

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 (“AACS LA”), is a cross-industry limited liability company with its principal offices in Beaverton, Oregon. The Founders of AACS LA are Warner Bros., Disney, Microsoft, Intel, Toshiba, Panasonic, Sony, and IBM. AACS LA licenses the Advanced Access Content System (“AACS”) technology that it developed for the protection of high definition audiovisual content distributed on optical media. That technology is associated with Blu-ray Discs. AACS LA’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, AACS LA has developed a separate technology for the distribution of audiovisual content in ultra-high definition digital

format. This technology is identified as AACS2, and not AACS 2.0. This distinction in nomenclature is significant, as the latter would suggest that it replaced AACS distributed on Blu-ray. It has not. AACS2 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. While proponents suggest that they want to circumvent UHD Blu-ray discs protected by AACS2, they have not demonstrated that they need UHD Blu-ray content any more than they have demonstrated that they need any other high quality content distributed on DVD or Blu-ray discs.

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

*Class 7(a): Motion Pictures - Data Mining*

## **ITEM C. OVERVIEW**

DVD CCA and AACS LA object to the proposed class as it would create a broad exemption to library dataminated copies of motion pictures that have been ripped CSS and AACS – protected DVD and Blu-ray discs.

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

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

**ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES**

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## **I. *Introduction***

The proposed class should be rejected. As explained below, the class –which would permit circumvention of TPMs protecting motion pictures on DVD and Blu-ray discs for the purpose of datamining - is impermissibly broad, as defining such a class would allow a boundless number of uses – for which there would be no supporting record evidence. Furthermore, the activities surrounding the datamining of the entirety of motion pictures cannot clearly be said to be noninfringing.

The precedent of this proceeding has recognized a finding of noninfringing use of motion pictures is more likely when the proposed use is limited to brief portions of the work. In past proposals, where the entire motion picture would be used, such as space-shifting for personal use or space-shifting for education purpose, the Register has repeatedly rejected such proposals on the ground that this proceeding is not the venue to resolve unsettled areas of law. To the extent datamining requires the interim step of space-shifting copies of motion pictures distributed on protected optical discs to a server copy, then that space-shifting cannot be said to be noninfringing, as the precedent of the proceeding has refused to find it so.

But, even assuming that the infringing nature of the interim step of space-shifting is overlooked, more information is absolutely required to analyze and understand the proposed librarying of the works and application of “data mining techniques” to the resulting library. The questions of “how?” and “for what purpose?” are relevant to the fair use analysis, as fair use requires case-by-case analysis. Thus, despite proponents’ assertion otherwise, no generalization can be drawn from the Google decisions, as the case law has permitted “search function” in some cases - mostly involving texts - and rejected fair use in other cases such as when a searchable library of collected news broadcasts included a viewing functionality. Because the context of the analysis matters, and insufficient information has been submitted by proponents here, the Register

should continue the practice of refraining from using this proceeding to resolve unsettled areas of the law.

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

### **A. The Requests Would Go Beyond the Statutory Limitation Requiring Exemptions from This Rulemaking to Apply Only to Those Beneficiaries Specifically Determined Pursuant to the Rulemaking**

Congress created a temporary exemption for persons in situations for which the Librarian has “determined, pursuant to the rulemaking . . .,” that such persons “are, or are likely to be, adversely affected” by virtue of the circumvention prohibition “in their ability to make noninfringing uses . . . .” Section 1201(a)(1). The statute thus limits the rulemaking to exempting certain uses from the general prohibition against circumventing TPMs based on the determination resulting from the rulemaking proceeding. The plain language of the statute requires identification of the persons who are adversely affected and a determination based on the rulemaking that those adverse effects exist in relation to noninfringing uses. There are to be no beneficiaries of the exemption based on vague references or suggestions. In this context, the proponents are not adversely affected, as the use they seek to make is not clearly noninfringing and there are available alternatives to circumvention. Further, the proposed class does not even suggest which users may avail themselves of the exemption, arguably seeking to apply the exemption to any and all users.

The House Commerce Committee, which created the rulemaking during its consideration of the WIPO treaties, which, in part, became Section 1201, did not contemplate a regulatory proceeding that would result in broad waivers to the general circumvention prohibition, such as an exemption for any and all fair use under Section 107, or for any and every activity permitted under Section 110 (1) (the classroom exception). Instead, the Committee foresaw “selectively waiv[ing]

[the prohibition against circumvention] for limited time periods, . . . for a particular category of copyrighted materials.”<sup>1</sup>

Not only did the Committee envision any exemption to be selective and particular, but also that the exemption would be fully evaluated in the rulemaking (in keeping with the statutory requirement that the exemption be “pursuant to the rulemaking”). The Commerce Committee Report instructs that any exemption resulting from the rulemaking is to flow from the “development of a sufficient record as to how the implementation of these technologies is affecting the availability of works in the marketplace for lawful uses.”<sup>2</sup> Most importantly, the Committee was quite clear that “the rulemaking proceeding should focus on distinct, verifiable and measurable impacts, [and] should not be based upon de minimis impacts . . .”<sup>3</sup> This instruction alone would render the current request – if it intended to permit datamining by anybody for any purpose - impossible to grant, as this rulemaking could never handle the quantum of evidence that would be necessary to support an unbound exemption enabling datamining for any purpose by anybody.

Congress’ final direction was that a particular class of work should “be a narrow and focused subset of the broad categories of works of authorship than is identified in Section 102 of the Copyright Act (17 U.S.C. § 102).”<sup>4</sup>

#### 1. Proposed Class is Impermissibly Broad

The proposed class is clearly too broad. Proponents have identified in their initial comments the class to be “lawfully accessed motion pictures where circumvention is undertaken

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<sup>1</sup> House Commerce Committee Report at 36.

<sup>2</sup> House Commerce Committee Report at 37.

<sup>3</sup> *Id.* at 37.

<sup>4</sup> *Id.* at 38.

in order to deploy data mining techniques,”<sup>5</sup> while in their petition they had also included reference for the purpose of research. Whether the class proposed class is now only “in order to deploy data mining techniques: or as proposed in the petition circumvention to employ data mining techniques for the purpose of research, the scope of the class is impermissibly broad. Indeed, the scope of the class and the evidence supporting the class are fundamental to the rulemaking, as the record has to identify the noninfringing use in order to determine whether the circumvention prohibition is indeed adversely affecting the alleged noninfringing use.

*a) Circumvention in Order to Deploy Datamining Techniques*

The current exemptions permitting the use of motion pictures demonstrate that deployment of datamining is insufficient to establish a class. The current exemptions of motion pictures permit circumvention for the purpose of making use of short clips of a motion picture. The creation of the clip itself - while useful for justifying the use under Section 107 analysis - is merely an interim step to the actual intended use of the motion picture. Similarly, deploying datamining techniques is an interim step for the proposed class and cannot in itself suffice as a “use” as that term has come to mean in this rulemaking.

*b) “Research Purposes” Is Impermissibly Broad as Well*

Defining the class to enable research purposes does not bring the class within Congress’ instruction that the class represent a narrowly focused subset of a category of works. In their petition, proponents suggested that datamining would be done by researchers in the humanities, social sciences, and sciences. This, however, does little in the way of refinement, because, while any reference to “researchers” makes explicit what was otherwise implicit in the activity of datamining (*i.e.*, “employment of datamining techniques” appears unlikely to be an activity a

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<sup>5</sup> Initial Comments at 4.

layperson would be able to do), even the term “researcher” is extremely broad. While the term may invoke a vision of faculty, staff, and even students at public, not-for-profit university, employees at a private company could also qualify as researcher. Finally, qualifying researchers to be in the “humanities, social sciences and sciences” does little to refine the class, as they represent all the major fields of studies. Thus, the proposed class as identified in their initial comments is not improved by what the proponents had additionally offered in their petition.

c) *“Research Purposes” Is Akin to a Categorical Exemption for “Education Purposes”*

In fact, a proposed class for “research purposes” is almost identical to a categorical exemption for education purposes, which, being too broad, the Register has previously determined could not constitute a permissible class. A mere requirement that a use be “noninfringing” or “fair” does not satisfy Congress’s mandate to craft “narrow and focused” exemptions. For this reason, the Register has previously rejected broad proposed categories such as “fair use works” and “educational fair use works” as inappropriate.<sup>6</sup>

The 2015 Recommendation pointed to the seminal Third Triennial Rulemaking, which constituted an evolution in how the Register would refine a class by uses and users. In announcing her new standard for a class of works, the Register considered the film professors’ petition, which sought an exemption to circumvent for the purpose of classroom teaching.<sup>7</sup> The Register started her analysis from the mandate that a “particular class of copyrighted works” be a narrow and focused subset of works of authorship. She noted that prior attempts to define a class by uses such as “fair use works, per se educational fair use works” had been rejected.

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<sup>6</sup> 2015 Recommendation at 100 (citation omitted).

<sup>7</sup> Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies at 19-24 (Nov. 17, 2006) (“2006 Recommendation”).

Such proposed classifications did not constitute narrowly focused subsets of categories of works. Instead, these proposals sought to define a “class” primarily or solely by reference to the intended use or user. It remains a sound conclusion that a “class” that is solely or primarily defined by reference to a particular use or a particular user is inconsistent with the legislative language and intent.<sup>8</sup>

Here, the proponents’ proposal “for research purposes” seeks to define the proposed class “solely or primarily defined by reference to particular use,” as prior proposals had for unidentified education uses. The Register explained, however, that this would not withstand scrutiny when the statutory factors are considered.

In 2006, the Register addressed how the application of statutory analysis differs between a well-refined class and those classes that are solely or primarily defined by reference to use. On the first factor (the availability of copyrighted works), the Register found that studios “are not likely to be deterred from releasing works on DVDs when “the class of works is more narrowly defined, permitting circumvention only by college and university film and media studies professors for classroom teaching[.]”<sup>9</sup> As for the second factor (the use of works for nonprofit archival preservation), the Register reasoned,

the analysis [would likely] be very different for a class of works consisting of all motion pictures on DVDs than it would be for a class of motion pictures in the educational library or a college or university’s film or media studies department, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by media studies or film professors. This statutorily favored purpose would be more clearly served by an exemption in the latter case than in the former.<sup>10</sup>

The Register reasoned that this finding would also be true for the third factor (the use of the work for criticism, comment, news reporting, teaching, scholarship, or research). On the final factor (the effect on the market for or value of the work), the Register noted that “the analysis will

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<sup>8</sup> See, e.g., 2006 Recommendation at 17.

<sup>9</sup> 2006 Recommendation at 19.

<sup>10</sup> *Id.* at 19-20.

be very different depending upon whether that class consists of all motion pictures on DVDs or only of motion pictures used by film and media studies professors for classroom teaching.” Here, the Register should find that the proposed class “for research purposes” is equally impermissible as prior proposals that sought to create broad classes “for education purposes.”

*d) Research Activities for Development of A.I. and Machine Learning*

In fact, the Copyright Office in the NPRM asked the proponents to better identify “the nature of proposed research activities” (the purpose), which gets to the heart of the determination whether the proposed use is indeed noninfringing.<sup>11</sup> In response to the NPRM, the proponents proffered sixteen researcher letters. Thirteen of the letters exclusively address making use of text and literary works, and of the remaining three letters, only two of the letters discuss how the researchers would make use of motion pictures. The third letter, from Lauren Tilton, discussing the use of audiovisual works, however, brings more clarity to this rulemaking regarding the possible commercial use of datamined motion pictures. She complains that Section 1201 means that “two of the most culturally, socially, and politically powerful forms of media in the world – US film and television – cannot be studied using computational methods. It also limits methodological innovation at the intersection of AI, machine learning, and audiovisual data.” Simply put, Tilton tells us that motion pictures are the raw material that, when processed by datamining, results in more information (knowledge) that can be applied of the development of the commercially explosive technologies of machine learning and artificial intelligence.

Tilton further reveals that the priority of using datamined motion pictures is indeed for the further development of machine learning and artificial intelligence.

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<sup>11</sup> Exemptions to Permit Circumvention of Access Controls on Copyrighted Works 85 Fed. Reg. 65293, 65305 (Oct. 15, 2020) (Notice of Proposed Rulemaking “NPRM”).

[the DMCA] puts American scholars at a competitive disadvantage to scholars in other parts of the world, specifically the European Union. National commitments such as the Netherlands's CLARIAH project and continental commitments such as the EU's DARIAH infrastructure are opening up extensive data for distant viewing, reading, and listening at institutions across the EU. These scholars are positioned to innovate in AI and machine learning while scholars in the United States are legally barred from this kind of research. Therefore, our appeal is not just about specific research areas, but a call to remove a barrier that prevents US scholars from being at the forefront of TDM with audiovisual data in the global community.

Thus, the use of datamined motion pictures really is about international competitiveness in the commercially-valuable areas of AI and machine learning. Therefore, not only is the class too broad, but it also includes commercial uses that would not readily qualify as noninfringing.

### **III. *The Proposed Use Is Neither Noninfringing nor Permissible Under Fair Use.***

#### **A. *The Precedent of the Proceeding Favors Making Use of Short Clips of Motion Pictures***

The precedent of this proceeding favoring the use of only short portions of motion pictures is predicated on the proposition that copying a short portion of a work is more likely to be noninfringing than copying a longer portion (or even the entire work). In the 2018 Recommendation, the Acting Register explained

the limitation to circumvention for uses of “short portions” of motion pictures is integral to the various proposals. While recognizing that the extent of permissible copying may vary, for purposes of this class, the “short portions” limitation provides useful guidance as to what is generally likely to be a fair use without imposing a wholly inflexible rule as to length. 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.<sup>12</sup>

The “short-portions” limitation has been in place for all of the current exempted uses of motion pictures since the 2012 Recommendation.

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<sup>12</sup> 2018 Recommendation at 46 (footnote reference omitted).

The 2012 Recommendation even recognized that while demonstrated educational uses may have permissibly been longer in length relative to the short portions other uses have been traditionally limited to, it was still subject to the guidance.

Under the third fair use factor, an essential component of the proposals is that only a short portion of the work is used. The record evidence suggests that most of proponents' cited uses involve only brief portions of the underlying work. . . the evidence demonstrates that, . . . not only is each relevant clip very short (rarely longer than a few seconds), but even multiple clips from the same motion picture, when used together, comprise an extremely small fraction of the entirety of the source material. In relation to a typical movie of perhaps 120 minutes, the excerpts are a quantitatively small amount, comparable to brief quotations from a book . . . . The record indicates that, in educational settings, the proposed uses are also usually short relative to the length of the entire work.

Most recently—and most relevant to proponents' arguments—the Register has rejected arguments that the entire motion picture may be used for educational purposes in the digital environment. She noted that, while the classroom exception permits the performance of the entire work under Section 110(1), the copies, implicating the reproduction and distribution rights, required for the performance in a digital transmission are indeed limited only to those performances permitted under the TEACH Act.<sup>13</sup> “[O]n its face, Section 112(f) does not permit nonprofit educational institutions to make copies to facilitate performances under Section 110(1).”<sup>14</sup> Thus, under Section 112(f), copies enabling transmissions (i.e., the making and temporarily storing of digital copies) are only noninfringing when the copies facilitate “reasonable and limited portions” of the motion pictures.

The Register also considered whether digital copies of whole motion pictures necessary for the digital performances could be warranted under fair use. She noted that there is no case law that supports the proposition that “ripping and library copies for educational uses are likely to be

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<sup>13</sup> 2018 Recommendation at 49-50 (reviewing Section 112(f)).

<sup>14</sup> 2018 Recommendation at 49.

fair under Section 107 . . . .”<sup>15</sup> While she also recognized the same cases that proponents rely on here, HathiTrust and Google, for the general propositions advanced by proponents, as explained below, that dicta was intended to distinguish between certain uses, carefully weighed by the courts, from the general proposition of space-shifting sought by other proponents. As far as the ability to engage in the sought-after space-shifting, the Register stated that “[a]s prior rulemakings have noted, current law ‘does not guarantee access to copyrighted material in a user’s preferred format.’”<sup>16</sup>

**B. The Precedent Establishes the Necessary Interim Step (Space-Shifting) Is Infringing**

While there is a dearth of information regarding exactly how proponents intend to make use of datamined motion pictures, the Register need only consider that use as far as its necessary interim step. Proponents explain “TDM [Text Datamining] requires creating a dataset of works of interest, which typically involves digitizing or downloading (i.e. reproducing) potentially copyrighted works in order to perform algorithmic extractions on them.”<sup>17</sup> That interim step, “creation of dataset of works” is fundamentally space-shifting, as any copy of a motion picture distributed on an optical disc must be stored on a computer.<sup>18</sup> The precedent of this proceeding has never found space-shifting to be noninfringing.

In the 2018 Recommendation when considering space-shifting proposed by a business, OmniQ, and others, the Register noted:

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<sup>15</sup> The Register also discussed the favored cases proponents advance now. That discussion however was dicta and explained why they did not permit space-shifting.

<sup>16</sup> 2018 Recommendation at 53.

<sup>17</sup> Initial Comments at 4.

<sup>18</sup> 2018 Recommendation at 111 (recognizing that “[s]pace-shifting’ occurs when a work is transferred from one storage medium to another, such as from a DVD to a computer hard drive.”).

In prior rulemakings, while past Registers have recognize[d] the consumer and policy appeal of an exemption for space-shifting, they have regularly declined to recommend such an exemption. As the Register summarized in the last triennial proceeding:

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.<sup>19</sup>

The Register recognized developments in the law since the 2015 Recommendation,

Since then, the Ninth Circuit, in *Disney Enterprises, Inc. v. VidAngel, Inc.*, rejected the contention that ‘space-shifting is a paradigmatic example of fair use,’ noting that the reported decisions unanimously reject the view that space-shifting is fair use under § 107. In doing so, the court credited the Register’s conclusion in the last rulemaking that the law of fair use, as it stands today, does not sanction broad-based space-shifting or format-shifting. The court ultimately concluded more narrowly that even assuming space-shifting could be fair use, [the defendant’s] service is not personal and non-commercial space-shifting.<sup>20</sup>

The Register went on to determine that the proposed space-shifting advanced by proponents was neither for personal nor non-commercial purposes.

As has been previously raised, proponents do not provide any information concerning the proposed use of dataminced motion pictures. Whatever the use is, the activity does not appear to be for personal use or even non-commercial purposes, especially when proponents themselves point to a desire for international competitiveness in the markets for commercially-valuable technologies. There simply is no context to determine whether the use is for noncommercial purposes - what is the nature of the research activities and who qualifies as a researcher (nonprofit universities or private-sector companies). Even that distinction may be false, as what may often

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<sup>19</sup> 2018 Recommendation at 113.

<sup>20</sup> 2018 Recommendation at 121.

seem to be academic research is frequently done with expectation of commercial exploitation.<sup>21</sup> Nevertheless, the proposed use lacks the necessary information (context) to do the case-by-case analysis required of Section 107. Thus, proponents have failed to provide any basis for reconsideration of the space-shifting precedent, if the analysis of the proposed use is rightly focused on the necessary interim step of space-shifting.

### **C. This Rulemaking Does Not Look to Settle Disputed Areas of Law**

Even if the Register seeks to consider the use of datamined motion pictures with the limited information provided, the caselaw concerning datamining is disputed. First, those decisions rest in large measure on the resulting search functionality. The proponents here, however, have not provided sufficient detail regarding what the end product or use will be. Nor, for that matter, have proponents indicated whether the use will include a similar search function at all. The only thing that can be ascertained from the comments submitted by proponents is that they allege they need to build a large database of motion picture works. That activity is, however, easily identifiable as librarying, and the cited cases certainly did not consider whether the librarying in itself – without any more identifying use – is fair use. Perhaps because the courts had a more fully-developed record, they could look past this threshold issue of the interim copying and see the ultimate targeted use, the clear limitations of which supported a fair use finding. Here, however, there is no such information, and what proponents have provided is very general and vague in nature.

The proposed use is further distinguishable, as proponents' cited cases concerned literary works and not motion pictures. Those literary works were copies distributed without any technological protection measures, as the works were analog, and had to be digitized. The copies

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<sup>21</sup> See, e.g., Markus Perkman et al., *Academic Engagement and Commercialization: A Review of the Literature on University–Industry Relations*, 42 *Research Policy* 423– 442 (2013).

of motion pictures contemplated here, however, are distributed with technological protection measures, and rightsholders have not put them into the stream of commerce for any and all possible uses. Instead, rightsholders released their works in high quality resolution in the digital marketplace with the very reasonable belief that technological protection measures would keep them secure for personal use (*i.e.*, the home viewing market).

Finally, the caselaw that has concerned the uses of dataminced audiovisual works was not resolved so favorably for the proposed use. In *Fox News Network, LLC v. TVEyes, Inc.*,<sup>22</sup> the Second Circuit -with the benefit of both *HathiTrust*<sup>23</sup> and *Google*,<sup>24</sup> which were decided in the same circuit - did not find that datamining is unquestionably a fair use. Notably the *TVEyes* court weighed the possibility of licensing the clips as more against a finding of fair use than the earlier courts had. While the availability of licensing was not dispositive, what *TVEyes* makes clear is that fair use requires a case-by-case determination, so the proponents are not entitled to rely on mere legal propositions without developing the required factual records so that proper analysis can be made.

Finally, as a disputed area of law, precedent suggest that the Register should not try to resolve fundamental questions of law in the confines of this rulemaking. Similarly, the Register should let the law develop in the courts, where the process facilitates a more fully developed record to resolve whether a disputed use does indeed constitute fair use.

#### **IV. *The Circumvention Prohibition Has Not Caused the Alleged Harm***

Because proponents themselves identify alternatives to circumvention of protected DVD and Blu-ray discs, the Register cannot find that the general prohibition against circumvention is in

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<sup>22</sup> 883 F.3d 169 (2d Cir. 2018).

<sup>23</sup> *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).

<sup>24</sup> *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015).

fact adversely affecting their allegedly noninfringing use of copies of motion pictures distributed on CSS and AACS -protected discs.

Professor Bamman explicitly states that he engaged in screen capturing motion pictures as an alternative to circumvention, and he acknowledges that screen capture works: “this digitation method allows for movie data to be used in computational analysis.” While it is not disputed that screen capture is less than the absolute highest quality; the resulting lower quality did not cause him to abandon the project. Presumably, he would not have used screen capture for 200 films if the quality was too inferior.

Instead, Bamman allegedly abandoned the project because screen capturing films takes too much time. Specifically, it was claimed screen capturing would take ten years to record 10,000 titles using his one operator model who worked 40-hour weeks with two weeks of vacation. However, this deceptively overly-simplistic model does not take into account the fact that a single operator can record more than one film at a time, and that screen capture works fairly automatically, once set up. If a single operator could capture six films per hour, 10,000 titles would take one year and four months, while ten films per hour would take require less than ten months to achieve 10,000 screen-captured titles. And, if multiple operators were utilized, the time frame shrinks even more. So the time argument is very much overstated, and, frankly, is probably not significantly more time-intensive than the time it would take to rip the same number of DVD or Blu-ray discs, a process which is also done one movie at a time. The time investment is probably inconsequential compared to the overall use of the database, if created, particularly if done to avoid paying licensing fees that copyright owners would otherwise be justified in seeking for using their works as the raw ingredient for a process producing something of arguably great commercial value.

In fact, licenses are available. Lauren Tilton explains that computational research has been done on audiovisual works. However, ownership of these works by “for profit multinational

corporations . . . [results in] the almost complete foreclosure of computational research on audiovisual data in the United States, except for rare research groups that get special access to materials from a company or have incredible financial resources to pay for access.” Tilton does not say that licenses are not available, that rightsholders are unwilling to license the works, or even that the fees for such licenses are unreasonable. While suggesting research groups need financial resources to license the works, she does not provide any more information about the cost of the licenses. As far as determining whether licensing constitutes an alternative to circumvention, this rulemaking has looked not so much whether the license is affordable but whether licensing was available to proponents.

**V. *An Exemption Would Upset Congress’ Policy for the Development of the Digital Market***

Congress established the prohibition against circumvention to encourage “rightsholders willingness to make their works available to the public in a variety of digital formats”.<sup>25</sup> Rightsholders introduced their works in digital formats with the assurance that the law would support the TPMs applied to the digital offerings of their copyrighted works. The DVD and Blu-ray disc formats are the quintessential offerings epitomizing the design of the DMCA. CSS-protected DVDs and AACS-protected Blu-ray discs have permitted rightsholders to distribute copies of their works in a high-quality and convenient digital format at a reasonable price, provided those copies were kept to a specific medium that would play back only on licensed players. Most importantly, distribution of that copy did not unnecessarily expose the work to unauthorized further reproduction and distribution. Those limitations would be enforced by technological measures to which the law gives full effect.

This rulemaking is a fail-safe mechanism to make sure that the employment of technological protection measures does not unnecessarily limit noninfringing use or uses that

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<sup>25</sup> U.S. Copyright Office, Section 1201 of Title 17: A Report of the Register of Copyrights at i (June 2017) (hereinafter, “Section 1201 Study Report”).

would otherwise be considered fair use.<sup>26</sup> Every proposed exemption must be reasoned under the statutory criteria to evaluate whether the exemption is more consistent than not with the balancing of economic incentives Congress embraced with the DMCA.

In the Second Triennial Rulemaking, the Register explained the economics of how TPMs made digital offerings possible when it rejected a proposed exemption to permit circumvention for “any work to which the user has lawful access (and variations)”.

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>27</sup>

Thus, rightsholders could offer the DVD at the reasonable price of \$20, for example, because the TPMs would enable, and the law would support, their intention to make the copy of the work available only for personal use and to ensure that the DVD copy did not displace other offerings. In other words, if the DVD copy was going to replace the offering made on a streaming service, or even the copy that may be used for datamining, then rightsholders could not be expected to have ever made the works available in the DVD format at such an affordable price. In fact, that displacement of other offerings would compel rightsholders to demand a far higher price.

Over several proceedings, this rulemaking has promulgated multiple exemptions permitting circumvention of TPMs employed in the protection of motion pictures when the proposed uses resemble uses that we know to be fair such as short portions of motion pictures used

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<sup>26</sup> See House Commerce Committee Report at 35–36.

<sup>27</sup> Second Triennial Recommendation at 92.

for criticism or comment. The current proposal far exceeds the scope covered by the uses enabled under the current exemptions. Actually, the proposed use contemplates enabling and launching entire new industries in AI and machine learning. Such an exemption is a far cry from those temporary exemptions that Congress intended to serve as safety valves. Instead, the proponents' exemption is effectively a license for sophisticated parties to freely exploit rightsholders' works free of charge. Such a use is anything but fair, particularly since proponents have not demonstrated an inability to obtain legitimate licenses to the works, an unwillingness of rightsholders to license the works for this purpose, or even that such licenses as are available are not reasonably priced. Therefore, the underlying policy consideration of the statutory factors lead to the conclusion that an exemption for the proposed class is not warranted.

## **VI. *Conclusion***

In light of the lack of factual information regarding the proposed use or sufficient legal precedent to support the proposed exemption, the exemption should be rejected. As it would create an unprecedented license to make use of motion pictures in a way that few courts—let alone Congress—have contemplated or considered, the Register should treat it as she has other proposals that concern areas of unsettled law. That approach would only call for the Register to look to proponents to produce a more compelling case for noninfringing use or to see if, in the next three years, the courts clarify whether the use of dataminced motion pictures is indeed a fair use. For these reasons the proposed exemption should be denied.

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