



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

Please submit a separate comment for each proposed class.

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

Item A. Commenter Information

DVD Copy Control Association

DVD Copy Control Association (“DVD CCA”), a not-for-profit corporation with its principal office in Morgan Hill, California, licenses the Content Scramble System (“CSS”) for use in protecting against unauthorized access to or use of prerecorded video content distributed on DVD discs. Its licensees include the owners of such content and the related authoring and disc replicating companies; producers of encryption engines, decrypters (hardware or software); and manufacturers of DVD players and DVD-ROM drives.

Advanced Access Content System Licensing Administrator

Advanced Access Content System Licensing Administrator, LLC (“AACCS LA”), is a cross-industry limited liability company with its principal office in Beaverton, Oregon. The Founders of AACCS LA are Warner Bros., Disney, Microsoft, Intel, Toshiba, Panasonic, Sony, and IBM. AACCS LA licenses the Advanced Access Content System (“AACCS”) technology that it developed for the protection of high-definition audiovisual content distributed on optical media, primarily Blu-ray Discs. AACCS LA’s licensees include the owners of such content and the related authoring and disc replicating companies; producers of encryption engines, decrypters (hardware or software); and manufacturers of Blu-ray Disc players and Blu-ray Disc drives.

As ultra-high-definition products gain popularity in the marketplace, AACCS LA has developed a separate technology for the distribution of audiovisual content in ultra-high-definition digital format. This technology is identified as AACCS2, and not AACCS 2.0. This distinction in nomenclature is significant, as the latter would suggest that AACCS2 is a successor version of the technology, which has replaced AACCS distributed on Blu-ray Discs. It has not. AACCS2 is a distinct technology that protects audiovisual content distributed on Ultra HD (UHD) Blu-ray Discs, a newer, distinct optical disc format which will not play on legacy (HD) Blu-ray Disc players. To the extent a proposal mentions CSS and/or AACCS, but does not explicitly include AACCS2, such mention should not be inferred to include AACCS2. Proponents here do not identify UHD Blu-ray Discs or AACCS2 in their discussion of relevant technological protection measures, Initial Comments at 3-4. Nor do they suggest at any point elsewhere in their Comments that for-profit and or non-accredited entities engaged in online learning need to expand the scope of the current exemption to include works distributed in a 4K or ultra high-definition digital format.

Representatives

Counsel to DVD CCA and AACCS LA:

Michael B. Ayers
Michael B. Ayers Technology Law
5256 S. Mission Rd., Suite 703-2215
Bonsall, CA 92003-3622
michael@ayerstechlaw.com
(760) 607-6434

David J. Taylor
Right Size Law PLLC
621 G ST SE
Washington, DC 20003
david.taylor@rightsize.com
(202) 546-1536

Item B. Proposed Class Addressed

Proposed Class 2: Audiovisual Works — Online Learning

Item C. Overview

Proponents are seeking an impermissible class that extends the right to circumvent technological protection measures (TPMs) for motion pictures to any and all circumstances of online learning. In the prior proceedings, Proponents failed to make a sufficient showing that for-profit and/or non-accredited educational entities should be included in the class of users benefitting from the exemption that was granted to massive, open online courses (MOOCs created by not-for-profit, accredited educational entities. Again, Proponents laud the value of online learning and the value of motion pictures in education – points that are not disputed. But they do not point to anything that has changed in the past three years with regard to for-profit and/or non-accredited educational entities that would support the proposed expansion here.

Proponents now abstractly style the proposed class as “qualified educational entities.” As discussed in further detail below, the Proponents’ own examples of use reveal that the proposed class proves to be nothing more than a strawman set up to distract from the true nature of the class – an untenable and overbroad array of possible uses of motion pictures in online learning made by disparate users not amenable to being defined as a coherent class.

Even if Proponents’ arguments were true that any educational use qualifies as fair use – which is not the law - this rulemaking has no ability to create such an unbound class for an exemption. Instead, this rulemaking must create narrow, well-defined classes based on the record evidence. Refining the proposed class to a reasonable degree based on the record evidence is impossible in this case because the Proponents proffer limited examples of use of motion pictures. Interestingly, it is also the case that none of the proffered uses are actually thwarted by the prohibition against circumvention.

But to the extent the Office is persuaded to view the facts around the leading example

differently – such that the use would incorporate an actual clip from the movie into a for-profit education course – then that use cannot be shown to be noninfringing. As demonstrated below this hypothetical use of incorporating clips in this very real case of a for-profit, non-accredited entity is very unlikely to be noninfringing.

Item D. Technological Protection Measure(s) and Method(s) of Circumvention

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

Item E. Asserted Adverse Effects on Noninfringing Uses

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I. The Proposed Class Is Not a Valid Class

A. “Qualified Education Entities”

Proponents want to create a new and extraordinarily broad exemption for any and all forms of online learning. This exemption is in addition to the education exemptions that already exist for massive, open online courses (MOOCs) created by accredited, non-profit educational entities, K-12 schools, and universities. Initial Comments at 1. Proponents argue that an inequity exists because more learning is happening on online platforms and this online learning does not have the same benefits (*i.e.*, the circumvention exemptions) that other educational entities (*i.e.*, accredited, non-profit educational institutions) already have. *Id.* at 2. Proponents erroneously presume that styling any online learning as being done by *qualified educational entities* is sufficient to create a class. These users would be recognized as *qualified educational entities* as they are “educational entities that employ educators or demonstrate that they themselves are educators that provide or develop content’ regardless of whether they are accredited or of a for-profit status.” Initial Comments at 2. The only further possible qualification to be considered “qualified educational entities” provided by Proponents is “if the entity is registered with their state or local jurisdiction as an entity, for-profit or not-for-profit, with an educational purpose or mission.” Initial Comments at 14-15.

Proponents provide three concrete examples of uses of motion pictures in online learning which would be included in their expanded class,

- Udemy, Inc. offering a course, *Learn English with Movie Clips*, which makes use of nearly forty different motion pictures.
- Common Sense Media offering lesson planning for teachers making use of *Inside Out*.
- Khan Academy offering *Pixar in a Box*, which makes use of Pixar’s content such as *Monster*.

The three examples either do not fit within the definition of “qualified educational entities” or fail

to demonstrate why for-profit and/or unaccredited entities require the benefits of the expanded exemption.

1. Udemy, Inc.

As a registered company with the state of Delaware, Udemy is not registered for education purposes but instead the “nature of the business or purposes to be conducted or promoted by [Udemy, Inc] is to engage in any lawful act or activity for which corporations may be organized under the DGCL.” Ex. 3, Art. III, Amended and Restated Certificate of Incorporation of Udemy Inc. (initially adopted on Jan. 20, 2010, and amended on Sep. 15, 2021).

Udemy, Inc. is neither an entity that employs educators (or demonstrates that it is an educator itself that provides or develops content) nor an entity registered by the state as having an education purpose. Indeed, Udemy, Inc., a publicly traded company on the NASDAQ, is a for-profit technology company. Exhibit 1, 2023 10K. Udemy is for online courses what eBay is for online sellers. Udemy offers a technological platform for independent instructors to publish their respective content. These instructors – not Udemy – are responsible for the content of the courses. Udemy warns, “We could face liability, or our reputation might be harmed, as a result of the courses posted to our platform.” Exhibit 1, 2023 10-K at 20. Udemy further explains:

Instructors at times post courses and related materials to our platform that contain content owned by third parties, and we do not proactively review content for potential infringement of intellectual property rights.

Id. at 20. Accordingly, Udemy primarily relies on safe harbor provisions of various countries afforded to online service providers to insulate it from copyright infringement claims. *Id.* In fact, Udemy has had to rely on the DMCA safe harbor protection due to claims that the courses found

on the platform are alleged to infringe the copyrights.¹ Therefore, availing itself of the online service provider safe harbor, Udemy expressly disavows the content on its platform – the courses as its own content, and instead, repeatedly confirms that the courses are the responsibility of the independent instructors, who post courses to Udemy’s platform.

Udemy also makes clear that it claims no ownership of the content found on its platform, Udemy informs instructors who may choose to publish their courses on its platform:

You retain ownership of content you post to our platform, including your courses. We’re allowed to share your content to anyone through any media, including promoting it via advertising on other websites.²

Udemy further states, “You and we agree that no joint venture, partnership, employment, contractor, or agency relationship exists between us.”³

2. *Common Sense Media*

Common Sense Media is not registered as an education entity. In response to the 2022 Form 990 question to describe its organization’s mission or most significant activities, Common Sense Media states

[It is] dedicated to helping kids thrive in a world of media and technology. [It] empower[s] parents, teachers, and policymakers by providing unbiased information, trusted advice, and innovative tools to help them harness the power of media and technology as a positive force in all kids' lives.

Exhibit 7, Form 990, Common Sense Media (November 11, 2023) (covering the 2022 calendar year). As for the type of charity, Common Sense Media is categorized as a charity pertaining to

¹ See, e.g., Exhibit 2, Henry Kronk, Udemy, Copyright Infringement, and Napster: Some Double Standards of the DMCA (Feb. 20, 2018) available at <https://news.elearninginside.com/udemy-copyright-infringement-napster-dmca-safe-harbors-still-place> (last visited Jan. 22, 2024).

² Terms of Use, 5. Udemy Rights to Content You Post available at <https://www.udemy.com/terms/>.

³ *Id.* (9.7 Relationship Between Us); see also Instructor Terms, 8.3 Relationship Between Us available at <https://www.udemy.com/terms/instructor>.

“Arts, Culture, and Humanities N.E.C.” and not “Education N.E.C.”⁴ Common Sense Media is also not recognized as an entity with an educational purpose or mission but rather for any charitable purpose within the meaning of 501(c)(3). *See* Exhibit 8, Second Amended and Restated Articles of Incorporation of Families Invested in Responsible Media (filed April 4, 2003) (renaming the entity Common Sense Media).

3. *Khan Academy*

The use that Khan Academy makes of motion pictures is plainly not adequate for the proposed class and, in fact, demonstrates why Proponent’s proposed class is untenably overbroad. Indeed, Khan is a successful, unaccredited, non-profit entity with \$93 million in resources, at the end of 2022.⁵ Accordingly, Khan was able to leverage its plentiful resources to enter into a cooperative relationship with the creators of the copyrighted content shown in its *Pixar in a Box* course. (Exhibit 5) Consequently, with Pixar’s participation, the use of Pixar’s motion pictures in the courses offered by Khan Academy is actually authorized by the content owner without any need to circumvent TPMs at all.⁶ That Khan no longer requires circumvention due to its success – which must go doubly so for for-profit entities – demonstrates the overbreadth of the proposed class.

In light of the above examination of the Proponents’ own examples, renaming the users of the proposed class as “qualified educational entities” proves to be nothing more than a strawman

⁴ Compare Common Sense Media organization page offered on ProPublica Nonprofit Explorer available at <https://projects.propublica.org/nonprofits/organizations/412024986> with Khan Academy Inc organization page offered on ProPublica Nonprofit Explorer available at <https://projects.propublica.org/nonprofits/organizations/261544963>.

⁵ See Exhibit 4, Form 990, Return of Organization Exempt from Income Tax (Nov. 9, 2023)

⁶ *See* Exhibit 6, Pixar in a Box Web Page available at <https://www.pixar.com/pixar-in-a-box>.

set up to distract from the fact that the term adds no necessary context. The proposed class for online learning is plainly not capable of being bound to a recognizable class of users.⁷ In the absence of a defined class, the proposal – once again – becomes one for an impermissible categorical exemption for any type of online learning.

B. The Precedent of This Rulemaking Has Settled that a Categorical Exemption for Online Learning Is an Impermissible Class

The Register previously determined that similar proposals for categorical exemptions related to educational uses could not constitute a particular class, as they were too broad.⁸ The NPRM for this proceeding cited prior rulemakings, the 1201 Study, and the legislative history for the standard that this rulemaking cannot create broad categorical exemptions that would replicate categorically noninfringing uses.⁹

The 2015 Recommendation provides the quintessential instruction from Congress that the Register relies on to refine a class:

A mere requirement that a use be “noninfringing” or “fair” does not satisfy Congress’s mandate to craft “narrow and focused” exemptions. For this reason, the Register has previously rejected broad proposed categories such as “fair use works” or “educational fair use works” as inappropriate.¹⁰

The 2015 Recommendation pointed to the seminal the third Section 1201 proceeding, which constituted an evolution in how the Register would refine a class by uses and users. In

⁷ Proponents acknowledged this proposed exemption is for a disparate group of users including: “2U, LinkedIn Learning, Skillshare, Udemy, etc., to utilize motion picture excerpts for legitimate educational purposes.” Initial Comments at 5.

⁸ 2006 Recommendation at 17.

⁹ See Exemptions to Permit Circumvention of Access Controls on Copyrighted Works 88 Fed Reg 72013, 72014 (Oct. 19, 2023) (“NPRM”) (explaining that a class is refined “by other criteria, such as the [TPMs] used, distribution platforms, and/or types of uses or users”).

¹⁰ 2015 Recommendation at 100 (citation omitted).

announcing her new standard for a class of works, the Register considered the film professors' petition, which sought an exemption to circumvent for the purpose of classroom teaching.¹¹ The Register started her analysis from the mandate that a "particular class of copyrighted works" be a narrow and focused subset of works of authorship. She noted that prior attempts to define a class by uses such as "fair use works, per se educational fair use works" had been rejected:

Such proposed classifications did not constitute narrowly focused subsets of categories of works. Instead, these proposals sought to define a "class" primarily or solely by reference to the intended use or user. It remains a sound conclusion that a "class" that is solely or primarily defined by reference to a particular use or a particular user is inconsistent with the legislative language and intent.¹²

Here, as in the 2018 and 2021 proceedings, Proponents' proposed class of "qualified educational entities" turns out to be a fig leaf that, when removed, reveals the proposed class is "solely or primarily defined by reference to particular use," – any and all uses of online learning. Indeed, Proponents even admit as much, stating that the exemption would "promote innovation in the nontraditional online educational field allowing qualified educational entities, such as 2U, LinkedIn Learning, Skillshare, Udemy, etc., to utilize motion picture excerpts for legitimate educational purposes." Initial Comments at 5. These unidentified educational uses are inconsistent with the statutory factors.

In 2006, the Register explained how the application of the fair use analysis differs between a well-refined class and those classes that are solely or primarily defined by reference to use. On the first factor (the availability of copyrighted works), the Register found that motion picture studios "are not likely to be deterred from releasing works on DVDs when "the class of works is more narrowly defined, permitting circumvention only by college and university film and media

¹¹ 2006 Recommendation at 19-24

¹² See 2006 Recommendation at 17.

studies professors for classroom teaching[.]”¹³ As for the second factor (the use of works for nonprofit archival preservation), the Register reasoned,

the analysis [would likely] be very different for a class of works consisting of all motion pictures on DVDs than it would be for a class of motion pictures in the educational library or a college or university’s film or media studies department, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by media studies or film professors. This statutorily favored purpose would be more clearly served by an exemption in the latter case than in the former.¹⁴

The Register went on to find that this rationale was equally true for the third factor (the use of the work for criticism, comment, news reporting, teaching, scholarship, or research). *Id.* On the final factor (the effect on the market for or value of the work), the Register suggested that “the analysis will be very different depending upon whether that class consists of all motion pictures on DVDs or only of motion pictures used by film and media studies professors for classroom teaching.”¹⁵ Just as proposals for broad categorical exemptions were impermissible in the 2006 and in every subsequent proceeding, so should it be impermissible for online learning in the 2024 Recommendation.

C. This Record Does Not Include Enough Examples – If Any – to Refine the Class Further

The record evidence does not support the refinement of a class, as there are no demonstrated noninfringing uses of motion pictures thwarted by the circumvention prohibition. Online learning is already making use of motion pictures, and these uses are not thwarted by the prohibition against circumvention. Proponents’ own examples make these points abundantly clear.

¹³ 2006 Recommendation at 19.

¹⁴ *Id.* at 19-20.

¹⁵ *Id.* at 20.

Indeed, Proponents' examples demonstrate that online learning is already able to, and, in fact, already is making use of motion pictures within the confines of copyright law.

Khan's Academy collaboration with Pixar Studios in offering *Pixar in a Box* demonstrates that content creators are both participating and making their motion pictures available to the online learning community.

Udemy's course *Learn English with Movie Clips* has made use of multiple motion pictures by reducing short excerpts of the dialogue into PowerPoint slides that are read aloud by performers. Despite its title, the course does not perform any clips from the motion picture.

Common Sense Media offers lesson plans for teachers, which include either showing the entire film or selected clips from the film in the classroom, playing the movie from existing consumer media such as DVD or Blu-ray Disc. For purposes of planning a lesson around the clips, the lesson plans developed by Common Sense Media includes the timestamp of where the clip should begin and end. The teacher simply advances the movie to the beginning time and lets it play to the end time, which provides students with direct access to the desired clip with no need for circumventing TPMs.

As far as performing clips, this proceeding has already affirmatively addressed making use of motion pictures in online leaning. In fact, this proceeding has created a responsive exemption such that online courses incorporating clips for certain purpose may even be offered by for-profit service providers.

What this proceeding has not yet – and should not – accommodate, would be hypothetical use built around the example of Udemy offering a course making use of motions pictures clips where the creators of the course do not qualify for the MOOC exemption (*i.e.*, the course is created by a for-profit entity or instructor that is not accredited). Further, this hypothetical use could not

be substantiated by the record, as it would require a determination that such use is noninfringing – a determination that cannot be made on the current record.

II. The Proposed Use Is Infringing

Proponents assert that any and all use of motion pictures for education purposes is noninfringing – however, this is contrary to the law, as even education uses are subject to statutory limitations and the fair use analysis.¹⁶ While claiming education uses to be “transformative,” *per se*, Proponents have not cited a single case that supports these conclusory arguments. And Proponents certainly have not subjected any specific uses discernable in their initial comments to a fair use analysis.

For example, Udemy’s course, *Learn English with Movie Clips*, developed by a non-accredited instructor who is selling the course for-profit, raises serious fair use concerns. The use of clips in the course is not transformative. Here, the instructor has built his course on the idea of coopting the inherent entertainment of movie clips to teach the English language, and in so doing

¹⁶ See *Campbell, Campbell v. Acuff-Rose Music, Inc.*, 510 US 569, 584 (U.S. 1994) (explaining “the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement.”). In *University Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014), the Eleventh Circuit explained,

[C]opyright has always been used to promote learning, . . . allowing some leeway for educational fair use furthers the purpose of copyright by providing students and teachers with a means to lawfully access works in order to further their learning in circumstances where it would be unreasonable to require permission. But, as always, care must be taken not to allow too much educational use, lest we undermine the goals of copyright by enervating the incentive for authors to create the works upon which students and teachers depend.

Id. at 1263-64 (citation omitted). This has been the practice in this proceeding. See, e.g., 2015 Recommendation at 73 (“[T]he Register must consider whether the specific proposed uses are likely to be non-infringing under section 110(2), or under section 107 as fair uses.”); 2021 Recommendation at 43 - 49 (applying the education exceptions and the fair use analysis to proposals made by Brigham Young University).

they are directly exploiting the works, in large part, for their original purpose – to bring viewers in and capture their attention through the creative elements embodied by the motion picture:

The video clips catches [sic] your full attention and can sometimes take you into another world. This is very important, because in that moment, the voices and the sounds coming from the screen are all you're focusing on.

In other words, you are surrounded by the English language and fully concentrating on it. This is full immersion, which is what we want to reach as learners—especially if it's hard to fully immerse ourselves in English during our daily activities.

What's better is that video clips can be used to improve English listening, vocabulary and grammar.¹⁷

The instructor's own description of including video clips focuses on the entertainment experience of movies, confirming the overriding lack of transformative quality, regardless of their education use.

Moreover, the popularity of particular movies and the possibility of viewing clips from these movies are core to the instructor's business model. Describing the course in steps, the *Introduction* video to the course starts with "Step 1: Watching Movie Clips." Exhibit 10.¹⁸ Beneath this text to Step 1, scenes from the motion pictures, *Joker*, *JoJo Rabbit*, and *Frozen*, simultaneously are played (albeit without sound) in three boxes for five seconds ("the Demo"). This leads the would-be learner to believe that this online course will include viewing clips from popular movies. The course page, along with the *Introduction* video, includes forty learning modules named after popular movies.¹⁹ Naming the modules after popular movies further leads

¹⁷ Exhibit 9 at 3, available at <https://www.udemy.com/course/learn-english-with-movie-clips/learn/lecture/27159268#overview> (last visited Feb. 18, 2024).

¹⁸ Exhibits 10 and 11 are multimedia evidence that will be submitted via email to the address provided in the NPRM. That email will have a link that will permit the Office to retrieve the exhibits from a shared Google Drive folder.

¹⁹ The list currently includes: *Radioactive*, *I Still Believe*, *Onward*, *The Call of The Wild*, *Sonic*

the would-be learner to believe that registering for the course would involve watching parts of these popular movies. The name of the course, “Learning English with Movie Clips”, the course description, the showing of actual clips in the *Introduction* video, and naming the forty modules after popular movies, all undeniably tease the prospective learner with the possibility of viewing the clips.

In light of the instructor’s business model, which relies heavily on popular movies, making use of the actual movie clips would hardly be tolerated in examining the purpose and character of the use. The instructor’s use of motion pictures in his for-profit course is definitively a commercial use.²⁰ A commercial purpose is a separate factor that “tends to weigh against a finding of fair use” though the impact of the commerciality of a use on the overall fair use analysis will vary in context. *Campbell v. Acuff-Rose Music, Inc.*, 510 US 569, 585 (U.S. 1994). In fact, the Court noted that uses similar to the UdeMy instructor course offends fair use:

The use, for example, of a copyrighted work to advertise a product, even in a parody, will be entitled to less indulgence under the first factor of the fair use enquiry than the sale of a parody for its own sake.

Id. Thus had the instructor additionally incorporated actual film clips in his for-profit course, where he was effectively making use of the works to advertise his own course, the purpose and use of the work would not weigh in favor of fair use.

The fourth statutory factor also weighs against a finding of fair use. Copyright owners

The Hedgehog, Downhill, Gretel and Hansel, Star Wars - The Rise Of Skywalker, The Gentlemen, Joker, Underwater, Frozen II, Green Book, Die Hard, Rocky, Bombshell, Midway, Spies In Disguise, Richard Jewell, Queen & Slim, A Cinderella Story: Christmas Wish, Knives Out, Legend, Frozen II, Ford v Ferrari, Shakespeare In Love, Freelancers, Arctic Dogs, Jexi, Paradise Hills, JoJo Rabbit, Maleficent: Mistress of Evil, The Addams Family, Gemini Man, The Day Shall Come, The Wedding Year, The Day Shall Come, The Wedding Year, Running With The Devil, Downton Abbey, and Ad Astra.

²⁰ Exhibit 12, Purchase Price \$19.99.

reasonably expect to license clips of their motion pictures. If a motion picture clip is incorporated in a commercial work, such that commercial product depends on the clip for its own success, then not requiring a license for use of the clip offends ordinary notions of fairness. Thus, in the instant case, where the instructor would build the business model for his course on the popularity of motion pictures, equity would demand that he take a license.

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

As the Proponents have not identified any uses making use of a clip from motion picture that has or would otherwise need to be circumvented, the prohibition cannot be said to cause any harm. But even assuming, *arguendo*, that there was such harm, which there is not, there are multiple alternatives to circumvention.

1. For-Profit and Non-Accredited Entities Can Create Their Own Clips

As demonstrated by the actual use of movie clips, the instructor created his own clips with performers reading the dialogue. This alternative to circumvention appears sufficient, as the instructor says that benefits of the course which include his own videos. are:

- Learn words from real world context.
- Learn how to correct pronunciation [sic]
- Learn a lot of listening examples from a real life movie.
- Learn English grammar with movies.
- Improve your English vocabulary related to movies.²¹

To the extent that Proponents want online learners to see “gestures within the culture” and “learn from the actors’ body language” – the instructor could have the script physically performed to record the audio and visual just as he had the script performed to record the audio.

2. Screen Capture Is Available as An Alternative to Circumvention

Screen capture is another appropriate alternative to circumvention. While Proponents

²¹ Exhibit 9 at 3.

argue that screen capture is generally inadequate – they have not explained how screen capture cannot be used for a specific purpose. With respect to *Learn English with Movie Clips*, DVD CCA and AACCS LA proffer a screen capture clip that clearly does offer sufficient quality to see gestures relevant to culture and to learn from the actors’ body language as Proponents claim they need. (Exhibit 11).

The screen capture clip reproduces the scene from *Radioactive* that is the dialogue used in the instructor’s course. This particular screen capture technology is OBS Studio 30.0.2 (64 bit), recorded on a MacBook Pro 16 inch, 2019 (Intel processor), and the source was Amazon’s Prime Video.

3. *Availability of Clip-Licensing Market*

Proponents have made no showing of any inability of for-profit and nonaccredited entities to avail themselves of the clip licensing market. Nor is there any evidence that efforts to obtain licenses have been ignored or rejected. Indeed, with regard to the Khan Academy, it appears that certain for-profit and/or nonaccredited entities are already engaged with content creators to license the rights to display clips (and, in fact, whole motion pictures) demonstrating the existence of a licensing market.

What Proponents have said is that overworked teachers should not have to be burdened with getting a clip license. While observation may be true, this rulemaking has already addressed how teachers – at all levels – may make circumvent to make use of clips for education purposes. This proposed exemption, however, is for for-profit and nonaccredited entities to engage in circumvention and nothing suggests that Proponents’ examples of “qualified educational entities, such as 2U, LinkedIn Learning, Skillshare, Udemy, etc.” are unable to pursue a clip license from creators.

IV. The Statutory Factors Weigh Against the Creation of the Proposed Exemption

A. Availability for Use of Copyrighted Works

The use will not result in the availability of more works. Nothing suggests that online learning platforms are presently unable to make or prepare educational materials. Similarly, Proponents have not shown that there will be a net positive result from the proposed additional exemption beneficiaries. In contrast, the creation of a broad, unwarranted exemption will negatively affect rightsholders confidence in the overall effectiveness of Section 1201 if this rulemaking strays from its practice of creating narrow focused exemptions that run low risk of harming of the market for the works.

1. *The Jailbreaking Video Game Consoles Precedent Is Applicable*

DVD and Blu-ray Disc players are devices that playback motion pictures just like video game consoles “playback” video games (*i.e.*, access and allow users to engage with the copyrighted content). In the 2012 Recommendation, the Register considered the proposed exemption to jailbreak video game consoles in the context of the first statutory factor, and concluded that a jailbreaking exemption for video game consoles would not result in the availability and use of more copyrighted works.

[C]onsole access controls encourage the development and dissemination of highly creative copyrighted works by facilitating secure platforms for the development and distribution of video games and other applications. In addition to artwork, graphics and sound effects, a sophisticated video game may include storyline, character development, voiceovers, music and other expressive elements. Such a work is far more challenging and expensive to create than the typical smartphone application, for example, like a motion picture, it involves a team of creators and may require funding in the millions of dollars. It is difficult to imagine that one would choose to make such an investment without some hope that it could be recouped by offering the resulting product through channels that provide some measure of protection against unauthorized copying and distribution.²²

²² 2012 Recommendation at 51.

The Register’s analysis looks past the copyright in the code, and more fully considers the copyrights that the code is ultimately intended to protect – the video games. She notes that video games are more akin to movies, creation of which requires a “team of creators” and “funding in the millions of dollars[.]”²³

More importantly, the Register’s reasoning reveals that motion pictures are, in fact, the quintessential works warranting the full weight of the prohibition against circumvention. The application of this rationale to motion pictures distributed on CSS- and AACS-protected optical discs has been fundamental to the rulemaking since its inception, as no other types of copyrighted works have been as regularly and intensely subject to evaluation than those copies of motion pictures distributed on CSS and AACS-protected optical discs. Consequently, the reasoning that weighed the first factor against the creation of an exemption to circumvent video game consoles should weigh as much, if not more, against creating an exemption to circumvent those players that playback CSS or AACS-protected optical discs.

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

This fourth statutory factor does not favor an exemption for online learning platforms. Frequently, this factor is intertwined with the fourth factor of the fair use analysis (the effect of the market for the copyrighted work) as it, too, seeks to ascertain the effect of circumvention of access controls on the market for or value of copyrighted works. Thus, DVD CCA and AACS LA provide here a discussion of the fourth factor of fair use analysis before addressing the statutory factor.

1. *The Concerns for the Value (or Market for the Work) for Players Approximate Concerns Identified in the Fair Use Analysis for Video Game Consoles*

²³ 2012 Recommendation at 51.

The Register should rely on the analogy that a DVD or Blu-ray Disc player is to motion pictures what video game consoles are to video games, and consider her prior analysis of jailbreaking video games as instructive to the review of the fourth factor of the fair use analysis in the context of exemptions permitting the circumvention of player devices. In considering jailbreaking a video game console under fair use, the Register found that under the fourth factor, the market or value for the code that protected the video game console would be diminished, and with that factor “weigh[ing] somewhat strongly against a finding of fair use”²⁴ there could not be any persuasive basis to establish that jailbreaking a video game console was noninfringing. The Register reasoned that, once jailbroken, “the compromised code can no longer serve as a secure platform for the development and distribution of legitimate content.”²⁵ The Register also concluded that the evidence supported the finding that circumvention was inextricably linked to piracy.²⁶

Similarly, copies of motion pictures distributed on DVDs and Blu-ray Discs employ CSS and AACS content protection technologies which is fundamental to protecting the integrity of the digital content ecosystem, which the Register recognized in the context of video game consoles as a “secure platform for the development and distribution of legitimate content.”

a) Piracy Is Still a Consequence of a Compromised Digital Ecosystem

Piracy takes advantage of weaknesses in the digital ecosystem. The first widely publicized hack of CSS, known as DeCSS, demonstrated this to be true, as DeCSS resulted from a single manufacturer’s failure to protect against the discovery and theft of a single cryptographic player

²⁴ 2012 Recommendation at 44.

²⁵ 2012 Recommendation at 44.

²⁶ 2012 Recommendation at 43.

key. Once a key is discovered, the chain of events unquestionably leads to piracy. This led to pirates' quintessential quest over the years to rip DVD or Blu-ray discs as a source for online piracy.²⁷

b) Hacked DVD and Blu-Ray Discs Remain Source for Piracy

Using software enabled by stolen decryption keys to read DVDs and Blu-ray Discs and then obtaining the digital content in the clear (often referred to as “ripping”) is still a significant source for piracy. Quite recently, the Department of Justice announced the indictment of members of the “Sparks Group”, who misrepresented themselves over a ten-year period to obtain advance distribution copies of “nearly every movie released by major production studios” and distributed on DVDs and Blu-ray Discs meant for retail.²⁸ According to the release, the accused pirates then ripped the discs and disseminated the film and TV content via the Internet prior to the retail release date.” The release described the activity as follows:

Sparks Group members then used computers with specialized software to compromise the copyright protections on the discs, a process referred to as “cracking” or “ripping,” and to reproduce and encode the content in a format that could be easily copied and disseminated over the Internet. They thereafter uploaded copies of the copyrighted content onto servers controlled by the Sparks Group, where other members further reproduced and disseminated the content on streaming websites, peer-to-peer networks, torrent networks, and other servers accessible to the public. The Sparks Group identified its reproductions by encoding the filenames of reproduced copyrighted content with distinctive tags, and also

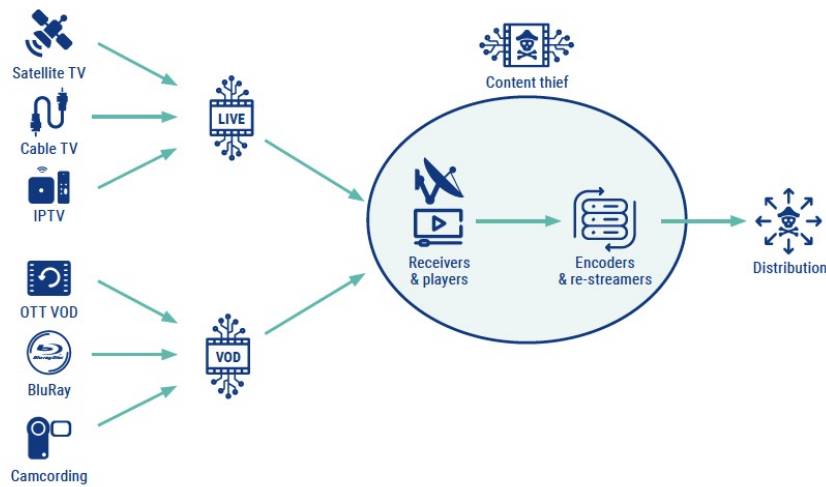
²⁷ “Over the years, TV shows and movies have become the most popular pirated materials. Apart from accessing them on an [legitimate streaming services], pirates deploy other efforts such as ripping DVDs or Blu-ray discs[.]” Mark Mulready, *How Do Pirates Get Ahead of OTT Video Providers?* (Oct. 5, 2022) available at <https://blog.irdeto.com/video-entertainment/pirates-are-primed-to-compete-in-the-streaming-wars/> (last visited Feb. 20, 2024).

²⁸ Acting U.S. Attorney Announces Federal Charges and International Operation to Dismantle Online Piracy Group, Press Release, Department of Justice (Aug. 26, 2020) (“DOJ Press Release”) available at <https://www.justice.gov/usao-sdny/pr/acting-us-attorney-announces-federal-charges-and-international-operation-dismantle-0> (last visited Feb. 20, 2024).

uploaded photographs of the discs in their original packaging to demonstrate that the reproduced content originated from authentic DVDs and Blu-Ray discs.²⁹

Just as the indictments against the Sparks Group show that they relied on ripped consumer market discs, online streaming piracy is generally well understood to be fueled by content ripped from discs using software implementing circumvention tools. For example, the Digital Citizens Alliance August 2020 Report, *Money for Nothing: The Billion-Dollar Pirate Subscription IPTV Business*, points to ripped Blu-ray Discs as a source for this piracy.³⁰

Figure 7 – Content theft



c) *Piracy and Its Harms*

This piracy undoubtedly leads to significant harm. In the above case of indictments against the Sparks Group, the DOJ stated that “Sparks Group has caused tens of millions of dollars in

²⁹ *Id.*

³⁰ Digital Citizens Alliance and NAGRA, *Money for Nothing: The Billion-Dollar Pirate Subscription IPTV Business*.

losses to film production studios.”³¹ The Digital Citizens Alliances Report, largely intended to show the billion-dollar industry that online streaming piracy has become, cites to other reports that have quantified the loss to the “U.S. economy [to be] at least \$29.2 billion in lost revenue each year.”³²

These recent accounts are consistent with what has been known about the effects of piracy for some time. A study prepared for the U.S. Patent Trademark Office, providing a systematic review of the literature, pointed out that “if the shutdown of one popular piracy site — Megaupload.com — caused a 6.5-8.5 percent increase in digital movie revenues in spite of all of the video piracy that remained after Megaupload, total losses to rightsholders from piracy in the home market could be quite substantial.”³³ The proposed exemption risks fostering piracy as the exemption poses a threat to the digital content ecosystem.

2. *Fourth Statutory Factor Does Not Favor the Creation of the Exemption*

a) *Threat to the Digital Content Ecosystem*

An exemption for for-profit and nonaccredited entities threatens the digital content ecosystem just as the prior proposal threatened the video game distribution system. The Register in the 2012 Recommendation explained why the fourth factor did not favor the creation of a repair exemption for video game consoles:

As discussed above . . . , due to the particular characteristics of the video game marketplace, the circumvention of access controls protecting a console computer

³¹ DOJ Press Release, *supra* note 24.

³² Digital Citizen Alliance Report at 1 n.4 (citing Digital Video Piracy: Impacts of Digital Piracy on the U.S. Economy (GIPC, June 2019)).

³³ Brett Danaher, Michael D. Smith, and Rahul Telang, Piracy Landscape Study: Analysis of Existing and Emerging Research Relevant to Intellectual Property Rights (IPR) Enforcement of Commercial-Scale Piracy at 27 (March 20, 2020) (Prepared for the U.S. Patent and Trademark Office).

program so that it can be copied and modified for the purpose of enabling unauthorized applications has the effect of decreasing the market for, and value of, that program, as it can no longer serve to facilitate a secure gaming platform. Further, by enabling the ability to obtain and play pirated games and other unauthorized content, the dismantling of console access controls undermines the value of legitimate copyrighted works in the marketplace, many of which require a substantial investment of creative and financial resources to create.³⁴

The Register again was concerned about the integrity of the overall content protection ecosystem, as she noted that the code , once decrypted, “can no longer serve a secure gaming platform.” Similarly, any exemption that permits the circumvention of CSS and AACS technologies risks the security of the digital content ecosystem.

As noted in the 2012 Recommendation:

Motion pictures involve significant effort and expense to create and, once created, frequently become a vital part of American culture. The motion picture industry has a legitimate interest in preventing motion pictures from being copied in their entirety or in a manner that would adversely impact the market for or value of these works, including reasonable derivative markets.³⁵

Since the resulting piracy of film and television content flows in part from the circumvention of CSS- and AACS-protected optical discs, rights holders can ill afford permitting any circumvention that relaxes the bright line of the circumvention prohibition. Creating an exemption for for-profit and non-accredited entities raises accountability concerns. The general prohibition against circumvention has created a bright line that any circumvention is unlawful. Carefully tailored exemptions created for very specific beneficiaries, who are largely knowable by their industries and or representatives with specific uses, may provide the Register comfort that these exemptions have not harmed the digital content ecosystem. This should not be assumed for for-profit and non-accredited entities.

³⁴ 2012 Recommendation at 52.

³⁵ 2012 Recommendation at 166.

An exemption benefiting for-profit (commercial) and non-accredited entities poses much more risk. As limitations incorporated in exemptions are regularly not understood and or ignored, “online learning” even if that term were better defined, would likely throw open the door for any “online activities” for all commercial and non-accredited entities. Even a well-crafted exemption could green-light circumvention by entities and persons who up until now understood that circumvention was unlawful. Any exemption for their benefit would certainly fray the bright line and encourage circumvention as the message would be out – even if said message is wrong – that they too can now lawfully engage in circumvention.

b) Availability of Clip-Licensing

The proposed use here of incorporating clips in courses relies on the exact use of the work in the market (*i.e.*, the business model for this course is dependent on the original use). Furthermore, this use is for a commercial purpose. Nothing suggests that the licensing market has failed to accommodate uses by this or like actors. The Proponents have not made any showing that clip licenses are not available for online learning or that they have made any attempt to acquire such licenses. Instead, they suggest that licensing should be excused due to “wages, limited time and difficult jobs” and that licensing is “not a feasible pursuit for teachers creating a learning plan to follow.” Initial Comments at 12. Policy makers have considered the circumstances where uses by teachers can be excused and none of the limitations created for education include the right to make use for the purpose of selling a course.

V. Conclusion

Proponents have failed to make their case for either a new exemption or an expansion of the current MOOC exemption. The Notice of Proposed Rulemaking observed that the proposed exemption was a third attempt at expanding the current MOOC exemption to for profit and or non-accredited entities. Observing that in the prior two proceedings, the Register rejected such

expansion, the NPRM sought what legal or factual changes, if any, have occurred that warrant disturbing the prior decisions. Proponents cast their argument for a new class in terms of “qualified educational entities;” however, this term as demonstrated by Proponents’ own examples means very little, anything at all.

Notwithstanding the distraction of this empty term, the proposed class is far too broad to constitute a class, and the record does not provide any meaningful examples of use to refine the class further. In fact, the most salient example of use cannot be said to be likely noninfringing.

But, even if this hypothetical use were noninfringing, the actual likely noninfringing use of clips created by the for profit, nonaccredited instructor (i.e., those clips not relying on the actual copy of the motion picture, but on recording audio from performers reading lines from the motion picture’s script) demonstrates that the circumvention prohibition is not causing harm to noninfringing uses. Moreover, additional alternatives to circumvention exist. Screen capture technology clearly permits the intended use of incorporating motion pictures clips into courses. And the clip license market is readily available to for-profit, non-accredited entities such as 2U, LinkedIn Learning, Skillshare, Udemy, etc.

In light of the above, the Proponents have not demonstrated that either a new exemption or an expanded MOOC exemption should be made to available to for-profit (commercial), non-accredited entities. Thus, this proposed exemption for online learning must be denied.