



UNITED STATES COPYRIGHT OFFICE

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

*Please submit a separate comment for each proposed class.*

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, AACSLA has developed a separate technology for the distribution of audiovisual content in ultra-high definition digital format. This technology is identified as AACSLA2 and not AACSLA 2.0. This distinction in nomenclature is significant as the latter would suggest that it replaced AACSLA distributed on Blu-ray. It has not. AACSLA2 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 AACSLA, but does not explicitly include AACSLA2, such mention should not be inferred to include AACSLA2. Indeed, AACSLA2 is not subject to the proposed exemptions put forward by any Class 5 proponents.

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#### **ITEM B. PROPOSED CLASS ADDRESSED**

*Proposed Class 5: Audiovisual Works—Preservation*

#### **ITEM C. OVERVIEW**

For the reasons stated below DVD CCA and AACSLA object to the proposal.

**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 copyrighted 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*

Proponents are incorrect in their argument that the interplay between Section 108 and fair use for the preservation of DVD and Blu-ray discs is the same as that made in the 2018 Recommendation for computer programs. Section 108 has far more significance for copies of motion pictures distributed on DVD and Blu-ray discs than computer programs, including video games. On this very issue, the “Register was reluctant to make ‘sweeping generalizations’ about the possible application of fair use, noting that ‘disparate works may be involved in the preservation activity and the effect on the potential market for the work may vary.’”<sup>1</sup>

Motion pictures are offered and enjoyed in a manner very different than that of other expressive works. The distribution strategies for motion pictures are dynamic and varied, from movie windowing among platforms, to custom licenses for varied uses and users, including libraries. In light of this, libraries with DVD and Blu-ray disc collections are constrained to Section 108 in their desire to preserve copies of motion pictures distributed on DVD and Blu-ray discs. Understanding this, proponents reach for fair use and argue that a fair use analysis supports their desire to engage in preemptive preservation. To that end, they have overstated the facts regarding (i) the medium (optical discs) allegedly deteriorating and (ii) some dozen cherry-picked titles for being out of print, in order to manufacture a crisis that does not actually exist. Most, if not all, of these titles were released in another format before they were released on DVDs, or even Blu-ray discs, and when they were released in these formats, they were never widely distributed in any significant way. In fact, if these titles were books, they would likely be found in a prized “rare book” collection. Nevertheless, these complaints are at best *de minimis*, and the unavailability of

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<sup>1</sup> 2018 Recommendation at 239.

these identified movie titles certainly has nothing to do with CSS or AACS, the technological protection measure employed in DVDs and Blu-ray discs, respectively.

As explained below, proponents' request is overreaching in the latest effort in the on-going dialogue between rightsholders and libraries over server copies. This disagreement centers on the essential question of how to enable libraries to fulfill their vital societal role while not doing so at the expense of rightsholders. As with other unsettled questions of law, the Register should not decide this question in the Section 1201 proceeding.

## **II. *The Proposed Class Does Not Constitute A Proper Class***

### **A. The Proposal Does Not Replicate the 2018 Software Exemption**

The scope of the proposed exemption here varies widely from the 2018 exemption for computer program/video game preservation. The activity, at least, analyzed under the fair use analysis, was limited to the "reproduction and modification of programs for purposes of preservation and research."<sup>2</sup> Proponents' use is not similarly limited, as, arguably, *any* lawful use would be permitted.<sup>3</sup> Furthermore, the proponents seek to engage in "preemptive preservation of

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<sup>2</sup> *Id.* at 241.

<sup>3</sup> Admittedly, the scope of the actual exemption does raise some confusion, as it merely states circumvention is permitted "solely for the purpose of lawful preservation of a computer program." In her discussion, the Register stated

But it is unnecessary for the regulatory text to attempt to articulate the precise circumstances under which the preservation of program-dependent materials is noninfringing. Such an effort to define the lawful uses of works outside the class would seemingly exceed the proper scope of this rulemaking. Rather, it is sufficient for the exemption to provide that such preservation activity, to the extent lawful, is a permissible purpose for which an eligible user may engage in the circumvention covered by the exemption

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The Acting Register concludes that an exemption defined in this manner is unlikely to adversely affect the market for or value of program-dependent materials. The exemption does not purport to expand the permissible uses of such materials

motion pictures on discs that have not yet begun to deteriorate.” The 2018 computer program/video game preservation exemption permits circumvention of programs “that are no longer reasonably available in the commercial marketplace[,]” which in no way permits preservation of programs *anticipated to eventually be* no longer reasonably available in the commercial marketplace. Therefore, the breadth of proponents’ request is far more extensive than the 2018 computer program exemption.

While proponents suggest that the requested class is identical to the computer program preservation - “subject to the same conditions (only works not reasonably available in the commercial marketplace)”<sup>4</sup> - the proponents are also asking to engage in space-shifting as preemptive preservation. They do not offer any way that the proposed preemptive preservation

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beyond what is already allowed under existing law; it simply would facilitate such lawful uses where they depend on access to a separate program protected by a TPM.

2018 Recommendation at 255-56. The Register did clearly distinguish preservation “primarily to enable access by researchers for purpose of scholarship” from preservation “to make programs available more broadly.” *Id.* Indeed, it would be troubling to suggest that the foundation of the exemption rests on a narrow noninfringing activity but since the exemption beneficiary now has the additional copy, the beneficiary may arguably use that copy for any other lawful purpose. If the Register does intend to permit any other lawful purpose, then that reasoning would be unfair to content owners and would stray far from the notion of refining a class to enable particular uses and users.

More importantly, courts have been much more circumspect and have looked at the alleged transformative or beneficial purpose to conclude that the downstream users would still make use of the work as the initial purpose of the work intended. For example, in evaluating the defendant’s argument that “users transform the broadcasts by using them for their factual, not entertainment, content.” *Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104, 108 (2nd Cir. 1998). The court found: “it is not clear that all of Kirkwood’s target audience ‘transforms’ the broadcasts as he suggests. Talent scouts, who admittedly would not be listening in order to be entertained themselves, would nevertheless be listening for the entertainment value of the broadcasts rather than the factual content.” *Id.* at 108. Thus, a fair use analysis properly concerns itself with those downstream uses and whether those activities are legitimately transformative. Consequently, the Register should examine the uses made of the server copy after preservation because it is those very uses that will supplant the creator’s market for the copyrighted work.

<sup>4</sup> Initial Comments at 4.

can be reconciled with the limitation that the work is not reasonably available in the marketplace. Thus, there is no way to distinguish when circumvention should actually be permitted under the activity of preemptive preservation.

B. The Proposed Use Is Neither Non-Infringing nor Permissible Under Fair Use.

1. Section 108 Makes Clear How Preservation for Copies of Movies Distributed on DVDs Is to Be Accomplished

Clothed in the guise of preservation, proponents are actually seeking a broad license to space-shift copies of movies distributed on DVD and Blu-ray discs to copies on a computer (*i.e.*, server copies). They note that Section 108(c) on its own is insufficient to permit modern-day preservation, as the three-copy limit does not adequately accommodate the creation of a server copy for use by numerous simultaneous users.<sup>5</sup>

Whether the activity is referred to as preservation or space-shifting, a much more careful analysis is warranted than what proponents have offered. In this context, preservation of a copy of a movie distributed on optical disc is limited to the statutory framework provided by Section 108. Proponents understand this.<sup>6</sup>

2. Libraries' Own Guidance Requires Preservation to Be Done on Another DVD disc

In the guidance provided to libraries by the American Libraries Association (“ALA”), the ALA describes preservation for copies of movies that were then distributed on VHS. The question posed is whether the library can “convert [its] VHS library of educational videos in VHS format

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<sup>5</sup> Initial Comments at 2-3.

<sup>6</sup> Initial Comments at 2 (recognizing that reproduction of “motion pictures on deteriorating discs is permitted under 17 U.S.C. § 108(c), which permits duplication ‘solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen....’”).



to DVD. Is it a copyright violation to convert to DVD and discontinue use of the VHS tapes”<sup>7</sup>

The ALA response is:

In most cases, yes, it would be a copyright violation. Reproducing a VHS to DVD without the prior permission of the rights-holder is an infringement of copyright. This kind of reproduction is not exempt because it is not “fair use” and it does not qualify as a lawful reproduction. Where the VHS tape is lost, stolen or deteriorating or is in an obsolete format (a 3/4” tape is obsolete because the equipment is no longer being sold, but a VHS tape is not obsolete) and is not available in the DVD format in the market for a reasonable cost, the library can make a reproduction. But if the reproduction is in a digital format (DVD is digital), then that copy cannot leave the library premises.<sup>8</sup>

Here the guidance is simple - at the point that the library determines the DVD is deteriorating, and assuming that the library can verify that a replacement copy of the work cannot be obtained at a reasonable cost in the marketplace, then the library may make up to three replacement copies. The library will likely choose to make those copies onto three new optical discs (whether DVD or Blu-ray), as then the physical medium would not implicate the reproduction or distribution rights like a copy stored on a hard drive (*i.e.*, a server copy) would.<sup>9</sup>

Replacement copies recorded onto new DVDs will provide libraries with a minimum of another thirty years of use. The Library of Congress Preservation Research & Testing Division is examining this issue and it currently states, “[t]he accelerated aging study conducted by NIST revealed significant variations in the predicted longevity for the different DVD products tested, although most life expectancies were greater than 30 years.” Considering the current twenty years

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<sup>7</sup> Copyright for Libraries: Videos/Movies, American Librarians Association available at <https://libguides.ala.org/copyright/video> (last visited Feb. 7, 2021).

<sup>8</sup> *Id.*

<sup>9</sup> While the statute does not circumscribe libraries to the DVD format, proponents recognize that making a digital copy would not allow libraries to make further use of the copy, as the “three-copy limit does not adequately accommodate the requirements of modern digital preservation practices.” Proponents’ Initial Comments at 2-3.

or so of original life plus an additional 30 years after reproduction, libraries have an outstanding bargain of making fifty years of use for their DVD and Blu-ray disc acquisitions.

### 3. Creating Server Copies from Movies Distributed on Optical Discs Goes Too Far

Preservation cannot justify space-shifting or making server copies from copies of movies distributed on DVD and Blu-ray discs. Libraries understand that they have built their collection of movie copies by availing themselves of copies of motion pictures intended for the home recording market and that they are lending such home recording market physical copies to their patrons. In the *American Libraries* magazine, a contributor, informing the readership on some of the contours of the law, notes, “DVDs and Blu-rays released by major studios are generally intended to be used only by an individual or family inside the home.”<sup>10</sup> Nevertheless, as the mission of libraries “include[s] collecting publicly disseminated materials relevant to the their user communities”<sup>11</sup> Thus, libraries acquired these copies of works distributed on DVD and Blu-ray discs to offer them to the public by lending the physical copies and/or facilitating their viewing by patrons on library premises.

Nevertheless, the bargain of distributing copies of motion pictures in either optical disc format, specifically regarding their price, was premised on offering copies of films in a digital format 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, distribution of that copy did not unnecessarily expose

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<sup>10</sup> Kati Irons, Screening Legally Film programming for public libraries, *American Libraries Magazine* (Feb. 16, 2015) available at <https://americanlibrariesmagazine.org/2015/02/16/screening-legally> (last visited Jan. 21, 2021).

<sup>11</sup> Section 108 Study Group Report at 13.

the work to unauthorized further reproduction and distribution. In the Second Triennial Rulemaking the Register explained the economics here:

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.<sup>12</sup>

If the DVD or Blu-ray copy was going to become a server copy, then rightsholders would arguably be justified in demanding a far higher price.

More importantly, when advocates sought an exemption to undo or reset the \$20.00 deal for a TPM-protected copy of the work, the Register 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.”<sup>13</sup> Some ten years later, in the Fifth Triennial proceeding, when Public Knowledge, an advocacy group, advanced a proposal for space-shifting copies of movies distributed on DVDs to consumer’s media management software, the Register repeated this point again: “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.”<sup>14</sup>

When libraries collected these copies of movies at the \$20.00 price point, they benefited from the deal that was actually intended to foster the retail consumer market. While certainly not begrudging libraries their exercise of the “first sale” doctrine capability to serve their communities by lending physical optical discs to their patrons, intentionally extending this serendipitous benefit

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<sup>12</sup> 2003 Recommendation at 92.

<sup>13</sup> 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).

<sup>14</sup> 2012 Recommendation at 163.

to libraries by an exemption that authorizes space-shifting copies of copyrighted works from DVDs to a server copy is a policy determination that is best left to Congress, particularly when there are legitimate licenses offered to do just that.

#### 4. Commercial Advantage

Section 108 also instructs that statutory protection is available to those who are not engaged in copying for commercial advantage. The contours of what Congress meant are not clear, as the Five-Year Report on Section 108 issued by the Copyright Office after passage of the 1976 Copyright Act, notes:

Wholly apart from the legislative reports, moreover, one must remember that the statute provides simply that §108 privileges are available only to libraries who copy for neither direct nor indirect commercial advantage. If making and selling photocopies for a profit is the pursuit of a “direct” commercial advantage, and if the House and Conference Reports' interpretations are correct, it is not at all clear what, if anything, remains of the proscription of copying for an “indirect” commercial advantage. But, of course, that language must have some meaning, *i.e.*, there must be some photocopying in pursuit of an “indirect commercial advantage,” proscribed here, which would otherwise be lawful under §108.

The record is devoid of any enlightening discussion of this; and the Copyright Office is not now in the position to perform the fine policy-oriented analysis which the question demands.<sup>15</sup>

While the ultimate legislative intent may not be clear, the Copyright Office’s explanation of the provision does clarify the specific point that nonprofit libraries engaging in making copies can obtain commercial advantage without making money or harboring profit motives. Certainly, choosing not to compensate the rightsholders for the use made of their works bestows some quantum of commercial advantage, and perhaps “indirect commercial advantage” may describe the very context here – libraries may not be intentionally seeking to directly deprive rightsholders of compensation for the use of their works as they pursue their preservation interest, but

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<sup>15</sup> Report of the Register of Copyrights - Library Reproduction of Copyrighted Works (17 U.S.C. §108) at 83-84 (1983).

nevertheless they are indirectly (*i.e.*, unintendedly or consequently) benefiting by foregoing payment to the rightsholders.<sup>16</sup> Furthermore, the proposed activity of preemptively space-shifting entire collections – when licenses are nonetheless available – undoubtedly provides financial benefit in that more money is available to be spent on other priorities than collecting the rights to the copyrighted works. This becomes even more clear when a fair use analysis is applied without an unwarranted prejudice that nonprofit libraries claiming preservation are presumptively entitled to do so when that activity would be readily recognized as space-shifting in any other context.

C. 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.*<sup>17</sup> 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 first fair use factor, the character and purpose of the use, the appropriate 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

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<sup>16</sup> See, *e.g.*, *infra* note 30 (discussing the common library practice of collecting fees for rentals, often in the form of fines for rentals returned late, and noting that the highest fees are typically reserved for late returns of motion pictures).

<sup>17</sup> 869 F.3d 848 (9th Cir. 2017).

words, whether and to what extent the new work is ‘transformative.’”<sup>18</sup> 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. This judicial instruction is particularly helpful because it at least recognizes that in transformative fair use cases there is creation of a “new work” – but, in space-shifting there is no new work created. 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*<sup>19</sup> to explain the difference between making server copies for transformative purposes and making server copies merely to retransmit the same work via a different medium:

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.<sup>20</sup>

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<sup>18</sup> *VidAngel*, 869 F.3d at 861.

<sup>19</sup> *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (2003).

<sup>20</sup> *Kelly*, 336 F.3d at 819.

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 entire, identical work. Applying the language of *Kelly* 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."<sup>21</sup>

a) *The Non-Profit Nature of Libraries and Copying for the Purpose of Preservation 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 not-for-profit libraries. Nor does attempting to characterize or justify the space-shifting as preservation render 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.*<sup>22</sup> 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 the verbatim copying of works for those reasons as fair use. The Ninth Circuit summarized the District Court's decision as follows:

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<sup>21</sup> *Id.*

<sup>22</sup> 227 F.3d 1110 (9th Cir. 2000).

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.**<sup>23</sup>

At the outset, 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 assembly<sup>24</sup>

In reversing the district court and 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 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 purpose of the use – the Court was not swayed by the not-for-profit status or by the stated educational purpose - a favored purpose explicitly recognized under Section 107.<sup>25</sup>

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<sup>23</sup> *Id.* at 1115 (emphasis added).

<sup>24</sup> 227 F.3d at 1115.

<sup>25</sup> The Court 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).

227 F.3d at 1117.



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).<sup>26</sup>

Like PCG, proponents are similarly not-for-profit organizations engaged in a well-recognized, socially valuable activity - the provision of library products and services. 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 preservation purposes also fails to insulate them from a claim of infringement and fails to justify a finding of fair use, particularly since “preservation”—unlike education—is not even an identified activity under the preamble of Section 107. Indeed, Congress specifically addressed the “preservation” imperative for libraries and archives by providing detailed exceptions to the rights of copyright owners under Section 108.

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.”<sup>27</sup>

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

<sup>26</sup> 227 F.3d at 1117.

<sup>27</sup> *Harper & Row*, 471 U.S. at 562, 105 S. Ct. 2218.

Proponents are indeed attempting to exploit copyrighted works without paying the customary price. As will be discussed below, rightsholders 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”,<sup>28</sup> 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” or “benefit” from its distribution and use of MOA without having to account to the copyright holder. The first factor weighs against fair use.<sup>29</sup>

The similarity to proponents is striking. Libraries attract patrons by offering movies.<sup>30</sup> In fact, libraries have enormous collections of DVD and Blu-ray discs today because they made DVD

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<sup>28</sup> 227 F.3d at 1118. The Court noted 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”).

*Id.*

<sup>29</sup> 227 F.3d at 1118.

<sup>30</sup> Of course, libraries generally do not practice tithing. But in the event that proponents argue that fact renders the case inapposite to libraries, the Register may then want to consider that libraries collect revenue from fees and/or fines. Most libraries prefer fines (late fees) to fees collected on the front-end and DVDs usually incur the highest late fees. A 2017 article in the Library Journal notes:

and Blu-ray discs available to the public for lending. In discussing the business practice, a newspaper article in the *Star Tribune* notes, “[l]ibrarians welcome the strong demand for free movies as a way to get people through the door. ‘People use us as their Netflix,’ said Kathy Boyd, who manages the DVD department for Hennepin County’s Minneapolis libraries. ‘It’s the highest circulating part of probably any library in the country.’”<sup>31</sup> County libraries offered more titles than a movie rental store by two-to-one “with 70 percent of discs for grownups being checked out at any given time.”<sup>32</sup> Proponents understand well the practice of using movies to attract patrons because the same article ends with a quote from the then-president of the American Library Association, “With DVDs, you have a service that people want, so they go to the library and see that there are other things going on[.]”

As fulfilling patrons’ demand for movies is now an integral component of their mission, libraries have recognized that the market is moving to online streaming and they are trying to get online one way or another. Rather than licensing and entering into partnerships with rightsholders, proponents’ preferred solution would appear to be to space-shift entire collections that they possess

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A substantial majority of public libraries continue to depend on fines and fees for some portion of revenue, with 92 percent of survey respondents reporting fine collection for late returns. Eight-eight percent of small libraries collect overdue fees, and 98 percent of large libraries, serving populations over 100,000, do so. Not all libraries charge fines for every type of material—for example, some (five percent) do not charge fines for juvenile materials—but libraries almost universally charge late fees for DVDs.

See Jennifer A. Dixon, Seven A. Gillis, *Doing Fine(s)? / Fines & Fees*, *Library Journal* (Aug. 4, 2017) available at <https://www.libraryjournal.com/?detailStory=doing-fines-fines-fees> (last visited Jan. 26, 2021).

<sup>31</sup> Randy A. Salas, *Free movies! Line forms at the library - Patrons seem more than willing to wait, at times for months, to borrow a free DVD*, *STAR TRIBUNE* (Apr. 20, 2008) available at <https://www.startribune.com/free-movies-line-forms-at-the-library/17961639/> (last visited Jan. 22, 2021).

<sup>32</sup> *Id.*

from DVD or Blu-ray discs to library servers and then stream such server copies to their patrons under the rubric of fair use. But they are wrong in believing their preferred solution is a fair use. Because the use will offer libraries the benefit of preserving and attracting new patrons, just like the copying did for PCG to grow its congregation without compensating the copyright owner, the first factor does not favor 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 works. Following the *Worldwide Church of God* Court, “the creativity, imagination and originality embodied in [motions pictures] tilt the scale against fair use.”<sup>33</sup>

## 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.”<sup>34</sup> The decision in *Sony*<sup>35</sup> only permits the entirety of a work because of “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 its entirety free of charge.’”<sup>36</sup>

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<sup>33</sup> *Worldwide Church of God*, 227 F.3d at 1118 (citing *Dr. Seuss Enter., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1402 (9th Cir. 1997)).

<sup>34</sup> *Id.* at 118.

<sup>35</sup> *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 450, 104 S. Ct. 774 (1984).

<sup>36</sup> *Worldwide Church of God*, 227 F.3d at 1118 (citing *Sony*, 464 U.S. at 449-50).

Here, proponents have not been invited to make use of the works for free. As previously discussed, DVDs and Blu-ray discs 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 it 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.<sup>37</sup>

So, too, for libraries that are seeking to transition their DVD and Blu-ray lending operation to an online streaming service, a reasonable person would expect the libraries to pay some compensation to rightsholders. Accordingly, the “third factor, therefore, weighs against fair use.”<sup>38</sup>

#### 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.”<sup>39</sup>

Proponents’ proposed use is available for licensing by the copyright owners. Libraries have long taken public performance licenses from copyright owners. Those distributors serving

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<sup>37</sup> *Worldwide Church of God*, 227 F.3d at 1118-19.

<sup>38</sup> *Worldwide Church of God*, 227 F.3d at 1119.

<sup>39</sup> *Id.*

the library community include Swank, Movie Licensing USA (a division of Swank) and MPLC (Motion Pictures Licensing Corporation).

Swank offers its extensive collection to university libraries through its Digital Campus program.<sup>40</sup> Nearly half of all traditional brick-and-mortar universities and colleges take advantage of the offering.<sup>41</sup> 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.<sup>42</sup> Swank explained that, even if a title is not queued-up in the Digital Campus Program, it usually is not difficult to clear the rights to make the title available in the program.<sup>43</sup>

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

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<sup>40</sup> <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.

<sup>41</sup> Barbara Nelson Interview (Feb. 5, 2021).

<sup>42</sup> Barbara Nelson Interview (Feb. 5, 2021). Nelson explained that the number becomes overwhelming to customers.

<sup>43</sup> Barbara Nelson Interview (Feb. 5, 2021).

the title. While titles licensed by Swank for educational purposes are not available for entertainment purposes, as other services provide streaming titles for “lending” services, Swank is clearly meeting the preservation need claimed by proponents.

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.<sup>44</sup> Finally, Swank reports that film studies professors love their program.<sup>45</sup>

But even more obscure titles are available to license.<sup>46</sup> For example, Canyon Cinemas has a robust licensing program for schools and libraries. Brett Kashmere of Canyon states that it has

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<sup>44</sup> Barbara Nelson Interview (Feb 5, 2021).

<sup>45</sup> 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.

<sup>46</sup> 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.

...

been providing to schools and libraries both public performances licenses for exhibition for many years and more recently streaming licenses.<sup>47</sup> These licenses are offered for periods of one, three, or five years.<sup>48</sup> 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.<sup>49</sup> Finally, Canyon expects that this segment of the market will grow, and it will represent a larger percentage of its revenue in the future as the market trend is to online streaming.

Courts have considered the fourth factor in similar circumstances, when licenses were available for the activity. In *American Geophysical Union v. Texaco Inc.*,<sup>50</sup> 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. It is especially appropriate to do so with respect to copying of articles from

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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.

<sup>47</sup> Interview with Brett Kashmere, Executive Director (Jan.18, 2021).

<sup>48</sup> *Id.*

<sup>49</sup> *Supra* note 47.

<sup>50</sup> 60 F.3d 913 (2nd Cir. 1994).



Catalysis, a publication as to which a photocopying license is now available.”<sup>51</sup> 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.”<sup>52</sup>

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) libraries are regularly entering into these licenses. Consequently, rightsholders will suffer harm as a result of this loss in licensing revenue if making server copies from DVDs and Blu-ray discs is permitted under the proposed scope of the exemption. Therefore, the fourth statutory factor weighs again in favor of the rightsholders and against a determination of fair use.

Unsurprisingly, as each of the statutory factors weighs against a determination of fair use and in favor of rightsholders, a significant legal shift would be required to conclude that the proposed use, space-shifting, is protected under Section 107. This result should not surprise the proponents, either. As pointed out earlier, the ALA guidance starting point is that “[t]his kind of reproduction is not exempt because it is **not** “fair use” and it does not qualify as a lawful reproduction.” (emphasis added). While proponents seek to space-shift their collection of copies of films distributed on DVD and Blu-ray discs to computers, and subsequently launch online streaming services, Section 108 does not permit them to do that, and fair use does not support it, either. Consequently, the Register should not grant proponents’ exemption request.<sup>53</sup>

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<sup>51</sup> *Id.* at 931.

<sup>52</sup> *Texaco*, 60 F.3d at 931.

<sup>53</sup> The Register’s precedent on space-shifting is clear. In the 2018 Recommendation, the Acting Register repeated what the Register had said in the 2015 Recommendation:

### III. Section 1201 Has Not Caused the Harm Claimed by Proponents

#### A. Proponents Have Not Shown a Nexus between the Circumvention Prohibition and Any Inability to Engage in Preservation Activities

The proponents at no time offer any evidence that the prohibition against circumvention is preventing them from engaging in preservation. They have ample discussion of their collections, disc rot, and allegedly out of print titles. But at no time do they draw a connection between the prohibition against circumvention and the activity of preservation. Thus, there is no *prima facie* case of harm.

In fact, proponents cannot claim that Section 1201 is interfering with preservation of copies of motion pictures, as preservation can already be achieved. They are able to preserve copies of motions pictures originally distributed by any portable medium (*e.g.*, 16 mm, VHS or DVDs) to new and high-quality recordable DVDs and Blu-ray discs under the provisions of Section 108. They can even preserve these copies of film to a hard drive, if the movie is performed on-premises to one user at a time. Of course, Section 108 does not authorize the multiple copies that would be required to make any further use of that copy on a hard drive by multiple simultaneous users remotely, but the work is indeed preserved.

If the need to preserve copies of work was really the primary motivation for proponents' exemption request, then proponents could have put forth a more reasonable request that would

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The Register has declined to recommend an exemption for such uses in the past four rulemakings because the proponents have failed to establish a legal or factual record sufficient to establish that the space-shifting and/or format-shifting of audiovisual works, e-books, and other copyrighted works constitutes a noninfringing use. When considering space-or format-shifting for the transfer of copyrighted works to different devices or the creation of back-up copies, the Register has consistently found insufficient legal authority to support the claim that these activities are likely to constitute fair uses under current law.

2018 Recommendation at 113 (reciting 2015 Recommendation at 108-09).

permit them to circumvent certain titles of motion pictures that would qualify for a Section 108 replacement copy if proponents demonstrated that the titles they were seeking to preserve were indeed distributed on CSS-protected DVDs, though, as explained below the titles proffered by proponents likely were not distributed on CSS-protected DVDs. Thus, circumvention is not required in order to preserve them. Proponents, however, are not proposing an exemption limited to a replacement/preservation copy mirroring the limits of Section 108.<sup>54</sup> Instead, proponents seek to space-shift the copy distributed on the DVD or Blu-ray disc to a computer and use that server copy to enable libraries to take advantage of other forms of distribution/exploitation, such as streaming to multiple remote users simultaneously. Because they are more concerned with this latter use, proponents have not even attempted to suggest that access would be limited to “researchers for purposes of scholarship.”<sup>55</sup>

Again, proponents, who seek to engage in space-shifting, run afoul of fair use requirements and, in the case of libraries, Section 108. The Register particularly understands this limitation of the law, as she convened the Section 108 Study Group in 2005, which released its report in 2008. She again launched discussion of reform in the summer of 2016 and issued the discussion draft in September 2017. To the extent that the reasoning for preservation of computer programs found in the 2018 Recommendation would represent an evolution in the perspective on these shortcomings,

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<sup>54</sup> For example, the Study Group drew this distinction.

The Study Group finds that it is important to separate preservation and access activities conceptually in order to craft workable, balanced preservation exceptions. If libraries and archives are concerned about preserving works in their collections, and if rightsholders perceive that their ability to exploit their markets could be harmed by lost sales and increased user access to these works, then an obvious solution is to allow preservation copying without increasing access.

Study Group Report at 77.

<sup>55</sup> 2018 Recommendation at 240 (discussing the aim of the exemption request for the preservation of computer programs).

the Register should consider that the exploitation of motion pictures is much more robust than that of the computer programs at issue (or even video games) and preservation can still be achieved without space-shifting.

But assuming *arguendo* that CSS or AACS were in fact causing measurable, quantifiable harm, the complaints here do not warrant an exemption, as they are overstated, and/or the works are still available in another format.

B. Most of the Alleged Out-of-Print Works Are Not CSS-protected

CSS protection is not employed on all titles released on DVDs. CSS is typically added at the point that the “master” is authored, at the direction of the rightsholder. The DVD replicator will then press the DVDs from the master. The common wisdom indicates that including CSS may be more cost effective for a creator when they expect to sell at least 5000 copies, and at the very least they would need a minimum order of 500 to 1000 units before a replicator would even accept a job that included CSS.

In light of the above, the possibility that the titles identified by proponents would include CSS is highly unlikely. As explained below, most of these titles were not originally released (published) in the DVD format, and when they were released, they were never widely released. Proponents referred to this as “limited print runs.” In any other context calling them “rare” would also be accurate. Nevertheless, the release of these rare titles served highly niche markets from which rightsholders would not expect the kind of copying that CSS-protected against with respect to box-office or feature films distributed on DVDs.

C. Cherry-Picked Titles Were Not Originally Released in the DVD Format, Were Never Widely Available in DVD Format and Are Still Available in Some Other Formats

A review of some of the rare titles identified by proponents demonstrate that these limited-run works were, for the most part, not originally published in the DVD or Blu-ray formats. Moreover, in some cases the works are currently available for purchase, and sometimes in multiple formats including DVD and/or Blu-ray. Of the list of rare titles, the proponents discuss the Blu-ray edition of *Red Sorghum*, a film demonstrating how rightsholders have exploited the work in different formats. The film was released in theaters in 1987 and is available from Amazon - a VHS edition released November 11, 1998 is available for \$3.99 (used), in the DVD format without region codes released January 12, 2009 for \$8.08 (new); and in the Blu-ray format for \$299.00. Moreover, the motion picture is available for streaming outside the United States on Amazon Prime.

*Freedom: The History of Us*, which is an epic, 16-part PBS series based on a book, aired originally in 2003. The four-pack DVD collection is still offered in the PBS store for \$250.

*This Is Edward R. Murrow* consists of two twenty-minute anthologies compiled and aired in 1965, shortly after the legendary reporter's death. The anthologies consist of segments of his television news broadcasts. The anthologies were originally released on vinyl records in 1975, 16 mm film in 1976, VHS tape in 2000, and finally DVD in 2005. Copies in the vinyl format are more available with even new or mint copies available for purchase for less than \$30.00. Copies of the work in the DVD format can be found in at least six libraries, while at least 26 libraries have the work in any of multiple formats. While this work is extremely rare, the segments comprising the anthology are widely available on an array of titles available from Amazon in DVD and Blu-

ray formats, including the four-pack DVD set *The Edward R. Murrow Collection*, which is still in print and available from Amazon for \$20.77.

*The Uncounted Enemy: a Vietnam Deception* is another rare work released in multiple formats. Similarly, copies of this work can be found in select libraries on DVD and in other formats.

*Ascension of the Demonoids* is an art-house film released in multiple formats. Again, a DVD copy of the work can be found in a few university libraries.

While an exhaustive review of all the titles has not been conducted yet,<sup>56</sup> the results are clear. If there is a problem with these titles at all, which there is not, that problem is not the result of the application of technological protection measures.

#### D. Disc-Damaged Titles Are Available for Purchase

Proponents overstate the proposition that titles are unavailable for purchase because the discs are defective. *Joan Crawford Collection Volume 2* is available from Amazon for \$79.66 with 96 reviews and a total rating of 4.4 out of 5 stars. Clearly, not all releases of this title were defective. Moreover, the top one-star review, acknowledging the DVD manufacturing flaw states, “[h]ad two copies of this and they were both defective. Had to return them. Bad press run back in 2008. Recently re-purchased each movie separately with the same extras on Warner Archive with no problems[.]”<sup>57</sup> So even if the DVD manufacturing defect was pervasive, which it was not, the same bonus features included in the box-set were also included in the individual DVDs.

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<sup>56</sup> See Appendix for a review of the other identified titles.

<sup>57</sup> Amazon Customer Review, *The Joan Crawford Collection, Vol. 2* (July 31, 2019), available at [https://www.amazon.com/gp/customerreviews/R1O3PI75ILYPTT/ref=cm\\_cr\\_dp\\_d\\_rvw\\_ttl?ie=UTF8&ASIN=B000XNZ7NO](https://www.amazon.com/gp/customerreviews/R1O3PI75ILYPTT/ref=cm_cr_dp_d_rvw_ttl?ie=UTF8&ASIN=B000XNZ7NO) (last visited Jan. 27, 2021).

*Reflection in a Golden Eye* (Warner Bros. 2006) is also available from Amazon with 266 reviews and a total rating of 4.4 out of 5. While the most critical reviews do suggest that the one-star review was earned due to disc problems, the percentage of one-star review was a mere two percent of the overall reviews.<sup>58</sup> Moreover, the work is also available to stream for \$1.99, to rent for \$7.99, and to buy, on Blu-ray for \$20.99, on DVD for \$14.99, and even on VHS tape at \$4.95.

*Rise of the Planet of the Apes* (Blu-ray). The title has 7,148 global reviews, only two of them complain about a problem with the discs - and both of those complaints were from outside the United States. But again, even if every copy of the work distributed in DVD were defective, the work is readily available in multiple formats.

E. Bonus Material Alone Has Never Warranted an Exemption

Access to bonus material has never in itself been a basis to grant an exemption.<sup>59</sup> The Register has acknowledged that in past proceedings the record showed that some bonus material may only have been available on Blu-ray. “However, the few cited uses of Blu-ray exclusive content are insignificant in number.”<sup>60</sup> Proponents certainly have not developed a record of a significant number, if any at all, as the cited works are indeed available in other formats.

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<sup>58</sup> The rest of the reviews, specifically the two-star reviews appear to address the artistic elements of the title.

<sup>59</sup> See, e.g., Recommendation at 138 (finding that Blu-ray only items was insignificant and documentary filmmakers did not need Blu-ray quality for its use, including documentary standards). When the unavailability of bonus features mattered was dependent upon the particular use developed on the record. See 2015 Recommendation at 52-53 (recognizing that some remix artists rely on Blu-ray bonus material for “examining and critiquing assumptions in the original work.”). Indeed library proponents have not made a persuasive case of the need for the use of bonus material as what they suggest is not exclusive to a particular format.

<sup>60</sup> 2012 Recommendation at 138.

1. Proponents' Discussed Example of Bonus Material Is in Fact Available on Streaming Services

The proponents discuss bonus material, *Hitler's Court*, included with the DVD *Memory After Belsen* as an alleged example of bonus material not offered on streaming services. However, this bonus material is indeed available on Amazon Prime, which is a readily-available streaming service.

2. Proponents' Other Cited Examples Are Found on DVDs that Are (or will be) Widely Available

As of the submission of this comment, *American Heretics: The Politics of the Gospel* [DVD] has not even been released yet. It is scheduled for release in February 2021 and can be pre-ordered from BestBuy for \$17.99.<sup>61</sup>

#### IV. *Statutory Factors Weigh Against the Creation of the Class*

The proponents' analysis of the statutory factors is inapposite to the reasoning the Register provided for the preservation of computer programs or even video games.

- A. Availability for Use of Copyrighted Works

In her 2018 Recommendation for preservation of video games, the Acting Register reasoned that the proposed exemption favored the statutory factor of making more copyrighted work available for use. "A relatively narrow exemption, drawing upon some of the principles of section 108, would allow libraries, archives and museums to restore and maintain access to video games that might otherwise be lost, thus enhancing the availability of copyrighted works."<sup>62</sup> First, proponents have not proposed a narrow exemption. Moreover, unlike the video game context where video game preservation was conditioned on "preserving the game in a playable form" (*i.e.*,

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<sup>61</sup> *We Are Egypt*, *Golda's Balcony* and *Behind the Wall* are all available for purchase.

<sup>62</sup> 2018 Recommendation at 279.



so that it may be played), the fair use analysis does not support subsequent use of the motion pictures because it actually supplants the original use of the copyrighted work for in-person home viewing via playback from an optical disc. Finally, there is no chance that these motion pictures will be lost, like abandoned video games, as rightsholders are exploiting these works and providing libraries with offerings that accomplish the desired activities.

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

The proponents' comments fail to make any reference to educational purpose, as they have not limited the exemption to preservation to enable scholarship and research. More importantly, the context of preservation of a copy of a motion picture is radically different than that of video game preservation. In the context of video games,

scholars and educators [did] not have access to most abandoned online video games. In turn, [videogame preservation proponents] argue [ ], preservation will enable future study, including allowing researchers to 'get inside' the software, and understand the development of the technology.<sup>63</sup>

With the preservation of motion pictures distributed on DVD or Blu-ray discs, there is no threshold issue of access, as the work can be fully studied when played back and that is equally true for a preservation copy or a replacement copy of the movie made preferably on an optical disc. Therefore, the factor should weigh against the creation of an exemption.

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

This reasoning is equally applicable to the third factor. Although proponents have not proffered that preservation is any more made for the purpose of criticism or comment than their preservation is for scholarship and research, criticism or comment is not restricted by the

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<sup>63</sup> 2018 Recommendation at 280 (references and quotations omitted).

circumvention prohibition nor will copying to another optical disc for preservation purposes restrict the ability to make use of the copy of the motion picture for the purpose of criticism or comment.

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

The issues are fundamentally different for the fourth statutory factor for the preservation of motion pictures than they are for the preservation of computer programs or video games. In the 2018 video game preservation analysis, this factor turned on whether the “exemption would harm the market for sequels or reissued older games” and the possibility for piracy. Here the proposed space-shifting of motion pictures to a computer threatens to supplant the market for the work as rightsholder are simultaneously exploiting this market and making the works available under various licensing arrangements. Permitting circumvention for space-shifting activities would be a profound setback for these legitimate efforts.

The issue here for a license to space-shift is very much akin to issues identified in the Section 108 Study Group Report. The Report summarized succinctly the very real possibility that in some cases, unlicensed space-shifting and streaming would better position libraries for digital offerings than the publishers:

[This use] could discourage the development of authorized digital rereleases and new media markets, particularly in an environment in which copyright owners are actively seeking to develop new business models based on “on-demand,” remote access to their works. In some cases, allowing remote access to electronic replacement copies could grant a library or archives greater rights than the publisher itself has. For example, a publisher may not own the rights necessary to rerelease the work electronically, or may be in the process of acquiring the rights. This process often demands a sizable investment of time and money, and a publisher would be at a competitive disadvantage to a library or archives that is able to

digitize and provide online access to the same work without engaging in any rights clearance process.<sup>64</sup>

While this argument was clearly articulated in the Report around remote access (lending); the concern is not limited to lending. Moreover, proponents are asking for remote access as they state that if the Register grants their request to expand the video game and software preservation exemptions to off-premises uses, then proponents want an exemption for the preservation of copies of motion pictures to include off-premises uses.<sup>65</sup>

In light of the foregoing, weighing the statutory factors does not favor the creation of an exemption.

## **V. Conclusion**

For the reasons stated above the proposed exemption, which would create an unprecedented license for libraries to space-shift copies of motion pictures distributed on DVD or Blu-ray discs to a server copy that may be used to redistribute copies of motion pictures by stream or digital download, simply is not warranted.

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<sup>64</sup> Section 108 Study Group Report at 59.

<sup>65</sup> Initial Comments at 5, Item E.



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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."