UNITED STATES COPYRIGHT OFFICE

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

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ITEM A: COMMENTER INFORMATION

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

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

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

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

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ITEM B: PROPOSED CLASS ADDRESSED

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

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

The Reply Comment addresses opposition comments submitted by the Joint Creators and Copyright Owners,[1] as well as the DVD Copy Control Association ("DVD CCA") and the Advanced Access Content System Licensing Administrator ("AACS LA")[2] (collectively, "Opponents").

Although Opponents objected to various aspects of Commenters' proposed exemption, they did not object to Commenter's recommended approach to evaluate educational uses of motion pictures separate from Class 1: Audiovisual Works—Criticism and Comment. Accordingly, the Register should create a separate independent class for consideration: "Audiovisual Works—Educational Uses," as detailed in Commenters' initial comment.[3]

ITEM C: OVERVIEW

Educators around the nation are facing a problem: the DMCA is preventing effective use of motion pictures in the classroom. It is true that this problem has been exacerbated by COVID-19, but it is a perennial problem, and it is not unique to Commenters. All educators in the United States face the same limitations on their noninfringing uses of motion pictures protected by access controls.

In 1976, Congress made a clear policy determination: educational performances and displays were to be exempt from copyright infringement claims.[4] For decades, motion pictures were distributed primarily in formats such as film reels, videotapes, LaserDiscs, etc., and

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[1] Joint Creators and Copyright Owners include the Motion Picture Association, Inc. ("MPA"), the Alliance for Recorded Music ("ARM"), and the Entertainment Software Association ("ESA"). (Joint Creators and Copyright Owners, Class 1 Long Comment at 1 (Feb. 10, 2021) ("Joint Creators 2021 Comment").)

[2] *See* DVD Copy Control Association and Advanced Access Content System Licensing Administrator, Class 1 Long Comment, at 1 (Feb. 10, 2021) ("DVD CCA 2021 Comment").

[3] Brigham Young University and Brigham Young University-Idaho, Class 1 Long Comment, at 3 (Dec. 14, 2020) ("BYU 2020 Comment").

[4] H.R. REP. NO. 94-1476, at 81 (1976).

educators were able to rely on these exemptions to show motion pictures in class, just as Congress intended. More recently, however, due to the proliferation of access controls and changing business models, teachers' ability to use motion pictures in class is waning. This inability may very well stifle the creators of tomorrow.

This rulemaking process was designed to address these exact kinds of problems. Understandably, rightsholders have concerns about the uses of their works, but addressing those concerns should also account for the practical realities faced by educators, and an exemption that is workable for all stakeholders should be recommended. When Opponents have concerns, Commenters invite them to suggest practical solutions so that their concerns can be addressed but the extant problem can still be alleviated.[5]

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

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

ITEM E: ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

As set forth in Commenters' initial comment, the following four elements of the Office's standard for granting an exemption all favor recommending Commenters' proposed exemption:

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

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[5] Although Opponents have not suggested any specific alternative language for a proposal, they have identified a number of issues that, if addressed, might alleviate their concerns. (*See, e.g.*, Joint Creators 2021 Comment, at 7.) Commenters welcome an opportunity to discuss these issues at the upcoming hearing.

4. The statutory prohibition on circumventing access controls is the cause of the adverse effects.[6]

Accordingly, the Register should recommend Commenters' proposed exemption.

COMMENT SUMMARY

[6] BYU 2020 Comment, at 6-34.

I. Commenters' Proposed Exemption Covers an Appropriately Narrow and Focused Class of Copyrighted Works

The first requirement for an exemption is that the proposed class includes at least some works protected by copyright. Here, it is undisputed that Commenters' proposed exemption covers works protected by copyright.[7] Opponents assert that the exemption should be rejected, because the proposed class is too broad.[8] Despite this assertion, however, Commenters' proposed exemption adheres precisely to the following pattern established by the Office for defining classes of works:

> As a starting point, each class of works must be a subset of one of the "broad categories of works . . . identified in section 102 [of title 17]." The Office then further refines classes by other criteria, including TPMs used, distribution platforms, and, in particular, types of uses or users.[9]

In Commenters' proposed exemption, the proposed class of works is a subset of the broad category of motion pictures. The class is further refined by the TPMs used (e.g., CSS, AACS, etc.), distribution platforms (e.g., DVDs, Blu-ray discs, etc.), the types of users (e.g., college and university employees or students, K-12 educators or students, etc.), and the types of uses (e.g., noninfringing uses under 17 U.S.C. §§ 107, 110(1), 110(2), or 112(f)). The proposed exemption, therefore, covers an appropriately narrow and focused class of copyrighted works.

II. Commenters' Proposed Exemption Covers *Only* Noninfringing Uses

The second requirement for an exemption is that the proposed uses are noninfringing under Title 17. As the Office has explained:

> The Office "will look to the Copyright Act and relevant judicial precedents when analyzing whether a proposed use is likely to be noninfringing," but the lack of any controlling precedent directly on point does not, in itself, require a finding that the use is not noninfringing.[10]

Although Congress has granted broad exemptions to educational users, these broad exemptions involve statutory provisions that have never been litigated and open fair use questions that have never even been presented to, let alone decided by, a court.[11] Against this

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[7] BYU 2020 Comment at 6–7.
[8] *See* DVD CCA 2021 Comment, at 15–19.
[9] Register of Copyrights, *Section 1201 of Title 17*, U.S. COPYRIGHT OFFICE, at 26 (June 2017) ("Section 1201 Study").
[10] *Id.* at 28.
[11] BYU 2020 Comment, at 7–8.

backdrop, it would be difficult for the Register to accurately define noninfringing educational uses without incorporating the relevant statutory provisions by reference. Thus, Commenters recommend an exemption conditioned on the likely determination that the underlying educational use is noninfringing.

A. The Register Is Free To Recommend Classes of Works Based on Current Circumstances, without Being Constrained by Previous Rulemakings

Citing "precedent of this rulemaking," Opponents rely heavily on the fact that the Register has rejected similar proposals for educational use in the past.[12] By its very nature, however, this rulemaking is intended to address changing market realities and is to be conducted on a *de novo* basis.[13] When the Office adopted the streamlined process currently used in these rulemakings, it expressly rejected a "presumptive rejection" approach, meaning it would not recommend against previously denied exemptions simply because they were previously denied.[14] Thus, Opponents' reliance on the denial of similar exemption proposals in past rulemakings is unavailing. Such reliance has led to nearly absurd conclusions, such as, "Just as the proposal was impermissible in the 2006 Recommendation, so should it be in what will be the 2021 Recommendation."[15]

The world has changed dramatically since 2006 when Blockbuster Video was near its peak of more than 9,000 stores,[16] motion pictures were disseminated mostly on VHS tapes and DVDs, and students were attending classes mostly in person. Today, by contrast, Blockbuster Video is a thing of the past,[17] and Netflix is one of only six members of the Motion Picture Association.[18] There is "permanent encryption of all electronic copies [of motion pictures], and

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[12] DVD CCA 2021 Comment, at 17–19; Joint Creators 2021 Comment, at 7.
[13] H.R. REP. NO. 105-551, pt. 1, at 37 (1998).
[14] Section 1201 Study, at 147.
[15] DVD CCA 2021 Comment, at 19.
[16] Christopher Harres, *The Sad End of Blockbuster Video: The Onetime $5 Billion Company Is Being Liquidated as Competition from Online Giants Netflix and Hulu Prove All Too Much for The Iconic Brand*, INTERNATIONAL BUSINESS TIMES, (Dec. 5, 2013) https://www.ibtimes.com/sad-end-blockbuster-video-onetime-5-billion-company-being-liquidated-competition-1496962.
[17] *Id*.
[18] Motion Picture Association of America, Inc., *MPAA Welcomes Netflix as New Member*, Jan. 22, 2019, https://www.motionpictures.org/press/mpaa-welcomes-netflix-as-new-member/.

the adoption of business models that depend upon restricting distribution."[19] And of course, countless students cannot attend classes in person currently due to the COVID-19 pandemic. Congress undoubtedly had precisely these sorts of changing circumstances in mind when it instituted this triennial rulemaking as a "fail-safe."[20] As the Office previously found:

> The *relatively quick* three-year turnover of the exemptions was put in place by Congress to allow the rulemaking to be "fully considered and fairly decided on the basis of real marketplace developments," and any streamlined process for recommending renewed exemptions must retain *flexibility to accommodate changes in the marketplace* that affect the required rulemaking analysis.[21]

Although Opponents acknowledge the undeniable effects of the COVID-19 pandemic on education, they still urge the Register to reject Commenters' proposed exemption, arguing that "the pandemic is a time-limited event that should not drive public policy changes with potentially *long-lasting* effects."[22] In making this argument, Opponents ignore the purpose of the rulemaking to address just these types of changing market conditions; the exemption is at least needed urgently now while educators address the impact of the pandemic. It will be evaluated again in three years, a timeframe that the Office has correctly described as "relatively quick."

In the meantime, the Register should consider Commenters' proposed exemption based on *current* market realities, which are markedly different than those presented in 2006, or any other previous rulemaking. Social distancing, limitations on in-person instruction, and widespread online classes are current realities for educational institutions everywhere. While Commenters share Opponents' hope that vaccines and other public health measures will provide much needed relief, schools cannot continue to wait for such speculative hopes to materialize, which could take years. Educators need help *now* to be able educate effectively.

B. Determinations of Noninfringing Fair Uses Are Generally Conducted on a Case-by-Case Basis, Rather than for a Whole Category of Uses

As the Office has previously found, "fair use is a critical part of the distance education landscape."[23] Even so, it has proven difficult to incorporate this critical part of the landscape into

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[19] H.R. REP. NO. 105-551, pt. 1, at 36 (1998).
[20] H.R. REP. NO. 105-551, pt. 1, at 36 (1998).
[21] Section 1201 Study, at 143 (emphases added).
[22] Joint Creators 2021 Comment, at 3 (emphasis added).
[23] Register Of Copyrights, *Report On Copyright And Digital Distance Education*, U.S. COPYRIGHT OFFICE (May 1999), at 161 (emphasis added) ("Digital Distance Education Report").

previous exemptions for educational uses, in part because these rulemakings relate to classes of works. Courts, by contrast, have generally declined to decide whether *categories* of uses qualify as noninfringing educational fair uses or not. Instead, courts have insisted on deciding disputed questions of fair use by educational institutions on a case-by-case, work-by-work basis.

For example, in *Cambridge University Press v. Becker*, a group of academic publishers sought a ruling that electronic course reserve systems, in general, involved infringing uses. The defendants undoubtedly hoped for a ruling that electronic course reserve systems, in general, involved only noninfringing uses. Even though both sides wanted the court to broadly determine whether electronic course reserve systems were infringing or not, the court declined to make such a determination for a whole category of uses. Instead, the court analyzed 74 specific instances of alleged infringement and decided whether or not each instance, individually, was noninfringing. In 48 of the 74 instances, the court conducted a fair use analysis and concluded that the uses were noninfringing fair uses in all but 11 instances.[24]

The fair use analysis of 48 instances of alleged infringement was painstaking work. Over the course of the litigation, which lasted more than ten years, the district court issued three separate opinions evaluating fair use, each spanning more than 100 pages of detailed factual and legal analysis.[25] Almost certainly, the court would have welcomed a chance to forego this difficult analysis, if possible, by simply deciding whether the electronic course reserve system, in general, involved a noninfringing *category* of uses. But the court correctly determined that such a categorical approach to fair use decision making would have been improper.

What if the literary works at issue in *Cambridge University Press* had been protected by access control TPMs subject to § 1201(a)? And what if the Register were presented with a proposed exemption covering electronic course reserves in this rulemaking? Would the uses covered by such a hypothetical proposed exemption be viewed as noninfringing, or not? After the mixed ruling of *Cambridge University Press*, both proponents and opponents of such an exemption could make arguments in favor of their respective positions. And the Register would

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[24] *Cambridge Univ. Press v. Becker*, 446 F. Supp. 3d 1145, 1271–72 (N.D. Ga. 2020).
[25] *Cambridge*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012); *Cambridge*, 371 F. Supp. 3d 1218 (N.D. Ga. 2016); *Cambridge*, 446 F. Supp. 3d 1145 (N.D. Ga. 2020).

be placed in the impossible position of deciding whether or not a whole category of proposed uses—electronic course reserves—was noninfringing.

Just as the court in *Cambridge University Press* declined to decide whether this category of uses was noninfringing, so too the Register should refrain from opining on whether space-shifting for educational purposes, or any other undecided category of uses, is noninfringing. The best way for the Register to avoid breaking new ground on fair use and noninfringement is to incorporate the relevant statutory provisions by reference, as Commenters have proposed.

C. Opponents' Understanding of Fair Use Is Not the Only Reasonable Interpretation of Case Law

The difficulty of evaluating categories of works is further highlighted by the fact that Opponents' understanding of fair use is not the only reasonable interpretation. There is no controlling judicial precedent directly addressing the question of whether copying full motion pictures for educational uses qualifies as a noninfringing fair use.[26] Opponents have not disputed this fact. Although all parties seem to agree that no controlling precedent exists, the parties disagree about how the Register should treat the absence of such controlling precedent in this rulemaking.

Opponents mistakenly suggest that Commenters are asking the Register to define Sections 107, 110(1), 110(2), and 112(f) as permitting the copying and performance of full-length motion pictures, thereby asking the Register to impermissibly "break new ground" on noninfringement.[27] Nothing could be further from the truth. As between Commenters and Opponents, only one side is asking the Register to decide unresolved questions of noninfringement. Only Opponents are seeking a recommendation that will endorse their preferred views of infringement in the absence of controlling precedent. Commenters appreciate that the Register cannot recommend an exemption without first determining that the proposed uses are or are likely to be noninfringing, which is why Commenters have proposed a *conditional* exemption that will only apply if the underlying use is found to be noninfringing.

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[26] In perhaps the most analogous case, one court analyzed copying motion pictures to a university server and found "it is ambiguous whether the use was fair use under copyright law." *Association for Info. Media & Equip. v. Regents of the Univ. of Cal.*, No. 2:10-CV-09378-CBM, 2012 WL 7683452, at *6 (C.D. Cal. Nov. 20, 2012).

[27] Joint Creators 2021 Comment, at 4.

Indeed, Commenters understand that "the Office is hesitant to place itself in the position of making fair use findings in a rulemaking context—*potentially subject to some degree of judicial deference*—that might have influence beyond the current state of the law."[28] In past rulemakings, the Register may have been reluctant to recommend similar proposed exemptions in part to avoid any perceived endorsement of the view that a category of uses, such as space-shifting motion pictures for educational use, is noninfringing. It is possible that previous Registers believed that by declining to recommend similar exemptions, they could express no opinion and remain neutral on such unresolved legal questions. But the decision to deny similar proposed exemptions in past rulemakings has *itself* been viewed as a determination by the Office, which has already been afforded judicial deference and has influenced the state of fair use jurisprudence.[29] So unless the Register adopts a new approach, opinions on noninfringement expressed in this rulemaking must *necessarily* "have influence beyond the current state of the law."

Opponents assert that Commenters somehow "suggest[] that copyright holders must sue over every potential infringement or violation of Section 1201 or lose their rights."[30] Opponents, however, misunderstand. Commenters never suggested that rightsholders must pursue every potential infringement claim or § 1201 violation. Rightsholders, of course, have the prerogative to pursue whichever claims they wish. But when rightsholders exercise that prerogative to forego certain claims, they also forego the opportunity to establish favorable (or unfavorable) precedent that could *properly* influence this rulemaking. Having made that decision, rightsholders should not be allowed to turn around and point to the lack of such precedent as a way to block proposed exemptions that do not conform to their preferred views of noninfringement. Otherwise, rightsholders can use § 1201 to prevent valid, noninfringing uses, without even subjecting their infringement arguments to judicial scrutiny—let alone convincing a court to agree with them.

In addressing situations without applicable controlling precedent, the Office has advised, "Nothing in section 1201 prevents a user from seeking declaratory judgment as appropriate, or

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[28] Section 1201 Study, at 117 (emphasis added).
[29] *See Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 862 (9th Cir. 2017) (citing the Register's 2015 recommendation in rejecting a fair use argument and holding that the use was infringing).
[30] Joint Creators 2021 Comment, at 4.

engaging in litigation involving works not protected by TPMs."[31] But educational users *have* engaged in litigation involving works not protected by TPMs, receiving generally favorable results. For example, *HathiTrust*,[32] *Google Books*,[33] and *Cambridge University Press*,[34] all involved literary works not covered by TPMs, and the courts held that copying by educational institutions—including copying full works in many instances—qualified as noninfringing fair use. Unlike the literary works at issue in those cases, however, virtually all motion pictures today are protected by TPMs. Thus, educational users cannot bridge the gap between these categories of works without first circumventing TPMs on motion pictures, risking potential violation of § 1201. But rather than extend the rationale of the court holdings regarding literary works, the Register has distinguished such holdings in past rulemakings, and has limited previous educational exemptions to uses involving only "short portions" of works.

This situation has turned these rulemakings into a recurring cycle in favor of rightsholders. The Register can break the cycle by acknowledging that, at a minimum, there are reasonable alternatives to Opponents' preferred views of the case law. Because Opponents' views are not the only reasonable interpretation of existing law, the Register should not defer to those views in analyzing Commenters' proposed exemption. Instead, the Register should acknowledge the differing interpretations, and revise the current exemption to encompass educational uses beyond short portions, which are likely to be held noninfringing.

To be clear, Commenters' proposed exemption does not require the Register to endorse the view that space-shifting for educational purposes, or any other particular use, is noninfringing. Recommending an exemption that applies only when circumvention is undertaken "for a noninfringing use under 17 U.S.C. §§ 107, 110(1), 110(2), or 112(f)" is *not* the same as determining that space-shifting for educational purposes, or any other use, is noninfringing. Indeed, if the Register recommends the proposed exemption, Commenters encourage her to expressly disavow, in the recommendation, any perceived endorsement of noninfringement positions or arguments raised by both Commenters and Opponents.

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[31] Section 1201 Study, at 117.
[32] *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 105 (2d Cir. 2014).
[33] *Authors Guild v. Google, Inc.*, 804 F.3d 202, 229 (2d Cir. 2015).
[34] *Cambridge Univ. Press v. Becker*, 446 F. Supp. 3d 1145, 1271–72 (N.D. Ga. 2020).

1. Space-Shifting Doctrines Are Not Clear and Are Not Settled

In the absence of controlling precedent, *any* case cited by Commenters or Opponents can be both analogized to and distinguished from the educational uses covered by Commenters' proposed exemption. For example, Commenters cited *Fox Broadcasting* for the proposition that "non-commercial time- and place-shifting of recordings already validly possessed by subscribers . . . is *paradigmatic fair use* under existing law."[35] Predictably, Opponents attempted to distinguish the case and criticize the court's rationale.[36] In the end, however, Opponents cannot dispute that *Fox Broadcasting* remains good law, which may properly influence the Register's noninfringement analysis.

On the other hand, Opponents point to *VidAngel* for the proposition that "the reported decisions unanimously reject the view that space-shifting is fair use under § 107."[37] Importantly, however, the court made this observation in the context of analyzing a use that was unquestionably "commercial, and thus 'presumptively . . . unfair.'"[38] In light of this disfavored commercial use, the court's statements about space-shifting should be limited to the facts of that case and not applied more broadly to non-commercial educational uses, which are expressly favored under copyright law. Indeed, the court specifically noted, "even assuming space-shifting could be fair use, *VidAngel's service is not personal and non-commercial space-shifting*: it makes illegal copies of pre-selected movies and then sells streams with altered content and in a different format than that in which they were bought."[39] Manifestly, the use at issue in *VidAngel* is vastly different from the socially beneficial educational uses contemplated by Commenters' proposed exemption. Thus, *VidAngel* can offer only minimal guidance to the Register when assessing whether the uses at issue here are noninfringing.

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[35] *Fox Broadcasting Co. v. DISH Network LLC*, 160 F. Supp. 3d 1139, 1178 (emphasis added).
[36] DVD CCA 2021 Comment, at 21-24.
[37] *Id.* at 23; Joint Creators 2021 Comment, at 4 (citing *Disney Enters. v. VidAngel, Inc.*, 869 F.3d 848, 862 (9th Cir. 2017)).
[38] *VidAngel*, 869 F.3d at 861.
[39] *Id.* at 862 (emphasis added).

2. Opponents Mischaracterize the "Deal" Associated with Purchases of Motion Pictures by Educational Institutions

One purpose of the prohibition against circumvention of TPMs was to encourage rightsholders to use new forms of digital media such as DVDs.[40] Congress reasoned that a robust legal framework for enforcing TPMs would encourage rightsholders to embrace digital media platforms and markets. At the same time, however, Congress envisioned a day when all copies of works would be protected by TPMs, thereby limiting user's ability to make noninfringing uses.[41] Hence, Congress instituted this rulemaking, in part to serve as a fail-safe to prevent rightsholders from using TPMs as a backdoor method to preclude noninfringing uses. In other words, the rulemaking and appropriate exemptions were a necessary part of the "deal" that came along with the prohibition against circumventing TPMs.

DVD CCA asserts that the low price point of motion pictures on DVDs ($20) was never intended for educators but for consumers.[42] It characterizes Commenters' proposed exemption as an attempt to "undo or reset the $20.00 deal for a copy of the work."[43] This assertion reveals a fundamental misunderstanding of how the broad exemptions for educational performances enacted by Congress impact the "deal" associated with DVD or Blu-ray disc purchases. While Commenters have no knowledge of the motion picture industry's intention, their intention does not matter. It *clearly* was the intent of Congress that educators should be able to use lawfully acquired motion pictures for educational performances, regardless of the purchase price. That is the whole point of §§ 110(1) and 110(2). Rightsholders were well aware of this "deal" long before the prohibition against circumvention of TPMs ever took effect. Indeed, motion pictures were disseminated on VHS tapes—which were also subject to § 110(1)—at a similar price point long before the DMCA became law.

When an educational institution lawfully acquires a copy of a motion picture, it simultaneously acquires the right to use that copy for noninfringing educational purposes. In *Sony*, the Supreme Court held that a consumer could reproduce a full copy of "a work which he

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[40] Section 1201 Study, at i.
[41] H.R. REP NO. 105-551, pt. 1, at 36 (1998).
[42] DVD CCA 2021 Comment, at 25 ("If universities collected these physical copies of movies at the $20 price point, then they were the fortunate beneficiaries of a consumer deal that was not actually directly intended for them.").
[43] *Id.* at 25.

had been invited to witness in its entirety free of charge."[44] Attempting to distinguish *Sony*, DVD CCA asserts, "Here, proponents have not been invited to make use of the works for free."[45] While it is true that educational institutions often purchase copies of motion pictures, they are then free to make noninfringing uses of the motion pictures in their collections. In *Sony*, the viewer was "invited" to witness works free of charge only after the viewer had paid for access through subscription, advertisement, public sponsorship, etc. Likewise, after an educational institution has purchased a single copy of a motion picture, the institution is "invited" to use the motion picture for noninfringing educational purposes, which includes the right to show the motion picture an unlimited number of times to an unlimited number of students *free of charge.*

3. While Not Determinative, Educational Uses Are More Likely To Qualify as Fair Uses

Because Commenters' proposed uses are for educational purposes, they are expressly favored under § 107.[46] Opponents, however, assert that the nonprofit educational nature of the uses "do not make the activity any more likely to be considered fair use"[47] and "should not alter this analysis."[48] These assertions are incorrect. While certainly not determinative, courts have found that the nonprofit educational nature of a use is in fact relevant to a fair use analysis.[49] DVD CCA relies extensively on *Worldwide Church of God*, which merely stands for the unremarkable (and undisputed) proposition that, in some cases, a given use by a nonprofit institution may not qualify as fair use.[50] No one suggests otherwise. But there can be no genuine dispute that nonprofit educational uses are favored throughout the copyright statute,[51] including in § 107 and in this rulemaking, specifically. As the Register found in the 2018 rulemaking,

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[44] *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449-50 (1984).
[45] DVD CCA 2021 Comment, at 32.
[46] BYU 2021 Comment, at 16.
[47] DVD CCA 2021 Comment, at 27.
[48] Joint Creators 2021 Comment, at 5.
[49] *See, e.g.*, *Cambridge University Press v. Patton*, 769 F.3d 1232, 1263–69 (11th Cir. 2014) ("[U]se for teaching purposes by a nonprofit, educational institution such as Defendants' favors a finding of fair use under the first factor, despite the nontransformative nature of the use.").
[50] DVD CCA 2021 Comment, at 27–32 (discussing *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000)).
[51] *See, e.g.*, 17 U.S.C. §§ 107(1), 108(h)(1), 109(b)(1)(A), 110(1), 110(2), 110(8), 112(f)(1), 114(b), 504(c)(2), 512(e), 1201(d), 1203(c)(5)(B), 1204(b).

"Each of these uses is favored under the preamble of section 107 and generally appears to be transformative or otherwise favored."[52]

D. At Least Some Noninfringing Educational Uses Are Not Covered by the Current Exemption

Opponents suggest—incorrectly—that Commenters have not identified any noninfringing use not covered by the current exemption.[53] This suggestion fails to recognize the full scope of the exemptions for noninfringing educational uses allowed under the law.

When the current copyright statute was enacted in 1976, Congress expressed its intention to exempt educational uses, as follows, "Clauses (1) and (2) [of Section 110] between them are intended to cover *all* of the various methods by which performances or displays in the course of systematic instruction take place."[54] As the Office later confirmed, "The exemptions in sections 110(1) and (2) embody a policy determination that performances or displays of copyrighted works in the course of systematic instruction should be permitted *without the need to obtain a license or rely on fair use*."[55]

Notwithstanding this clear policy determination made 45 years ago, it has become steadily more and more difficult for educators to make noninfringing uses of motion pictures due to the proliferation of TPMs and a widespread "pay-per-use" mindset among rightsholders, not to mention the recent challenges caused by the COVID-19 pandemic. Opponents have not disputed these current market realities. Instead, they argue, "Rights holders should not be deprived of revenues and potential revenues derived from the titles that are available on, or may soon be available on, . . . licensed streaming services . . . ."[56]

In view of its strong policy preference in favor of education, however, it seems unlikely that Congress intended § 1201 to act as a barrier preventing noninfringing educational uses of motion pictures. Nevertheless, the current exemption for educational uses does not unambiguously cover some noninfringing uses, such as:

- making copies of more than "short portions" of motion pictures, including some full-length copies, when such copying is noninfringing under § 107 or 112(f); and

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[52] 2018 Recommendation, at 51.
[53] Joint Creators 2021 Comment, at 4.
[54] H.R. REP. NO. 94-1476, at 81 (1976) (emphasis added).
[55] Digital Distance Education Report, at xv (emphasis added).
[56] *See, e.g.*, Joint Creators 2021 Comment, at 6.

- performing more than "short portions" of motion pictures, including some full-length performances, when such performances are noninfringing under § 107, 110(1) or 110(2).

For example, any discrepancy between the seemingly arbitrary "short portions" language of the current exemption and the statutory "reasonable and limited portions" language excludes at least some noninfringing uses under § 110(2). While the magnitude of the adverse impact may be up for debate, the only way to cure this discrepancy is to incorporate the statute by reference.

Contrary to what Opponents have suggested,[57] Commenters' proposed exemption would not allow for performances of more than "reasonable and limited portions" of motion pictures. Opponents have objected to Commenters' supposedly "stretched interpretation" of the "reasonable and limited" provision of § 110(2).[58] However, it was the Congressional Research Service—not Commenters—that found, "the exhibition of an entire film may possibly constitute a 'reasonable and limited' demonstration if the film's entire viewing is exceedingly relevant toward achieving a[n] educational goal."[59]

As another example, the current exemption does not clearly allow for noninfringing educational fair uses beyond "short portions." As the Office previously found:

> Fair use is a *critical part* of the distance education landscape. . . . Fair use could apply . . . to instructional transmissions not covered by [section 110(2)]. Thus, for example, *the performance of more than a limited portion of a dramatic work in a distance education program might qualify as fair use in appropriate circumstances*.[60]

Congress endorsed this finding when it enacted the TEACH Act.[61] The current exemption, however, does not unambiguously cover this important category of performances in distance education, even though it has been recognized by both the Office and Congress as noninfringing fair use in appropriate circumstances. Without Commenters' proposed exemption, the prohibition

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[57] *Id.* at 5.
[58] DVD CCA 2021 Comment, at 38.
[59] BYU 2020 Comment, at 10 (quoting JARED HUBER, BRIAN T. YEH & ROBIN JEWELER, CONG. RESEARCH SERV., RL 33516, COPYRIGHT EXEMPTIONS FOR DISTANCE EDUCATION: 17 U.S.C. § 110(2), THE TECHNOLOGY, EDUCATION, AND COPYRIGHT HARMONIZATION ACT OF 2002 (2006)).
[60] Digital Distance Education Report, at 161-62 (emphases added).
[61] H.R. REP. NO. 107-687, at 15-16 (2001) (citing Digital Distance Education Report, at 162).

against circumvention prevents educators from making these noninfringing uses, which in turn adversely impacts the quality of education for students.[62]

Opponents have acknowledged, "No one disputes that educational uses are favored under copyright law, or that the identified statutory provisions clearly render some such uses in education to be noninfringing."[63] But Opponents also assert, without citing any authority, that Congress did not intend this rulemaking "to create exemptions that merely replicate the exceptions in copyright law."[64] Apparently, Opponents accept and approve of a regime where § 1201 prohibits educational users from being able to make certain noninfringing uses of motion pictures.

On this point, the parties appear to have a fundamental disagreement. Commenters believe that the primary purpose of this rulemaking is to ensure that noninfringing uses—especially educational uses—are not adversely affected by the prohibition on circumvention. Opponents, by contrast, appear to believe that the primary purpose of the rulemaking is to create tailored exemptions pertaining to "narrow and focused" classes of works;[65] if the prohibition on circumvention precludes educators from making certain noninfringing uses, so be it.

Importantly, Opponents do not represent the views of all filmmakers and rightsholders. For example, while the Motion Picture Association includes six major motion picture studios as its members,[66] it does not speak for the film industry as a whole. Many individual filmmakers believe that educational institutions should be allowed to make all noninfringing uses of motion pictures, uninhibited by the prohibition against circumvention. Commenters have attached a letter supporting their proposed exemption signed by more than 220 such filmmakers and copyright holders.[67] This letter states:

> Educational uses are vital for the motion picture industry. Not only do universities educate new generations of creators, but they also expose students of all disciplines to content they would not encounter otherwise. The mission of educators to enlighten, inspire, expose, illuminate, critique, and inform resonates

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[62] Section 1201 Study, at 41 (noting a report that legal uncertainty led educators to forego use of materials they otherwise would have made available to students).
[63] *Id.*
[64] DVD CCA 2021 Comment, at 15.
[65] *Id.*
[66] The MPA's members are: Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc. (Joint Creators 2021 Comment, at 1.)
[67] *See* Mar. 10, 2021 Letter to Hon. Shira Perlmutter, Appendix A, *infra*.

> deeply with me as a creator. It is often through the power of film that educators are able to meet these objectives. For these reasons, I believe the laws that prohibit decryption should be relaxed for educators so they can make the full range of educational uses allowed under applicable copyright laws.[68]

Commenters acknowledge that this rulemaking necessitates careful balancing of competing interests and priorities, and that the Register should give full consideration to Opponents' views as part of this balancing process. But the Register should also consider the views of the numerous filmmakers and copyright holders who do *not* share Opponents' views. Their voice is an important part of the conversation, too. Although Commenters' proposed exemption is opposed by *some* rightsholders, including Opponents, many other rightsholders support an exemption that will allow educators to make the full range of noninfringing educational uses.

E. The Register Should Be Guided by the Statutory Factors in Determining the Breadth of the Class of Copyrighted Works Covered by the Exemption

In defining the class of works in this rulemaking, Commenters' proposed exemption should be examined in light of contemporary marketplace realities, and its scope should be determined based on the statutory factors set forth in 17 U.S.C § 1201. As noted in the initial comment, statutory definitions of noninfringement *cannot* be overbroad.[69] Yet, Opponents object to the incorporation of such statutory definitions, asserting that this approach makes the proposed exemption "incredibly broad."[70]

Despite this objection, Commenters are unsure how statutory definitions of noninfringement could be considered too broad. What better authority could be consulted in this rulemaking to assess noninfringing uses than the very statutory provisions where Congress has defined noninfringement? Indeed, the Office has made it clear that it "will look to the Copyright Act" when analyzing noninfringement in these rulemakings.[71]

III. Commenters Have Provided Unrebutted Evidence of Adverse Impact

As pointed out in Commenters' initial comment, the five factors that Congress has directed the Register to consider in assessing adverse impact are:

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[68] *Id.*
[69] BYU 2020 Comment, at 7-9.
[70] DVD CCA 2021 Comment, at 15.
[71] Section 1201 Study, at 28.

(i) the availability for use of copyrighted works;

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

(iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;

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

(v) such other factors as the Librarian considers appropriate.[72]

For the reasons set forth in the initial comment, all of these factors support Commenters' proposed exemption.[73]

A. Opponents Do Not Dispute that TPMs Have Made Motion Pictures Effectively Unavailable for Many Educational Uses

The first two statutory factors should focus on the availability of works for use generally and for educational uses, specifically. [74] But DVD CCA suggests that for the first and second factor to favor recommending a proposed exemption, it would have to somehow make works more available.[75] This suggestion conflates the first two factors with the fourth factor: market effect. Joint Creators also suggests that the combination of streaming services and screen capture show that the "the availability of the works" factors support their position.[76]

Opponents have not—and cannot—reasonably dispute that the proliferation of TPMs has made motion pictures effectively unavailable for many noninfringing educational uses. Nor have Opponents suggested any realistic alternatives to circumvention that will actually meet educators' needs. Thus, the first two statutory factors favor recommending the proposed exemption.

Commenters and Opponents seem to agree that there are at least some titles needed by educational institutions that are not available on educational streaming services.[77] This lack of availability is plainly a problem; however, Commenters and Opponents have very different views about the magnitude of this problem. Opponents suggest that this problem is very small,

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[72] BYU 2020 Comment, at 21 (citing 17 U.S.C. § 1201(A)(1)(C)).
[73] *Id.*, at 21–31.
[74] *Id.*, at 22–23.
[75] DVD CCA 2021 Comment, at 39–42.
[76] Joint Creators 2021 Comment, at 6-7, 9–10.
[77] *Id.* at 6 ("Even if not all titles are available…, many titles are available and more are constantly added.").

and it is rare that anything needed by an educational institution will not be available.[78] Conversely, Commenters have found the gaps in educational streaming services to be a significant problem in practice.

Educational streaming services such as Swank do provide an important service for educators; however, they do not alone adequately provide for all content needed by educators.[79] Educational streaming services have historically served as a satisfactory supplement to educational libraries. But, due to recent technological trends and COVID-19, students and faculty have had diminishing access to physical DVDs. Unfortunately, educational streaming services do not fill in all of the gaps left behind by this diminishing access.[80] Exemplifying these gaps, Swank Digital Campus contains less that 10% of the titles included in BYU's disc collection.[81]

Even for titles that are available on educational streaming services, they often do not meet the needs of educational institutions and libraries. For example, available titles are not always provided in an accessible format for students with disabilities. As another example, it is not uncommon for streaming providers such as Swank to lose rights to films due to other exclusive licensing contracts among the variety of streaming services. When this loss of rights happens, educators may be left with no choice but to remove a required film from a course.

For example, at BYU-Idaho, which has been a Swank Digital Campus subscriber since its inception more than nine years ago, a theatre art course originally used *Hunt for the Wilderpeople*; when it was removed from Swank, the course had to be changed. A humanities course used *Bread and Tulip*; that course also had to be changed when it was removed from

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[78] *Id.* at 6–7, appx. I–iv; DVD CCA 2021 Comment, appx. (Letter from Tim Swank).
[79] The DVD CCA opposition comment quoted the testimonials several librarians provided to Swank. These librarians, James Conley, Monique Louise Threatt, Rhonda Rosen, and Susan Albrecht, authorized Commenters to provide the following response: "While Swank does provide value for our students and faculty, our views as cited in the opposition are taken out of context. The availability of a streaming license through Swank does not provide all of the content needed by faculty and students. We support the proposed exemption to allow educational institutions to decrypt discs in their collections for noninfringing educational uses."
[80] Opponents also suggest that students can fill the gaps by subscribing, purchasing or renting required films from personal streaming services. (Joint Creators 2020 Comment, at 7.) This suggestion reveals a lack of understanding of the financial burdens imposed on today's students and the rising costs of education.
[81] BYU 2020 Comment, at 24.

Swank. A film studies course that used *Bicycle Thief* had to be changed when the film was removed from Swank. Many other similar examples could be cited.

Although Commenters and Opponents may dispute the magnitude of these problems, all parties acknowledge that educational streaming services suffer from at least some problematic limitations. Commenters' proposed exemption will allow educational institutions to address these limitations by engaging in circumvention when needed to fill in the gaps. Opponents, by contrast, largely ignore the limitations of educational streaming services, and make no suggestions to help educators fill in the gaps. Again, Commenters welcome constructive suggestions from Opponents or other rightsholders to address the issue of orphan works in their collections or other motion pictures that are not available through educational streaming services.

B. Educators Are Adversely Affected Now and Are Likely To Continue To Be Adversely Affected by the Prohibition against Circumvention in the Next Three Years

The third statutory factor requires the Register to evaluate the adverse effects on education of the prohibition against circumvention. Opponents assert that the COVID-19 pandemic is a "time-limited event" and expressed hope, "based on the availability of vaccines, that widespread effects from the pandemic will reduce substantially during the next year."[82] Accordingly, Opponents argue, "BYU does not identify a substantial adverse effect that is likely to occur within the next three years and that is caused by the statutory prohibition on circumventing access controls."[83]

This novel argument attempts to insert additional conditions and limitations into the statute, which simply are not there. Nothing in the statute nor the legislative history suggests that adverse effects must be felt throughout the *entirety* of the three years following a given rulemaking. Instead, an exemption is proper when users "are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition [on circumvention]."[84] Here, educators *are* and *are likely* to be adversely affected by the prohibition against circumvention in the next three years.

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[82] Joint Creators 2020 Comment, at 3.
[83] *Id.* at 3–4.
[84] 17 U.S.C. § 1201(C).

C. The Register Must Consider Only the Market for Copyrighted Works—Not Licensing Markets

The fourth statutory factor requires the Register to consider the effect of a potential exemption on the market for copyrighted works. Opponents have identified certain effects of circumvention of technological measures on the market. However, they are all effects on licensing markets, which should not even be considered when evaluating the fourth statutory factor. Indeed, the Register has found that "that the effect of noninfringing uses on licensing markets should be excluded" from consideration under the statutory factors.[85] Otherwise, the fourth factor would *always* disfavor any exemption because a licensing market to circumvent TPMs could always be negatively affected.[86]

Excluding licensing markets creates a difference between this statutory factor and the parallel factor in § 107. In a fair use analysis, licensing markets are relevant. However, because fair use inquiries are ancillary to defining a class of works based on § 1201 factors, the effect of the exemption on licensing markets should have little to no consideration in this rulemaking.

IV. Opponents Do Not Dispute that the Adverse Impacts Are Caused in Part by the Statutory Prohibition against Circumvention

The fourth and final requirement for an exemption is a determination that the statutory prohibition on circumventing access controls is the cause of the adverse effects. Rather than refute Commenters' evidence of adverse impact, Opponents observe that the adverse effects are caused in part by factors other than the prohibition against circumventing TPMs. For example, Opponents point to factors such as underlying copyright restrictions, difficulties using optical disc players, and general side effects of the COVID-19 pandemic.[87] Commenters acknowledge that educators today confront a number of challenges that may impact their ability to use motion pictures in class. But noting these challenges does nothing to rebut the showing that the

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[85] Section 1201 Study, at 122.

[86] For similar reasons, the effects on licensing markets should not be given undue weight in a fair use analysis. *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 614 (2d Cir. 2006) ("We have noted, however, that 'were a court automatically to conclude in every case that potential licensing revenues were impermissibly impaired simply because the secondary user did not pay a fee for the right to engage in the use, the fourth fair use factor would always favor the copyright holder.'"); *Princeton Univ. Press v. Michigan Document Servs.,* 99 F.3d 1381, 1387 (6th Cir.1996) (stating that a copyright holder must have a right to copyright revenues before finding that a failure to pay a license fee equals market harm).

[87] Joint Creators 2021 Comment, at 2.

prohibition against circumvention is also adversely affecting educators' ability to make noninfringing uses of motion pictures.

As the Office has explained, this rulemaking requirement "comes directly from the statute, which requires that users be 'adversely affected by the prohibition [on circumvention].'"[88] Although other sources of adverse impacts are beyond the scope of this rulemaking, the statute certainly does not require that the prohibition on circumvention be the *only* cause of adverse impact.

The Office has previously summarized the overarching inquiry that should guide this rulemaking, as follows:

> At bottom, under section 1201(a)(1)(C), the Office must inquire: *Are users of a copyrighted work adversely affected by the prohibition on circumvention in their ability to make noninfringing uses of a class of copyrighted works, or are users likely to be so adversely affected in the next three years?*[89]

With respect to Commenters' proposed exemption, the answer to this question is undoubtedly yes. The exemption will make it possible for prudent educational institutions to use motion pictures in their collections, only after making a good faith determination that the desired use is noninfringing. This approach will involve a careful case-by-case, work-by-work analysis.

While the final language of the exemption should take into account the legitimate concerns of Opponents and other rightsholders, the Register should also recognize that educational institutions and libraries have a proven track record of respecting others' valid intellectual property rights. Indeed, educational institutions and libraries have been stewards of content for centuries and have consistently taken steps to prevent infringement and unauthorized access to materials. To say that Commenters' proposal lacks adequate protections for rightsholders is to ignore the trust and stewardship provided by educational institutions and academic libraries throughout history.

Accordingly, the Register should recommend Commenters' proposed exemption.

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[88] Section 1201 Study, at 117 (quoting 17 U.S.C. § 1201(c)).
[89] *Id.* at 114 (emphasis in original).

March 10, 2021

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

Re: Eighth Triennial Section 1201 Rulemaking

Dear Register Perlmutter:

As a filmmaker and copyright owner, I generally favor strong copyright protections for creators. But I also believe that vibrant education is essential for society and for the motion picture industry to thrive, specifically. I have signed this letter to inform you of my views relating to educational use of motion pictures.

I understand that Brigham Young University and Brigham Young University—Idaho (collectively, "BYU") have petitioned the Register to grant an exemption that would allow educators to decrypt DVDs and Blu-ray discs for the full range of permissible educational uses, including showing full-length motion pictures when allowed under applicable copyright laws. I understand that this petition is opposed by the Motion Picture Association ("MPA"), which includes six major motion picture studios as its only members. I, however, support the petition and am writing to let you know that the position of the MPA is not representative of all stakeholders in the film industry, including many filmmakers and copyright owners such as myself.

Educational uses are vital for the motion picture industry. Not only do universities educate new generations of creators, but they also expose students of all disciplines to content they would not encounter otherwise. The mission of educators to enlighten, inspire, expose, illuminate, critique, and inform resonates deeply with me as a creator. It is often through the power of film that educators are able to meet these objectives. For these reasons, I believe the laws that prohibit decryption should be relaxed for educators so they can make the full range of educational uses allowed under applicable copyright laws.

I support BYU's petition and urge you to grant their proposed exemption.

Respectfully,
(Signatories' organizations are shown for identification purposes only.)

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Temple University

Emily Allan

Mara Alper
Professor Emerita
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Ann Alter
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