

April 27, 2021

Regan A. Smith
General Counsel and Associate Register of Copyrights
U.S. Copyright Office
101 Independence Ave. S.E.
Washington, D.C. 20559-6000
regans@copyright.gov

Re: Docket No. 2020—11
Exemptions to Prohibition Against Circumvention of Technological Measures Protecting
Copyrighted Works

Dear Register Smith,

I appreciate the opportunity to provide you with written responses to your additional inquiries you asked in the letter dated April 16, 2021 following up on the Proposed Class 1 (Audiovisual Works—Criticism and Comment (Education and Noncommercial Videos)) as part of the Copyright Office’s Section 1201 rulemaking proceeding.

In sub-section (a) of the first question you ask us to identify whether and how licensors of full-length motion pictures for educational purposes have responded to the pandemic’s disruption to education. While this question might have been intended for the producers and distributors of motion pictures included in your request for comment, I also wanted to submit an answer to this question given our experiences at BYU-Idaho.

Early in the pandemic the following video streaming companies reached out to promote some early helps with pandemic access, mostly as “free access trials” to their collections that have since expired (the trials or access was available from April of 2020 to as late as September of 2020: *Jove*, *Kanopy*, *Artfilms*, *Docuseek* were the companies providing this type of *free* access. While we were grateful for their efforts in our behalf (though we already had existing licenses with several of these providers and others as well.), the real issue is the disrupting gap that exists in marketplace for films that are not available via these or any streaming services. This gap relates to films that are no longer being produced or that have limited availability (and often without available streaming options) even in the pre-pandemic marketplace - especially in the educational context. The pandemic did not change this existing disruption. What the pandemic did achieve, in this instance, was to highlight the problem of professors and students wishing to teach and learn using videos they once had access to via their library collections that are no longer accessible since they can no longer rely on the Section 110(1) exception to copyright for face-to-face teaching due to the virtual nature of remote teaching during, and continuing through, this pandemic.

Your next inquiry in sub-section (b) of the first question is to ask what regulatory language would address any disruption to the educational licensing of full-length motion pictures during the pandemic. Recognizing the disruption in the marketplace for many of the films in our library

collection that existed well before the pandemic, the language that I would propose to address this disrupting gap would include the following or something similar:

Use of Motion pictures (including television shows and videos), as defined in 17 U.S.C. 101, where:

1. a college, university, or K-12 educational library lawfully owns the motion pictures 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, where circumvention is undertaken by college and university employees or students or by kindergarten through twelfth-grade (K-12) educators or students (where the K-12 student is circumventing under the direct supervision of an educator), including of accredited general educational development (GED) programs, for the purpose of criticism, comment, teaching, or scholarship allowed under 17 U.S.C. §§ 107, 110(1), 110(2);
2. a reasonable search of major educational motion picture platforms demonstrates that no ownable or licensable copy which can be streamed for classroom uses as defined under §§ 110(1) and 110(2) is available for purchase at a reasonable price;
3. the college, university, or K-12 institution reasonably protects any copies of motion pictures made under this exception from downstream uses;
4. the college, university, or K-12 institution has reasonable policies ensuring all uses are non-infringing under §§ 107, 110(1), and 110(2);
5. and decrypted copies are not transferred to any other institutions or entities.

I appreciate the opportunity to provide further written responses to your inquiries.

Sincerely,

Nathan Wise

Nate Wise
Brigham Young University Idaho
Intellectual Property Office
120C McKay Library
208-496-9544 office