

UNITED STATES COPYRIGHT OFFICE



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

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ITEM A. COMMENTER INFORMATION

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

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

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

This Comment was prepared by the BYU Copyright Licensing Office, which provides services and resources to the university’s faculty, staff and students relating to copyright issues that arise on campus. Interested parties may contact the following individuals:

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Privacy Act Advisory Statement: Required by the Privacy Act of 1974 (P.L. 93-579)

The authority for requesting this information is 17 U.S.C. §§ 1201(a)(1) and 705. Furnishing the requested information is voluntary. The principal use of the requested information is publication on the Copyright Office Web site and use by Copyright Office staff for purposes of the rulemaking proceeding conducted under 17 U.S.C. § 1201(a)(1). NOTE: No other advisory statement will be given in connection with this submission. Please keep this statement and refer to it if we communicate with you regarding this submission.

ITEM B. PROPOSED CLASS ADDRESSED

This comment addresses Proposed Class 1: Audiovisual Works—Criticism and Comment.

ITEM C. OVERVIEW

The current DMCA exemptions for motion pictures used for educational purposes should be consolidated and expanded to include the following class of works:

Motion Pictures (including television shows and videos), as defined in 17 U.S.C. § 101, where circumvention is undertaken solely in order to facilitate noninfringing performances of the works for nonprofit educational purposes, in accordance with 17 U.S.C. § 110(1) or § 110(2).

This revision would simplify the DMCA exemption for noninfringing educational performances, by aligning it with the statutory conditions for such performances and eliminating extraneous conditions, such as distinctions between different categories of educational users and unnecessary restrictions to “short portions” of motion pictures. Such an exemption would give life and meaning to the policies embodied in the educational performance exemptions when they were enacted by Congress.

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

This Comment relates to technological protection measures (TPMs) employed on DVDs, Blu-ray discs, and by various online streaming services. Such TPMs and methods of circumvention have been described adequately in prior rulemaking proceedings. (*See, e.g.*, Register of Copyrights, Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights, at 29-30 (2015) (“2015 Recommendation”).)

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

Commenters generally agree with the new rulemaking approach advocated by petitioners Electronic Frontier Foundation (EFF), New Media Rights (NMR), and Organization for Transformative Works (OTW). As set forth above, the current DMCA exemption for motion pictures should be consolidated based on type of use, and distinctions based on the type of user should be eliminated.

For example, the exemption should consolidate the uses for nonprofit educational purposes and eliminate unnecessary distinctions between types of users such as the following:

- college and university faculty and students, *see* 37 C.F.R. § 201.40(b)(1)(iv),
- faculty of massive online open courses (MOOCs), *see* 37 C.F.R. § 201.40(b)(1)(v),
- kindergarten through twelfth-grade educators, *see* 37 C.F.R. § 201.40(b)(1)(vi),
- kindergarten through twelfth-grade students, *see* 37 C.F.R. § 201.40(b)(1)(vii),

The copyright statute draws no distinctions between these user groups, and neither should the DMCA exemptions for motion pictures. On the other hand, the copyright statute does provide

specific exemptions for performances of motion pictures for nonprofit educational purposes, as set forth in 17 U.S.C. § 110(1) and § 110(2), which should be recognized and reflected in the DMCA exemptions.

I. The Exemption to Facilitate Nonprofit Educational Performances Should Not Be Limited to “Short Portions” of Motion Pictures

The preamble of the current DMCA exemption includes some restrictions that unnecessarily limit instructors and pupils seeking to make noninfringing performances of audiovisual works. For example, the current exemption is limited to “short portions” of motion pictures. 37 C.F.R. § 201.40(b)(1). In the 2015 rulemaking proceedings, the Register stated, “the use of only short segments is critical to the Register’s determination in this proceeding that a significant number of the desired uses are likely noninfringing.” (2015 Recommendation, at 99.)

While the Register’s statement may have been true for “a significant number of the desired uses,” it is manifestly untrue for performances made for nonprofit educational purposes under 17 U.S.C. § 110(1), sometimes referred to as the “classroom exemption.” Section 110(1) was not mentioned in the 2015 Recommendation, and it is not clear to what extent, if any, the Register considered this exemption. To qualify for the classroom exemption, a performance must satisfy the following statutory conditions:

- made by instructors or pupils;
- in the course of face-to-face teaching activities;
- of a nonprofit educational institution;
- in a classroom or similar place devoted to instruction; and
- cannot be given by means of a copy that the person responsible for the performance knew or had reason to believe was not lawfully made.

See 17 U.S.C. § 110(1). Notably, the classroom exemption of Section 110(1) provides no limitations or restrictions on the types of works performed or the length of such performances. Thus, instructors or pupils can perform even *full-length* motion pictures in class, and such performances are unquestionably noninfringing, provided that they satisfy the remaining conditions set forth in the statute.

Even so, instructors and pupils are adversely affected in their ability to make noninfringing uses of more than “short portions” of motion pictures under the classroom exemption due to the unduly restrictive language of the current DMCA exemption. As the Register concluded in the 2015 rulemaking proceeding, “generally speaking, copyrighted motion pictures are not widely available in formats not subject to technological protections.” (2015 Recommendation, at 83.) Therefore, to make noninfringing performances under the classroom exemption, instructors or pupils must have access to licensed decryption and playback devices in the classroom, such as DVD players, Blu-ray players, or computers with licensed optical drives.

As technology advances, however, fewer and fewer classrooms will be equipped with such licensed decryption and playback devices. For example, although BYU and BYU-Idaho currently have numerous media-enabled classrooms with DVD or Blu-ray players, both

universities have decided not to replace such devices as they age out over the next several years. And while many classrooms are equipped with personal computers, licensed optical drives are becoming increasingly rare in new computers. (Kyrnin, Mark. [“Why Do Most New PCs Not Come with DVD or Blu-ray Drives?”](#) *Lifewire*. N.p., 12 Aug. 2017. Web. 18 Dec. 2017.)

Accordingly, instructors and pupils are increasingly likely to be adversely affected in their ability to make noninfringing uses under the classroom exemption during the next three years.

To meet the needs of the changing modern classroom, the DMCA exemption for motion pictures should be expanded to allow nonprofit educational institutions to circumvent technological protection measures solely to facilitate noninfringing performances of the motion pictures. In many cases, such circumvention may necessitate that a copy of the motion picture be stored on a media server or similar device. Such reproduction and storage would be subject to the conditions for ephemeral recordings, as provided in 17 U.S.C. § 112(f). In addition, the reproduction and storage of such copies would also qualify as fair use under 17 U.S.C. § 107. *See, e.g., Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 98-99 (2d Cir. 2014) (holding that copying the full text of more than ten million works to university servers was not “excessive or unreasonable” to support uses “permitted by the law of copyright”); *Authors Guild v. Google*, 804 F.3d 202, 229 (2d Cir. 2015) (holding that digital copies of more than 20 million books made “so as to enable [libraries] to make non-infringing use” were “lawfully made” copies).

II. The Exemption to Facilitate Nonprofit Educational Performances Should Not Distinguish Between Different Types of Courses

Some of the current DMCA exemptions for educational uses distinguish between “film studies or other courses requiring close analysis of film and media excerpts,” and other types of courses. *See* 37 C.F.R. §§ 201.40(b)(1)(iv)(B), 201.40(b)(1)(v)(B), 201.40(b)(1)(vi)(B). This distinction, which has no basis in the copyright statute, is not helpful and should be eliminated.

Instructors and pupils regularly make noninfringing performances of motion pictures in a wide range of educational settings, well beyond film studies courses. As just one example, motion pictures are used extensively in foreign language courses to provide students with opportunities to hear a given foreign language as spoken in film and television programs from a given country or region.

BYU has the largest language program in the nation, with more intermediate and advanced students in a number of language programs than any other university. Around 60 languages are taught in a typical semester. About 35% of the students are enrolled in language classes, almost four times the national average. Over 75% of the student body has some proficiency in a foreign language, due to the majority of these having served as missionaries around the world. Film and video becomes an integral part of the teaching and learning of languages from the beginning levels, accounting for almost 75% of the nearly 4,000 video titles that have been requested through the Humanities Learning Resource Center.

Instructors have requested the ability to queue up a series of clips from a film, and add comments, annotations, interactions, questions, or other customization to the playback of the

video to enhance or individualize the viewing assignment. Instructors should be enabled to make such uses, as long as they satisfy the statutory conditions set forth in Section 110(1) or 110(2).

However, instructors and pupils are adversely affected in their ability to make noninfringing uses of motion pictures in non-film studies courses due to the unduly restrictive language of the current DMCA exemption.

III. DMCA Exemptions Should Not Include Any References to Screen-Capture Technologies

As noted in the 2015 rulemaking proceeding, “Section 1201(a)(1) specifies that the exemption adopted as part of this rulemaking must be defined based on ‘a particular *class* of works.’” (2015 Recommendation, at 17 (emphasis in original).) The statute authorizes the Librarian of Congress, upon the recommendation of the Register of Copyrights, to determine *classes* of works that should be exempt from the prohibition on circumvention. The statute makes no mention, however, that the Librarian of Congress is authorized to decide or opine on specific *means* by which users may circumvent technological protection measures controlling access to copyrighted works. Thus, Commenters recommend avoiding the topic of screen-capture technologies (or any other specific technologies alleged to be circumventing) altogether during this rulemaking proceeding.

To the extent the Register wishes to address screen-capture technologies, it should clarify the confusing, if not contradictory, references to such technologies in the current DMCA exemptions. For example, the exemptions repeatedly use the phrase, “Where the circumvention is undertaken using screen-capture technology,” which suggests that the use of such technology constitutes circumvention. See 37 C.F.R. §§ 201.40(b)(1)(i)(A), 201.40(b)(1)(ii)(A), 201.40(b)(1)(iii)(A), 201.40(b)(1)(iv)(A), 201.40(b)(1)(v)(A), 201.40(b)(1)(vi)(A), 201.40(b)(1)(vii), 201.40(b)(1)(viii). On the other hand, the exemptions also repeatedly use the phrase, “screen-capture software *or other non-circumventing alternatives*,” which suggests that screen-capture software is an example of non-circumventing technology. See 37 C.F.R. §§ 201.40(b)(1)(i)(B), 201.40(b)(1)(ii)(B), 201.40(b)(1)(iii)(B), 201.40(b)(1)(iv)(B), 201.40(b)(1)(v)(B), 201.40(b)(1)(vi)(B).

The Register and various commenters during the 2015 rulemaking proceeding frequently referred to screen-capture technology as an “alternative to circumvention.” (See, e.g., 2015 Recommendation, at 57, 84, 87.) For example, the DVD Copy Control Association (“DVD CCA”) made the following unqualified statement in *opposition* to any proposed expansion of Class 1, “Video Capture Recording Is an Alternative to Circumvention.” (2015 DVD CCA Comments, p. 8.) Similarly, the Advanced Access Content System Licensing Administrator LLC (“AACSLA”) made the following unqualified statement, “Video Capture Recording of DVD Playback Is an Alternative to Circumvention.” (2015 AACSLA Comment, p. 9.)

In the Notice of Proposed Rulemaking, the Office invited comment on “whether there is common understanding that screen-capture technology is non-circumventing.” (Exemptions to Permit Circumvention of Access Controls on Copyrighted Works, 82 Fed. Reg. 49560 (Oct. 26, 2017). *Federal Register: The Daily Journal of the United States*. Web. 18 Dec. 2017.)

Commenters believe there is common understanding in at least the following acknowledgment made by the Register in 2015, “at least some types of screen-capture software are ‘comparable to camcording the screen—a process that has been identified as a noncircumventing option to accomplish noninfringing uses’ because the images are captured after they have been decrypted.” (2015 Recommendation, at 88.) Because screen-capture technologies “enabling the reproduction of motion pictures after content has been lawfully acquired and decrypted” do not involve circumvention, they are beyond the scope of these rulemaking proceedings. Yet, these are the *very types* of screen-capture technologies that the current DMCA exemptions repeatedly suggest may be circumventing. *See* 37 C.F.R. §§ 201.40(b)(1)(i)(A), 201.40(b)(1)(ii)(A), 201.40(b)(1)(iii)(A), 201.40(b)(1)(iv)(A), 201.40(b)(1)(v)(A), 201.40(b)(1)(vi)(A), 201.40(b)(1)(vii), 201.40(b)(1)(viii).

Commenters believe the references to screen-capture technologies in the current exemptions are confusing and sometimes contradictory. As set forth above, Commenters recommend resolving the confusion by eliminating all references to screen-capture technology.

IV. Conclusion

In summary, Commenters propose revising the current DMCA exemptions for motion pictures used for educational purposes, to align with the statutory conditions for noninfringing performances set forth in 17 U.S.C. §§ 110(1) and 110(2). Such an approach would simplify the DMCA exemptions and increase the likelihood that instructors and pupils would be able to use the educational performance exemptions in the manner contemplated by Congress when they were enacted into law.