



CLASS 2

Long Comment Regarding a Proposed Exemption

Under 17 U.S.C. 1201

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Item 1.

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I. Item 2.

Proposed Class Addressed

Proposed Subclass 2: Audiovisual works—educational uses—primary and secondary schools (K–12). This proposed class would allow kindergarten through twelfth-grade educators and students to circumvent access controls on lawfully made and acquired motion pictures and other audiovisual works for educational purposes. This exemption has been requested for audiovisual material made available in all formats, including DVDs protected by CSS, Blu-ray discs protected by AACS, and TPM-protected online distribution services.

II. Item 3.

Overview

Today, what we call “learning” is transforming: it’s no longer focused on learners who sit-and-listen and instructors stand-and-deliver. This new model is emerging where teachers are **designing-and-curating** rich multimedia artifacts and as learners take responsibility for their own education by demonstrating their comprehension, knowledge and skills by **making-and-creating** media messages in print, visual, sound, audiovisual, interactive and digital formats.¹

We request an exemption that enables educators and students to use artifacts of their cultural heritage – classic and contemporary film and other digital media – for these new instructional practices that have the potential to engage, motivate and inspire children and

¹ Alvermann, D. (2002). *Adolescents and literacies in a digital world*. New York: Peter Lang; Carrington, V. & Robinson, M. (2009). *Digital literacies: Social learning and classroom practices*. Thousand Oaks: Sage. Hobbs, R. (2010). *Digital and media literacy: A plan of action*. Washington, D.C.: John S. and James L. Knight Foundation and Aspen Institute. See also Jenkins, H., Purushotma, R., Clinton, K., Weigel, M., & Robinson, A. (2006) *Confronting the challenges of participatory culture: Media education for the 21st century*. Chicago: The MacArthur Foundation; Kress, G. (2003). *Literacy in the new media age*. London: Routledge; and Lankshear, C. & Knobel, M. (2003). *New literacies: Changing knowledge and classroom learning*. New York: Open University Press. For historical context on the use of multimedia production activities by students in elementary, secondary and higher education, see Palmieri, J. (2012). *Remixing composition: A history of multimodal writing pedagogy*. Carbondale: Southern Illinois University Press.

young people in American public, parochial and private schools. Such learning experiences activate digital and media literacy competencies, including the ability to access, analyze, evaluate, and create messages in a wide variety of forms. Students are able to reflect on the social consequences of media in society and take action in the use of information and communication to make a difference in the world. Such purposes involving the use of copyrighted content in education are well-aligned with the goals of copyright law, which is to promote creativity, innovation and the spread of knowledge.²

The spirit of the Section 1201 rulemaking process is to protect and preserve fair use in the digital age.³ We seek an exemption for the circumvention of audiovisual works used for educational purposes to allow both educators and students the ability to make high-quality clips of lawfully obtained motion pictures for a variety of educational purposes, including to facilitate the acquisition of media literacy competencies. We maintain that educational uses that depend upon close analysis of film or media images are adversely impacted if students are unable to apprehend the subtle detail or emotional impact of the images they are analyzing. In 2012, the Register of Copyrights agreed that under some conditions, screencasting is not an adequate mechanism to address the need for high-quality digital clips for educational use. As part of their formal learning, elementary and secondary students sometimes engage in creating transformative content using motion picture excerpts. These projects are often designed for authentic audiences including parents, peers and members of the local community and thus students have an authentic need for high-quality source material.⁴ In this comment, we demonstrate that elementary and secondary **teachers and their students** both need the ability to make fair use of entertainment, documentary and other forms of film that are currently protected from copying by various forms of copy-protected protection measures.

In support of this exemption, we incorporate by reference the comments made in support of exemptions for Proposed Classes 1–3, as well as all the comments made in previous rulemaking cycles concerning circumvention for educational uses. There is no pedagogical difference between the need for using audiovisual works in different educational settings. They are equally necessary in higher education, K–12, MOOCs, and the more informal settings of libraries and museums. And the necessity for these uses is even more compelling now than three years ago, as audiovisual works have become even

² Crews, K. (1993). *Copyright, Fair Use and the Challenge for Universities*. University of Chicago Press.

³ Copyright law - Digital Millennium Copyright Act - Librarian of Congress exempts university professors and film students from DMCA anticircumvention provisions." *Harvard Law Review* Apr. 2011: 1604+.

⁴ Tripp, L. (2011). Digital Youth, Libraries, and New Media Literacy. *The Reference Librarian*, 52(4), 329–341. doi:10.1080/02763877.2011.584842

more dominant in the lives of students. Further, the Register's conclusion in previous rulemaking cycles that the use of clips of audiovisual works for educational purposes is a fair use is still correct.

III. Item 4.

Technological Protection Measures and Methods of Circumvention

CSS, AACS and TPM-protected online distribution services are the technological protection measures and methods of circumvention included de-encrypting software.

IV. Item 5.

Noninfringing Uses

Both teachers and students need to use film clips for a wide range of teaching and learning purposes characterized broadly as educational use. It's important to note that the use of film clips for learning includes (but is not limited to) practices of comment and criticism. At the Remix T website, the University of Notre Dame offers a list of examples of student-created media projects that promote learning, including digital storytelling, public service announcements, documentaries, video essays, lip dubs and more. All of these project-based learning activities can be effective with children and teens in elementary and secondary schools, although not all of them make use of the practice of comment and criticism in the way that media analysis activities do. One of the most popular examples of student video production at the middle-school and high-school levels is National History Day (NHD), a national educational competition sponsored by the National Endowment for the Humanities, among others. Students create historical presentations in various media, including individual and group documentaries. Student-created documentaries often include excerpts from existing films and videos, as well as still photos, copyrighted sound clips, and originally produced video. The official NHD rules explicitly acknowledge students' right to make fair use of video clips and mandate the use of attribution. In these documentaries, sometimes the fair use of film and video excerpts is for the purpose of illustration, not comment and criticism per se. Many different forms of creative video production are now considered essential elements of contemporary learning and are widely used in K-12 education. But today, based on our work with public school teachers, we believe that most teachers and students have little understanding of the scope and limits of their ability to make fair use of copy-protected film and video for composing National History Day video projects.

Critical analysis of film clips is a vital component of teaching and learning with and about media. Naomi Bates, a teacher from Northwest High School in Justin, TX reports that both educators and pupils use film clips to evaluate changes in formality and tone across various media for different audiences and purposes; evaluate the objectivity of coverage of the same event in various types of media; evaluate the interactions of different techniques (e.g., layout, pictures, typeface in print media, images, text, sound in electronic journalism) used in multi-layered media; evaluate how messages presented in

media reflect social and cultural views in ways different from traditional texts; synthesize ideas and make logical connections (e.g., thematic links, author analyses) between and among multiple texts representing similar or different genres and technical sources and support those findings with textual evidence.

For example, in one assignment, students compared character and theme development in the novel *The Great Gatsby* and the movie *Chicago*, both of which depict the prevailing attitudes and social norms of the 1920s. Students are required to choose four characters from the novel and compare them to the character from the movie that they most closely resemble, looking at how the film director develops the characters visually through specific elements including costume, gesture, body movement, facial expression, dialogue and emotional expression. In this assignment, when students have the ability to create clips, they access and use specific details from the films that support close reading and critical analysis through activities that include comparison and contrast. In another example, when high school media teacher Kara Clayton from Redford High School in suburban Detroit asks students analyze media, she encourages them to embed film and video clips into a sequence of PowerPoint slides and use a combination of images and writing to support their analysis. According to Clayton, this assignment is designed to activate and support multimodal writing skills.

The creation and use of highly customized film clip compilations increases the efficiency of instruction in the elementary and secondary grades. When Rebecca Hranj taught high school in suburban Minneapolis, she needed to circumvent DRM on several occasions. She sometimes wanted to de-encrypt HD or Blu-Ray disks. When teaching a unit on Shakespeare, the lesson involved looking at pieces of several different plays and adaptations of the story by other authors and directors to appreciate how Shakespeare's works are used, referenced or acknowledged in popular culture and other works of literature and art. Before she was legally able to make a film compilation of copy-protected film, “it it took the better part of a class period to put in a DVD, locate the appropriate clip, play it, stop, and change the DVD.” After Hranj legally created a single DVD with all of the necessary clips for the entire unit, it made everything much easier during class.

The effective use of audiovisual resources is facilitated when educators and learners can create their own clips intentionally with a specific purpose in mind. Joy Millam, a school librarian from Placentia, California, notes that teachers use films and film clips frequently throughout the year. She notes that a film clip from *The Patriot* shows the brutality of war better than any lecture could. But educators and teacher-librarians cannot always rely on film clip compilation websites like MovieClip.com, where excerpts have been selected and labeled by others who are unfamiliar with the needs of the learners or the particular context and situation of the educational use. When teachers must rely on clips created by others, they lose control over vital aspects of the instructional design of learning experiences. When students must rely on pre-packaged clips, their critical thinking may be shortcut as they no longer get to make decisions about where to begin and end a clip. Such editorial decisions require strategic thinking and consideration of author, purpose

and point of view. These skills are not activated when students merely select a pre-packaged clip from a website.

Screencasts are inferior to digitally copied clips and are needed by some students for various forms of direct instruction and project-based learning in the elementary and secondary grades. At the 2012 rulemaking hearing, Spiro Bolos, a high school social studies teacher at New Trier High School in Winnetka, Illinois offered oral testimony before the Copyright Office on June 4, sharing his own experience using film clips in his teaching. To address the claim that K–12 teachers didn’t need access to high-quality video clips, he showed a video where he conducted some informal classroom research, playing a short clip from *Citizen Kane* (dir: Orson Welles) and leading a discussion with two groups of high school students. One group viewed a screencast version of the clip while the other group viewed and discussed a digital clip that had been “ripped.” We could clearly students’ comments were influenced by their ability to see and hear the visual and verbal content of the film.⁵ Andrew Young, a high school English teacher at Riverbend High School in Spotsylvania County, Virginia, teaches students to watch film using critical lenses (including feminist and Freudian theory) as well as how to use motifs to enhance understanding. He teaches basic film theory using a variety of clips to familiarize students with the vocabulary of film (shot, sequence, scene, depth of field, etc.) and to illustrate the many subtle choices that are being made during the process of filmmaking. When students conduct a film analysis, they must watch carefully to identify symbols, look for mirror characters, and examine power and dominance by reflecting upon which character is made to look larger in a given shot and whether those dynamics change during the course of the film and if that change is reflected in shot selection. Young notes that our culture relies on film and visual media to tell stories and that students need to practice examining the story forms of film with a critical eye, because too many are simply passive consumers of this type of media.

V. Item 6.

Adverse Effects

Learner’s lack of access to film cultural heritage for purposes of learning contributes with other factors to diminish the quality of education. Should learners continue to be denied legal access to use film clips for hands-on project-based learning, this lack of access will

⁵ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies: Rulemaking Hearing on Proposed Exemptions to Section 1201 Before the Register of Copyright 131-35 (2009) [hereinafter Section 1201 Hearing] (statement of Renee Hobbs, Professor of Broadcasting, Telecommunications & Mass Media, Temple University), available at <http://www.copyright.gov/1201/hearings/2009/transcripts/1201-5-6-09.txt>.

contribute with other factors to erode the transformative potential of digital media for learning. In England, with a strong national film heritage public organization, the British Film Institute, students in elementary and secondary schools receive free-of-charge, access to a systematic program of instruction in both critically analyzing and creating film.⁶ In the United States, where there is no strong public national film heritage organization, copyright holders seek to monetize the educational use of film through online streaming services like Discovery Education, based on a sit-and-watch model of passive consumption, which re-packages excerpts from public broadcasting's treasure trove of educational documentaries and sells access to these resources to schools for \$10,000 or more per annual subscription contract. Given that one in five American children grows up in poverty, enrolled in underfunded urban and rural communities, it is unlikely that such monetization strategies will enable children and teens to have robust access to film resources for innovative forms of education.

Current law makes irrational distinctions among learners enrolled in different programs of study. There is no rationale to make a distinction between college level and K–12 educators and their students, because doing so ignores the highly integrated and cross-disciplinary nature of technology usage in the classroom today. Frances Jacobson Harris, a co-petitioner, emeritus faculty and former school librarian has supervised several groups of students who were doing mixed-media projects in which they needed to capture various types of media for transformative purposes. For example, one student group was creating a hypothetical election campaign for the cartoon character Scooby Doo. They needed to create press releases, t-shirt and bumper sticker designs, radio and TV spots. But because students could not legally “rip” video, they used poor quality video from YouTube. The diminished sense of pride learners experience from such productions cannot compare to alternative situations where learners are able to take pride in their work because their use of high-quality video excerpts enables them to create work that meets contemporary standards for image quality.

Underscoring the irrationality of the distinctions created by the current set of exemptions is the case of Advanced Placement classes. In 2013, more than 135,000 teachers taught over 2.2 million high school students in AP classes. The objective of the AP program is to enable high school students to take college level classes. It makes no sense for high school students enrolled in AP courses to have less creative and challenging assignments than college students. And it certainly would make no sense for the exemption not to be renewed for the instructors. Why should high school students in AP courses have less engaging classroom sessions than students taking similar courses in college?

⁶ UNESCO (2013). Media and information literacy: Strategy and policy guidelines. UNESCO: Paris. Retrieved from <http://unesdoc.unesco.org/images/0022/002256/225606e.pdf>.

The Register of Copyright acknowledges that film students need to use high-quality images in their media productions, but this neglects the genuine educational needs of other learners—including those who major in business, history, women’s studies, literature or physics. At the present time, these learners are not entitled to legally rip clips for their creative projects. Instead, students must use screen capture software to accomplish their educational goals. On what pedagogical basis can it be determined that high school students don’t need high-quality images for their videos offering critical commentary of *Boyz and the Hood*, *Romeo and Juliet*, or *Spiderman*? Are their creative works inherently less valuable or important than the work of film majors? The distinction drawn between college students and other learners is baseless. Many different types of learners, in and out of schools, are equally in need of quality media because of the ever-blurring line between informal and formal learning and between high school and college curricula.

It is important to recognize that 75% of U.S. households have at least one high definition television. A 60 inch LED high definition television now can be purchased for as little as \$600. A generation of students is growing up accustomed to viewing sharp, high quality images. For them, low quality images are distracting and can interfere with the educational process. Further, the availability of only low quality images in the educational setting signals to students that education is not valued by their society.

Reliance on movie clip websites puts some learners at an educational disadvantage.

We have previously mentioned the disadvantages of movie clip websites that do not allow teachers or learners to select for themselves the precise starting and ending points of the excerpt. In many American schools today, there other challenging issues associated with this use of such websites due to unreliable or inconsistent Internet connections, slow bandwidth, website unavailability, and school district-imposed content filters. Clip compilation websites (with names such as MovieClip.com) present an extremely limited clip inventory, constraining teachers’ ability to locate particular clips needed for their lesson plans. In order for media compilation websites to be adequate alternatives to circumvention for clip compilation uses, these websites would need, at a minimum, to offer educationally relevant clips from movies still in commercial distribution. Moreover, those limited clips are also subject to discretionary editing by the website administrators, thereby decreasing their utility in K–12 classrooms. The website administrators also split longer scenes into separate clips, forcing teachers and students to sit through page loading, buffering, and (sometimes) advertisements.

Confusion over how teachers and students can legally access audiovisual clips for fair use is exacerbated by current DMCA law. When it comes to the growth of digital learning, many educators and other creative people depend upon copyright and fair use but few have used the rulemaking process as a means to protect their approach to digital learning as well as new forms of creative self-expression. Indeed, “both fair use and the broader structure of copyright law need to accommodate new forms of art that average citizens make” (Tushnet, 2012, p. 891). In research on more than 1,300 K–12 teachers in 17 states, researchers examined the legal knowledge and educational background of teachers, finding that most educators are uninformed or misinformed about student and

teacher rights; have taken no course in school law; get much of their legal information from other teachers; would change their behavior if they knew more about the law; and want to learn more about these issues.⁷ Indeed, the arcane aspects of DMCA are eroding the spirit and practice of fair use for digital learning in American public education. To what extent should we expect educators to be aware of technical, counterintuitive features of law that make it better, from a DMCA perspective, to download a full unauthorized copy of a TV show or movie that is already “in the clear” than to pay for DVDs and take small clips from them in order to create a remix?⁸ For K–12 educators and students with interests in digital learning, these questions are highly salient and address some the real-world consequences of the law.

Today, every educator’s work is directly implicated by copyright law. The fair use doctrine has to be understood in the context of existing patterns and particular group practices of making creative and transformative use of copyrighted work.⁹ These patterns will vary for many reasons. Art teachers will make use of copyrighted materials in a different way from science teachers, who, in turn, will use materials differently from those in the humanities. Over time, too, teachers and students will use copyrighted works in new ways. For example, in 1913, educators used copyrighted materials differently than we do today, where we are exploring digital media, social networking, wikis, podcasts, and videogames to engage and motivate learners. We are beginning to see that the work of media literacy educators is gradually becoming synonymous with “literacy.”¹⁰ Thus, the use of copyrighted materials as a resource for the practices of reading, critical analysis, and composing with digital media will become the rule rather than the exception in education. Fair use is challenging enough for educators and students to apply. They should not also have to navigate complex, inconsistent exemptions. Instead, the Librarian should adopt a simple exemption for audiovisual works for educational uses.

Restrictions on the Use of Clips Harms the Next Generation of Creators. The winner of the grand prize in Doritos Super Bowl advertisement contest, Scott Zabielski, exemplifies the importance of K–12 media education. The advertisement, entitled

⁷ Halme, M. & Somervuori, O. (2012). Copyrighted Internet material in education – teacher needs and use arrangements. *Education and Information Technologies* 17: 331- 344. DOI 10.1007/s10639-011-9161-0

⁸ Tushnet, R. (2010). I Put You There: User-Generated Content and Anticircumvention, *Vanderbilt Journal of Entertainment and Technology Law* 12, 889+.

⁹ McSherry, C. & Hofmann, M. (2012, Nov 2). The 2012 DMCA rulemaking: What we got, what we didn’t and how to improve the process next time. Electronic Freedom Frontier. Retrieved December 29, 2012 from <https://www.eff.org/deeplinks/2012/11/2012-dmca-rulemaking-what-we-got-what-we-didnt-and-how-to-improve>.

¹⁰ Hobbs, R. (2010). *Digital and media literacy: A plan of action*. Washington, D.C.: John S. and James L. Knight Foundation and Aspen Institute.

“Middle Seat,” shows a young man in the aisle seat on an airplane employing various ruses to keep the middle seat next to him vacant. When he sees an attractive blonde coming down the aisle, he attracts her to the middle seat using a bag of Doritos, only to discover that she is holding a squirming baby. The ad won Zabielski \$1,000,000 and a one year contract with Universal Pictures. According to the *Washington Post*, Zabelieski, a television director and producer based in California, credits his success in the advertisement to the training in digital video editing he received at the video technology and media lab at the Thomas Jefferson High School for Science and Technology in Fairfax, Virginia. Preventing K–12 students from learning how to create high-quality remixes will hinder their growth as artists and will make them less competitive in the global entertainment marketplace.

VI. Item 7.

Statutory Factors

This requested exemption supports lawful uses that fall squarely within the mandate that section 1201 confers on the Copyright Office. Many of the uses just described fall within the ambit of Sec. 110(1) of the Copyright Act. Beyond that, use of copyright content for classroom teaching is a classic fair use. Importantly, the incorporation of video clips into student-created multimedia presentations represents a strong transformative use of the copyrighted material. In light of each of the statutory factors set forth in 17 U.S.C. 1201(a)(1)(C), this exemption is recognized as a fair use:

- (i) **Nature of the Work.** Copy-protected audiovisual content, including entertainment, informational and other forms of contemporary and classic film and video content is relevant to learners today as educators aim to make direct connections between the academic content of the classroom, the targeted competencies and skills to be strengthened, and the lived experience of the learner.
- (ii) **Character and Use.** Whether originally used for entertainment, information or persuasive purposes, short excerpts of copy-protected works are repurposed as resources for learning in K–12 education as learners activate critical thinking, collaboration, creativity and communication skills in responding and creating with these resources.
- (iii) **Purpose.** An exemption enabling circumvention of technological measures applied to copyrighted works enables the robust practice of learning and teaching as well as criticism and comment.
- (iv) **Effect on Market.** The circumvention of technological measures does not impair the market for or value of copyrighted works because K-12 learners are using these resources for an educational purpose only. The bypassing of copy-protection is used not as a replacement or substitute for the original, but as a resource for learning used for the primary purpose of activating students’ critical thinking, creativity, communication and collaboration skills.