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May 14, 2021

Ms. Regan Smith
General Counsel and Associate Register of Copyrights
United States Copyright Office
101 Independence Avenue, S.E.
Washington, D.C. 20540-1000

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

Dear Ms. Smith:

Thank you for your letter dated April 16, 2021, inviting participants in the recent Section 1201 rulemaking hearing on Proposed Class 1 (Audiovisual Works – Criticism and Comment (Education and Noncommercial Videos)) to submit written responses to the following questions:

- 1a. Please identify whether and how licensors of full-length motion pictures for educational purposes have responded to the pandemic's disruption to education. Please include any examples of policy adjustments for educational licensing in light of the pandemic.
- 1b. Please provide your views on regulatory language that would address any disruption to the educational licensing of full-length motion pictures during the pandemic.

The following response is submitted on behalf of Brigham Young University ("BYU").

We understand that Questions 1a and 1b were precipitated by a discussion at the hearing of a proposal to expand the scope of the current educational exemption in light of the effects of the COVID-19 pandemic on education. As you noted, "The Office inquired whether the pandemic has created a gap in what would normally be a functioning market for educational licensing of full-length motion pictures, and whether the existing exemption should be adjusted to account for the pandemic during its duration."

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As one of the Commenters that raised the issue of the impact of the COVID-19 pandemic on education, BYU appreciates the opportunity to clarify and expand on its previous comments. We recognize the importance of the educational licensing market for motion pictures, and we regularly participate in the market by purchasing licenses from vendors such as Swank, Kanopy, Alexander Street, and others. We genuinely value the efforts of such vendors to make relevant motion pictures available to educators and students.

But despite their best efforts, vendors in the educational licensing market simply cannot offer *all* of the motion pictures required to meet the needs of BYU and countless other educational institutions. Gaps in the educational licensing market for motion pictures are virtually inevitable. Such gaps and other problems are, of course, nothing new. For example, in 1999, the Copyright Office conducted an extensive study of the educational licensing market and found:

In the course of this study, educational institutions expressed dissatisfaction with the functioning of the licensing process in the digital environment. While some institutions engage in licensing for their distance education programs on an ongoing basis, many describe having experienced recurrent problems. These problems can be broken down into three categories: difficulty locating the copyright owner; inability to obtain a timely response; and unreasonable prices or other terms.¹

Clearly, gaps and other problems in the educational licensing market long predated the COVID-19 pandemic, and will almost certainly persist well after the pandemic. Although the pandemic did not directly create gaps in the educational licensing market for motion pictures, it *did* cause a major disruption to the licensing market, by dramatically limiting the ability of BYU and other educational institutions to use the physical discs in their collections. This dramatic limitation, in turn, caused an unprecedented spike in demand for streaming licenses at BYU. We understand that other educational institutions also received unprecedented numbers of requests for streaming licenses.

In effect, the COVID-19 pandemic made it virtually impossible for BYU and other educational institutions to teach in-person classes in traditional classroom settings. The large-scale shift to remote instruction happened abruptly, essentially overnight. Without advance warning or opportunity to prepare, BYU and other educational institutions were suddenly precluded from relying on exemptions such as Sections 107 and 110(1) to make noninfringing uses of discs in their collections.

Against this backdrop, and in response to Question 1a specifically, we note that quite a few academic publishers responded rapidly to the COVID-19 pandemic with generous offers of free, unlimited access to eTextbooks and other digital resources as an accommodation through the

¹ Register Of Copyrights, *Report On Copyright And Digital Distance Education*, U.S. COPYRIGHT OFFICE (May 1999), at 41-42 (“Digital Distance Education Report”).

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current school term.² We understand that shortly after the COVID-19 outbreak, some vendors in the educational licensing market for motion pictures also offered temporary discounts. In our experience, however, many motion pictures requested by faculty members were unavailable for licensing, or the licensing fees were cost-prohibitive in view of the increased demand.

Based on our experience at BYU, we were not surprised to learn of the rapid growth experienced by Swank after the pandemic, which it touted in its letter previously submitted in connection with this rulemaking:

Swank has seen a **growth of 600% since 2019** of K-12 schools using the Digital Campus platform. Swank has also seen a **growth of 80% in the number of colleges and universities** making use of the platform.... The growth Swank is seeing on this platform has **increased significantly during the pandemic** as educators look to offer their curricula to students learning remotely.³

While the pandemic had a devastating economic impact on countless individuals and businesses, it apparently represented a significant commercial windfall for Swank. We recognize the importance of a functioning educational licensing market for motion pictures. However, such a market should take into account the longstanding policy determinations made by Congress when it enacted exemptions such as Sections 107, 110(1), 110(2), which were “intended to cover *all* of the various methods by which performances or displays in the course of systematic instruction take place.”⁴

When exemptions such as Sections 107 and 110(1) were effectively and abruptly eliminated by the COVID-19 pandemic, it caused a significant unexpected disruption to the existing educational licensing market for motion pictures. We believe this sudden market disruption is a significant cause of the extraordinary growth experienced by Swank (and presumably other motion picture licensing vendors) since the pandemic.⁵

² See, e.g., Press Release, *Barnes & Noble Education Joins VitalSource and Leading Publishers to Make eTextbooks Free for Students Impacted by COVID-19 Campus Closures*, (Mar. 16, 2020) <https://investor.bned.com/investor-relations/news-and-events/news/press-release-details/2020/Barnes--Noble-Education-Joins-VitalSource-and-Leading-Publishers-to-Make-eTextbooks-Free-for-Students-Impacted-by-COVID-19-Campus-Closures/default.aspx>.

³ Feb. 9, 2021 Letter from Tim Swank to Hon. Shira Perlmutter, attached as an appendix to DVD Copy Control Association and Advanced Access Content System Licensing Administrator, Class 1 Long Comment, at 1 (Feb. 10, 2021) (emphasis in original) https://www.copyright.gov/1201/2021/comments/opposition/Class_1_Opp'n_DVD%20CCA%20and%20AACS%20LA.pdf#page=51.

⁴ H.R. REP. NO. 94-1476, at 81 (1976) (emphasis added); see also *Digital Distance Education Report*, at xv (emphasis added).

⁵ It is somewhat disconcerting that Swank’s website promoting its products misstates the elements of Section 110(1). See *Copyright Compliance and Public Performances*,

In response to Question 1b, we believe that our proposed regulatory language submitted previously represents an appropriate balance between the interests of rightsholders and educational users. For reference, our proposed regulatory language is as follows:

Motion pictures (including television shows and videos), as defined in 17 U.S.C. 101, where the motion picture is lawfully made and 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 a noninfringing use under 17 U.S.C. §§ 107, 110(1), 110(2), or 112(f).

As noted in our previous comments, if our proposed exemption is recommended, it will not harm a properly functioning market for educational licensing of motion pictures. Instead, it will address current market failures and restore the ability that educational institutions had before the pandemic to rely on exemptions such as Sections 107 and 110(1) to use the discs in their collections.⁶

We understand the desire to avoid harming legitimate licensing markets for educational uses of motion pictures. We continue to recommend that the best way to include market considerations in the context of this rulemaking is to adopt regulatory language incorporating Section 107 by reference. Under the fourth fair use factor, a noninfringement analysis under Section 107 will necessarily take into account the market impact of a particular proposed use.

For example, if an educational institution owns a motion picture that is an orphan work or motion picture for which a license is not available, it is more likely that use of the motion picture will qualify as fair use. We believe that Section 1201 should not act as an additional barrier to prevent educational institutions from making such noninfringing fair uses.⁷

On the other hand, if an educational institution can readily purchase an affordable streaming license for a particular motion picture, it is less likely that use of the motion picture will qualify

<https://www.swank.com/k-12-schools/copyright/> (visited May 14, 2021) (Attached as Appendix A).

⁶ See, e.g., Brigham Young University and Brigham Young University-Idaho, Class 1 Long Comment, at 28-31 (Dec. 14, 2020).

⁷ As the Office has previously found, “Fair use is a *critical part* of the distance education landscape. . . . Fair use could apply . . . to instructional transmissions not covered by [section 110(2)]. Thus, for example, *the performance of more than a limited portion of a dramatic work in a distance education program might qualify as fair use in appropriate circumstances.*” Digital Distance Education Report, at 161 (emphasis added).

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as fair use. Our proposed exemption will not apply to any uses that do not qualify as noninfringing fair uses under Section 107 (or the other exemptions incorporated by reference). Thus, as licensing markets continue to develop and more motion pictures become available for licensing, the scope of the exemption will naturally tend to shrink over time.

If you remain concerned that the proposed exemption is too broad, one suggestion might be to include regulatory language limiting the exemption to motion pictures currently in the library of the educational institution. For example, “Motion pictures . . . , where the motion picture is in the library of an educational institution. . . .” The Register made favorable comments about a similar limitation during the 2006 rulemaking.⁸

Finally, we would like to respond to your comment that the Office may consider revising the existing exemption “to account for the pandemic during its duration.” Respectfully, we submit that Section 1201 requires that exemptions must last for three years, and the Librarian of Congress is not authorized to grant exemptions that last for a shorter (or longer) period of time. Specifically, Section 1201(a)(1)(D) provides:

The Librarian shall publish any class of copyrighted works for which the Librarian has determined, pursuant to the rulemaking conducted under subparagraph (C), that noninfringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected, and *the prohibition contained in subparagraph (A) shall not apply to such users with respect to such class of works for the ensuing 3-year period.*⁹

In addition, Section 1201 specifically contemplates granting exemptions in situations where users are adversely impacted by the prohibition against circumvention for less than the full 3-year term. For example, Section 1201(a)(1)(C) directs the Librarian to determine “whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition.” If a user is “*likely* to be [adversely affected] in the succeeding 3-year period,” it follows that the user may be adversely affected for only a *portion* of that 3-year period.

⁸ See Register Of Copyrights, *Recommendation of the Register of Copyrights in RM 2005-11; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, U.S. COPYRIGHT OFFICE (Nov. 2006), at 19-20 (“[T]he analysis would be likely to be very different for a class of works consisting of all motion pictures on DVDs than it would be for a class of motion pictures in the educational library of a college or university’s film or media studies department”)

https://cdn.loc.gov/copyright/1201/docs/1201_recommendation.pdf.

⁹ 17 U.S.C. § 1201(a)(1)(D) (emphasis added).

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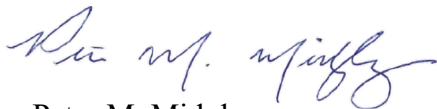
Accordingly, we respectfully submit that Section 1201 requires that all exemptions last for a 3-year period, and it does not require a determination that users will be adversely affected by the prohibition for the *entirety* of the 3-year period. As the Office previously found:

The *relatively quick* three-year turnover of the exemptions was put in place by Congress to allow the rulemaking to be “fully considered and fairly decided on the basis of real marketplace developments,” and any streamlined process for recommending renewed exemptions must retain *flexibility to accommodate changes in the marketplace* that affect the required rulemaking analysis.¹⁰

It appears that all parties agree that educational institutions are *currently* suffering adverse impacts caused by the prohibition against circumvention, which impacts have been exacerbated by the COVID-19 pandemic. Accordingly, the record supports granting our proposed exemption during this rulemaking cycle. As required under Section 1201, any such exemption will last for a “relatively quick” 3-year period, and will be reevaluated during the next triennial rulemaking cycle. In the meantime, though, the proposed exemption should be granted to enable BYU and other educational institutions to make the full range of noninfringing educational uses of motion pictures in their collections.

Thank you, again, for the opportunity to submit this written response. Please feel free to contact us with any additional questions or comments.

Sincerely,



Peter M. Midgley
Director, Copyright Licensing Office
Brigham Young University

Transmitted via e-mail (regans@copyright.gov)
cc: Anna Chauvet, via e-mail (achau@copyright.gov)

¹⁰ Register Of Copyrights, *Section 1201 of Title 17*, U.S. COPYRIGHT OFFICE (Jun. 2017), at 143 (2017) (emphases added)
<https://www.copyright.gov/policy/1201/section-1201-full-report.pdf>.

NEWS

ABOUT US

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COPYRIGHT LAW

Copyright Compliance and Public Performances.

The Federal Copyright Act specifies that copyrighted materials like movies can be used in your schools if properly licensed. It's important to know that neither the rental nor purchase of a movie carries the right to exhibit it outside of someone's home. However, Movie Licensing USA can properly license movies for copyright compliant showings in your school.

What exactly is a public performance?

A public performance is an exhibition of a movie that is shown outside of someone's home.

Why should I obey copyright law?

Violating copyright law through unauthorized use of a movie:

- Prevents those who worked hard on a film from receiving their just compensation.
- Essentially steals motivation to create from authors, computer programmers, playwrights, musicians, inventors, movie producers and more.

A public performance license ensures money will be paid to the entire cast and crew who worked on a film from start to finish. If these men and women do not receive this hard-earned revenue through sources like licensing fees, they may no longer invest their time, research and development costs to create new movies.

Who does copyright law apply to?

This law applies to all U.S. schools, regardless of:

- Whether admission is charged.
- Whether the institution is commercial or nonprofit.
- Whether a federal, state or local agency is involved.
- What year the movie was produced.

This means public schools, colleges, universities, public libraries, day care facilities, parks, recreation departments, summer camps, churches, private clubs, prisons, lodges, businesses and more all must properly license movies to show them publicly.

Do I need a license to show a movie for educational purposes? This activity is covered under the “Face-to-Face Teaching Exemption,” right?

It depends. Under the "Face-to-Face Teaching Exemption," copyrighted movies may be shown in a K-12 school setting without copyright permission only if all criteria are met:

- A teacher or instructor is present, engaged in face-to-face teaching activities.
- The institution must be an accredited, nonprofit educational institution.
- The showing takes place in a classroom setting with only enrolled students in attendance.
- The movie is used as an essential part of the core, required curriculum being taught. (The instructor should be able to show how the use of the motion picture contributes to the overall required course study and syllabus.)
- The movie being used is a legitimate copy, not recorded from a legitimate copy or recorded from TV.

This means the "Face-to-Face Teaching Exemption" does not apply outside the nonprofit, in-person, classroom teaching environment. It doesn't apply to movies shown online – even if they're part of course-related activities and websites. It also doesn't apply to interactions that are not in-person - even simultaneous distance learning interactions. It doesn't apply at for-profit educational institutions.

For specific requirements, please reference The Copyright Act of 1976, Public Law No. 94-553, 90 stat 2541: Title 17; Section 110(i), or consult your copyright attorney.

Who can provide me with the proper licensing?

Only Movie Licensing USA can provide the necessary licensing to show films at your school on behalf of the studios we represent.

Do we need a license even if we don't charge admission?

A license is required for all public performances regardless of whether admission is charged.

What if someone owns the movie?

The rental, purchase, lending or download of a movie does not provide the right to exhibit it publicly outside the home unless the screening is properly licensed.

If I borrow movies from a public library can I use them legally for entertainment in a school?

The school itself must be licensed to legally show these movies. A public library cannot pass on copyright compliance to anyone, and only Movie Licensing USA or the studio that produced the movie can grant copyright compliance.

Who's responsible if a film is shown without a license?

The administration of the school where the movie is shown bears the ultimate responsibility and consequences of copyright infringement.

If I purchased a Single Event Public Performance License to show a movie, can I show that movie whenever I want?

Unfortunately, no. These licenses cover showing a specific title during a designated time frame.

A small group is having an informal gathering in our facility. Do we still need a license?

A license needs to be obtained regardless of the number of people attending the screening if the movie is being shown outside the home.

Where can I find more information on copyright laws?

For more information on copyright laws, feel free to read these sources:

- [Copyright Law of the United States of America](#)

Limitations on exclusive rights: Exemption of certain performances and displays.

- [Motion Picture Association \(MPA\)](#)

The MPA is an anti-piracy organization that is dedicated to assisting local governments and law enforcement authorities in the investigation and prosecution of piracy cases.

- [Copyright for Schools: A Practical Guide](#)

By Carol Mann Simpson, 5th edition, (Linworth Publishing, c2010).

- [Commonsense Copyright: A Guide For Educators & Librarians](#)

by Rosemary Talab, 2nd edition. (McFarland & Co. Publishing, c1999).

- [Kids In Mind](#)

This site rates kids movies on a scale of 1-10 on categories of "sex & nudity," "violence & gore" and "profanity" and gives examples from the movie on each.

- [FilmRatings.com](#)

This site explains the rating system that movies are set up with. There is also a 25 page PDF file on this site that goes into vast description on each rating.

FAQS

ANY QUESTIONS?

We're here to answer everything. Our FAQs might have just what you're looking for.

VISIT FAQS