Triennial Proceeding, Recommendation of the Acting Register of Copyrights at 40 (October 2018) [hereinafter, “2018 Recommendation”].

³ 2018 Recommendation at 40-41.

technology.⁴ OTW’s proposal would remove this limitation and no longer require the beneficiary to consider whether the planned use could be achieved without circumvention (*e.g.*, by making use of screen capture technology.) Effectively, the proposed language would turn the clock back to the first iteration of the exemption issued in 2010 and discard the precedent that currently applies, which established the limitation in 2012 and preserved the limitation in the rulemakings following 2012. Before reviewing that precedent, a review of the statute makes plain that the limitation is wholly consistent with the Congressional mandate of this rulemaking.

A. The Statute Does Not Permit an Unqualified Exemption for Noncommercial Videos, as Not All Uses Are Adversely Affected

The statute creating this rulemaking provides an exemption to those “persons who are users of a copyrighted work [who] are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition [against circumvention].” 17 U.S.C §1201(a)(1)(C). To reach this determination of whether a user has been adversely affected, the Copyright Office’s inquiry in the rulemaking has considered the statutory factor of “the availability of copyrighted works” and whether alternatives to circumvention exist that make the copyrighted work available for such use.⁵ When there are such alternatives to circumvention, then that factor should weigh against granting the exemption, as the intended use can be accomplished without circumvention.

⁴ See 37 C.F.R. § 201,40(b)(1) (permitting circumvention of motion pictures, in part, when a beneficiary “reasonably believes that non-circumventing alternatives are unable to produce the required level of high-quality content”); *see also* 2018 Recommendation at 140 (“Prospective users of the recommended exemptions should take care to ensure that they satisfy each requirement of the narrowly tailored exemptions before seeking to operate under their benefits. Creators and educators should consider whether there is an adequate alternative before engaging in circumvention under a recommended exemption.”).

⁵ U.S. Copyright Office, Section 1201 of Title 17: A Report of the Register of Copyrights at 27-28 (June 2017) (hereinafter, “Section 1201 Study Report”) (explaining that a determination of adverse effect is made “on the totality of the evidence, including market alternatives that enable noninfringing uses.”).

Since 2010, the Register has recognized that screen capture is a satisfactory alternative for the use of motion pictures in noncommercial videos for the purpose of criticism or comment. In 2010, although no formal finding was made that screen capture was an alternative to circumvention, the Register determined that, for all uses, including uses in noncommercial videos, the user must actually have a reasonable belief that circumvention is necessary for the purpose of the use.⁶ She explained:

If, for example, it would have been sufficient for purposes of the noninfringing criticism or comment to use screen capture software rather than to circumvent in order to obtain a higher quality digital film clip, and if the person engaging in the circumvention did not both (1) actually and (2) reasonably believe that circumvention was necessary in order to engage in such criticism or comment, the prohibition on circumvention would remain in force.⁷

Even in 2010, the Register stated that screen capture was sufficient for some uses, and circumvention was not warranted when screen capture could serve the intended use. As more fully explained below, screen capture has been recognized explicitly as an alternative to circumvention.⁸

⁶ Section 1201 Rulemaking: Fourth Triennial Proceeding, Recommendation of the Register of Copyrights at 75 (June 2010) [hereinafter, “2010 Recommendation”].

⁷ *Id.*

⁸ In the case of noncommercial video uses, the mere desire to always use DVD or Blu-ray quality is insufficient, as simple disappointment is not an “adverse effect.” In her 2006 Recommendation, the Register best explained the distinction –

Simply finding that a work is optimized in a particular format, however, is not determinative of whether or not an exemption is warranted. As the United States Court of Appeals for the Second Circuit has stated, ‘fair use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user’s preferred techniques, or in the format of the original.’ Preferences are not determinative and, in most cases, relate only to convenience. What is relevant is what formats are available that are necessary to achieve a productive purpose – and in particular, a purpose singled out in the statutory considerations found in § 1201(a)(1)(D).

Section 1201 Rulemaking: Third Triennial Proceeding, Recommendation of the Register of Copyrights at 22 (November 2006) [hereinafter, “2006 Recommendation”].(reference numbers and citation omitted)).

In light of the history, the proponents cannot demonstrate that categorically all their uses are adversely affected to warrant the unqualified exemption that they now seek. Indeed, to grant them such a request would run afoul of the statute.

B. The Precedent of the Proceeding Does Not Support an Unqualified Exemption for Noncommercial Videos

1. *The Register Determined Screen Capture Was a Viable Alternative to Circumvention for Certain Uses in Noncommercial Videos (2012)*

The 2012 Recommendation establishing screen capture as an alternative to circumvention resulted from a more developed record in that proceeding, which demonstrated how screen capture technology could serve for some of the proposed uses. The Register explained that, while in the previous proceeding the Copyright Office raised the possibility of screen capture technology, opponents of the exemption did not advance the argument until the 2012 proceeding.⁹ Consequently, the Copyright Office was now able to find that the record demonstrated some proposed uses for classes previously approved in 2010 were satisfied by screen capture technology.¹⁰

Noting that the proponents for noncommercial video had developed its record more fully than documentary filmmakers, multimedia ebook authors, and certain types of education uses, the Register found that

the record does not support a finding that all noncommercial videos necessarily require high-quality images. Some noncommercial videos offered into the record could apparently accomplish the proposed noninfringing use without a high level of image detail.

⁹ Section 1201 Rulemaking: Fifth Triennial Proceeding, Recommendation of the Register of Copyrights at 132 (October 2012) [hereinafter, “2012 Recommendation”].

¹⁰ See 2010 Recommendation at 65 (“The record in this rulemaking establishes that video capture software is more likely than not to meet the needs of college and university students (other than those in film and media studies classes) as well as K-12 teachers and students.”).

...

For uses that do not require higher-quality images, the Register finds that screen capture is a satisfactory alternative to circumvention.¹¹

Thus, when presented with more evidence of the utility of screen capture technology in 2012, the Register decided that, for next three years, the 2010-approved classes could be preserved, but the exemptions would recognize that that not all uses in the class required DVD quality.

2. *In Subsequent Proceedings the Register Has Found that Screen Capture Constitutes an Alternative to Circumvention for Certain Noncommercial Video Uses*

In the 2015 Recommendation, the Register again found that screen capture technology was satisfactory for uses that did not require high-quality images. Specifically, the Register found:

But the record does not demonstrate that all noncommercial videos covered by Proposed Class 7 require high-quality images that would be obtained through circumvention of access controls on DVDs, Blu-ray discs, or digitally transmitted video. For example, EFF/OTW submitted “mash-up” videos that mix images from one source with audio from another, and other videos that simply add subtitles over material from a single source. Because these examples do not obviously require high quality source material to serve their objectives, it is not apparent that screen-capture technology would not be a suitable alternative.¹²

In the 2018 Recommendation, while the Acting Register did not make an explicit statement that screen capture is often a satisfactory alternative to circumvention, this principle was clearly the underlying assumption. The Acting Register assumed the suitability of screen capture for some uses by noting that the record shows screen capture is insufficient for certain other uses.¹³

¹¹ 2012 Recommendation at 134.

¹² 2015 Recommendation at 86 (citation and quotations omitted).

¹³ See, e.g., 2018 Acting Register Recommendation at 69 (“The record also demonstrates that screen capture may not be an adequate alternative for certain educational uses and that modern students use media differently and have higher expectations of digital media”); *Id.* at 75-76 (“the record again supports the conclusion that screen-capture technology is at times inadequate for the expanded set of filmmaking uses”).

C. Quality Has Served as a Benchmark for this Proceeding

Even if screen capture had never been recognized as satisfactory for any use (for which the record of prior proceedings clearly evidences the contrary), proponents would still need to demonstrate that every use needs high-quality images to warrant application of the exemption. Since the 2006 Recommendation, the need for high-quality images has been the overarching requirement for exemptions to make use of motion pictures protected by TPMs and fundamentally reset the contours for how the Register would consider what constituted an appropriate class.

1. Recognizing the Need for High-Quality Images Altered the Possibilities of a Class.

In the 2006 Recommendation, film professors' need for high-quality images spurred the Register to expand the boundaries of a class. The Register noted that those needs could not be satisfied with alternatives to circumvention.

The record does not reveal sufficient viable alternatives to the DVD version of the motion pictures for this purpose. For instance, VHS versions of the films altered the color balance and aspect ratio. Similarly, the demonstration at the hearing of screen shots with a digital video recorder revealed dramatic color distortions and greatly reduced picture quality. While these options may have satisfied the needs of many types of noninfringing users and even many noninfringing educational uses – e.g., those wanting to comment on the historical context of a film or create a parody, or to show a film clip in class unrelated to cinematographic significance – the reduced quality of alternative formats was wholly insufficient for the pedagogical purposes for which the clips were sought in film and media studies classes.¹⁴

At the same time the Register acknowledged that alternatives to circumvention were insufficient for the needs of film professors who required high-quality images, the Register also noted that the alternatives to circumvention could satisfy other uses identified in the hearings, such as “those wanting to comment on the historical context of a film or create a parody, or to show a

¹⁴ 2006 Recommendation at 20.

film clip in class unrelated to cinematographic significance”¹⁵ Thus, the demonstrated need for high-quality images not only warranted a fundamental change in how the Office understood its own rulemaking, but it also has been the benchmark for determining which uses warranted circumvention and which uses were sufficiently enabled with alternatives to circumvention.

2. 2009 Proceeding

More of the same reasoning followed in the 2009 proceeding. To no one’s surprise, other proponents advanced similar arguments that the film professors had made in 2006, and, in due course, the Register granted similar exemptions to proponents for noncommercial videos, documentary filmmakers, and multimedia ebooks concerning film analysis, and also expanded the film professor exemption. These exemptions were granted because the Register had concluded that alternatives to circumvention were insufficient for these proponents’ particular and demonstrated needs to make use of higher quality images. Once again, the Register found that not all uses warranted high-quality images and concluded that, for those uses not needing high-quality images, an alternative to circumvention, such as screen capture technology, would be sufficient:

Of critical importance to the class proposed by film and media studies professors in the previous rulemaking was the demonstrated need for high-quality portions of motion pictures in order to fulfill a noninfringing purpose. . . . **The record in this rulemaking establishes that video capture software is more likely than not to meet the needs of college and university students (other than those in film and media studies classes) as well as K-12 teachers and students.**¹⁶

Thus, there was a general recognition applicable to all beneficiaries that circumvention for those uses not requiring high quality images would not be warranted.

Generally under the 2010 version of the exemption, if the proponents had demonstrated the

¹⁵ 2006 Recommendation at 20.

¹⁶ 2010 Recommendation at 64 (emphasis added).

need for high-quality images, then the resulting class provided for the use of DVD-quality images. That does not mean, however, that the Register permitted circumvention for all uses by these class beneficiaries. As discussed above, the exemption included the “reasonable belief” limitation that held circumvention was only permitted when the exemption beneficiary reasonably believed that the particular use of motion pictures distributed on CSS-protected DVDs for the purpose of criticism or comment could not be achieved with an “inferior copy” (*i.e.*, the exemption would only permit exemption beneficiaries “to circumvent in order to obtain [the necessary] higher quality digital film clip[.]”¹⁷

3. *Per the 2012 Record, Not All Uses Require DVD Quality Images*

In the Fifth Triennial Rulemaking, which resulted in the 2012 Recommendation, opponents undertook to explain and present screen capture technology, and developed a more complete record in favor of screen capture as an alternative to circumvention. As discussed above, the class evolved, and in defining the class, the Register no longer regarded all uses of motion pictures in noncommercial videos to be equivalent.¹⁸ “Some noncommercial videos offered into the record could apparently accomplish the proposed noninfringing use without a high level of image detail.”¹⁹

Examining the particular use of and need for high-quality copies was applied to the other 2010 exemption beneficiaries as well. “Where precise detail is not required for the particular use in question – for example, where a clip is presented simply to illustrate a historical event – lower-

¹⁷ 2010 Recommendation at 75.

¹⁸ *See, supra*, The Register Determined Screen Capture Was a Viable Alternative to Circumvention for Certain Uses in Noncommercial Videos (2012).

¹⁹ 2012 Recommendation at 124.

quality screen capture images may be fully adequate to fulfill the noninfringing use.”²⁰ This practice of permitting exemption beneficiaries to circumvent only in those instances when the particular use necessitated high-quality images was again embraced and repeated in the 2015 and 2018 Recommendations.

4. *Quality Issue - Close Analysis Limitation - Permitted Expansion of the Exemption*

In 2012, the need for high-quality images in education was reframed by the Register as one of uses requiring close analysis. To assist exemption beneficiaries in determining when they could circumvent and when an alternative to circumvention (screen capture) would suffice, the Register announced the close analysis requirement: “educational uses that depend upon close analysis of film or media images may be adversely impacted if students are unable to apprehend the subtle detail or emotional impact of the images they are analyzing, such as the full brilliance of a diamond or the glint of an eye[.]”²¹

This limitation served to enable the expansion of the education exemption to university and college students, non-professor faculty, and K-12 teachers – all of whom could circumvent so long as the use required close analysis. “Because the exemption is limited to educational activities involving close analysis, there is no basis to limit the exemption only to professors.”²²

In response to the proposal to permit circumvention by all university faculty and students and all K-12 instructors, the Register concluded that an across-the-board exemption was not warranted. “Instead screen capture technology is sufficient for uses that do not require close

²⁰ *Id.* at 134

²¹ 2010 Recommendation at 134 (citation and references omitted).

²² 2012 Recommendation at 139.

analysis. General-purpose classroom uses should be satisfied by the use of screen capture software.”²³ In 2015, the Register again expanded the class for education purposes using the close analysis requirement.

5. *Quality Remains the Benchmark for the Exemption*

While in her 2018 Recommendation, the Acting Register departed from the close analysis requirement, the need to make use of quality images remains the benchmark. The Register expanded the exemption to K-12 students (acting under the supervision of a teacher) on the notion that K-12 students too should be able to work with high-quality images that “permeate[] daily life” such they may “effectively achieve their pedagogical ends.”²⁴ The Register did note again that the exemption retains the “requirement that a person must reasonably believe that non-circumventing alternatives are unworkable.”²⁵

D. Proponents’ Current Arguments Are Unpersuasive

1. *They Ignore the Statute and Precedent*

As mentioned at the outset, proponents’ proposed language seeks to return the exemption to its 2010 formulation. Proponents offer no explanation how, since the 2010 Recommendation, the Register has either erroneously interpreted the statute by examining alternatives to circumvention or erroneously applied the law to the facts developed on the record in 2006, 2009, 2012, 2015, and 2018 in premising exemptions on the demonstrated need for high-quality images. Proponents have not offered an alternative framework for implementing the statute or to engage in the line-drawing expected of an agency in rulemakings without making use of the record and

²³ 2012 Recommendation at 140.

²⁴ 2018 Recommendation at 86 (pointing to almost exclusive post hearing responses).

²⁵ 2018 Recommendation at 86.

the need for quality images. Instead, they merely rely on the complaint that their artistic expression is insufficiently respected.

Creativity and expression are fundamentally at the heart of copyright law. In this case, the desired expression in noncommercial videos, which makes use of another creator’s copyrighted motion pictures, relies on the contours of fair use. The Register has repeated the *Corley* axiom “the law does not guarantee access to copyrighted material in a user’s preferred format or technique.”²⁶ While this truth has lent weight to reject space-shifting, it has equal application to the efforts of noncommercial video proponents, whose constituency has already gained substantial benefit from this this rulemaking.

This rulemaking is described as a “fail-safe” mechanism to protect against the possibility that the prohibition against circumvention may lead to “a diminution in the availability to individual users of a particular category of copyrighted materials.”²⁷ As a result of weighing the evidence and applying the law, the Register has had to engage in proverbial “line-drawing.” Here she has granted proponents the benefit of the exemption based on a record and imposed limitations that are consistent with the statute and the evidence produced in numerous proceedings. Nevertheless, proponents are dissatisfied and persist in their pursuit of an unqualified exemption. However, to create such an exemption merely on the basis of artistic preference would not only be contrary to the statute, but also would represent a renunciation of twenty years of conscientious rulemaking, which simply is not warranted.

²⁶ 2018 Recommendation at 53; 2015 Recommendation at 109 (citing 2012 Recommendation at 163); *see also* 2010 Recommendation at 224; 2006 Recommendation at 74; 2003 Recommendation at 132.

²⁷ 2018 Recommendation at 10 (H.R. REP. NO. 105-551, pt. 2, at 36 (1998) (“Commerce Comm. Report”).

2. *Proponents Create a Strawman Argument over Complexity and Length*

Our legal culture usually emphasizes substance over form, which proponents eschew. The length and complexity of the exemption are the result of the record and the Register's diligent pursuit to implement the law as Congress instructed. That mandate encourages (i) a "narrow and focused subset of categories of works", (ii) the "boundaries of which should not be too narrowly defined"; and should consider (iii) the "adverse effects an exemption may have on the market for or value of the copyrighted works."²⁸ As the "scope and boundaries of a 'particular class' of copyrighted works" that have been "adversely impacted" by the general prohibition against circumvention must be determined based upon the law and facts developed in the proceeding, it would undermine the foundation and balance of Section 1201 to trade detailed and defined exemptions premised on the facts at hand and consistent with the statute for short, "concise" exemptions that run afoul of the statute and disregard those facts. Thus, any effort to make the exemption simple and concise should not be done at the expense of ignoring the law in favor of artistic preferences.

²⁸ 2018 Recommendation at 14.

a. Example of Ignorance of the Law Does Not Render the Law Invalid

The ignorance or dislike of the law by the proponents' constituency does not justify reinventing the standards of this rulemaking. In most circumstances where knowledge is an element or defense, an application of the particular facts will usually determine whether liability attaches. For example, the DMCA contains provisions relieving innocent violators from monetary liability.²⁹ As the statute clearly permits a court to remit the total award of damages for the innocent violator, pursuing a case against an innocent violation (or even a person who possibly could claim an innocent violation) is unattractive. DVD CCA and AACS LA are not aware of any DMCA claims being pursued for innocent violations. The absence of any reported cases discussing the innocent violation provision would suggest that the provision has successfully discouraged the lawsuits proponents profess concern about. Indeed, the proponents have not pointed to even a single case involving such threat, where innocent parties have been ensnared by their own ignorance.

DVD CCA and AACS LA to date have not pursued claims for innocent violations. As they testified during the 1201 Study, they have chosen to spend legal resources on combating those that traffic in circumvention devices and tools because those actors do the greatest damage to the digital marketplace.

²⁹ . 17 U.S.C. § 1203(c)(5)

2. BYU

I. **The Rulemaking Cannot Achieve What Proponents Request**

The NPRM clearly forewarned the proponents that their request to space-shift entire copies of motion pictures (whole works) was inconsistent with previous proceedings, and their request would again likely be rejected in this proceeding. In response, the proponents express the mistaken belief that the Copyright Office is suggesting that their desired exemption cannot be granted because the Copyright Office questions whether the identified statutory provisions for educational uses are indeed noninfringing. Proponents are missing the point. No one disputes that educational uses are favored under copyright law, or that the identified statutory provisions clearly render some such uses in education to be noninfringing. Instead, the disagreement lies in the purpose of this rulemaking, which is not intended to create exemptions that merely replicate the exceptions in copyright law. Congress could easily have done that, but it clearly did not. Instead the mandate of this proceeding is, among other things, to create tailored exemptions pertaining to particular classes of works. And those classes of works are to be “narrow and focused.” As explained below, what proponents seek is not narrow and focused.

A. Proponents Are Seeking an Even Broader Exemption than Previously Requested

This exemption request is even more categorically broad than the proponents’ request in the 2018 proceeding. That request, denied on different grounds, sought to remove the distinction between types of users and permit performances of motion pictures provided that such performances complied with Section 110(1) and Section 110(2). In this request, proponents do not limit themselves to the performance right, but instead they seek to include any noninfringing use that would be permitted under 17 U.S.C. §§ 107, 110(1), 110(2), or 112(f). Therefore, this request is incredibly broad, as “any use” implicates all the exclusive rights under section 106, and

fair use under Section 107 is available to any party who may infringe any of those exclusive copyrights.

B. The Requests Far Exceed Congress' Intent

The House Commerce Committee, which created the rulemaking during its consideration of legislation to implement the WIPO treaties, which, in part, became Section 1201, did not contemplate a regulatory proceeding that would result in broad waivers to the circumvention prohibition, such as an exemption for any fair use under Section 107 or for any activity permitted under Section 110 (1) (the classroom exception). Instead, the Committee foresaw “selectively waiv[ing] [the prohibition against circumvention] for limited time periods, . . . for a particular category of copyrighted materials.”³⁰

Not only did the Committee envision any exemptions to be selective and particular, but also that the exemption would be fully evaluated in the rulemaking (in keeping with the statutory requirement that the exemption be “pursuant to the rulemaking”). The Commerce Committee Report instructs that any exemption resulting from the rulemaking is to flow from the “development of a sufficient record as to how the implementation of these technologies is affecting the availability of works in the marketplace for lawful uses.”³¹ Most importantly, the Committee was quite clear that “the rulemaking proceeding should focus on distinct, verifiable and measurable impacts, [and] should not be based upon de minimis impacts”³² This instruction alone would render the current request impermissible, as this rulemaking could never handle the quantum of evidence that would be necessary to support an unbound exemption for education purposes as

³⁰ House Commerce Committee Report at 36.

³¹ House Commerce Committee Report at 37.

³² *Id.*.

contemplated by proponents.

Congress' final direction was that the category of work be "narrow and focused." Again, the House Commerce Report states that a particular class of work should "be a narrow and focused subset of the broad categories of works of authorship . . . identified in Section 102 of the Copyright Act (17 U.S.C. §102)."³³

In light of these instructions, the Register should continue to apply these principles from Congress to deny the proposed class as she has done in the past.

C. Precedent of This Rulemaking Has Settled that a Categorical Exemption for Education Purposes Is an Impermissible Class

The Register previously determined that similar proposals for educational use could not constitute a particular class, as they were too broad.³⁴ The NPRM pointed to the 2015 Recommendation, which explained that the rulemaking is unable to create broad exemptions that would replicate categorically noninfringing uses.

A mere requirement that a use be "noninfringing" or "fair" does not satisfy Congress's mandate to craft "narrow and focused" exemptions. For this reason, the Register has previously rejected broad proposed categories such as "fair use works" or "educational fair use works" as inappropriate.³⁵

The 2015 Recommendation pointed to the seminal Third Triennial Rulemaking, which constituted an evolution in how the Register would refine a class by uses and users. In announcing her new standard for a class of works, the Register considered the film professors' petition, which sought an exemption to circumvent for the purpose of classroom teaching.³⁶ The Register started

³³ House Commerce Report at 38.

³⁴ 2006 Recommendation at 17.

³⁵ 2015 Recommendation at 100 (citation omitted).

³⁶ 2006 Recommendation at 19-24

her analysis from the mandate that a “particular class of copyrighted works” be a narrow and focused subset of works of authorship. She noted that prior attempts to define a class by uses such as “fair use works, per se educational fair use works” had been rejected.

Such proposed classifications did not constitute narrowly focused subsets of categories of works. Instead, these proposals sought to define a “class” primarily or solely by reference to the intended use or user. It remains a sound conclusion that a “class” that is solely or primarily defined by reference to a particular use or a particular user is inconsistent with the legislative language and intent.³⁷

Here, as in the 2015 proceeding, proponents’ proposed class is “solely or primarily defined by reference to particular use,” which here is all educational uses. These unidentified educational uses are inconsistent with the statutory factors.

In 2006, the Register explained how the application of the fair use analysis differs between a well-refined class and those classes that are solely or primarily defined by reference to use. On the first factor (the availability of copyrighted works), the Register found that motion picture studios “are not likely to be deterred from releasing works on DVDs when “the class of works is more narrowly defined, permitting circumvention only by college and university film and media studies professors for classroom teaching[.]”³⁸ As for the second factor (the use of works for nonprofit archival preservation), the Register reasoned,

the analysis [would likely] be very different for a class of works consisting of all motion pictures on DVDs than it would be for a class of motion pictures in the educational library or a college or university’s film or media studies department, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by media studies or film professors. This statutorily favored purpose would be more clearly served by an exemption in the latter case than in the former.³⁹

³⁷ See 2006 Recommendation at 17.

³⁸ 2006 Recommendation at 19.

³⁹ *Id.* at 19-20.

The Register reasoned that this finding would also be true for the third factor (the use of the work for criticism, comment, news reporting, teaching, scholarship, or research). On the final factor (the effect on the market for or value of the work), the Register suggested that “the analysis will be very different depending upon whether that class consists of all motion pictures on DVDs or only of motion pictures used by film and media studies professors for classroom teaching.”⁴⁰ Just as the proposal was impermissible in the 2006 Recommendation, so should it be in what will be the 2021 Recommendation.

3. MOOCs

Proponents are seeking an even broader exemption than they had previously. In past proceedings MOOC (“Massive Open Online Courses”) proponents failed to provide a sufficient quantum of evidence of use by for-profit and/or non-accredited educational entities. Rather than introduce evidence demonstrating how for-profit and/or nonaccredited entities could make use of short-clips, proponents attempt to side-step those examples and repackage the entire exemption for any online learning platform. Proponents do not provide any definition for the Register of the concept of an “online learning platform”. But looking at the examples in their comments, the class would apparently consist of disparate entities that could conceivably claim their use of short portions of motion pictures serves an educational purpose. Effectively any entity with an online presence that represents that its intended use constitutes “online learning” would be an eligible beneficiary of the repackaged exemption. Clearly proponents’ proposed class for online learning platforms would neither readily nor easily comport with what Congress meant by a narrow subset.

The evidence does not present any apparent means to refine the class. The evidence

⁴⁰ *Id.* at 20.

consists of

- CSforALL is a not-for-profit “central resource of individuals and organizations interested in K-12 computer science (CS) education.”⁴¹
- Osmosis.org offers a health education platform. This private company has been recognized by Inc. Magazine as one of the America’s fastest growing companies, with “three year revenue growth of 417 percent.”⁴²
- Musora Media, Inc., headquartered in Abbotsford, Canada,⁴³ is a provider of online music study courses for the drums, the piano, and the guitar; respectively “Drumeo”, “Pianote”, and “Guitareo”.
- LinkedIn Learning, formerly Lynda.com, which is a “leading online learning platform that helps anyone learn business, software, technology and creative skills to achieve personal and professional goals.”⁴⁴ Monthly subscription plans are \$25.00 for basic and \$37.50 for premium.⁴⁵

⁴¹ <https://www.csforall.org/about>.

⁴² Press release available at https://www.prweb.com/releases/osmosis_org_recognized_by_inc_magazine_as_one_of_americas_fastest_growing_companies/prweb17324518.htm

⁴³ Zoominfo notes, “Headquarters:107-31265 Wheel Ave, Abbotsford, British Columbia, V2T 6H2, Canada” available at <https://www.zoominfo.com/c/musora-media-inc/450691255>.

⁴⁴ <https://www.lynda.com/aboutus>.

⁴⁵ <https://www.bitdegree.org/online-learning-platforms/lynda-com-review> .

Three of the four examples proponents identify are for-profit entities. LinkedIn Learning is a subsidiary of a publicly traded company, while Osmosis and Musora are private companies. Apparently, proponents intend that any kind of for-profit entity offering any kind of educational program would be eligible for the exemption.

IV. The Use Is Infringing

1. Noncommercial Video

DVD CCA and AACSLA accept that the Register has determined that some uses of motion pictures in noncommercial videos are, or are likely to be, noninfringing.

2. BYU

I. The Only Identifiable Use (Space-shifting) Cannot Be Determined to Be Noninfringing

A. Proponents' Give a Broader Read to *Fox Broadcast v. Dish Network*

Space-shifting is the only identifiable activity in proponents' comments, which states the "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."⁴⁶ Proponents explain that this proposed exemption permitting space-shifting would be limited to the "purpose of facilitating education performances."⁴⁷ Presumably in response to the NPRM's query as to what may have changed since the last rulemaking, the proponents erroneously assert the proposition that *Fox Broadcast v. Dish Network*⁴⁸ broadly recognizes space-shifting as a "paradigmatic fair use."

⁴⁶ Initial Comments at 20.

⁴⁷ *Id.*

⁴⁸ *Fox Broadcasting Co. v. Dish Network LLC*, 160 F. Supp. 3d 1139 (CDC 2015).

*Fox Broadcast v. Dish Network*⁴⁹ is inapposite to the proponents' proposed space-shifting. In *Fox*, the court considered whether Dish Network should be held secondarily liable for the space-shifting done by subscribers with the Hopper services (Prime Time Any Time ("PTAT") DVR recordings and Hopper Transfers). In analyzing the PTAT recordings, the court relied heavily on the reasoning in *Sony*⁵⁰ that the manufacturer of home VCRs should not be found liable for the copying done by consumers who bought the Sony home VCR, concluding that the time-shifting of broadcast television programming done by VCR owners was fair use.⁵¹ The district court concluded that the evidence put forward in that case to demonstrate market harm from the time-shifted recordings was too speculative to overcome the holding in *Sony*.⁵² Subsequently, without further analysis, the court found that its PTAT reasoning was equally applicable to the Hopper Transfers function.⁵³ It did so citing to the Ninth Circuit's decision in *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys.*, 180 F.3d 1072 (9th Cir. 1999), for the proposition that non-commercial time- and place- shifting of broadcast television done by Dish subscribers under either

⁴⁹ *Id.*

⁵⁰ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

⁵¹ *Fox Broadcast*, 169 F.Supp.3d at 1170-73.

⁵² *Id.* at 1170-74.

⁵³ *Id.* at 1178. Immediately after the mention of "paradigmatic fair use," cited by proponents, the district court reasoned:

As with PTAT, where the subscriber engaged in the volitional conduct of copying, Fox has not demonstrated that DISH subscribers' use of Hopper Transfers standing alone is likely to cause harm to the secondary market for Fox programming that rises beyond the speculative, such that the question should be presented to a jury. Subscribers' activation of Hopper Transfers is fair use, and DISH is not liable for secondary infringement.

Id. (citation omitted).

service was “paradigmatic fair use.”⁵⁴ But this is an erroneous reading of that decision, which was a case interpreting the Audio Home Recording Act and did not involve claims of copyright infringement or fair use, as the Ninth Circuit itself has since pointed out in rejecting the very claim made here. In *Disney Enters. v. VidAngel, Inc.* the court rejected defendant *VidAngel’s* reliance on the same case for the proposition that space-shifting is “a paradigmatic example of fair use,” noting that the case “states only that a portable music player that ‘makes copies in order to render portable, or ‘space shift,’ those files that already reside on a user’s hard drive’ is ‘consistent with the [Audio Home Recording] Act’s main purpose—the facilitation of personal use.’”⁵⁵ The Register pointed to the *VidAngel* decision in the 2018 Rulemaking, noting that in 2015, “after careful review, the Register did ‘not find any fair use precedent that sanctions broad space-shifting or format shifting” and that “[s]ince then, the Ninth Circuit in *Disney Enterprises, Inc. v. VidAngel, Inc.*, rejected the contention that space-shifting is a ‘paradigmatic example of fair use,’ noting that ‘[t]he reported decisions unanimously reject the view that space-shifting is fair use under §107.”⁵⁶ Even were the reasoning not inconsistent with the later Ninth Circuit analysis in *VidAngel*, the *Fox Broadcast v. Dish Network* holding does not support proponents intended uses. Here, the university is looking to space-shift its vast collection of copies of movies distributed on DVDs and Blu-ray discs to a central server - to the extent they have not done so already - so that they may stream the work more conveniently than arranging for physical players and discs in classrooms. In contrast, the space-shifting at issue in the Fox case was done by each individual Dish subscriber

⁵⁴ *Id.*

⁵⁵ *Disney Enters. v. VidAngel, Inc.*, 869 F.3d 848, 861 (9th Cir. 2017).

⁵⁶ 2018 Recommendation at 120-22. The Register noted that “the [VidAngel] court considered, but did not credit, [Diamond Multimedia Sys.], as supporting the contention that space-shifting is fair use.” *Id.* at 121. See also *Disney Enters. v. VidAngel*, 869 F.3d at 861 (citing cases).

— rather than Dish itself-using that subscriber’s own individual Dish set-top box. The content was only available to that same subscriber, as conditioned by use of the subscriber’s account credentials to access it on a device other than the Dish set-top box. And there is evidence that the Hopper Transfers function responded to technical measures to limit whether a program could be copied, for how long and on how many devices. Here, proponents propose that a single DVD or Blu-ray disc be space-shifted and stored on a server for access by potentially large numbers of people, and to do so notwithstanding the presence of technological measures designed to prevent such copying. This scenario is materially different and therefore inconsistent with the Fox court’s holding.

B. Proponents’ Misconception of Copyright Law and this Rulemaking

The proponents insist that, due to the constraints imposed by the current pandemic, they are being denied the ability to use their extensive collection of movies. However, what they really have are copies of the movies distributed on DVD or Blu-ray discs intended to be distributed to ordinary consumers at an affordable price, usually for less than \$20.00. That “deal” was made possible because the copy was distributed on a specific medium that would play back only on licensed players, and, most importantly, distributing the physical copy of the work did not unnecessarily expose the work to unauthorized distribution, let alone streaming or other public performances. In the Second Triennial Rulemaking, the Register explained the economics of employing TPMs on works distributed in a digital format:

Not only would the proposed exemption invariably limit the alternatives available to users and consumers of copyrighted works, but it would also most likely increase the prices. No longer could a copyright owner allow time-limited or scope-limited access to works at a portion of the sale price. All loans, rentals, or conditional access would be required to be priced the same as the full sale price of the work,

since users would be free to circumvent the access controls that enforced the limitations as to time or scope.⁵⁷

As copies of the motion picture were distributed on CSS-protected DVDs, copyright owners reasonably expected that they were introducing their creative works into the home market where it would lawfully be confined to playback in the DVD player environment. If the DVD were offered as a server copy for libraries or universities, then copyright owners would not have been able to offer their costly investments to the home consumer market at an affordable price; they would have had to seek a far higher price which accounted for the different use and the different risks.

More importantly, when faced with a proposed exemption to undo or reset the \$20.00 deal for a copy of the work, the Register has said as early as the first rulemaking, “there is no unqualified right to access a work on a particular machine or device of the user’s choosing.”⁵⁸ Some ten years later, in the Fifth Triennial proceeding, when Public Knowledge advanced a proposal for space-shifting copies of movies distributed on DVDs to a consumer’s media management software, the Register reiterated that “the law does not guarantee access to copyrighted material in a user’s preferred format or technique. Indeed, copyright owners typically have the legal authority to decide whether and how to exploit new formats.”⁵⁹ If universities collected these physical copies of movies at the \$20 price point, then they were the fortunate beneficiaries of a consumer deal that was not actually directly intended for them. It would be an inappropriate extension to then let them turn a DVD copy into a server copy through this rulemaking, particularly when there are

⁵⁷ 2003 Recommendation at 92.

⁵⁸ Exemption to Prohibition on Circumvention of Copyright Control Technologies, 65 Fed Reg. 64,556, 64,569 (Oct. 27, 2000) (rejecting the exemption for an unlicensed Linux player).

⁵⁹ 2012 Recommendation at 163.

legitimate licenses offered to educational institutions to support the steaming of motion pictures to students for educational purposes.

A. Fair Use Does Not Support Library Space-Shifting

1. *Creating a Server Copy is Not Transformative*

A server copy made under the pretext of preservation is inherently space-shifting and certainly not transformative. While *Disney Enterprises, Inc. v. VidAngel, Inc.*⁶⁰ concerns the space-shifting and streaming done by a commercial enterprise, it is still instructive for evaluating that this proposed use is indeed space-shifting. In *VidAngel*, the infringer circumvented CSS-protected DVDs to space-shift the copy of the motion picture contained on it from the DVD to a computer (*i.e.*, a server copy). From there, the infringer made the motion picture available for use, primarily as part of a streaming service.

When looking at the character and purpose of the use, the question is “whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character... [;] in other words, whether and to what extent the new work is ‘transformative.’”⁶¹ Here, the desired use is to space-shift the copy from the DVD to a computer - very much what *VidAngel* did as the instrumental step. The judicial instruction is particularly helpful because it at least assumes that there is a “new work” – but, in space-shifting there is no new work. It is fundamentally the same work (*i.e.*, there is nothing new with a further purpose or different character - it simply is the same work stored in a different medium).

The *VidAngel* Court pointed to *Kelly v. Arriba*⁶² to explain the difference of making server

⁶⁰ 869 F.3d 848 (9th Cir. 2017).

⁶¹ *VidAngel*, 869 F.3d at 861.

⁶² 280 F.3d 934 (9th Cir. 2002) withdrawn, re-filed at 336 F.3d 811 (9th Cir. 2003).

copies for transformative purposes:

Courts have been reluctant to find fair use when an original work is merely retransmitted in a different medium. Those cases are inapposite, however, because the resulting use of the copyrighted work in those cases was the same as the original use. For instance, reproducing music CDs in computer MP3 format does not change the fact that both formats are used for entertainment purposes. Likewise, reproducing news footage into a different format does not change the ultimate purpose of informing the public about current affairs.

Even in *Infinity Broadcast Corp. v. Kirkwood*, where the retransmission of radio broadcasts over telephone lines was for the purpose of allowing advertisers and radio stations to check on the broadcast of commercials or on-air talent, there was nothing preventing listeners from subscribing to the service for entertainment purposes. Even though the intended purpose of the retransmission may have been different from the purpose of the original transmission, the result was that people could use both types of transmissions for the same purpose.

This case involves more than merely a retransmission of Kelly's images in a different medium. Arriba's use of the images serves a different function than Kelly's use Furthermore, it would be unlikely that anyone would use Arriba's thumbnails for illustrative or aesthetic purposes because enlarging them sacrifices their clarity.⁶³

Unlike *Kelly*, where the image was reduced to thumbnails and made part of a search engine, proponents are not suggesting that they will in anyway alter the server copy of the work, but instead they will make use of the identical work. Applying the language of *Infinity Broadcast* to the proponents' proposed use, even though the "intended purpose" may be for preservation purposes, "the result [is] that people could use the space-shifted copy for the same purpose."

a. The Non-Profit Nature of Education and Copying for the Purpose of Education Do Not Alter the Analysis.

The character and use of space-shifting to make a server copy do not make the activity any more likely to be considered fair use merely because the proponents are nonprofit education institutions. Nor does attempting to characterize or justify the space-shifting as education render

⁶³ *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 819 (2003).

it a fair use. This principle was clearly set forth in the Ninth Circuit case *Worldwide Church of God v. Philadelphia Church of God, Inc.*⁶⁴ In that case, the offshoot of a splintered church (PCG), the infringer, continued to make use of teachings, the Mystery of the Ages (“MOA”), that the parent church (WCG), the copyright owner, had stopped distributing due to changes in WCG’s doctrine. While the District Court found PCG’s copying to be fair use partly on the basis of its non-profit religious use and partly on the basis that MOA was out of print, the Ninth Circuit reversed the District Court and rejected that verbatim copying of works for those reasons qualifies as fair use. The Ninth Circuit summarized the District Court’s decision as follows:

The facts support a finding that PCG's use of MOA is a statutorily protected “fair use” of the work.” In reaching this conclusion, it found that PCG uses MOA “**for non-profit religious and educational purposes,**” that **copying a complete religious text “is reasonable in relation to that use,”** that WCG presented no evidence that it lost members due to PCG's distribution, that a potential annotated MOA produced by WCG would not compete against PCG's copies of MOA, and that **MOA's being out of print provided additional justification for PCG's production of MOA.**⁶⁵

At the outset, in reversing the District Court, the Ninth Circuit noted that the copyrights at issue were

not diminished or qualified by the fact that WCG is a not-for-profit organization and does not realize monetary benefit from the use of the copyrighted work. Nor is that right affected by the religious nature of its activity; Congress narrowly limited the privilege accorded religious uses to “performance of a . . . literary or musical work . . . or display of a work, in the course of services at a place of worship or other religious assembly⁶⁶

Furthermore, in holding that PCG’s copying did not qualify as fair use, the Ninth Circuit clearly stated that neither the non-profit status of PCG nor the religious/educational use of the

⁶⁴ 227 F.3d 1110 (9th Cir. 2000).

⁶⁵ *Id.* at 1115 (emphasis added).

⁶⁶ *Id.*

MOA copyrighted materials pre-determined a finding of fair use. Instead, the Court carefully evaluated all four factors.

In evaluating the first fair use factor – the character and use – the Court was not swayed by the not-for-profit purpose or for the education purpose – the latter a favored purpose explicitly recognized under Section 107.⁶⁷

The Supreme Court has cautioned that “the commercial or nonprofit educational purpose of a work is only one element of the first factor inquiry into its purpose and character.” *Campbell*, 510 U.S. at 584, 114 S. Ct. 1164. While the fact that a publication is commercial tends to weigh against fair use, the absence of a commercial use merely eliminates the presumption of unfairness. “[T]he mere fact that a use is educational and not for profit does not insulate it from a finding of infringement” *Id.*; see also *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 450, 104 S. Ct. 774, 78 L.Ed.2d 574 (1984) (“Even copying for noncommercial purposes may impair the copyright holder’s ability to obtain the rewards that Congress intended him to have.”); *Marcus v. Rowley*, 695 F.2d 1171, 1175 (9th Cir.1983).

Like PCG, proponents are similarly not-for-profit organizations engaged in education mission. The sole benefit that the not-for-profit nature of the proponents provides with respect to the fair use analysis is that nonprofit entities do not start off under the weight of a presumption that the copying is unfair. They are not, however, insulated from a claim of infringement. Similarly, that the use is for education purposes also fails to insulate them from a claim of infringement and

⁶⁷ The Court had also found that

PCG’s copying of WCG’s MOA in its entirety bespeaks no “intellectual labor and judgment.” It merely “supersedes the object” of the original MOA, to serve religious practice and education. Although “transformative use is not absolutely necessary for a finding of fair use,” *Campbell*, 510 U.S. at 579, 114 S. Ct. 1164, where the “use is for the same intrinsic purpose as [the copyright holder’s] . . . such use seriously weakens a claimed fair use.” *Weissmann v. Freeman*, 868 F.2d 1313, 1324 (2d Cir.1989).

As previously discussed, space-shifting does not add anything more and a server copy – even for preservation – serves the same intrinsic purpose, the copy is available for use.

fails to justify a finding of fair use. Indeed, Congress specifically addressed various educational activities none of which amount to what proponents propose.

The court went on to explain that the “crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”⁶⁸

Proponents are indeed attempting to exploit copyrighted works without paying the customary price. As will be discussed below, rights holders are actively marketing sales of works and licenses that would permit proponents to make use of a server copy for their uses, including reasonable performances (streaming) to patrons.

After recognizing that benefit can come in a form other than direct monetary gain, particularly in other circumstances and settings, where “profit is ill-measured in dollars”,⁶⁹ the court considered how the church gained from copying:

MOA's use unquestionably profits PCG by providing it at no cost with the core text essential to its members' religious observance, by attracting through distribution of MOA new members who tithe ten percent of their income to PCG, and by enabling the ministry's growth. During the time of PCG's production and distribution of copies of MOA its membership grew to some seven thousand members. It is beyond dispute that PCG “profited” from copying MOA—it gained an “advantage”

⁶⁸ Harper & Row, 471 U.S. at 562, 105 S. Ct. 2218.

⁶⁹ 227 F.3d at 1118. The Court noted

We agree with the Second Circuit that in weighing whether the purpose was for “profit,” “[m]onetary gain is not the sole criterion . . . [p]articularly in [a] . . . setting [where] profit is ill-measured in dollars.” Weissmann, 868 F.2d at 1324 (holding that a professor's verbatim copying of an academic work was not fair use, in part because “the profit/nonprofit distinction is context specific, not dollar dominated” and a professor can “profit” by gaining recognition among his peers and authorship credit). See also Webster's Third New International Dictionary (1971) 1811 (defining “profit” as “an advantage, [a] benefit”).

or “benefit” from its distribution and use of MOA without having to account to the copyright holder. The first factor weighs against fair use.⁷⁰

As market preference and utility have changed, schools have recognized that the market is moving to online streaming and they are trying to get online one way or another. As explained below many schools are willing to participate in the offering rightsholder have developed for the educational market. Others would rather avoid licensing, and their preferred solution, like proponents’, would be to space-shift entire collections that they possess from DVD and Blu-ray discs to library servers and then stream such server copies to their education community under the rubric of fair use. But they are wrong. That is not fair use.

2. *Use of Expressive Works, like Motion Pictures, Tilt Against Fair Use*

Under the second factor, the analysis looks to the nature of the copyrighted work. Motion pictures are expressive work. Following the *Worldwide Church of God* Court, “the creativity, imagination and originality embodied in [motions pictures] tilt the scale against fair use.

3. *Amount and Substantiality of Use Weigh Against Fair Use*

The third factor looks at the amount and substantiality of the portion used in relation to the copyrighted work as a whole. “The extent of permissible copying varies with the purpose and character of the use” and a finding that the alleged infringers copied the material to use it for the same intrinsic purpose for which the copyright owner intended it to be used is strong indicia of no fair use. The decision in *Sony*⁷¹ only permits the entirety of a work because under the unique circumstances of that case, to wit: copying of television broadcasts to videotapes for time-shifting for personal use to “enable[] a viewer to see such a work which he had been invited to witness in

⁷⁰ 227 F.3d at 1118.

⁷¹ 464 U.S. 417 (1984).

its entirety free of charge.”⁷²

Here, proponents have not been invited to make use of the works for free. As previously discussed, DVDs were intended for the home retail market, and while the “first sale” doctrine enables libraries’ lending activity of DVDs and Blu-ray discs, it does not permit further copies to be made and certainly does not permit those copies to be used to take advantage of other exploitation models, such as streaming or other types of public performances. As the Ninth Circuit found in *Worldwide Church of God*:

No such circumstances exist here to justify PCG's reproduction of the entire work. PCG uses the MOA as a central element of its members' religious observance; a reasonable person would expect PCG to pay WCG for the right to copy and distribute MOA created by WCG with its resources.⁷³

So, too, for schools that are seeking to transition their DVD and Blu-ray collections to an online streaming service, a reasonable person would expect the schools to pay appropriate compensation to rightsholders, as some of them indeed do. Accordingly, the “third factor, therefore, weighs against fair use.”⁷⁴

⁷² 227 F.3d at 1118.

⁷³ *Id.* at 1118-19.

⁷⁴ *Id.* at 1118-19.

4. *The Effect on the Value or Market for the Copyrighted Work*

The fourth factor weighs “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4). In *Worldwide Church of God*, the Ninth Circuit explained

It has been said that “[f]air use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied.

...

As *Sony* states, “[e]ven copying for noncommercial purposes may impair the copyright holder's ability to obtain the rewards that Congress intended him to have.”

Proponents’ proposed use is available for licensing by the copyright owners. Schools and libraries have long taken public performance licenses from copyright owners. The primary provider for education purposes is Swank,

Swank offers its extensive collection to university libraries through its Digital Campus program.⁷⁵ Nearly half of all traditional brick mortar university and colleges take advantage of the offering.⁷⁶ In Swank’s testimonial video regarding the Digital Campus program, Susan Albrecht, Fellowship Advisor and Library Visual Media Liaison at Wabash College, states the “[c]atalog is fantastic. I mean, really, when almost anything that a professor is hoping to use is available in Swank’s catalog then it’s a no-brainer.” While Swank advertises that only part of its collection is available through the program, it is actually more accurate to say that almost its entire collection is available.⁷⁷ Swank explained that, even if a title is not queued-up in the Digital Campus

⁷⁵ <https://www.swank.com/digital-campus/>. “Digital Campus simplifies film distribution by providing faculty and students a legal streaming resource both on and off campus” offering “feature films, documentaries, foreign film and TV shows.

⁷⁶ Barbara Nelson Interview (Feb. 5, 2021).

⁷⁷ Barbara Nelson Interview (Feb. 5, 2021). Nelson explained that the number becomes overwhelming to customers.

Program, it usually is not difficult to clear the rights to make the title available in the program.⁷⁸

Swank is able to fulfill requests by schools, including university libraries, with either the specific requested title, or, sometimes, with a suitable alternative acceptable to the requester, more than 99 percent of the time. In the testimonial video, James Conley, the Media Services Librarian at Loyola University Chicago, states: “[y]ou’ve had almost all the content that we have ever asked for, which is pretty incredible to have like a one-stop shop.” And even in the rare instance that Swank is not able to fulfill a request, Swank will tell their clients how and who to contact to get the title.

Swank is able to provide foreign and art-house films. Monique Threatt, Media Services Associate Librarian at Indiana University, who describes Swank’s collection as “awesome” says that “[a]ll of the films have subtitles to them in various languages that we can select from.” If the title is licensed for distribution in the United States, which most are due to the interwoven relationship between studios, their foreign affiliates and national distributors, then Swank will likely have access to it.⁷⁹ Finally, Swank reports that film studies professors love their program.⁸⁰

⁷⁸ Barbara Nelson Interview (Feb . 5, 2021).

⁷⁹ Barbara Nelson Interview (Feb 5, 2021).

⁸⁰ In fact, under the categories of film studies sorted by popularity many of the titles discussed over the course of this rulemaking are available via Swank’s license including: Citizen Kane, Casablanca, The Matrix, The Godfather, and The Wizard of Oz.

But even more obscure titles are available to license.⁸¹ For example, Canyon Cinemas has a robust licensing program for schools and libraries. Brett Kashmere of Canyon states that it has been providing to schools and libraries public performances licenses for exhibition for many years and, more recently, streaming licenses.⁸² These licenses are offered for periods of one, three, or five years.⁸³ Universities are particularly interested in its catalog because Canyon offers titles that are regularly part of film studies classes. Examples of these titles include works by avant-garde American filmmaker James Broughton and Kirk Tougas, one of Canada's pre-eminent feature documentary cinematographers. Since the pandemic, Canyon has seen more libraries requesting licenses.⁸⁴ Finally, this segment of the market will grow, and it will represent a larger percentage of creators' revenue in the future as the market trend is to online streaming.

⁸¹ *See, e.g.*, Streaming Videos: Streaming for Instructors, Washington State University/Libraries available at <https://libguides.libraries.wsu.edu/stream/teach#s-lg-box-wrapper-22168050> . The Washington State University notes that streaming licenses can be obtained directly from various providers such as:

Bullfrog Films: Bullfrog works with Docuseek2 to provide streaming access to their documentary films.

...

Films Media Group: Content includes films and segments from Films for the Humanities & Sciences, ABC News, NBC News, BBC, National Geographic, The NewsHour with Jim Lehrer, Bill Moyers, Shopware, The Open University, A&E, Dartmouth-Hitchcock Medical Center, Fred Friendly Seminars, Cambridge Educational, and many more.

...

Video Project: The Video Project collection features programs from over 200 independent filmmakers, including Oscar and Emmy winners, as well as films that aired on Showtime, HBO and PBS.

Women Make Movies: Offers streaming licenses for the life of the file format, with prices based on the full list price for the film.

⁸² Interview with Brett Kashmere, Executive Director (Jan.18, 2021).

⁸³ *Id.*

⁸⁴ *Id.*

Courts have considered the fourth factor in similar circumstances, when licenses were available for the activity. In *American Geophysical Union v. Texaco Inc.*,⁸⁵ the publishers sued in response to unauthorized copying employees at Texaco had done in the course of sharing a professional journal in the office. Because a license was available to permit them to photocopy articles from the journals, the Second Circuit reasoned that it was appropriate to consider the loss of licensing revenues in evaluating “the effect of the use upon the potential market for or value of journal articles.”⁸⁶ It is especially appropriate to do so with respect to copying of articles from *Catalysis*, a publication as to which a photocopying license is now available.⁸⁷ The court went on to conclude, “primarily because of loss of licensing revenue, . . . , we agree with the District Court ‘the publishers have demonstrated a substantial harm to the value of their copyrights through [Texaco's] copying, and thus conclude that the fourth statutory factor favors the publishers.’”⁸⁸

There can be no doubt that: (i) licenses are available for the streaming from server copies of the same motion pictures found on DVD and Blu-ray discs, and (ii) schools are regularly entering into these licenses. Consequently, rights holders will suffer harm as a result of this loss in licensing revenue if making server copies from DVD and Blu-ray discs is permitted under the proposed scope of the exemption. Therefore, the fourth statutory factor weighs again in favor of the rights holders and against a determination of fair use.

Unsurprisingly, as each of the statutory factors weigh against a determination of fair use and in favor of rights holders, a significant legal shift would be required to conclude that the

⁸⁵ 60 F.3d 913 (2nd Cir. 1994).

⁸⁶ *Id.* at 931

⁸⁷ *Id.*

⁸⁸ *Texaco*, 60 F.3d at 931.

proposed use, space-shifting, is protected under Section 107. Consequently, the Register should not grant proponents exemption request.

3. MOOCs

All of the purported uses proffered by proponents are vague and do not provide an opportunity to “kick the tires” as this rulemaking has insisted upon in past proceedings. The absence of any details makes a fair use analysis impossible. First, the proponents have not identified any particular scenes or the proposed lengths from any of the three identifiable works. They do, however, suggest that use of the work could fulfill the following purposes:

Hidden Figures to show the inspiring stories of role models for girls who aspire to careers in STEM;

Stranger Things to show the rare genetic condition called cleidocranial dysplasia; and

Mr. Robot to show the illegal acts of a fictional cyber-vigilante.

The uses identified for *Hidden Figures* and *Mr. Robot* are not particularly transformative. Neither use suggests that the use is adding anything more to the work. In fact, the purpose of the use is identical to the underlying work. The entire movie *Hidden Figures* is intended to present historical figures who are inspiring, perhaps especially to young women with an interest in STEM. Similarly, *Mr. Robot* is all about the illegal acts of a cyber-vigilante. Thus, these two uses simply supplant the use of the original work. Accordingly, the first fair use factor weighs heavily against a finding of fair use.

More importantly, three of the four entities identified by proponents would use the works for commercial purposes. This use threatens the existing clip licensing business. There has been no showing that licenses are unavailable, and certainly not unavailable due to the possibility that the nature of the intended use may disparage the works, as proponents suggest. Thus, the

fourth fair use factor should weigh more heavily against a finding of fair use.

V. Section 1201 Has Not Caused the Harm Claimed by Proponents

1. Noncommercial Video

In light of the previous exemptions granted since the 2010 Recommendation for the use of motion pictures in noncommercial videos for the purpose of criticism or comment, the proponents cannot legitimately claim an ongoing harm as a result of the circumvention prohibition. The Register has carefully considered their uses and distinguished those uses not necessitating high-quality images as outside the class of the intended beneficiaries because those uses in noncommercial videos can be accomplished without circumvention.

2. BYU

As the law is currently written, educators can perform the entire work found on a copy on a disc under the in-person teaching exception. Additionally, under the TEACH Act, they can perform reasonable and limited portions of an audio-visual work (*e.g.*, motion pictures) in the context of distance learning. However, the in-person teaching exception does not stretch to the server copy necessary to stream the movie to a classroom or to an individual student's laptop, and, notwithstanding the proponents' stretched interpretation of "reasonable and limited", the TEACH Act will not cover the motion picture being performed in its entirety (streamed over the Internet). Nor is it clear that BYU's proposed use meets the other requirements of the TEACH Act. As such, the impairments cited by the proponents are rooted, not in the prohibition on circumvention, but by the underlying copyright law itself. In fact, the Register's understanding of the issue ultimately led to her conclusion that the proposed exemption was inappropriate because the limitations in the law constrained her analysis as to whether the activity was indeed noninfringing. In light of these circumstances, there is no basis for proponents to petition the Register repeatedly for relief that the law simply does not permit her to provide.

3. MOOCs

Regarding the Musora example offered by proponents, it makes very little sense that the circumvention prohibition could cause any harm. They have not identified any motion picture or any particular title. So, there is no way to tell whether they would be required to circumvent at all. Because not all DVDs employ CSS, that harm is completely speculative.

Moreover, screen capture is an appropriate alternative to circumvention. None of the uses suggest that the particular contemplated use requires high quality images or anything that even approximates the close analysis that has been historically required for educational purposes. Notwithstanding proponents' objection to screen capture, as explained above, the precedent of this rulemaking clearly establishes that for these identifiable purposes - "representation of historical facts or other information" - screen capture quality is sufficient.

Finally, proponents have made no showing of any inability to avail themselves of the clip licensing market. None of the uses would conflict with any of the anti-disparagement clauses. Nor is there any evidence that efforts to obtain licenses have been ignored or rejected. Thus, even if screen capture is not a viable option, then clip licensing most certainly would be.

VI. Statutory Factors Weigh Against the Creation of the Class

A. Availability for Use of Copyrighted Works

1. Noncommercial Videos

The proposed language change that would result in an unqualified class to make use of motion pictures in noncommercial videos would harm the availability for use of copyrighted works. Since the 2010 Recommendation, the exemption beneficiaries have been able to make use of short clips of motion pictures in their noncommercial videos. To the extent Section 1201 had previously prevented exemption beneficiaries from making their noncommercial videos, exemption beneficiaries are likely contributing more works to the public (or alternatively, they are

not creating any fewer noncommercial videos than when Section 1201 prevented their use of motion pictures in noncommercial videos in the period before the exemption).

The limitation in the exemption, which permits circumvention only when higher quality images are necessary to make such use, likely has a negligible effect, if any, on the production of works by proponents' constituency. According to the proponents, the complexity and length of the exemption discourages people, presumably including proponents' constituency, from trying to understand the law. Further, proponents posit that, even if these people did take the time to understand the law, which the exemption is, their new understanding of the law would likely generate disdain for copyright law (the exemption). Nevertheless, whether understood, appreciated, or disdained, the exemption has been in place now for ten years, and presumably proponents' constituency has availed itself of the exemption - knowingly or unknowingly. Thus, adoption of the proposed language will offer little to no additional benefit in the availability of copyrighted works.

On the other hand, an unqualified exemption to circumvent TPMs in order to make use of motion pictures distributed on DVDs or Blu-ray discs in noncommercial videos would harm the incentive for content providers to continue to distribute works in the digital format. The Register has concluded repeatedly that the refinements of a class and exemption limitations should not result in a disincentive for content providers to continue to release their works in digital formats.⁸⁹ An exemption premised on a class that provides users complete license to circumvent whenever they want (or as they may be artistically inspired), as proponents' proposed language would permit, falls far short of what content providers would expect a reasonable exemption to permit.

⁸⁹See, e.g., 2003 Recommendation at 60.

Moreover, given that proponents have clearly stated its members do not understand the scope or purpose of copyright protections, and what they do understand, they disdain, providing such a class with an unprecedented license to circumvent is far from ideal. Undoubtedly content providers would be more circumspect in what works and how they are going to release their works in future digital formats if this rulemaking were to stray too far from its previous reasonable interpretation and application of facts to the law to remove vital safeguards. Weighing the nominal possible benefit of new derivative works resulting from the proposed change against the loss of incentives for the creation and distribution of original works, this factor militates strongly against the creation of a class that has an unqualified right to circumvent.

2. *BYU*

This proposed exemption for space-shifting would even be more disruptive. The space-shifting proposed here does not enable any derivative uses – thus the exemption would not in itself result in more creative works. This space-shifting would also harm current efforts to make more copyrighted works available through licenses as well as diminish the revenues generated from these legitimate licenses. This factor therefore weighs strongly against the creation of an exemption for space-shifting even for educational purposes.

3. *MOOCs*

The use will not result in the availability of more works. Nothing suggests that online learning platforms are presently unable to make or prepare educational materials. Similarly, proponents have not shown that there will be a net positive result from the proposed additional exemption beneficiaries. In contrast, the creation of a broad, unwarranted exemption will negatively affect rightsholders confidence in the overall effectiveness of the law if this rulemaking strays from its practice of creating narrow focused exemptions that run low risk of harming of the market for the works.

B. The Availability for Use of Works for Nonprofit Archival, Preservation, and Educational Purposes

1. *Noncommercial Videos*

While some use of motion pictures in noncommercial videos that serve as criticism and comment may have an educational purpose, adopting the proposed language for the exemption will not make any additional works available for use, as the current exemption already enables that use. This factor therefore weighs against the creation of a broad exemption for unqualified use of motion pictures in noncommercial videos.

2. *BYU*

Similarly, while the proposed class is for educational purposes, space-shifting the work does not make more works available, it merely makes the existing works that are already available more convenient. This factor therefore weighs strongly against an exemption permitting a use (space-shifting) that is not clearly noninfringing.

3. *MOOCs*

The use allegedly will be made for educational purposes. However, because there are alternatives to circumvention, this will unlikely result in more works being made for educational purposes.

C. 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

1. *Noncommercial Videos*

The current and prior iterations of the exemption for noncommercial video have already mitigated against the impact that the prohibition on circumvention has had on the use of motion pictures in noncommercial videos for the purpose of criticism and comment. Providing an unqualified exemption for such uses will not have any effect on use for the purpose of criticism

and comment as the Register has determined in multiple proceedings that those uses do not qualify for the exemption as they can still be made with lower quality video. This factor therefore weighs against the creation of an unqualified exemption that would not provide any additional benefit beyond what is provided under the current exemption.

2. *BYU*

Technological protection measures do not have any impact on the use of space-shifting, as there is no right to space-shift in the first place. Further, notwithstanding the fact that the works are not lawfully permitted to be space-shifted to a server copy,⁹⁰ all of the permitted educational uses can be made with the existing copy of the motion picture distributed on DVD or Blu-ray discs. This factor therefore weighs against the creation of a space-shifting exemption, a use that is not clearly noninfringing.

3. *MOOCs*

Technological protection measures have no impact on the intended use, as not all of the uses have been shown to be prohibited by TPMs, and there are alternatives to circumvention.

D. The Effect of Circumvention of Technological Measures on The Market for or Value of Copyrighted Works

For both proposed exemptions, the fourth factor is extremely relevant. As noted in the 2012

Recommendation

Motion pictures involve significant effort and expense to create and, once created, frequently become a vital part of American culture. The motion picture industry has a legitimate interest in preventing motion pictures from being copied in their entirety or in a manner that would adversely impact the market for or value of these works, including reasonable derivative markets.⁹¹

⁹⁰ There is some evidence that proponents have already engaged in some amount of space-shifting.

⁹¹ 2012 Recommendation at 166.

1. Noncommercial Videos

While the Register has previously concluded that making use of small portions of a work is unlikely to supplant the market for the work, grave concern should be given to the proponents' constituency and their disdain for copyright law. The success of the rulemaking exemption in large measure rests on the conduct of the beneficiaries. Fundamentally, one bad apple can spoil the whole barrel. Consequently, giving these beneficiaries any more license to circumvent would be folly until there is more evidence that the proponents' constituency wants to respect the law, including the limitations in the current exemption.⁹² Therefore, this factor weighs heavily against the creation of an unqualified license to circumvent motion pictures for use in noncommercial videos.

2. BYU

Unlike the 2012 Recommendation, the proposed exemption for space-shifting would make use of the entire work. This is a classic example in which the proposed use would supplant the market for motion pictures, including the already existing market of licensing the streaming of motion pictures to educational institutions for educational uses. Thus, again, this factor weighs heavily against the creation of an exemption for space-shifting.

3. MOOCs

Most of the proposed uses are identical to the use in the market. Furthermore, most of these uses are for commercial purposes. Nothing suggests that the licensing market has failed to accommodate uses by these actors. Therefore, this statutory factor weighs even more heavily against the creation of an exemption for online learning platforms than it does for the other

⁹² C.f. 2015 Recommendation (gamers unlikely to respect copyrights).

proposals.

In light of the four factors weighing somewhat to strongly against modifying the exemption for noncommercial videos and creation of a space-shifting exemption, the statutory factors, on the whole, do not warrant the creation of either an exemption permitting an unqualified right to make use of motion pictures in noncommercial videos or a space-shifting exemption

VII. Conclusion

For the reasons stated above the proposed exemptions which would involve adopting new regulatory language for noncommercial videos and a completely new exemption to engage in space-shifting for education purposes are not warranted.

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February 9, 2021

Honorable Shira Perlmutter
Register of Copyrights
U.S. Copyright Office
101 Independence Ave. S.E.
Washington, D.C. 20559

Re: Eighth Triennial 1201 Rulemaking

Dear Register Perlmutter:

Using video-based content as part of a student lesson plan or curriculum has been commonplace in the United States and has been in place for decades. Recently, digital content which is accessible to the student for **in- and out-of-classroom viewing** has become more sought after by US educators in both higher and lower education institutions. Similar to assigning a book to a student to be read outside of the classroom in order to later participate as part of an in-classroom conversation, videos (including movies, TV, and documentaries) are being used in the same manner throughout the US.

Swank has been providing a catalog of **over 60,000 titles** from major and independent studios and currently has **thousands of institutions** using the Swank Digital Campus® platform to gain access to legally provided and protected video content for streaming to students for educational purposes. Swank has seen significant growth in educational institutions moving to providing digital videos to students and using the Swank Digital Campus platform to accomplish this task, mirroring the trend to digital in the commercial arena.

Swank provides educational institutions (from primary schools to universities) and their libraries great flexibility to license titles from its Digital Campus platform. Institutions can choose the number of titles they wish to license for unlimited viewing within a license period of their choosing. This allows students to watch licensed films multiple times, for what amounts to a license fee of pennies per student to most of the educational institutions we serve.

Swank has seen a **growth of 600% since 2019** of K-12 schools using the Digital Campus platform. Swank has also seen a **growth of 80% in the number of colleges and universities** making use of the platform. Today, approximately 1,000 "brick and mortar" universities and colleges are Swank Digital Campus platform licensees. This offering is not only sold at the school level but is also sold at the school-district and even State level (e.g. the States of Vermont and Hawaii have bought or makes available this license for every one of their K-12 public schools). The growth Swank is seeing on this platform has **increased significantly during the pandemic** as educators look to offer their curricula to students learning remotely.

Swank is able to meet the educational needs of this broad array of educational institution libraries and instructors due to the expansive range of titles available for licensing on our Digital Campus platform. Indeed, **we are able to fulfill more than 99% of the requests and inquiries** we receive from educational

institutions for a title for a particular subject, theme, or topic to the satisfaction of the relevant educational institution. This includes limited instances when an instructor initially requests a title that Swank does not have available to license, but where we are almost always able to offer a suitable alternative title that satisfies pedagogic needs. In those rare cases where an instructor still desires a specific title that we are not able to license, we provide assistance by directing the instructor to the relevant copyright owner to seek permission.

Swank is proud of the positive feedback we have received from our Digital Campus platform licensees and the satisfaction they have expressed with the content and services that we offer. Please visit <https://www.swank.com/digital-campus/customer-stories/> to see a number of videos featuring some of our Digital Platform university and college campus licensees, including campus librarians, describing their experiences and satisfaction with the Swank license and service. Attached as Annex A to this letter are sample testimonials from our K-12 school licensees.

We understand that there have been requests for exemptions to the Digital Millennium Copyright Act (DMCA) that would allow an educational institution to legally circumvent technology protection measures on DVDs and Blu-ray discs to gain access to digital motion picture files "in the clear" in order to provide the files to students for educational viewing. The important need for remote educational viewing in the United States is being fulfilled by Swank and our multiple competitors in the manner we have described above. Indeed, in the last nine years, we have provided a legal means to streaming digital files that are assigned by the instructor to the student for viewing. Our digital offering was specifically designed and approved by our licensor studios to address the needs of educators in the United States. It provides relevant content across the spectrum of time and genre to educators for their course curriculums in an affordable, efficient manner, while maintaining studio-required encryption. This platform has been available for nine years and is in use by thousands of educational institutions (colleges, universities, and K-12 schools) throughout the United States including some of the DMCA petitioners in this eighth triennial rulemaking proceeding.

For these reasons, Swank believes that the request from educational institutions for an exemption to circumvention prohibitions to stream content on DVDs and Blu-rays for educational purposes should not be granted.

Sincerely,

A handwritten signature in black ink, appearing to read "Tim Swank". The signature is fluid and cursive, with a large initial "T" and "S".

Tim Swank
Chairman, Swank Motion Pictures, Inc.

ANNEX A

K12 Public:

Prospect High School

Mount Prospect, IL
Head Librarian

"It's hard to imagine my work life without Swank, it's been a godsend this year."

Averill Park Central School District

Rensselaer, NY

"Swank Streaming has really been perfect with the school buildings shut down and teachers teaching remotely. So many rely on the visual component when teaching, and when you can't play a DVD that you've always taught with, it furthers the frustration and anxiety for teachers. Being able to request movies that aren't in the core collection and having such a fast turnaround has really come to our rescue."

Delaware Valley Regional High School

Frenchtown, NJ

"Cost effective way to control/handle licensing issues with movies in a digital environment with ease!"

K12 Private:

St. Margaret's Episcopal School

San Juan Capistrano, CA
Angela Mackenzie

"Swank is the best streaming service for K-12 out of the existing services."