

UNITED STATES COPYRIGHT OFFICE



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

ITEM A. COMMENTER INFORMATION

This petition is submitted by Peter Decherney, Professor of Cinema and Media Studies and English at the University of Pennsylvania, and Professor Katherine Sender, Department of Communication, Cornell University on behalf of themselves and John L. Jackson, Jr., Professor and Dean, Annenberg School of Communication, University of Pennsylvania; Rebecca Stein, PhD, Executive Director, Online Learning Initiative, University of Pennsylvania; the International Communication Association (ICA); the Society for Cinema and Media Studies (SCMS); Console-ing Passions; the Library Copyright Alliance (LCA), Shiv Gaglani, CEO and Co-Founder, Osmosis.org; Stefan Wisbauer, Managing Director, Lecturio; Andrew Berg, MD, Co-Founder, SketchyMedical, Saud Siddiqui, MD, Co-founder, SketchyMedical; Ken Robertson, COO, Picmonic Inc.; and Ruthe Farmer, Chief Evangelist, CSforAll.

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ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 1: Audiovisual Works—Criticism and Comment

ITEM C. OVERVIEW

I. Our Exemption Seeks Social Justice and Educational Equity

Education is a catalyst for opportunity – a gateway to progress through which people of all ages and backgrounds can acquire the skills, knowledge, and experiences needed to remain competitive in the 21st century job market. Yet educational inequalities, such as equal access to quality education, are still persistent and far-reaching within the U.S. The Joint Educators understand that it is certainly beyond the scope of § 1201 rulemaking proceedings to rid the U.S. of all education inequality. However, squarely within the scope of this proceeding is the ability

to effectively respond to the demonstrated challenges faced by online educators and students – especially if such challenges exacerbate unequal opportunities and are the result of the current anticircumvention provisions.

For the past few decades, education has rapidly moved towards an experience that is increasingly enriched by advancements in technology. Incorporating short clips from relevant movies and TV shows promotes retention, problem solving, and critical thinking – benefits that online learners are actively denied due to the current anticircumvention provisions imposed against educators and preparers of online learning material. Adopting an exemption that allows for the incorporation of clips in online learning material will also promote fairness, equity in education, and innovation in online learning. This exemption will result in a varied range of affordable high-quality education options for learners who need it the most: learners who cannot bear the financial burden of the high costs associated with more traditional educational institutions; current and potential employees who need to be retrained for new careers to combat record high unemployment rates due to the coronavirus; and learners from underserved populations who use online learning materials to offset the curriculum limitations present in underfunded schools.

Moreover, online learning is now an integral aspect of education.¹ In fact, the demand for online learning has steadily and significantly increased at a rapid rate well before the emergence of the coronavirus.² The pandemic has only thrust online education even further into the spotlight, causing that demand to skyrocket due to the abrupt and mandatory transition from in-person to online instruction. A year after the coronavirus was declared a national emergency, and one thing has become readily apparent – the modalities of teaching and learning that have been relied upon out of necessity during the pandemic are here to stay. Educators and preparers of online learning materials cannot meet the demand for online education with the same quality learning experiences as in-person instruction if they continue to be unfairly inhibited by the current anticircumvention provisions. Regardless of when the pandemic recedes, the pedagogical value of online learning will remain – and it is in our collective interest to make that learning as effective as possible.

Lastly, for nearly two decades the Copyright Office’s recommendations for the adoption and consistent renewal of the following exemptions have been visionary steps towards the advancement of online learning that have expanded access to high quality education:

- Kindergarten through 12th grade (K-12);
- College and Universities; and
- Massive Open Online Courses (MOOCs).

However, those exemptions do not sufficiently accommodate the current online education ecosystem. The Joint Educators represent thousands of professors, teachers, scholars, artists, educators, students, lifelong learners, and preparers of online learning materials, all interested in

¹ Ronald Wagner, *Online Learning is Here to Stay*, Edtech Digest (September 01, 2020) <https://www.edtechdigest.com/2020/09/01/online-learning-is-here-to-stay/>.

² Ilker Koksall, *The Rise of Online Learning*, Forbes.com (May 2, 2020), <https://www.forbes.com/sites/ilkerkoksall/2020/05/02/the-rise-of-online-learning/?sh=16d1eabc72f3>.

improving equity in education. As one united front, Joint Educators urge the Copyright Office to recommend and the Librarian of Congress to create a new exemption that expands upon the underlying premise of these three previous exemptions – learners should be entitled to the same quality of education irrespective of venue. For the absence of doubt, Joint Educators do not ask for the creation of additional educational uses but simply a new exemption that expands the Class 1 beneficiaries of current educational circumvention exemptions to include educators and preparers of online learning materials and allows them to incorporate short clips from movies and TV shows into their learning materials – an educational use that the Copyright Office and the Librarian of Congress have already approved for limited groups.

II. The Copyright Office Asked to Hear from Affected Parties before Considering an Expanded Educational Exemption for Educators and Online Learning Platforms; We Bring these Educators and their Need for Short Clips to this Proceeding.

Previous similar exemptions that have been brought forth by traditional educators, to expand the protection offered by already existing exemptions, have been rejected because of a lack of participation from affected parties. With this new exemption, numerous educators and preparers of online learning materials have joined together with traditional educators to form a new coalition and advocate for the exemption before you today. These educators and preparers of online learning materials include Osmosis.org, Lecturio and SketchyMedical. Our expanded coalition represents a vital component in providing online learners of all backgrounds access to the same high-quality supplemental education that in-person teachers can already provide.

Specifically, in the 2018 rulemaking proceeding, a similar exemption was rejected based on standing and not substance.³ Requests by Joint Educators to expand educational exemptions to a broader set of online learning materials have never been rejected on their merits by the Copyright Office. The Register of Copyrights did deny these requests on the basis that Joint Educators did not bring sufficient involvement from educators and preparers of online learning materials. Specifically, the Register stated:

“In the 2015 rulemaking, a group of educators similarly argued that for-profit uses are not necessarily precluded from being fair uses, but the then-existing record—similar to this current rulemaking—did not include examples of proposed uses in connection with MOOCs operated on a for-profit basis.”⁴

Today we bring these parties with us. Not only have educators and preparers of online learning materials participated in this rulemaking process, but they are also signatories in this proceeding given the crucial need for this exemption.

³ Register of Copyrights, Section 1201 Rulemaking: Seventh Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Acting Register of Copyrights at 55 (October 2018) [hereinafter, “2018 Recommendation”].

⁴ *Id.*

III. Our Exemption is Narrowly Tailored, Limited, and Consistent with Existing Class 1 Exemptions.

For the absence of doubt, our requested exemption is narrow and limited. We note that the opposing comments of Joint Creators and Copyright Owners (hereinafter “JCCO”) and DVD Copy Control Association and Advanced Access Content System Licensing Administrator (hereinafter “DVD CCA”) claim that our proposed exemption is too broad and would allow “any entity with an online presence that represents that its intended use constitutes ‘online learning’” to benefit from it. *However, these claims greatly mischaracterize the proposed exemption, which provides well-defined boundaries that an online learning platform must comply with to be eligible.*

The bounds are meant to ensure that the class of eligible educators and preparers of online learning materials remains limited and to ensure the online learning platforms that they use comply with the numerous technological protection measures, copyright policies, and retention limitations required by existing educational exemptions.

For instance, online learning platforms will limit online learning materials to registered learners and work to reasonably prevent unauthorized sharing of the content in accessible form to others.

Further, while our proposed exemption is not for a new class of MOOCs, it parallels the language and limitations of the existing MOOC exemption in Class 1. The existing MOOC exemption requires:

“ . . . the MOOC provider through the online platform limits transmissions to the extent technologically feasible to such **officially enrolled students**, institutes **copyright policies** and provides **copyright informational materials to faculty, students, and relevant staff members**, and applies **technological measures that reasonably prevent unauthorized further dissemination** of a work in accessible form to others.”⁵ [emphasis added]

Our proposed exemption language proposes the same strict requirements for educators and preparers of online learning materials working with online learning platforms:

“**The online provider will limit these online learning materials**, to the extent technologically feasible, **to registered learners** of the online learning platform, **institute copyright policies**, and **provide copyright information to educators and preparers of online learning materials, learners, and relevant staff members.**

Further, the online provider, to the extent technologically feasible, will work to reasonably **prevent unauthorized further dissemination of online learning materials in accessible form to others, including after the registration period ends.**”⁶ [emphasis added]

⁵ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 83 Fed. Reg. 54018 (Oct. 26, 2018) (“2018 Final Rule”) [hereinafter “2018 Final Rule”].

⁶ Joint Educators III Class 1 Pet. at 2.

Since these requirements, including for registration, copyright policies, and retention of materials were found sufficient for “Approved MOOC” providers, we respectfully submit that they should be sufficient for educators and preparers of online learning materials working with online learning platforms. Copyright owners are just as protected, if not more.

We note that these requirements will serve to exclude many educators and preparers of online learning materials who work with online platforms that are unwilling or unable to comply with this rigorous set of requirements. This is not a door for everyone to enter.

Modern Education and Learning Requires an Array of Presentation Formats

The reality is that learners now seek the educational services they want and need from a wide variety of sources that go beyond the traditional education ecosystem. There is a broad spectrum of commercial and non-commercial providers that work both on their own and with traditional educational institutions, like colleges and universities, to provide learners with a comprehensive learning experience. These commercial and non-commercial providers create a bridge to traditional education by allowing students to access learning materials on their own time in a way that works for them. For instance, a medical student has the flexibility to access materials on Osmosis.org at 2 a.m. to brush up on anatomy or neurology concepts after finishing their rounds. Having this ability allows learners to meet the ever-increasing demands of pursuing an education in a modern world while tailoring the experience to meet individual learning needs.

Educators and preparers of online learning materials that use online learning platforms should not be barred from using short clips of movies and TV shows based on their for-profit, commercial status. That would be the equivalent of preventing professors at accredited, non-profit institutions from teaching out of a textbook that was produced by a for-profit company and using an image taken from a movie or a quote from a news article. To prevent these online educators from accessing short clips of movies and TV shows based on this distinction would deny learners the opportunity to gain the comprehensive and tailored learning experiences that define the landscape of modern education.

IV. The DVD CCA Mischaracterizes the Joint Educators’ Petition as Seeking a Renewal of an Earlier Petition to Expand MOOCs.

On Pages 39, 41, and 42 of their comments, the DVD CCA mistakenly refer to Joint Educators’ exemption request as a renewal of prior “MOOCs” petitions.

The Joint Educators in this Triennial proceeding are not requesting to expand, modify or change the Class 1 protections for Massive Online Open Courses.

V. The Need Shown by Joint Educators for this New Exemption Remains Uncontested: The Demand for Online Education has Skyrocketed and Educators of Online Materials Need Short Clips as Much as Traditional Educators to Help

Americans Learn Cutting-Edge Skills, Find Better Jobs and Live Richer, More Creative Lives.

It has gone uncontested in this proceeding that educators and preparers of online learning materials using short clips from motion pictures for the purpose of criticism, comment, illustration, and explanation will contribute significantly to learning.

As we shared in our Long Comments:

Osmosis.org, a health education platform, has found that the use of short clips can expand how health professionals, medical students, and patients understand medical conditions. Medical students may use short clips from movies and TV shows to gain a deeper understanding of complex conditions, and understand the emotional turmoil that patients may experience when dealing with these conditions.

For example, enhanced understanding of achondroplasia can be gained by medical students when Osmosis.org can incorporate in its online instructional materials a powerful scene in which Peter Dinklage, in character as *Game of Thrones*' Tyrion Lannister, shared his isolation and pain sometimes experienced by those with dwarfism. The presentation of this emotional scene for an educational, rather than entertaining, purpose can provide unique insight for medical students into the mental and societal impacts of the condition of a future patient that would not be gained if the online learning platform could not use short motion picture clips in its materials. This is a clearly transformative and powerful use as it is part of medical training.

CSforALL, formed as a central hub of computer science education for U.S. youth in and out of school, has online coding courses under its umbrella aimed at girls who aspire to pursue STEM and computing careers. These courses would use, for example, short clips from *The Big Bang Theory* to show scenes depicting the experiments and projects shown by the characters Dr. Bernadette Rostenkowski and Dr. Amy Fowler as they prosper as a microbiologist and neuroscientist, respectively. These scenes, originally created for entertaining and comedic purposes, can be used to provide powerful media examples of successful women in STEM. This may help young girls see the value and opportunity in pursuing STEM careers, thus opening paths for future educational opportunities and job prospects.

Individuals across the country rely on platforms, including LinkedIn Learning, for skills retraining as shifting market needs have rapidly accelerated, and global factors like the coronavirus have put urgent pressure on displaced workers to rely on online learning to adapt to a changing economy. To re-enter the job market, people are using LinkedIn Learning courses to gain new skills with courses such as *Time Management: Working from Home*, *Communicating with Confidence*, *Learning Personal Branding*, *Designing a Resume for Creatives*. The ability to use short clips of movies and TV shows in these materials would make the experience that much more personal, providing the learner with richer educational opportunities.

For example, a clip from *The King's Speech* that shows the main character overcoming a speech impediment could provide confidence to anybody learning public speaking skills in the *Communicating with Confidence* course. *The King's Speech* is a historical drama film that depicts King George VI's struggle with a stammer during an unexpected and wartime rise to the

throne after his brother's abdication. While entertaining and informative for history enthusiasts, clips from the film can provide an entirely new purpose in showing students who struggle with stammers demonstrations and techniques displayed in the film that can be used to overcome their own stammers and other public-speaking difficulties.

Pursuit of the creative arts is an essential kind of education that is increasingly shifting online. Online learning platforms like Musora Media help learners of all ages to play like their favorite artists and learn the technical abilities behind their performances. Music educators merely describing or mimicking performance techniques to students fails as an adequate demonstration because instructors cannot possibly convey the same bravado as the performer who inspired learners to want to learn in the first place. Learners need short clips of musical performances from movies and TV shows incorporated in their online music learning to maximize their understanding of often nuanced techniques through an ability to scrutinize and watch clips of the musical heroes that inspire learners to want to play.

The educational value for a trumpet learner to see Louis Armstrong's embouchure (mouth position on the trumpet's mouthpiece) in a clip from his renowned performance in *Hello Dolly*, or Dooley Wilson's finger techniques in his piano performances in *Casablanca* cannot be understated.

We note that DVD CCA claim that the Joint Educators do not introduce evidence demonstrating how for-profit and non-profit/non-accredited entities would make use of short clips.⁷ We respectfully submit that this claim ignores the many examples of transformative uses described in detail in the Joint Educators' Petition and Long Comment. The ability to use short clips of movies and TV shows will enable many online educators to offer rich, innovative, and engaging online courses that enrich the lives of learners.

Just as traditional educators have the right to use these powerful clips, it is equally important for learners of all ages, backgrounds, and socioeconomic status to have access to educational materials containing these short clips.

VI. Our Exemption Request Falls Squarely Within the Visionary Goals for Online Learning that Congress Outlined in the TEACH Act.

It is uncontested that the vision of the TEACH Act emphasizes the importance of providing education not only to traditional learners, but also nontraditional learners of all backgrounds who are not a part of a traditional learning system. The exemption we bring forth now seeks to reconcile the Internet of today with the broad range of education, learners, and national opportunities that Senate Judiciary Chair Orrin Hatch hoped to reach with the creation of the TEACH Act. He, the Senate, and Congress, saw modern technological advances as an opportunity for the country to offer breadth and equity in education, including for those who are far from classrooms or otherwise unable to participate in traditional educational systems.

⁷ DVD CCA & AACCS LA Class 1 Opp'n at 19.

The legislative history of the TEACH Act is visionary in its anticipation of the reach of technology and the Internet to help us address broad national challenges including national needs and crises for increasing educational access and opportunities. Specifically, in his report to the Committee on the Judiciary on the TEACH Act, Senator Hatch and the Senate Judiciary Committee laid out the following broad vision for online education:

“For our nation to maintain its competitive edge, it will need to extend education beyond children and young adults to lifelong learning for working adults, and to reach all students of all income levels, in cities and rural settings, in schools and on campuses, in the workplace, at home, and at times selected by students to meet their needs.”⁸

Our proposed exemption stays true to the original ideals Senator Hatch and Congress sought the TEACH Act to have and falls squarely within Congress’ intent to reach all learners and ensure that online educational institutions are permitted to deliver invaluable education to traditional and nontraditional students, both in the era of today’s crisis and beyond.

We note that across two opposing comments, totaling over 59 pages, our premise was not contested. By extending educational opportunities to often overlooked groups of nontraditional learners, the vision that Congress outlines in the TEACH Act will be adequately fulfilled by this new exemption.

VII. Our Protections for Copyrighted Materials Embody the Vision and Spirit of TEACH Act Section 110(2) and Mirror the Requirements of Approved MOOCs.

The legislative history of the TEACH Act is visionary in its anticipation of the ability of technology and the Internet to offer a place for lifelong learners to learn flexibly on their own time. The TEACH Act envisions the type of learning that the Joint Educators provide and the type of exemption we propose in this Triennial proceeding. Our exemption stays true to the original ideals Senator Hatch intended the TEACH Act to have and aligns with Congress’ intent to reach all learners and ensure that online educational institutions are permitted to deliver invaluable education to traditional and nontraditional students.

Our proposed exemption aligns precisely with the spirit and vision underlying the TEACH Act, which is to provide significant protection to the copyrighted materials while allowing for the modernization of education.

The proposed exemption is also consistent with the Approved MOOC exemption that was granted and renewed in previous rulemakings. Our proposed exemption requires online learning platforms to comply with technological protection measures (TPMs) that provide a high level of protection for copyrighted content, and mirrors the same technical and retention requirements as the Approved MOOCs.

⁸ (Committee on the Judiciary Report on Technology, Education and Copyright Harmonization Act of 2001) S. Rep. No. 107-31, at 4 (2001).

a. “To the Extent Technologically Feasible” is Language from the Approved MOOC Exemption

For the avoidance of doubt, our proposed exemption would provide the same protections for copyrighted materials as those of the Approved MOOCs. JCCO argues that our proposed exemption weakens the technological protection measures requirement by using the clause “to the extent technologically feasible.” We respond that our proposed exemption uses *the same language regarding technological protection measures as the existing MOOC exemption.*

The Approved MOOC exemption requires:

“... the MOOC provider through the online platform *limits transmissions to the extent technologically feasible* to such officially enrolled students, institutes copyright policies and provides copyright informational materials to faculty, students, and relevant staff members, and applies technological measures that reasonably prevent unauthorized further dissemination of a work in accessible form to others or retention of the work for longer than the course session by recipients of a transmission through the platform, as contemplated by 17 U.S.C. 110(2).”⁹ [emphasis added]

Our proposed exemption would require:

“The online provider will limit these online learning materials, *to the extent technologically feasible*, to registered learners of the online learning platform, institute copyright policies, and provide copyright information to educators and preparers of online learning materials, learners, and relevant staff members.

Further, the online provider, *to the extent technologically feasible*, will work to reasonably prevent unauthorized further dissemination of online learning materials in accessible form to others, including after the registration period ends.”¹⁰ [emphasis added]

Thus, Joint Educators’ clause “to the extent technologically feasible” does not weaken the TPM requirement as opposing commenters claim. *This clause aligns with the standard in Section 110(2), which only requires that the online provider must “reasonably prevent” unauthorized sharing and retention.*

b. Learners Will Not Retain Clips After Their Courses Finish

As with Approved MOOCs, learners cannot have access to the course material with copyrighted content after the courses end under our proposed exemption. JCCO on page 9 of their comments argue that Joint Educators do not limit users from retaining works. *However, that is an inaccurate representation of our proposed exemption.*

We note that the existing MOOC exemption requires:

⁹ 2018 Final Rule at 54018.

¹⁰ Joint Educators III Class 1 Pet. at 2.

“technological measures that reasonably prevent *unauthorized further dissemination of a work in accessible form to others or retention of the work for longer than the course session* by recipients of a transmission through the platform . . .”¹¹ [emphasis added]

Our proposed exemption would provide the same protections:

“Further, the online provider, to the extent technologically feasible, will work to reasonably *prevent unauthorized further dissemination of online learning materials in accessible form to others, including after the registration period ends.*”¹² [emphasis added]

In an abundance of clarity, the educators and preparers of online learning materials on online learning platforms in our coalition, like Approved MOOCs, would only make course content using short clips of movies and TV shows available to students while they are “registered learners” for the course.

VIII. Our Proposed Uses are Protected Under the Fair Use Provisions of Title 17.

Under § 107 of the Copyright Act, courts evaluate four factors on a case-by-case basis to determine whether a use constitutes fair use.¹³ While navigating through a fair use analysis of the proposed educational uses, Joint Educators determined that the use of short clips from movies and TV shows would likely qualify as non-infringing given that all factors lean towards a finding of fair use.¹⁴

Nevertheless, opposing commenters – specifically DVD CCA – mistakenly suggest that balancing the statutory factors is an unpredictable process that may not apply consistently to like cases. When in reality, educational uses of short audiovisual clips in the circumstances described in our proposed exemption are highly likely to be fair uses. Recontextualizing a scene from a movie or TV show and repurposing it so that it illustrates an educational concept is fundamentally transformative.

Joint Educators note that DVD CCA completely failed to address or contradict the second and third factors in our fair use analysis. Instead, DVD CCA’s apparent attempt to rely on only two factors out of a four-factor analysis to argue against fair use goes directly against decades of settled case law. In the seminal fair use case, *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court explicitly stated that the “four statutory factors [cannot] be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.”¹⁵

¹¹ 2018 Final Rule at 54018.

¹² Joint Educators III Class 1 Pet. at 2.

¹³ 17 U.S.C. § 107 (2018) (“(1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work”).

¹⁴ Joint Educators III Class 1 Comment. at 15-17.

¹⁵ 510 U.S. 569, 578-579 (1994).

DVD CCA attacks a straw man in its analysis of the first factor, purpose and character of use, by arguing that the example educational uses identified for *Mr. Robot* and *Hidden Figures* are not particularly transformative because they “supplant” the uses in the original works.¹⁶ *This argument is meritless and exaggerates the narrowness of fair use analyses.*

In our initial Comment, Joint Educators demonstrated the importance of using short audiovisual clips through the potential use of *Mr. Robot* in a LinkedIn Learning course to aid instructors teaching ethics in coding who cannot actually conduct unethical coding, and thus merely describe the behaviors considered to be unethical.¹⁷ Certainly, this transformative educational use could not logically be presumed to supplant the obvious superhero-esque entertainment purposes of *Mr. Robot*, which depicts a computer programmer who works as a cybersecurity engineer during the day and a vigilante hacker at night working to bring down an evil corporation.¹⁸

Similarly, *Hidden Figures* was created to tell the untold stories of three African American women as they navigated through women’s and civil rights hardships while working at NASA during the early years of the U.S. space program.¹⁹ Joint Educators believe that the educational use of short clips of *Hidden Figures* has the ability to serve a multitude of purposes in addition to being an inspiration to those pursuing a career in STEM. For example, there is a captivating scene where Katherine Johnson uses innovation in mathematical problem solving by using Euler’s Method to successfully calculate the launch and landing of the space capsule, *Mercury-Atlas 6*. Young learners can see the ingenuity math requires in real time as they watch Katherine Johnson return to “ancient” math when there was no modern mathematical formula that could solve an equation at the time. Repurposing short specific scenes from movies and TV shows into an educational tool that helps learners understand complex concepts is highly transformative and does not supplant the use of the original work.²⁰

Additionally, the proposed class of uses is strictly for educational purposes. In general, educational uses are more likely to be fair than other types of uses; teaching, criticism, and comment are all specifically enumerated as favored uses in § 107 of the Copyright Act.²¹ As such, the purpose of any use under this exemption would be to educate online learners, not to merely replace the distinctive entertainment purpose of the original audiovisual work as DVD CCA suggest.

¹⁶ DVD CCA & AACS LA Class 1 Opp’n at 37.

¹⁷ Joint Educators III Class 1 Comment. at 10.

¹⁸ *Mr. Robot: About the Show*, USANetwork.com (last visited Mar. 8, 2021) <https://www.usanetwork.com/mr-robot>.

¹⁹ Hanneke Weitering, *Why ‘Hidden Figures’ is a Movie Everyone Should Watch*, Space.com (January 6, 2017) <https://www.space.com/35247-why-everyone-should-watch-hidden-figures.html>.

²⁰ See *Campbell*, 510 U.S. at 580 (1994) (stating that the central purpose of the first factor in a fair use enquiry is to see whether the new work merely “supersede[s] the objects” of the original creation, or instead adds something new, with a further purpose of different character); *Authors Guild v. Google, Inc.*, 804 F.3d 202, 214 (2d Cir. 2015) (“[A] transformative use is one that communicates something new and different from the original or expands its utility, thus serving copyright’s overall objective of contributing to public knowledge.”).

²¹ See §107 (providing that “the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright.”).

Finally, while addressing the fourth factor, effect of the use on the market or value of the copyrighted work, DVD CCA asserts an unsupported claim that relies on theories of the threat of harm to the clip licensing market and the commercial status of the online learning entities identified in Joint Educator’s Comment.²² First, Joint Educators note again, that the Copyright Office and the Librarian of Congress have approved and consistently renewed identical educational uses as seen in the K-12, Colleges and Universities, and existing MOOC exemptions for nearly a decade. Therefore, it has already been acknowledged that the effect of the educational use of clips upon the potential market of such clips is minimal at best.

Second, case law and the Supreme Court have stated time and time again that commercial use does not serve as a bar to fair use – especially if such use is transformative.²³ In *Campbell*, the Supreme Court stated, “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”²⁴

Here, the educational uses we propose are highly transformative. Through the incorporation of short audiovisual clips in a tailored course discussion, educators and preparers of online learning material allow online learners to become more engaged with their work by providing visual examples of a concept being taught. Additionally, the transformative nature of these uses neutralizes concern regarding the fourth factor and potential market harm because transformative uses by definition do not impermissibly harm the market for the original work.²⁵ In the 2nd Circuit case, *Author’s Guild, Inc. v. HathiTrust*, the court affirmed this notion by stating “any economic ‘harm’ caused by transformative uses does not count because such uses, by definition, do not serve as substitutes for the original work.”²⁶

Given that all factors still heavily lean towards a finding of fair use, the incorporation of audiovisual clips in online learning materials would qualify as a non-infringing use.

IX. Clip Licenses Do Not Meet the Need and Should Not Be Required for Online Educators.

Clip licensing services are not a realistic option that educators and preparers of online learning materials can use to serve their pedagogical needs. Clip licensing services offer a limited

²² DVD CCA & AACLS LA Class 1 Opp’n at 37-38 (referencing Osmosis.org, LinkedIn Learning, CSforALL, and Musora Media, Inc).

²³ See *Campbell*, 510 U.S. at 579 “The goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright; see also American University School of Communication Center for Social Media, et al., *Code of Best Practices in Fair Use for Academic and Research Libraries*, https://cmsimpact.org/wpcontent/uploads/2016/01/code_of_best_practices_in_fair_use_for_arl_final.pdf (Jan. 2012) (stating that fair use is “healthy and vigorous in broadcast news and other commercial media, where references to popular films, classic TV programs, archival images, and popular songs are frequently unlicensed. Trade and academic publishers regularly rely on fair use to justify the incorporation of third-party material into books they produce.”).

²⁴ *Campbell*, 510 U.S. at 579.

²⁵ See *Campbell*, 510 U.S. at 591 (“cognizable market harm” is limited to “market substitution”); *Author’s Guild, Inc. v. HathiTrust*, 755 F.3d 87, 99 (2d Cir. 2014).

²⁶ *HathiTrust*, 755 F.3d at 99.

selection of preselected clips which leaves little certainty that clips from movies and TV shows needed for specific educational lessons will be available.

JCCO claims that the Fandango movie clips website and Fandango movie clips YouTube channel potentially serve as a source of clips for educators and preparers of online learning materials. However, they appear to actually be the same website, and there are no TV clips within the limited supply of movie clips and trailers provided.

Educators and preparers of online learning materials need to curate their own clips to highlight exact moments from movies and TV shows that match the intended educational purpose in a particular lesson. The entire value in using clips is lost if the lone source of clips is a third-party licensing service's limited supply of only movie clips and trailers that are preselected -- many for their promotional value -- with no relation to the actual educational lessons that might be taught.

X. The Copyright Office Has Rejected Screen Capture as an Adequate Alternative to Circumvention for These Proposed Pedagogical Ends.

The DVD CCA comments suggest that screen capture is an appropriate alternative to circumvention, claiming that “none of the suggested uses requires high quality images in accordance with the close analysis that has been historically required for educational purposes.”²⁷ However, historical precedent differs from this suggestion.

An exemption currently exists to aid K-12 instructors using DVDs or digitally distributed material, and was also granted for MOOCs. Almost identical contentions were made by opposing commenters in 2018, when JCCO claimed that “proponents have not submitted any evidence to demonstrate that screen-capture is no longer a viable alternative.”²⁸ However, the Register indicated that “as high-quality video permeates daily life, for a variety of uses, it is increasingly important for these users to incorporate high-quality clips to effectively achieve their pedagogical ends.”²⁹ The pedagogical ends in this proposed exemption do not differ from those that were deemed to need high-quality clips beyond what screen capture offers.

DVD CCA comments singles out Musora Media in analyzing the harms caused by the circumvention prohibition. The claim is that “none of the uses suggest that the particular contemplated use requires high quality images or anything that even approximates the close analysis that has been historically required for educational purposes.”³⁰

Yet the proposed uses for music students on Musora's platform are analogous to the uses of filmmaking students for which the Register has already ruled that screen capture may not be an adequate alternative to circumvention.³¹ “Modern students use media differently and have higher

²⁷ DVD CCA & AACS LA Class 1 Opp'n at 39.

²⁸ 2018 Recommendation at 75.

²⁹ 2018 Recommendation at 86.

³⁰ DVD CCA & AACS LA Class 1 Opp'n at 39.

³¹ See 2018 Recommendation at 69.

expectations of digital media,”³² which is just as true for music students as it is for filmmaking students as audio quality continues to increase. Music and dance educators could demonstrate:

- Bob Fosse’s jazz and modern dance style with a clip from *Damn Yankees*, and
- How a bicycle horn as a percussion instrument can recreate the sound of taxis on the streets of 1920s Paris using a clip from *An American in Paris*.

Joint Educators note that the recognized deficiencies of screen capture, including dropped frames and loss of audio sync for film students, would likewise apply to music and dance students relying on high-quality and uninterrupted audio and video in their lessons and analysis.

If these scenes were to be degraded by the shortcomings of screen capture, the magic of the scene would be lost and students would quickly disengage. These scenes require best-quality images to allow students to scrutinize the fine and nuanced techniques displayed by the performers.

XI. Opposing Comments Mischaracterize Prior Rejection as Substantive and Not Procedural.

During the Seventh Triennial Proceeding, the Register of Copyrights could not justify a consideration of Joint Educator’s newly proposed exemption on the merits because of the sparse involvement of affected parties in the rulemaking. JCCO in its comment mischaracterizes this determination by the Register as a rejection of the 2018 exemption on its merits. In fact, JCCO rests the core of its argument against the current exemption request on a selectively edited quote that they characterize as suggesting that the 2018 exemption was solely rejected based on substance and not procedure.³³

However, that is not what the full quote from the Register in the 2018 final recommendation concluded. JCCO writes in its comments:

“While acknowledging the growth and importance of online education, in granting the existing exemption in 2015 the Register agreed that an “‘unbounded exemption’ where ‘[a]nybody can declare that they’re teaching a MOOC’ and ‘anyone can be a student’” would be “anathema to the exemption process as envisioned by Congress.” As in 2015, Joint Educators’ current “broadly framed proposal would seemingly encompass any online video that could be characterized as an educational experience.”³⁴

The full quote from the Register in the 2018 final recommendation states:

“While acknowledging the growth and importance of online education, in granting the existing exemption in 2015 the Register agreed that an “‘unbounded exemption’ where ‘[a]nybody can declare that they’re teaching a MOOC’ and ‘anyone can be a student’”

³² *Id.*

³³ JCCO Class 1 Opp’n at 8.

³⁴ *Id.*

would be “anathema to the exemption process as envisioned by Congress.” As in 2015, Joint Educators’ current “broadly framed proposal would seemingly encompass any online video that could be characterized as an educational experience.” **Moreover, the record is very sparse on examples of “online courses” that lack enrollment features and/or could not be considered a MOOC, but also use motion picture clips. Accordingly, the record does not justify expansion to “all online courses.”**³⁵
[emphasis added]

The full quote makes clear that before creating a new exemption, the Register wanted sufficient examples of an “online course” with adequate technological protections that fell outside of already existing exemptions. We bring forth in this record now, examples of online courses and our expanded Joint Educators coalition, the educators and online learners who will benefit directly from the educational exemption we seek.

XII. Conclusion

Our broad coalition of college and university professors, associations of universities, and non-traditional educators urge the Copyright Office to recommend and the Librarian to create an exemption closing the gap between online and in-person education to remedy the unequal opportunities that are the result of the current anticircumvention provisions. This exemption represents a step in the right direction towards the future of education. Traditional educators and online educators seek the vitality of equal educational experiences, whether within the four corners of the classroom or within the confines of one’s home.

Opposing comments do not contest that the use of these short clips in our requested exemption will provide Americans with a lifeline to modern online education. The adoption of our exemption will enable educators and online learning platforms to provide enhanced, vivid, and affordable high-quality online educational materials to lifelong learners who otherwise do not fit within the framework of today’s traditional educational institutions.

For the reasons given here, and in our Long Comment, we ask the Copyright Office, and Librarian to extend a lifeline to the learners across the country in need and approve this limited exemption, a small expansion to the educators and beneficiaries of Class 1.

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

Please see comments above.

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGEMENT USES

Please see comments above.

³⁵ 2018 Recommendation at 54.