

Submission on behalf of ESA, MPA, N/MA and RIAA
Class 2: Audiovisual Works – Online Learning

UNITED STATES COPYRIGHT OFFICE



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

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

ITEM A. COMMENTER INFORMATION

The Entertainment Software Association (“ESA”) is the United States trade association serving companies that publish computer and video games for video game consoles, handheld video game devices, personal computers, and the internet. It represents nearly all of the major video game publishers and major video game platform providers in the United States.

The Motion Picture Association, Inc. (“MPA”) is a trade association representing some of the world’s largest producers and distributors of motion pictures and other audiovisual entertainment for viewing in theaters, on prerecorded media, over broadcast TV, cable and satellite services, and on the internet. The MPA’s members are Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc.

The News/Media Alliance (“N/MA”) represents over 2,200 publishers in the U.S. and internationally, ranging from the largest news and magazine publishers to hyperlocal newspapers, and from digital-only outlets to papers who have printed news since before the Constitutional Convention. Its members produce quality journalistic and creative content that accounts for nearly 90 percent of daily newspaper circulation in the U.S., over 500 individual magazine brands, and dozens of digital-only properties.

The Recording Industry Association of America, Inc. (“RIAA”) is a nonprofit trade organization that supports and promotes the creative and financial vitality of recorded music and the people and companies that create it in the United States. RIAA’s several hundred members—ranging from major American music companies with global reach to artist-owned labels and small businesses—make up the world’s most vibrant and innovative music community. RIAA’s members create, manufacture, and/or distribute the majority of all legitimate recorded music produced and sold in the United States. In supporting its members, RIAA works to protect the intellectual property and First Amendment rights of artists and music labels.

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 website 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.

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ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 2: Audiovisual Works—Online Learning.

ITEM C. OVERVIEW

As the Office’s Notice of Proposed Rulemaking (“NPRM”)¹ in this proceeding recognizes, Class 2 addresses broad proposals for online learning exemptions that the Register previously “considered and ultimately recommended against” in both the 2018 and 2021 proceedings.² In fact, the Register effectively rejected these proposals in the 2015 proceeding as well, when Professor Decherney and a different set of co-proponents sought a broad exemption for massive open online courses (“MOOCs”) that would have been roughly equivalent to the exemption sought here, and the Register instead recommended a much more tailored exemption that was the predecessor of current 37 C.F.R. § 201.40(b)(1)(ii)(B).³ These proposals have not improved with age or repetition. Despite the Office’s request for the Class 2 proponents (“Joint Educators”) to identify “whether any changed legal or factual circumstances warrant altering” the prior determinations,⁴ the Joint Educators offer little more than a cursory argument that online education has continued to grow in popularity.⁵

While the specific regulatory language the Joint Educators propose is not entirely clear, it appears that they are pushing for adoption of the regulatory language that NTIA advocated, and

¹ Exemptions To Permit Circumvention of Access Controls on Copyrighted Works: Notice of Proposed Rulemaking, 88 Fed. Reg. 72,013 (Oct. 19, 2023), <https://www.govinfo.gov/content/pkg/FR-2023-10-19/pdf/2023-22949.pdf>.

² *Id.* at 72,024.

³ See SECTION 1201 RULEMAKING: SIXTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS, 26, 72-76, 102, 105 (2015), <https://cdn.loc.gov/copyright/1201/2015/registers-recommendation.pdf> (“2015 Register’s Recommendation”).

⁴ 88 Fed. Reg. at 72024-25.

⁵ See Joint Educators Class 2 Long Comment at 2, 6-8 (Dec. 21, 2023) (“Joint Educators Comments”).

the Register rejected, in the 2021 proceeding.⁶ That language differs from the exemption currently in 37 C.F.R. § 201.40(b)(1)(ii)(B) in important respects, including that:

- It is not limited to “accredited nonprofit educational institutions,” but instead would apply to all “educational entities,” including for-profit companies and unaccredited programs.
- It is not limited to “faculty” of eligible institutions and “employees acting at the[ir] direction,” but also would broadly apply to other “preparers of online learning materials” that are ultimately “offered by educational entities.”
- It is not limited to courses provided to “officially enrolled students” but instead extends to materials provided to any “registered learners of online learning platforms.”
- It is not limited to “film studies or other courses requiring close analysis of film and media excerpts” and use for “purpose of criticism or comment,” but instead extends to any use that “will contribute significantly to learning.”
- It does not require the institution to apply “technological measures that reasonably prevent unauthorized further dissemination of a work,” but merely “to the extent technologically feasible . . . work to reasonably prevent unauthorized further dissemination.”

The Joint Educators do not provide any meaningful justification for these proposed expansions. They focus primarily on the first of these changes – elimination of the limitation to accredited nonprofit institutions. Even there, however, the closest they come to a justification for the change is an argument that for-profit, nonaccredited entities would use motion picture excerpts “in the same manner” as other eligible institutions⁷ and that the “commercial nature of any of these qualified for-profit educational entities does not undermine their legitimacy or their entitlement to fair use protections.”⁸ The Register has already rejected such arguments *three times*.⁹ With respect to elimination of the “close analysis” requirement, the Joint Educators

⁶ Compare Joint Educators Comments at 2, 4, 13-15, 17-19 with Letter from Evelyn L. Remaley, Acting Assistant Sec’y for Commc’ns & Info. & Adm’r, Nat’l Telecomms. & Info. Admin., U.S. Dep’t of Commerce, to Shira Perlmutter, Register of Copyrights and Dir., U.S. Copyright Office, at 12-13 (Oct. 1, 2021); see also SECTION 1201 RULEMAKING: EIGHTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS, 56-58 (2021), https://cdn.loc.gov/copyright/1201/2021/2021_Section_1201_Registers_Recommendation.pdf (“2021 Register’s Recommendation”).

⁷ Joint Educators Comments at 11.

⁸ *Id.* at 13.

⁹ 2021 Register’s Recommendation at 38-39, 49-53; SECTION 1201 RULEMAKING: SEVENTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE ACTING REGISTER OF COPYRIGHTS, 32-33, 37, 53-55 (2018), https://cdn.loc.gov/copyright/1201/2018/2018_Section_1201_Acting_Registers_Recommendation.pdf (“2018 Register’s Recommendation”); 2015 Register’s Recommendation at 31-32, 36-37, 72-76.

merely argue that use of high-quality excerpts is broadly beneficial.¹⁰ However, the Register has heard these arguments before and consistently concluded that for many purposes, a lower image quality is good enough.¹¹ The Joint Educators do not make any effort at all to justify the other proposed changes.

The Joint Educators have utterly failed to meet their burden of proof. The proposed exemption should be rejected again for the same reasons similar ones have been rejected before.¹²

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

The proposed expanded exemption would cover a wide array of access controls because it appears that the Joint Educators are not proposing any change to the preamble of 37 C.F.R. § 201.40(b)(1). That preamble identifies the copyrighted works involved as “[m]otion pictures (including television shows and videos) . . . acquired on a DVD protected by the Content Scramble System, on a Blu-ray disc protected by the Advanced Access Content System, or via a digital transmission protected by a technological measure.”¹³ By virtue of the reference to digital transmission – an increasingly important means of access to copyrighted motion pictures – the proposed exemption implicates technological measures used on digital streaming services, download services, remote services that facilitate cloud-based access, and (potentially) cable and satellite set-top boxes and video game consoles.¹⁴ Many of these access controls enforce terms of use that allow for lower cost, temporary access and do not allow for the retention of permanent reproductions. These are precisely the kinds of access controls Congress intended to incentivize and protect when enacting Section 1201 because they increase the availability of motion pictures at affordable prices through access-based business models.¹⁵

The Joint Educators’ various proposed changes to 37 C.F.R. § 201.40(b)(1)(ii)(B) would greatly expand the universe of people eligible to circumvent all these technological protection measures and thereby obtain unprotected copies of motion pictures that they easily could use for purposes beyond the contemplation of the proposed exemption. Obviously, this includes the ill-defined

¹⁰ Joint Educators Comments at 9-11.

¹¹ See 2021 Register’s Recommendation at 54-36; 2015 Register’s Recommendation at 99.

¹² See 2021 Register’s Recommendation at 59; 2018 Register’s Recommendation at 53-55; 2015 Register’s Recommendation at 102. Because the Joint Educators have provided no evidence of any factual changes relevant to Class 2, and ESA, MPA, N/MA, and RIAA are not aware of any such evidence, we agree that it would be appropriate for the Office to take into account evidence submitted in prior proceedings. We do not agree that such evidence “support[s] the expansion.” See 88 Fed. Reg. at 72,025.

¹³ 37 C.F.R. § 201.40(b)(1).

¹⁴ Given that the Register and Librarian have previously denied proposed exemptions for circumventing the HDCP encryption scheme utilized for devices that connect to televisions through HDMI cables, and also denied exemptions for circumventing access controls on video game consoles, the proposals are best interpreted to exclude these devices from their scope even though the devices are used to receive transmissions of motion pictures and further transmit the motion pictures to screens. If any expansion is granted, it should make these implied limitations express.

¹⁵ See, e.g., U.S. COPYRIGHT OFFICE, SECTION 1201 OF TITLE 17 at 9-10 (2017), <https://www.copyright.gov/policy/1201/section-1201-full-report.pdf> (“By providing legal protection for access controls, Congress hoped to encourage copyright owners to make their works available to consumers through flexible and cost-effective online platforms” including ones that “allow access during a limited time period”).

category of “educational entities” that would be the primary beneficiaries of this exemption. However, it also includes *anybody* that prepares online learning materials ultimately offered by educational entities. This would at least seem to include contractors of educational entities and commercial providers of educational materials adopted by educational entities. It is certainly a much broader set of people than just faculty of accredited nonprofit educational institutions and employees of such institutions acting at the direction of faculty, creating a significant risk of infringement of valuable motion picture copyrights.

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGEMENT USES

The Register should reject the proposed changes constituting Class 2 for the same reasons the Register rejected similar proposals from some of the same proponents in the 2021, 2018 and 2015 proceedings.¹⁶ There have been no developments in the last nine years that would justify making the proposed changes at this time.

As the Register has consistently reiterated, proponents “bear the burden of establishing that the requirements for granting the exemption have been satisfied.”¹⁷ This burden means that the proponents must prove that (1) the class includes copyrighted works; (2) the proposed uses “are likely to be noninfringing”; (3) “the statutory prohibition on circumventing access controls is the cause of the adverse effects”; and (4) “users are either adversely affected, or are likely to be adversely affected, in their ability to make noninfringing uses during the next three years,” as analyzed under Section 1201(a)(1)(C)’s statutory factors.¹⁸ Here, the proposed class includes copyrighted works (satisfying item (1)), but none of the other three requirements are met. As set forth below, there is no need or basis for revising the current exemption for MOOCs, which ESA, MPA, N/MA and RIAA did not oppose renewing, and the Office has already said it intends to recommend renewing.¹⁹

1. The proposed class includes copyrighted works.

It is undisputed that the proposed class includes copyrighted works.²⁰ As the Register has stated, “it is well established that motion pictures are creative and thus at the core of copyright’s protective purposes.”²¹

2. The additional uses will include infringement.

As described above, the Joint Educators once again seek a broad exemption for educational uses of motion pictures. Despite numerous references to “qualified” educational entities,²² this broad

¹⁶ See 2021 Register’s Recommendation at 59; 2018 Register’s Recommendation at 53-55; 2015 Register’s Recommendation at 102.

¹⁷ See, e.g., 2021 Register’s Recommendation at 7 (quoting 2015 Register’s Recommendation at 13).

¹⁸ *Id.* at 10-11.

¹⁹ 88 Fed. Reg. at 72,017.

²⁰ See, e.g., Joint Educators Comments at 13; 2021 Register’s Recommendation at 42.

²¹ 2021 Register’s Recommendation at 43.

²² Joint Educators Comments at 2, 3, 4, 5, 12, 13, 15, 18, 20.

exemption would apply to any and all “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.”²³ It would also (1) extend to “preparers of online learning materials” that are “offered by educational entities,” potentially including commercial providers of educational materials adopted by educational entities; (2) permit circumvention for purposes of offering material to users who have merely completed a perfunctory online registration process, rather than being “officially enrolled students”;²⁴ (3) greatly expand the number and type of eligible courses, and the purposes for which motion pictures could be used in those courses; and (4) weaken the requirement that technological measures be used to prevent unauthorized further dissemination of the motion pictures involved.

The Register has rejected requests for similar exemptions in the last three cycles. In 2021, responding to a similar request from the Joint Educators, the Register concluded:

[T]he Register finds that the record lacks support to expand the existing exemption to for-profit and/or unaccredited educational companies and organizations. Moreover, the Register does not recommend adoption of proponents’ broadly framed proposal to encompass “online learning materials” of “online learning platforms,” as it would seemingly encompass any online video that could be characterized as an educational experience.²⁵

The Joint Educators’ petition in this proceeding presents the same problems, and their persistence in continually advocating for such expansions should not be rewarded.

The Register’s rationale for not adopting a broad educational exemption in the 2021 proceeding was that “the substantial prevalence of commercial uses in the proposal, and the difficulty of separating truly educational uses from ordinary commercial uses” made it impossible for her “to conclude that the proposed uses are likely to be noninfringing.”²⁶ Taking into account the full scope of activity that would be enabled by the Joint Educators’ proposal in the current proceeding leads to the same conclusion as in the 2021 proceeding – that the use that would be enabled by the broader exemption is not a fair use. Below we describe why it is not a fair use on a factor-by-factor basis.

A. Purpose and character of the use.

While some educational purposes may qualify as transformative uses of copyrighted works, such as uses for the “purpose of criticism or comment” as enabled by the current exemption in 37

²³ *Id.* at 2 (emphasis added; internal quotation marks omitted).

²⁴ See 2018 Register’s Recommendation at 53 (describing proposal to allow users to register for a course “through a Facebook login”).

²⁵ 2021 Register’s Recommendation at 59; see also 2018 Register’s Recommendation at 55 (“The Acting Register agrees that the record lacks examples sufficient to evaluate or recommend expansion to for-profit or unaccredited educational institutions. . . . Just as the 2015 record did not support the inclusion of MOOCs offered by for-profit and/or unaccredited institutions, neither does the current record.”).

²⁶ 2021 Register’s Recommendation at 52.

C.F.R. § 201.40(b)(1)(ii)(B), the Joint Educators propose to eliminate that limitation. Moreover, the Joint Educators’ comments suggest that they are interested in using entertainment content in lessons simply because it is entertaining, rather than because of a purpose of criticism or comment or because it is uniquely necessary to an educational purpose.²⁷ Certainly some of the examples of potential uses they provide do not seem “highly” transformative, if they are transformative at all.²⁸ For example, using a motion picture to “provide a first-hand depiction of an experience rather than reading a second-hand account through text,”²⁹ means using it for the motion picture’s original purpose, rather than a transformative one. Similarly, “watching clips of a nature documentary . . . for a biology course”³⁰ also means using the work for its original purpose rather than a transformative one.

In any event, the Joint Educators specifically seek to include commercial uses within the exemption – including use by both commercial educational entities and commercial “preparers of online learning materials.” In 2021, that was a sufficient reason for the Register to find that the first factor weighed against fair use.³¹ Since the last proceeding, the Supreme Court has emphasized that even when a use can be considered transformative, it is not appropriate simply to assume that the transformative nature of the use trumps a commercial purpose. Rather, a transformative purpose (if there is one at all) “is a matter of degree, and the degree of difference must be balanced against the commercial nature of the use.”³² Unless a commercial secondary use has a purpose meaningfully distinct from the original use, “the first factor is likely to weigh against fair use, absent some other justification for copying.”³³ Here, the Joint Educators have not proposed an exemption that would ensure that all the commercial uses they would enable have purposes that outweigh their commercial nature. In fact, and as described above, the proposed exemption would enable uses that are not transformative at all. Given this, the first fair use factor once again weighs against a finding of fair use.

B. Nature of the work.

The Register has stated that “motion pictures are creative and thus at the core of copyright’s protective purposes.”³⁴ The Joint Educators don’t meaningfully dispute this, although pointing to the purportedly transformational purpose of the use, they strangely claim that “the nature of these copyrighted works lends themselves to fair use.”³⁵ That is contrary to the text of Section 107(2), which commands a focus on the characteristics of the work used (not the way it is used),

²⁷ See Joint Educators Comments at 9 (“Educational materials that are both engaging and interesting to students grab their attention and increase their willingness to learn.”), 11 (“the students enjoyed using movies to learn English”).

²⁸ See Joint Educators Comments at 13.

²⁹ *Id.* at 10.

³⁰ *Id.* at 14.

³¹ 2021 Register’s Recommendation at 52.

³² *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 598 U.S. 508, 532 (2023).

³³ *Id.*, 598 U.S. at 532-33. For these purposes, “justification” refers to a purpose such as parody making copying necessary to serve the purposes of copyright. See *id.* at 530-33.

³⁴ 2021 Register’s Recommendation at 43.

³⁵ Joint Educators Comments at 13.

as well as ample case law.³⁶ This factor weighs against fair use now just as it did in the Register’s 2021 analysis.³⁷

C. Amount and substantiality of the portion used.

Assuming we are correct that the Joint Educators intend to retain the existing limitation to “short portions of the motion pictures,”³⁸ this factor may not weigh against a finding of fair use. However, that is not to say that copying short portions of works is always fair use. The amount copied must be weighed against the other factors, and “the extent of permissible copying may vary.”³⁹ For example, the third factor can weigh against fair use when a small portion that is copied is nonetheless qualitatively important.⁴⁰ It is reasonable to expect that educational entities and content developers often will wish to copy the more qualitatively important portions of the motion pictures they use.

D. Effect of the use on the market.

As was the case in 2021, the widespread commercial use of motion pictures advocated by the Joint Educators risks significant market harm to copyright owners. Educational licenses for motion pictures are available, and even when copyright owners may elect to permit *gratis* use of motion picture clips for certain educational purposes, they regularly impose conditions on use that would not apply when ill-defined educational entities and preparers of online learning materials simply help themselves to motion picture clips.

The Joint Educators’ proposal would negatively affect copyright owners’ legitimate revenues from streaming and download services that publicly perform or otherwise transmit copies of motion pictures – some of which cater specifically to educational institutions. Even if not all titles are available through one or more of these services, many titles *are* available and more are constantly added. Copyright owners should not be deprived of revenues and potential revenues derived from the titles that are available on, or may soon be available on, these licensed streaming services that cater to educational institutions. These include:

³⁶ See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994) (“factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied”); *Andy Warhol Foundation v. Goldsmith*, 11 F.4th 26, 45 (2d Cir. 2021) (“though we have previously held that this factor ‘may be of limited usefulness where the creative work is being used for a transformative purpose,’ . . . this relates only to the weight assigned to it, not whom it favors” (quoting *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006)), *aff’d on other grounds*, 143 S. Ct. 1258 (2023); *Cariou v. Prince*, 714 F.3d 694, 709 (2d Cir. 2013); *Blanch v. Koons*, 467 F.3d 244, 256-57 (2d Cir. 2006).

³⁷ 2021 Register’s Recommendation at 43.

³⁸ 37 C.F.R. § 201.40(b)(1).

³⁹ 2021 Register’s Recommendation at 43.

⁴⁰ *Harper & Row, Pubs. v. Nation Enters.*, 471 U.S. 539, 564-66 (1985).

- **Swank - Digital Campus**⁴¹ provides on and off campus faculty and students in colleges and universities with over 30,000 films (including from major studios), documentaries and TV shows via streaming.
- **Kanopy**⁴² partners with public libraries and universities to stream content for free to personal devices. Users can log in with a library membership and enjoy a diverse catalog with new titles added every month.
- **Alexander Street**⁴³ enables libraries to increase faculty and student access to learning and scholarly content. It offers subscription and demand-driven acquisition options.
- **Passion River**⁴⁴ distributes a catalogue of award-winning independent and documentary films on topics such as Multicultural Studies, Women’s Studies, Medical Studies and Advances, Religious and Spiritual Studies, Environmentalism, Aging, Drug Addiction, LGBT issues and others. It provides educational DVD and streaming licenses.
- **Roco Films Educational**⁴⁵ enables students and faculty to instantly stream documentaries at any time, on or off campus through their proxy library server. Roco Films’ catalog consists of highly acclaimed, festival award-winning films, specifically curated with their academic potential in mind. They offer à la carte licenses, entire collection subscriptions, and a patron-driven acquisition model that allows users to pay only for films that are being used.
- **Collective Eye Films**⁴⁶ offers a license for colleges, universities, and corporations for films to be used by students, staff and faculty in classrooms or at home.

In addition, the downstream markets addressed by commercial educational entities are orders of magnitude different from those addressed by accredited nonprofit educational institutions. For example, Professor Decherney’s institution, the University of Pennsylvania, is a relatively large brick-and-mortar institution with about 29,000 total students (including graduate and part-time students).⁴⁷ By contrast, some of the individual for-profit companies that the Joint Educators seek to cover with their proposed exemption claim to have more than a thousand times as many students.⁴⁸ This vast reach creates a much greater risk of exploitive use of valuable copyrighted works.

⁴¹ See <https://www.swank.com/digital-campus/> (last visited Feb. 15, 2024).

⁴² See <https://www.kanopy.com/en/> (last visited Feb. 15, 2024).

⁴³ See <https://alexanderstreet.com/page/academic> (last visited Feb. 15, 2024).

⁴⁴ See <https://edu.passionriver.com/> (last visited Feb. 15, 2024).

⁴⁵ See <https://rocofilms.com/services/educational/> (last visited Feb. 15, 2024).

⁴⁶ See <https://www.collectiveeye.org/>; <https://www.collectiveeye.org/pages/distribution-page> (last visited Feb. 15, 2024).

⁴⁷ *University of Pennsylvania, Facts*, <https://www.upenn.edu/about/facts> (last visited Feb. 19, 2024).

⁴⁸ The Joint Educators give examples of potential beneficiaries of the exemption that include Udemy, 2U and LinkedIn Learning. Joint Educators Comments at 5. Udemy professes to have over 210,000 courses and over 69 million learners. *Udemy, Welcome to Where Possibilities Begin*, UDEMY.COM, <https://about.udemy.com/?locale=en->

Particularly given the commercial nature of the proposed beneficiaries of a broadened exemption and the scale of their operations, the fourth factor weighs against fair use.⁴⁹

* * *

Because at least three of the four fair use factors, and particularly the important first and fourth factors, weigh firmly against fair use, the incremental usage that the Joint Educators seek to cover with a broadened exemption cannot be considered a fair use.⁵⁰

Notably, the Joint Educators do not discuss Section 110(2) of the Copyright Act, except to complain that it does not suit their wishes.⁵¹ However, it reflects a carefully-calibrated balance that the Joint Educators wish to upend by conferring on a much broader set of users benefits that Congress chose to provide only to accredited nonprofit educational institutions. Section 110(2) incorporates specific protections that the Register has built into the existing exemption, but that the Joint Educators would like to remove, including the limitation to officially enrolled students⁵² and application of technological protection measures.⁵³ The Register did so because she found that Section 110(2) “offers important and meaningful guidance concerning Congress’s desire to balance pedagogical needs in distance learning with copyright owners’ concerns of harmful impact.”⁵⁴ The gulf between what Congress specifically permitted in Section 110(2) and what the Joint Educators would like to shoehorn into fair use is a further indication that infringing uses are involved.

3. The alleged adverse effects are not primarily caused by the statutory prohibition on circumventing access controls.

Because the Joint Educators propose to extend an exemption to cover infringing uses, it is not necessary to analyze that proposal further.⁵⁵ However, considering other factors confirms that the Register should deny their request for a broader exemption in this proceeding.

The adverse effects cited by the Joint Educators are wide-ranging but boil down to the idea that “students suffer consequences when nontraditional educational entities are adversely affected in

[us](#) (last visited Feb. 16, 2024). 2U professes to have over 4,500 courses and over 83 million learners. *Delivering World-Class Learning Outcomes*, 2U.COM, <https://2u.com/about/> (last visited Feb. 16, 2024). LinkedIn Learning professes to have over 22,300 courses. *Keep Learning in the Moments That Matter*, LINKEDIN LEARNING, <https://www.linkedin.com/learning/> (last visited Feb. 16, 2024).

⁴⁹ 2021 Register’s Recommendation at 52.

⁵⁰ *Id.*

⁵¹ See Joint Educators Comments at 17.

⁵² 17 U.S.C. § 110(2)(C)(i).

⁵³ 17 U.S.C. § 110(2)(D)(ii)(I).

⁵⁴ 2015 Register’s Recommendation at 102.

⁵⁵ See 2021 Register’s Recommendation at 56 (“[I]n light of the Register’s finding that proponents have failed to establish a noninfringing use, it is unnecessary to address whether they have demonstrated an adverse impact on such use.”).

their ability to make noninfringing uses of high-quality motion pictures [sic] excerpts”⁵⁶ The Joint Educators assert that an exemption that applies to for-profit, unaccredited learning centers is necessary “so these educators and students currently left behind can access quality audiovisual learning materials through high-quality short motion picture excerpts.”⁵⁷ This cursory statement lacks any factual support and is just flat wrong.

Setting aside the conceptual problem that the Joint Educators are advocating for an exemption to cover *infringing* uses, there is simply no evidence for the assertion that students are being left behind or that any educational harms are being caused by limitations in the current exemption. In assessing the costs of for-profit, unaccredited programs, Joint Educators compare certificate programs to full-time college curriculums.⁵⁸ They also include costs for housing, food, and personal expenses as costs of full-time programs, even though any student in any program must live and eat.⁵⁹ These are false comparisons. The reality is that educational options such as community colleges have reasonably affordable tuition.⁶⁰ And accredited institutions offer online certificate courses and programs typically within a price range of \$50 to \$6,000.⁶¹ Some certificate programs offered by accredited institutions are even free.⁶² As examples of non-accredited and for-profit programs, the Joint Educators identify entities such as 2U, LinkedIn Learning, Skillshare, and Udemy. But notably, 2U, together with its platform edX.org, offers a

⁵⁶ Joint Educators Comments at 6.

⁵⁷ *Id.* at 20.

⁵⁸ *Id.* at 6-7.

⁵⁹ *Id.* at 7.

⁶⁰ See, e.g., *Northern Virginia Community College, Cost of Attendance*, <https://www.nvcc.edu/admissions/tuition/cost.html> (tuition and fees of \$2,662 per semester) (last visited Feb. 17, 2024).

⁶¹ Five examples of the many accredited institutions nationwide offering certificate or certificate-type programs – of which many are available online – are Santa Monica College, Southern New Hampshire University, Colorado State University, Calhoun Community College in Alabama, and Lehman College of the City University of New York. See, e.g., <https://www.smc.edu/student-support/academic-support/transfer-center/areas-of-study/certificates/certificates-achievement/>; <https://www.smc.edu/admission-aid/tuition-fees/> (specifying resident enrollment fees of \$46 per course unit); <https://www.smc.edu/academics/areas-of-interest/all-programs.php>; <https://www.snhu.edu/online-degrees/certificates/>; <https://www.snhu.edu/online-degrees/certificates/human-resource-management> (offering undergraduate certificate in Human Resources Management for \$330 per credit for 12 credits, or \$3,960); <https://www.online.colostate.edu/certificates/>; <https://www.online.colostate.edu/badges/creative-organizational-innovation/> (offering 3-week “mastery badge” in Creative Organizational Innovation for \$324); <https://calhoun.edu/workforce-solutions/>; <https://calhoun.edu/workforce-solutions/cyber-it-certifications/cyber-safe/> (\$69 course preparing for “Certified CyberSAFE credential”); <https://www.lehman.edu/academics/continuing-education/learn-more/online-courses/>; <https://ce.cuny.edu/lehman/searchResults.cfm?prgID=2105> (New York State-approved “77-hour course to help you become a Real Estate Salesperson” offered for \$235 online, or \$550 as “hybrid” online/in-person); <https://www.lehman.edu/academics/continuing-education/learn-more/administrative-executive-assistant/>; <https://ce.cuny.edu/lehman/searchResults.cfm?prgID=2103> (Executive Assistant certificate program for total cost of less than \$1,500) (websites last visited Feb. 15, 2024).

⁶² See, e.g., <https://www.smc.edu/academics/noncredit/> (last visited Feb. 15, 2024) (“Free Noncredit Classes & Certificate Programs ... SMC offers free classes with no prerequisites! Jumpstart your career and develop new skills!”).

large number of offerings from *accredited* intuitions,⁶³ while courses on platforms such as Udemy, Skillshare, and LinkedIn often last less than one hour and rely on “instructors” who are solicited online and create and publish course content themselves.⁶⁴ Indeed, virtually anyone can hold themselves out to be an unaccredited learning center, which invites exploitation of a broadened exemption. The proliferation of such content in unaccredited and for-profit settings raises substantial concerns about security and piracy that are addressed by limitations in the current exemption that the Joint Educators would like to eliminate.⁶⁵ Programs from accredited educational institutions cover the same areas of study, allow for online learning to accommodate students’ schedules, and are reasonable in cost when suitably compared.

Equally or more seriously, the Joint Educators ignore the fact that the growing proliferation of unaccredited learning platforms and for-profit credential programs in some cases are scams. A 2021 *Washington Post* article bears the subheading, “As more jobs require postsecondary training, more providers jump in to offer it – including fakes and scammers,” and points out that “[t]he result is confusion among employers scrambling for workers – and growing concern that unsavory players may be taking advantage to sell fraudulent credentials.”⁶⁶ To the extent that would-be beneficiaries are scammers, there is no reason to believe that such scofflaws would abide by any limitations on the proposed exemption or take meaningful steps to protect copyrights. Expanding the current exemption into such an environment presents unnecessary risks, is unsupported by the Joint Educators’ evidence, and would contravene the “appropriately tailored restrictions” called for in these proceedings.⁶⁷

Simply put, access controls protecting motion pictures are not causing educational deficiencies, and opening up the possibility of circumventing motion picture access controls to an ill-defined category of educational entities and preparers of online learning materials is not clearly the solution to any obvious educational problem.

⁶³ See <https://2u.com/> (last visited Feb. 15, 2024) (referring to 2U’s “partnership with leading universities and industry experts”). Although Joint Educators make much of “bootcamp”-style programs, every single program identified as a “bootcamp” on the 2U-affiliated website edX.org appears to be offered through an accredited institution. See <https://www.edx.org/boot-camps> (last visited Feb. 15, 2024).

⁶⁴ See <https://www.linkedin.com/learning>; <https://learning.linkedin.com/instructors>; <https://www.udemy.com/>; https://www.udemy.com/teaching/?ref=teach_header; <https://teach.udemy.com/course-creation/>; <https://help.skillshare.com/hc/en-us/articles/205222257-How-do-I-publish-my-class-to-Skillshare> (websites last visited Feb. 15, 2024).

⁶⁵ See, e.g., 2021 Register’s Recommendation at 50 (noting that in “in first recommending the existing exemption in 2015,” the Register “credited opponents’ concern that an “unbounded exemption’ where ‘[a]nybody can declare that they’re teaching a MOOC’ and ‘anyone can be a student’” would be “anathema to the exemption process as envisioned by Congress.”); *id.* at 58 (“The Register believes . . . that the predominantly commercial nature of most of the proposed beneficiaries is significant.”).

⁶⁶ Jon Marcus, *Growing ‘Maze’ of Education Credentials Is Confusing Consumers, Employers*, WASHINGTONPOST.COM (Dec. 26, 2021), <https://www.washingtonpost.com/education/2021/12/26/education-credential-certificate-scams/> (last visited Feb. 15, 2024) (“The result is confusion among employers scrambling for workers — and growing concern that unsavory players may be taking advantage to sell fraudulent credentials.”).

⁶⁷ See, e.g., 2021 Register’s Recommendation at 279.

4. Proponents fail to demonstrate requisite adverse effects, particularly ones that outweigh the harm that would be caused by a broadened exemption.

The Joint Educators have not met their burden to demonstrate that the statutory prohibition against circumvention, as modified by the existing exemption, is causing (or will in the coming three-year period cause) an adverse effect on noninfringing uses. The Register has explained that the requisite adverse effects should be analyzed in reference to the nonexclusive statutory factors in Section 1201(a)(1)(C). In assessing those factors, the Register “balances the harm identified by a proponent of an exemption with the harm that would result from an exemption.”⁶⁸ “To prove the existence of adverse effects, it is necessary to demonstrate ‘distinct, verifiable and measurable impacts’ occurring in the marketplace.”⁶⁹ “[E]xemptions ‘should not be based upon de minimis impacts.’”⁷⁰ Nor should they be based on impacts that are “hypothetical, theoretical, or speculative.”⁷¹

As was the case in 2021, the Joint Educators have not provided substantial evidence of for-profit or non-accredited entities seeking to circumvent access controls to make noninfringing use motion picture clips in educational materials.⁷² The one example that comes closest is one Udemy course (out of over 210,000)⁷³ that uses a still from a movie, rather than footage, for purposes of teaching English rather than criticizing, commenting, or educating about the movie.⁷⁴ However, there is no justification for using any particular motion picture in such a context, meaning that it is an exploitative use of the copyrighted work rather than a transformative fair use.⁷⁵ Another example involves a case where Khan Academy *was* able to use high-quality motion picture excerpts in a course notwithstanding the prohibition on circumvention.⁷⁶

In any event, the marketplace offers a variety of options that could provide all or at least most motion pictures required by bona fide educational institutions for both in-person and remote learning without the need to circumvent. For-profit entities by the nature of their structure can pass on the costs of licensing copyright materials to their students. Asking students to subscribe, purchase, rent, or digitally download a motion picture through a retailer or an education-oriented or mainstream service is akin – although often much cheaper – to asking students to purchase a book, especially as many of these services are available for low prices and several (like Amazon,

⁶⁸ 2021 Register’s recommendation at 12 (quotation marks and alterations omitted).

⁶⁹ *Id.* (quoting Staff of H. Comm. on the Judiciary, 105th Cong., Section-By-Section Analysis of H.R. 2281 as Passed by The United States House of Representatives on August 4, 1998, at 7 (Comm. Print 1998)).

⁷⁰ *Id.*

⁷¹ 2021 Register’s Recommendation at 12 (quoting U.S. COPYRIGHT OFFICE, SECTION 1201 OF TITLE 17 at 120 (2017)).

⁷² See 2021 Register’s Recommendation at 56.

⁷³ *Welcome to Where Possibilities Begin*, UDEMY.COM, <https://about.udemy.com/?locale=en-us> (last visited Feb. 16, 2024).

⁷⁴ Joint Educators Comments at 11.

⁷⁵ See *Warhol*, 598 U.S. at 529-33.

⁷⁶ *Id.*

Hulu, Peacock, and YouTube) offer student discounts. These alternatives to circumvention include streaming available through cable providers, satellite service providers, Amazon Prime Student,⁷⁷ Disney Plus,⁷⁸ Max,⁷⁹ Hulu,⁸⁰ Netflix,⁸¹ Peacock,⁸² and YouTube Premium;⁸³ Vudu’s Disc-to-Digital program;⁸⁴ digital copies made available with purchases of discs through redeem codes; digital copies available for rental or long-term access; access through Movies Anywhere;⁸⁵ permanent and temporary downloads available through Amazon,⁸⁶ Apple iTunes⁸⁷ and Google Play;⁸⁸ and other services (many of which offer time-limited downloads of many titles). In the 2021 proceeding, the Joint Educators listed several movies that could be used for teaching, and all of them were available on a streaming service.⁸⁹ Their comments in the current proceeding notably fail to mention any title that would not be commercially available for a reasonable price.

Licensed clip services also continue to be available. For example, the Fandango Movie Clips Website and Movie Clips YouTube Channel offer a wide variety of clips and movie trailers. The Joint Educators’ avowed concerns with the quality of screen capture clips is overstated as the quality of screen capture services continues to improve.⁹⁰

Finally, even if the statutory prohibition on circumvention was causing some adverse effect on for-profit and non-accredited educational entities’ fair use of motion pictures (which, as

⁷⁷ https://www.amazon.com/amazonprime?ie=UTF8&planOptimizationId=WLPStudentMonthlyEligiblePlans&primeCampaignId=studentWlpPrimeRedir&ref=std_prime_desktop (last visited Feb. 15, 2024).

⁷⁸ <https://www.disneyplus.com> (last visited Feb. 15, 2024).

⁷⁹ <https://www.max.com/> (last visited Feb. 15, 2024).

⁸⁰ <https://www.hulu.com/student?&cmp=14553> (last visited Feb. 15, 2024).

⁸¹ <https://www.netflix.com> (last visited Feb. 15, 2024).

⁸² <https://www.peacocktv.com/student> (last visited Feb. 15, 2024).

⁸³ <https://www.youtube.com/premium/student> (last visited Feb. 15, 2024).

⁸⁴ <https://www.vudu.com/content/movies/d2d> (last visited Feb. 15, 2024).

⁸⁵ <https://moviesanywhere.com/home> (last visited Feb. 15, 2024).

⁸⁶ <https://www.amazon.com/> (last visited Feb. 15, 2024).

⁸⁷ <https://www.apple.com/itunes/> (last visited Feb. 15, 2024).

⁸⁸ <https://play.google.com/store> (last visited Feb. 15, 2024).

⁸⁹ See Joint Educators’ Class 1 Long Comment at 7-8 (Dec. 14, 2020), https://www.copyright.gov/1201/2021/comments/Class%2001_InitialComments_Joint%20Educators.pdf (last visited Feb. 15, 2024); Opp. Comment of Joint Creators and Copyright Owners at 9 n. 26 (Feb. 9, 2021), https://www.copyright.gov/1201/2021/comments/opposition/Class_1_Opp'n_Joint%20Creators%20and%20Copyriht%20Owners.pdf (last visited Feb. 15, 2024) (*Hidden Figures* was available on Amazon Prime, Disney Plus; *Stranger Things* was available on Netflix; *Game of Thrones* is available on Hulu; *Mr. Robot* was available on Amazon Prime).

⁹⁰ See, e.g., Steve Paris, *The Best Free Screen Recorder in 2024*, TECHRADAR.COM (Oct. 17, 2023) <https://www.techradar.com/news/the-best-free-screen-recorder> (“OBS Studio supports both streaming and recording in high definition, with no restrictions on the number or length of your creations.”); Paul Bender, *The 18 Best Screen Recorders for PC in 2024 [Free & Paid]*, ISPRINGSOLUTIONS.COM (Dec. 2, 2023) <https://www.ispringsolutions.com/blog/10-best-screen-recording-software-for-windows-free-and-paid>.

described above, the Joint Educators have *not* shown), that would need to be balanced against the harm to motion picture copyright owners that would result from adoption of the proposed exemption. Here, the effects on educational activity asserted by the Joint Educators are hypothetical, or at least not supported by concrete evidence of noninfringing courses that would have been offered but for the limitations in the current exemption.⁹¹ By contrast, it is clear that dramatically expanding the exemption to allow pretty much anyone with a claimed educational purpose to circumvent the access controls on not only discs, but also digital streaming services, download services, remote services that facilitate cloud-based access, and (potentially) cable and satellite set-top boxes and video game consoles, would create a substantial risk of unscrupulous actors putting unprotected copies of valuable motion pictures into circulation, which is precisely what Section 1201 was intended to prevent. If the Register gets to this point in the analysis of the proposed exemption, she should find that the latter outweighs the former and deny the Joint Educators' request for a broader exemption.

Respectfully submitted:

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⁹¹ See Joint Educators Comments at 11-12 (admitting that uses are “hypothetical”).