

Submission on behalf of Joint Creators and Copyright Owners
Class 1: Audiovisual Works – Criticism and Comment



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

ITEM A. COMMENTER INFORMATION

The Motion Picture Association, Inc. (“MPA”) is a trade association representing some of the world’s largest producers and distributors of motion pictures and other audiovisual entertainment for viewing in theaters, on prerecorded media, over broadcast TV, cable and satellite services, and on the internet. The MPA’s members are: Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc.

The Alliance for Recorded Music (“ARM”) is a nonprofit coalition comprising the many artists and record labels who together perform, create, and/or distribute nearly all of the sound recordings commercially released in the United States. Members include the American Association of Independent Music (“A2IM”), the Music Artists Coalition (“MAC”), the Recording Industry Association of America, Inc. (“RIAA”), hundreds of recording artists, the major record companies, and more than 600 independently owned U.S. music labels.

The Entertainment Software Association (“ESA”) is the United States trade association serving companies that publish computer and video games for video game consoles, handheld video game devices, personal computers, and the internet. It represents nearly all of the major video game publishers and major video game platform providers in the United States.

Represented By:
J. Matthew Williams (mxw@msk.com)
Sofia Castillo (szc@msk.com)
MITCHELL SILBERBERG & KNUPP LLP
1818 N Street, NW, 7th Floor
Washington, D.C. 20036
202-355-7904

ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 1: Audiovisual Works—Criticism and Comment.

ITEM C. OVERVIEW

MPA, ARM and ESA (“Joint Creators and Copyright Owners”) did not oppose renewal of the existing exemptions applicable to circumvention to access short portions of motion pictures for

certain educational purposes and noncommercial video creation.¹ However, the proponents now request the following expansions: (1) allowing the circumvention of full length motion pictures for purported non-infringing purposes under Sections 107, 110(1), 110(2) and 112; (2) the creation of a broad new exemption for “educators and preparers of online learning materials,” regardless of their accreditation or for-profit status; and (3) the elimination of the obligation to consider and use screen-capture technology where satisfactory. These, or similar proposals, have all been rejected by the Copyright Office in the past, and no material, new evidence has been submitted to justify a different outcome in this rulemaking.

Although the Joint Creators and Copyright Owners do not object in principle to rewording the existing regulatory language, the language must be appropriately targeted to preserve current limitations and to prevent an unwieldy exemption that goes beyond both the aims of the rulemaking and what is warranted by the record and the law. Those who endeavor to eliminate the limitations have not presented sufficient information to support discarding the current, common-sense boundaries. Moreover, the Petitioners have not demonstrated that using screen-capture technologies, or other licensed marketplace alternatives, are inadequate for accomplishing many uses of motion pictures. Indeed, options for presenting clips of motion pictures in-person for teaching and in remote classroom settings, as well as for licensing uses of motion pictures in videos that are not exempted by the current regulations are even more broadly available today than they were three years ago. The Register should preserve the limitations contained in the existing exemptions.

Finally, the Petitioners requested exemptions applicable to motion pictures, but the Copyright Office described this class in the NPRM as applying to all audiovisual works. There is nothing in the record to justify expanding the exemptions to apply to video games. The limitation to motion pictures should be retained.

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

The proposed expanded and new exemptions would cover a wide array of access controls, including on discs, digital streaming services, digital download services, remote services that facilitate cloud-based access, and (potentially) cable and satellite set-top boxes and videogame consoles.² Many of these access controls enforce terms and conditions of use that allow for lower cost, temporary access and do not allow for the retention of permanent copies. These are precisely the kinds of access controls Congress intended to incentivize when enacting the DMCA, as they increase the availability of motion pictures at affordable prices through access-based business models.

¹ The Joint Creators and Copyright Owners continue to believe that exempting the entire category of “non-commercial videos” is vastly overbroad and prone to abuse. Nevertheless, given the Copyright Office’s repeated adoption of the existing exemption for this class of works, our comments will not belabor the issue.

² Because that the Copyright Office previously rejected a proposed exemption for circumventing the HDCP encryption scheme utilized for devices that connect to televisions through HDMI cables, including video game consoles, [REGISTER OF COPYRIGHTS, SECTION 1201 RULEMAKING: SEVENTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION: RECOMMENDATION OF THE ACTING REGISTER OF COPYRIGHTS](#) 144-45 (2018) (“2018 Rec.”), the proposals are best interpreted to exclude circumvention of HDCP and other access controls on consoles from their scope.

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

1. The Record Does Not Justify An Exemption To Obtain Access To Unauthorized Copies Of Full-Length Motion Pictures For Educational Performances

BYU seeks to expand the existing exemption for educational purposes to include “[m]otion pictures (including television shows and videos), as defined in 17 U.S.C. 101, where the motion picture is lawfully made and acquired on a DVD protected by the Content Scramble System, on a Blu-ray disc protected by the Advanced Access Content System, or via a digital transmission protected by a technological measure, where circumvention is undertaken by college and university employees or students or by kindergarten through twelfth-grade (K-12) educators or students (where the K-12 student is circumventing under the direct supervision of an educator), including of accredited general educational development (GED) programs, for a noninfringing use under 17 U.S.C. §§ 107, 110(1), 110(2), or 112(f).”³

BYU claims that this exemption is necessary because:

As a practical matter, optical discs and players are becoming increasingly difficult to use for educational purposes. Such difficulties have been exacerbated by the large-scale shift to remote instruction caused by the COVID-19 pandemic. And unfortunately, the current market for licensing or purchasing digital copies of motion pictures does not meet the needs of educational institutions.⁴

First, BYU identifies a problem that is not caused by access controls, but by the unexplained difficulty of using optical players⁵ and the shift to remote instruction caused by the temporary social distancing measures necessary to address the COVID-19 pandemic. The Joint Creators and Copyright Owners of course acknowledge the difficulties created by the pandemic and are willing to identify the best ways to resolve issues through marketplace solutions. However, the current market for accessing, licensing and obtaining digital copies of motion pictures is, as specified later in this comment, already robust. In addition, the pandemic is a time-limited event that should not drive public policy changes with potentially long-lasting effects. The proposed exemption would be in effect until at least 2024. We are hopeful, based on the availability of vaccines, that widespread effects from the pandemic will reduce substantially during the next year. Thus, BYU does not identify a substantial adverse effect that is likely to occur within the

³ Brigham Young University, [Class 1 Long Comment](#) at 2 (Dec. 14, 2020) (“BYU 2020 Comment”).

⁴ BYU 2020 Comment at 3.

⁵ Petitioner does not elaborate on the reasons for this “difficulty.” In the last rulemaking, however, it was clear that the difficulty was caused by choices made by institutions not to invest in players, which are currently available, including from well-known brands such as Sony and LG, for under \$50 from retailers such as [Amazon](#) and [Best Buy](#). To the extent BYU and other educational institutions have been choosing not to invest in available players to support the use of their collection, and instead are relying on unauthorized reproduction and streaming, their actions are on questionable legal footing that and do not support the requested exemption.

next three years and that is caused by the statutory prohibition on circumventing access controls.⁶

Second, BYU has not identified a non-infringing use in which it seeks to engage that is not covered by the existing exemptions and that requires unauthorized access via circumvention. BYU reminds the Copyright Office of its own statement that this proceeding is not the place to “break new ground” on fair use.⁷ And yet, BYU’s proposed expansion to cover space-shifting of full motion pictures asks the Copyright Office to break such ground. As the Register has repeatedly concluded,⁸ and should conclude again during this proceeding, no court has held that space-shifting is fair use. Indeed, “the reported decisions unanimously reject the view that space-shifting is fair use under § 107.”⁹ BYU suggests that the absence of judicial precedent on point in the education context means that “rightsholders are not overly concerned about the practice of space-shifting motion pictures by educational institutions, at least not concerned enough to file any lawsuits about it.”¹⁰ This claim suggests that copyright holders must sue over every potential infringement or violation of Section 1201 or lose their rights—a position the Supreme Court has flatly rejected.¹¹ The Section 1201 Rulemaking should not have such an effect on rights holders.

Third, BYU misreads *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169 (2d Cir. 2018), and *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), to support its proposition that making copies of full-length motion pictures is transformative because it purportedly enhances the efficiency of delivering content.¹² In *TVEyes*, the court ruled that the service’s Watch function had a “modest” transformative character because it enabled clients to isolate a subset of material from Fox’s vast audiovisual corpus, and to access that material with targeted precision.¹³ However, that did not render the use lawful. *Id.* The court in *TVEyes* read *Sony* to stand for the proposition that “a secondary use *may* be fair use if it utilizes technology to achieve the transformative purpose of improving the efficiency of delivering content without

⁶ See [Exemptions To Permit Circumvention of Access Controls on Copyrighted Works: Notice of Proposed Rulemaking](#), 85 Fed. Reg. 65293, 65294 (Oct. 15, 2020) (“NPRM”) (listing requirements for granting an exemption).

⁷ BYU 2020 Comment at 7.

⁸ *E.g.*, 2018 Rec. at 111-27 (“2018 Rec.”); [REGISTER OF COPYRIGHTS, SECTION 1201 RULEMAKING: SIXTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS](#) 107-26 (2015) (“2015 Rec.”) (explaining, *inter alia*, that *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072 (9th Cir. 1999), and *Fox Broadcasting Co. v. Dish Network LLC*, 160 F. Supp. 3d 1139 (C.D. Cal. 2015), do not support a broad conclusion that space-shifting is a fair use).

⁹ *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 862 (9th Cir. 2017).

¹⁰ BYU 2020 Comment at 14-15.

¹¹ See *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 665 (2014) (“It is hardly incumbent on copyright owners...to challenge each and every actionable infringement. And there is nothing untoward about waiting to see whether an infringer’s exploitation undercuts the value of the copyrighted work, has no effect on that work, or even complements it.”).

¹² *Id.* at 17.

¹³ *TVEyes*, 883 F.3d at 177.

unreasonably encroaching on the commercial entitlements of the rights holders.” *Id.* (emphasis added). Here, BYU’s proposed copying of motion pictures would be mere “republishing” of original copyrighted works without any “enhanced efficiency” or addition of new expression, meaning, or message. In addition, BYU’s proposed use of full-length motion pictures would unreasonably encroach on rights holders’ educational licensing market, as explained below. Therefore, *TVEyes* does not justify a change in the Copyright Office’s 2018 conclusion that the proposed uses of full-length motion pictures are unlikely to be fair use.¹⁴

Fourth, as the Copyright Office recommended in 2018, the fact that BYU is an educational institution should not alter this analysis.¹⁵ The Supreme Court has held that “the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement.”¹⁶

Fifth, the inherent conflict in BYU’s request is apparent in that the proposed exemption simultaneously: (1) allows circumvention to copy full-length motion pictures; and (2) incorporates by reference sections of the Copyright Act that *do not* allow educational institutions (“EIs”) to copy full-length motion pictures to perform them in a classroom or remotely. *See* 17 U.S.C. §§ 110, 112. Moreover, BYU’s proposal would violate the requirement of Section 110(2) that prevents EIs from making transmissions of full-length copyrighted works for distance learning and from engaging “in conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination.”¹⁷ Although Section 110(1) allows BYU to engage in certain public performances of complete motion pictures “*in a classroom or similar place devoted to instruction*” (emphasis added), without obtaining licenses, it does not allow those performances to be generated from unauthorized copies, nor does it contain any limitation on the reproduction right. If Congress wanted EIs and students to be exempt from purchasing complete copies of works or authorized access thereto, it would have included an exception to the reproduction right within Section 110 – which it clearly did not.

The educational exemptions granted in prior cycles are limited to copying short portions of works for what the Copyright Office has concluded are transformative purposes. Thus, they are more compatible with Section 110(2), which limits online transmissions by educational institutions to “reasonable and limited portions” of motion pictures.¹⁸ They are also more

¹⁴ In its 2018 Recommendation, the Copyright Office rejected BYU’s claim that *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 98-99 (2d Cir. 2014), and *Authors Guild v. Google, Inc.*, 804 F.3d 202, 229 (2d Cir. 2015), render all copying for educational purposes a fair use because these opinions “distinguished the proposed uses of indexing and data analysis, from performing the works themselves, and carefully considered the risk that those circumscribed uses might act as market substitutes.” 2018 Rec. at 52.

¹⁵ *Id.* at 52-53.

¹⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994); *see also Sony Corp. of Am.*, 464 U.S. at 450 (“Even copying for noncommercial purposes may impair the copyright holder’s ability to obtain the rewards that Congress intended him to have.”).

¹⁷ 17 U.S.C. §110(2)(D)(ii)(II).

¹⁸ BYU references a 2006 Congressional Research Service Report, which cites to a Senate Judiciary Committee report, for the proposition that the TEACH Act allows for performance of full-length motion pictures in certain circumstances. BYU 2020 Comment at 10. There are two problems with this source. First, the CRS report is without interpretive value. Second, the CRS Report is wrong in its interpretation of the Senate Report. The Senate Report itself *does not* endorse the notion that full-length movies might properly be performed in some

compatible with fair use, given that the third factor specifically favors the use of no more of a work than is necessary to accomplish a legitimate purpose.¹⁹

Sixth, BYU's proposed exemption would pose a significant threat to the value of copyrighted works.²⁰ BYU's proposed copying for space-shifting would negatively impact rights holders' legitimate revenues from streaming and download services that publicly perform or otherwise transmit copies of motion pictures – some of which cater specifically to educational institutions.²¹ Even if not all titles are available through one or more of these services, many titles are available and more are constantly added. Rights holders should not be deprived of revenues and potential revenues derived from the titles that are available on, or may soon be available on, these licensed streaming services that cater to educational institutions, such as:

- [Swank - Digital Campus](#) provides on and off campus faculty and students in colleges and universities with over 25,000 films, documentaries and TV shows via streaming.
- [Kanopy](#) partners with public libraries and universities to stream content for free to personal devices. Users can log in with a library membership and enjoy a diverse catalog with new titles added every month.
- [Alexander Street](#) enables libraries to increase faculty and student access to learning and scholarly content. It offers subscription and demand-driven acquisition options.

circumstances. S. REP. NO. 107-31, at 7-8 (2001) (“The performance of works other than non-dramatic literary or musical works is limited, however, to ‘reasonable and limited portions’ of less than the entire work. What constitutes a ‘reasonable and limited’ portion should take into account both the nature of the market for that type of work and the pedagogical purposes of the performance. In addition, because ‘display’ of certain types of works, such as literary works using an ‘e-book’ reader, could substitute for traditional purchases of the work (*e.g.*, a text book), the display exemption is limited to ‘an amount comparable to that which is typically displayed in the course of a live classroom setting.’ This limitation . . . recognizes that a ‘display’ may have a different meaning and impact in the digital environment than in the analog environment to which section 110(2) has previously applied. The ‘limited portion’ formulation used in conjunction with the performance right exemption is not used in connection with the display right exemption, because, for certain works, display of the entire work could be appropriate and consistent with displays typically made in a live classroom setting (*e.g.*, short poems or essays, or images of pictorial, graphic, or sculptural works, etc.”).

¹⁹ See 2018 Rec. at 52 (“The Register has previously found the ‘short portions’ limitation to be critical in recommending exemptions for audiovisual works”); 2015 Rec. at 70 (“[T]he Register suggests that the ‘short portions’ limitation provides useful guidance as to what is generally likely to be a fair use in these contexts without imposing a wholly inflexible rule as to length. As a general matter, longer uses are less likely to be considered fair because they are more likely to usurp the market for a work.”); *id.* at 99 (“[T]he use of only short segments is critical to the Register’s determination in this proceeding that a significant number of the desired uses are noninfringing.”).

²⁰ See 17 U.S.C. § 1201(a)(1)(C)(iv).

²¹ An exemption from the 1201 prohibition would not supplant equivalent prohibitions established in the Terms of Service of many of these services. See *e.g.*, [Terms of Service](#), Kanopy (last revised Apr. 17, 2020) (“(c) Except with respect to Your Content, you may not: (i) use, capture, reproduce, modify, adapt, create derivative works from, publicly perform, publicly display, distribute, make, have made, assign, pledge, transfer or otherwise grant rights to the Service, except as expressly permitted under the TOS.”).

- [Passion River](#) distributes a catalogue of award-winning independent and documentary films on topics such as Multicultural Studies, Women’s Studies, Medical Studies and Advances, Religious and Spiritual Studies, Environmentalism, Aging, Drug Addiction, LGBT issues and others. They provide educational DVD and streaming licenses.
- [Roco Films Educational](#) enables students and faculty to instantly stream documentaries at any time, on or off campus through their proxy library server. Roco Films’ catalog consists of highly-acclaimed, festival award-winning films, specifically curated with their academic potential in mind. They offer *à la carte* licenses, entire collection subscriptions, and a patron-driven acquisition model that allows users to pay only for films that are being used.
- [Collective Eye Films](#) offers a license for colleges, universities, and corporations for films to be used by students, staff and faculty in classrooms or at home.

Additionally, the marketplace offers a variety of options that could provide all or at least most motion pictures required by educational institutions for both in-person and remote learning without the need to circumvent. Asking students to subscribe, purchase, rent, or digitally download a motion picture through a retailer or an education-oriented or mainstream service is akin – although often much cheaper – to asking students to purchase a book, especially as many of these services are available for low prices and some (like Hulu) offer student discounts. These alternatives to circumvention include streams/transmissions available through cable providers, satellite service providers, [Amazon Prime Student](#), [Disney Plus](#), [HBO Max](#), [Hulu](#), [Netflix](#), [Peacock](#), and [YouTube Premium](#); [Vudu’s Disc-to-Digital program](#); digital copies made available with purchases of discs through redeem codes; digital copies available for rental or long-term access; access through [Movies Anywhere](#); permanent and temporary downloads available through [Amazon](#), [Apple iTunes](#) and [Google Play](#); and other services (many of which offer time-limited downloads of many titles). We attach hereto an Appendix summarizing such services.

In sum, BYU’s proposed exemption is unnecessary and legally unsupportable. It was denied three years ago. The only change in circumstances identified – admittedly an important one – is the current pandemic. Yet, the proposal is not limited to instances of pandemics or other emergencies; nor is it limited to titles that are unavailable at reasonable prices in the legitimate marketplace; nor does it impose other limitations common to other exemptions, such as an obligation to encrypt unauthorized copies, to take other steps to prevent infringement and unauthorized access, to only engage in circumvention for the sole purpose of the purported noninfringing activity, or to prevent transfers of decrypted copies to other institutions or commercial actors. It does not even require any criticism or commentary on the works. Remote learning is incredibly important, especially right now, but ignoring and upending the statutory regime in place and undermining developing licensing markets is not the answer. Doing so would hinder technological development and ultimately deprive consumers of new methods of accessing motion pictures at reasonable prices.

2. The Record Does Not Justify Creating A New Exemption For “Educators And Preparers Of Online Learning Materials”

Joint Educators IV seek a new exemption:

[t]o allow educators and preparers of online learning materials to use short portions of motion pictures (including television shows and videos), as defined in 17 U.S.C. 101, for the purpose of criticism, comment, illustration and explanation in offerings for registered learners on online learning platforms when use of the film and media excerpts will contribute significantly to learning. The online provider will limit these online learning materials, to the extent technologically feasible, to registered learners of the online learning platform, institute copyright policies, and provide copyright information to educators and preparers of online learning materials, learners, and relevant staff members. Further, the online provider, to the extent technologically feasible, will work to reasonably prevent unauthorized further dissemination of online learning materials in accessible form to others, including after the registration period ends.²²

Petitioners claim that this exemption is necessary because the existing exemption for Massive Open Online Courses (“MOOCs”) is insufficient to accommodate similar uses by a skyrocketing number of online learning platforms, irrespective of their educational accreditation or for profit status.²³

The Copyright Office rejected similar petitions in 2015 and 2018 for the following reasons:

While acknowledging the growth and importance of online education, in granting the existing [MOOCs] exemption in 2015 the Register agreed that an unbounded exemption where anybody can declare that they’re teaching a MOOC and anyone can be a student would be anathema to the exemption process as envisioned by Congress. As in 2015, Joint Educators’ current broadly framed proposal would seemingly encompass any online video that could be characterized as an educational experience.²⁴

Joint Creators IV’s current petition presents the same problems in this cycle.

First, the Section 110(2) limitations benefit accredited nonprofit educational institutions. Joint Educators IV seek to bestow this benefit upon a much broader – indeed, potentially infinite – segment of users. Moreover, Section 110(2) requires accredited nonprofit educational institutions to apply technological measures that reasonably prevent the (1) “retention of a work in accessible form by recipients of the transmission... for longer than the class session”, and (2) “unauthorized further dissemination of the work in accessible form by such recipients to others.” Without an explanation, Petitioners weaken the technological measures requirement by inserting

²² Joint Educators IV, [Class 1 Long Comment](#) at 18 (Dec. 14, 2020) (“Joint Educators IV 2020 Comment”).

²³ *Id.* at 2.

²⁴ 2018 Rec. at 54 (internal quotations omitted).

the clause “to the extent technologically feasible” and leaving out the requirement of technological measures that prevent “retention” of a work.

Second, their proposal would pose a significant threat to the value of copyrighted works. As discussed above, educational licenses for motion pictures are available. In addition, licensed clip services continue to be available. For example, the Fandango [Movie Clips Website](#) and [Movie Clips YouTube Channel](#) offer a wide variety of clips and movie trailers. Finally, all the motion pictures cited as examples of works for which the exemption would allow circumvention are available in streaming services in the marketplace.²⁵

Third, this exemption is unnecessary because at least some of the proposed uses are presumably covered by the “non-commercial” video and the documentary filmmaking (biographical significance) exemptions. Also, using non-circumventing alternatives such as screen capture technology, users could obtain the clips they want to use.

3. The Record Fails To Justify Eliminating The Screen-Capture Language

All three Petitioners in Class 1 ask for the elimination of the screen-capture limitation from the existing exemptions. BYU argues that screen-capture is not a viable alternative to circumvention because it produces low-quality and static copies, causes the loss of metadata, is time consuming, and does not prevent infringing uses.²⁶ Joint Educators IV claim that screen-capture is inadequate because “the image resolution, audio synchronization, and frame coherence of screen-capture can degrade picture quality, create distortions in image and audio, and drop frames at critical moments.”²⁷ The Organization of Transformative Works claims that the screen-capture language makes the non-commercial video exemption difficult to understand and that most users do not use screen-capture technology.²⁸

As the 2018 Recommendation explained, “a requirement that users consider whether it is really necessary to engage in circumvention before doing so is consistent with the aims of the rulemaking.”²⁹ In addition, the screen-capture language serves an important purpose “to address the possibility that use of this technology could be deemed to involve circumvention. Inclusion of this provision can give a user comfort that if he or she uses technology that was marketed as a non-circumventing screen-capture tool, then the user can use the technology without fear of violating Section 1201 regardless of its actual technological operation.”³⁰ Both of these reasons justify keeping the screen-capture language. There is no evidence that the performance of screen capture technologies has degraded during the last three years.

²⁵ *Hidden Figures* is available on Amazon Prime and Disney +; *Stranger Things* is available on Netflix; *Game of Thrones* is available on Hulu; *Mr. Robot* is available on Amazon Prime.

²⁶ BYU 2020 Comment at 23.

²⁷ Joint Educators IV 2020 Comment at 7.

²⁸ Organization of Transformative Works, [Class 1 Long Comment](#) at 7 (Dec. 14, 2020) (“OTW 2020 Comment”).

²⁹ 2018 Rec. at 84-85.

³⁰ *Id.* at 85.

Congress intended this rulemaking proceeding to be a “fail-safe” mechanism to “allow the enforceability of the prohibition against the act of circumvention to be selectively waived, for limited periods of time.”³¹ Therefore, exemptions should be narrowly tailored to avoid swallowing the general rule against circumvention. Because the exemption in question applies only to “short portions” of works, screen-capture is the most narrowly tailored and appropriate method of obtaining access, as the user can capture only the short portion of the motion picture that the user actually needs to accomplish his or her purpose. In contrast, non-screen-capture methods involve bypassing protection measures in a manner that disables access restrictions and results in the creation of an unprotected, perfect, digital, in-the-clear copy of the entire work.

Moreover, the existing exemption does not *require* the use of screen capture and expressly allows for circumvention where a user “reasonably believes that non-circumventing alternatives are unable to produce the required level of high-quality content.”³² Additionally, some of the expressed concerns with the quality of screen capture clips are overstated, as the quality of screen capture services continues to improve.³³ None of the petitioners dispels previously posed questions about whether screen capture involves circumvention. Therefore, keeping the present language assures users that uses based on screen-capture remain exempt.

ITEM F: DOCUMENTARY EVIDENCE

We have included hyperlinks to webpages/documents within the body of this document. We also attach an Appendix. We are not submitting any other documentary evidence.

Respectfully submitted:

/s/ J. Matthew Williams
J. Matthew Williams (mxw@msk.com)
Sofia Castillo (szc@msk.com)
MITCHELL SILBERBERG & KNUPP LLP
1818 N Street, NW, 7th Floor
Washington, D.C. 20036
202-355-7904

³¹ H.R. REP. No. 105-551, Part 2, at 36 (1998).

³² 37 C.F.R. § 201.40(b)(1).

³³ See Cat Ellis, [The Best Free Screen Recorders 2021: Free Software to Capture All the Action](#), TECHRADAR (last visited Feb. 2, 2021); Paul Bender, [13 Best Screen Recording Software for Windows – Free and Paid \(Updated 2021\)](#), iSPRING (Dec. 17, 2020) (last visited Feb. 2, 2021).

Appendix

The digital ecosystem for enjoying motion pictures continues to evolve to the benefit of copyright owners, their licensees and consumers. MPA's members, and other producers and distributors of quality motion pictures, continue to seize opportunities to reach viewers with content they want to watch, in the formats they desire, for prices that are reasonable, and via devices on which audiences prefer to watch movies and TV shows. Copyright owners are embracing digital technologies to expand the reach of creative works and to make them available to audiences more broadly than ever before.

(a) *Digital Copies Available With Disc Purchases*

DVDs, Blu-ray discs, and Ultra HD discs are often sold in “combination packs” that include a “digital code” the consumer can use to access a downloadable digital copy of the motion picture through a variety of channels. For example, each MPA member that distributes titles on discs generally provides an avenue for redeeming digital codes through its website or through the *Movies Anywhere* website and app (discussed further below). For years, discs have been sold with digital codes, or with actual digital copies included on discs in the package at the time of purchase. These offerings are usually sold at a higher price than offerings that include only a disc with no access to a separate digital copy.

(b) *Disc-To-Digital Through Vudu*

If a consumer owns a disc that did not offer access to a digital copy, that consumer may be able to obtain a digital copy through the [Vudu](#) mobile application by scanning the disc's barcode. This [Disc-to-Digital](#) program enables a consumer who owns a DVD to obtain access to a standard-definition digital copy for \$2.00 or a high-definition digital copy for \$5.00. If the consumer owns a Blu-ray disc or Ultra HD disc, the consumer can obtain access to a high-definition digital copy for \$2.00.

(c) *Digital Retailers and Movies Anywhere*

Numerous digital retailers offer consumers the opportunity to obtain downloads of digital copies of movies and TV shows produced, distributed or owned by MPA members and other copyright owners. New releases are frequently available for \$19.99 in HD quality. Older titles are frequently available in HD quality for as little as \$9.99.

[Movies Anywhere](#) (previously known as “*Disney Movies Anywhere*”) continues to provide consumers with the ability, via its “Key Chest” technology, to link their accounts with participating digital retailers in order to bring eligible movies from those accounts into one synched collection and to make them available across all of their connected retailer accounts. In October 2017, *Movies Anywhere* launched its service with titles from Disney, Marvel and Lucasfilm, and almost every other MPA member. Eligible titles obtained through the redemption of digital codes included with Ultra HD, Blu-ray, and DVD discs, as well as through purchase from participating digital retailers are accessible through *Movies Anywhere*. The number of participating retailers has expanded significantly since the 2018 rulemaking proceeding and now includes [Amazon Prime Video](#), [Google Play](#), [YouTube](#), [iTunes](#), [Apple TV+](#),

[Fandango Now](#), [Microsoft Movies](#), [Vudu](#), [Verizon](#), [Xfinity On Demand](#), and [DIRECTV Movies](#).¹ Any eligible title obtained from a connected account with one of those retailers also becomes available via connected accounts with the other participating retailers' platforms (*i.e.*, once you connect multiple retailer accounts to *Movies Anywhere*, you can view movies purchased from, for example, *Vudu*, within your *Amazon*, *Google Play* and *iTunes* accounts). Consumers have used *Movies Anywhere* to store more than 280 million movies in user collections.

Movies Anywhere users may download movies from *Movies Anywhere* to as many as eight permitted devices for viewing via *Movies Anywhere* at any given time. These downloads are in addition to downloads that may be permitted by the participating retailers through linked accounts (*e.g.*, for viewing via iTunes). The number of times a user may download a single movie through a *Movies Anywhere* account to devices associated with the account is unlimited. A user may download movies to a maximum of sixteen different devices within a rolling twelve-month period. Given the large number of devices that may be used to access content using *Movies Anywhere* and linked accounts with participating digital retailers, a user's movie library becomes accessible to her entire family. Through *Movies Anywhere*, viewers can start streaming a movie on one device and finish it on another; two viewers can watch the same title on different devices at one time; and up to four viewers can stream different content on different devices at the same time.

Viewers can also use the [co-viewing](#) feature to invite up to nine other viewers to join a synched viewing of a movie that the viewers have in their libraries. Finally, *Movies Anywhere* now offers a feature called [Screen Pass](#), which allows eligible users to send up to three *Screen Passes* per month to another user to view a movie in their collection for a limited time with no additional cost. By combining the *Screen Pass* and co-viewing features, the number of viewers eligible to join a synched viewing increases to include users who do not have a title in their personal collection.

(d) *Digital Rental*

Digital retailers, including those mentioned above, and others, make motion pictures available for temporary digital rental at low prices. Once rented, the movies may be streamed directly from these services or downloaded temporarily to devices to enable mobile viewing. Some services, like [Amazon Prime Video](#), give the user up to 30 days to begin watching the movie after the rental price is paid. New release titles are often made available for \$5.99, even in high definition quality. Older titles are available for as little as \$2.99. [Vudu](#) offers free, ad-supported viewing options for some titles. These services supplement the availability of on-demand rentals from cable and satellite television providers.

(e) *Online Streaming Services and Over-The-Top Services*

Consumers continue to embrace streaming services that existed in 2018 – like [Hulu](#) (currently owned by MPA member Disney and MPA member Universal's parent company,

¹ In July 2019, the Ultraviolet digital rights locker service discontinued its operations. Many of the studios and digital retailers in Ultraviolet are currently participating in *Movies Anywhere*. Many Ultraviolet users have transferred their movie collections to *Movies Anywhere*.

Comcast), [Netflix](#) (which is also now an MPA member), [Crackle](#), and *Amazon Prime Video*, among many others, for viewing of both movies and TV shows on mobile devices, computers, smart televisions, and (increasingly during the last three years) cable boxes. In addition, MPA members have launched multiple new streaming services in recent years. [Disney+](#), [HBO Max](#), and [Peacock](#) all offer subscription access to long-time favorites and original programming/movies. HBO Max is currently even making Warner Bros. movies available for streaming for a 31-day period at the same time the films premiere in theaters. For sports programming, [ESPN+](#) is available directly to consumers for \$5.99 per month providing access to exclusive live events, original studio shows, and acclaimed series that are not on the ESPN networks, as well as on-demand access to an extensive archive of ESPN content. [Paramount+](#), which will offer movies from Paramount as well as television shows from other Viacom properties such as *CBS*, *BET* and *Comedy Central*, is scheduled to launch in March 2021.² And streaming services offered by non-MPA members are also proliferating, including [Apple TV+](#), [Discovery+](#), and many others. Streaming services offer consumers access to numerous titles for low monthly fees. For instance, basic access to *Hulu* is currently available for \$5.99 per month (or \$1.99 for college students) or \$59.99 for a year; *Disney+* is available for \$6.99 per month, or \$69.99 for a year; basic *Netflix* access is available for \$8.99 per month; and *Amazon Prime Video* is free to Amazon Prime members. Streaming services are also frequently included in cable television provider bundles. Many titles available on streaming services may also be downloaded for offline viewing while the user remains a subscriber.

Several of these services have also increasingly offered add-on subscription access to additional sources of programming. For example, *Hulu* provides subscription access to *HBO Max*, *Cinemax*, *Showtime* and *Starz*, news networks, broadcast networks and sports programming including on ESPN. This includes *Hulu's Live TV* option where consumers can view more than 65 live and on-demand TV channels on Roku, Android devices, iOS devices, Xbox One, Nintendo Switch, Playstation, Apple TV and Chromecast. These types of services allow for the use of multiple devices by a single account, which enables access throughout a household by multiple family members simultaneously.

(f) *Cable, Satellite, IPTV and Fiber-Optic Subscriptions*

Subscription television providers like [Comcast Xfinity](#), [Cox](#), [Spectrum](#), [AT&T TV](#), [Verizon Fios](#), [DISH Network](#), [DIRECTV](#), and [Sling TV](#) continue to offer large numbers of channels for real-time, in-home viewing. In addition, their on-demand and remote access options continue to grow rapidly and to enable access for subscribers to watch live programming. A subscriber to *Comcast Xfinity*, for example, can, on a laptop or mobile device, sign into an account, and watch all of the content stored on an in-home DVR associated with that account. The consumer can also order on-demand movies and TV shows on mobile devices, for limited-time rental or for long-term access. They may also watch linear and on-demand programming from various channels via computers or through apps on mobile devices, smart televisions or other connected devices simply by authenticating their cable or satellite subscription. For example, the same *Comcast Xfinity* subscriber can access the [Disney Now](#) app for free on their mobile device, AppleTV, Roku or other device to watch the live, linear stream of the *Disney*

² Brett Molina, [Streaming service Paramount+, featuring content from CBS, Viacom, to launch March 4](#), USA TODAY (Jan. 19, 2021).

Channel, Disney Junior and Disney XD, as well as to obtain on-demand access to a library of popular shows, shorts, and other content. These “TV Everywhere” services have revolutionized the way consumers enjoy their television and on-demand programming.

(g) *TV Shows and Movies Accessible Directly From Networks and Apps*

Networks continue to make more and more programming available for viewing directly to consumers, including back catalogues of programming and even live viewing of linear content, through websites and mobile applications, often for free (usually in exchange for watching advertising). For example, abc.com and the [ABC mobile app](#) allow free, ad-supported access to recent episodes of popular TV shows and full seasons of many “throwback” favorites. New episodes stream on-demand the day after they air for authenticated subscribers of cable and satellite provider partners. In addition, consumers have increasingly greater options for viewing movies and TV shows on ad-supported free video-on-demand (“AdVOD”) streaming platforms, such as *YouTube*, [IMDb TV](#) and [Tubi](#). These AdVOD platforms allow viewers to stream a variety of content via multiple devices without having to pay a fee to access such content.