

Before the United States Copyright Office
Library of Congress
Washington, DC

In the Matter of:

Exemptions To Permit Circumvention of
Access Controls on Copyrighted Works

Docket No. 2020–11

**RESPONSES OF DVD CCA AND AACSLA
TO POST-HEARING LETTER FOR CLASS 1**

REQUEST 1. *During the hearing, there was discussion of a proposal to expand the scope of the current educational exemption in light of the effects of the COVID-19 pandemic on education. 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. To provide participants with an opportunity to address these issues, the Office invites written responses to the following questions:*

a. 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.

RESPONSE TO REQUEST 1a.:

Evidence Is Inadequate to Establish the Norms for Licensing Market

Sufficient evidence to evaluate what constitutes a normal “functioning market for educational licensing of full-length motion pictures” has not been proffered in this proceeding by any party. While proponents have asserted that they need the exemption because some titles are not available for licensing, they have produced very little evidence of titles which

- (i) they actually have in their DVD collection **and**
- (ii) are not available for streaming.

Instead, they propose that, because *some* titles are not available for streaming, they should be allowed to circumvent all of the titles they have on DVD - even if those same titles are available to license or otherwise available on online streaming platforms. For example, in its reply, BYU identified the following: *Hunt for the Wilderpeople*, *Bread and Tulips (Pane E Tulipani)*, and *The Bicycle Thief*. While

BYU's library website indicates that it has three DVD copies of *The Bicycle Thief*, BYU does not actually have a DVD copy of either *Hunt for the Wilderpeople* or *Bread and Tulips*. Looking at the availability of these titles via streaming services, BYU offers *Hunt for the Wilderpeople* through the well-known streaming service Kanopy. Kanopy also offers *Bread and Tulips* and *The Bicycle Thief*. So, instead of offering the Copyright Office stronger evidence that specific titles they have on DVD are not available for licensing/streaming, proponents assert that the streaming market is insufficient.

As another example, Columbia University asserts that only 38% of its DVD collection is available on streaming services. Closer examination of the collection via the Columbia Library Internet catalog shows that Columbia has about 6,889 motion picture titles on DVDs¹ and many of the titles are from outside the United States. Preliminarily, whether these titles are CSS-protected is not clear. Not even all DVDs released in the U.S. market include CSS. Further, some titles in Columbia's collection are described as being distributed in the PAL format (as opposed to the NTSC format used in the United States). Distribution in the PAL format (the video format used, for instance, in many European countries) indicates that the rightsholders did not anticipate or intend these PAL-formatted copies to reach the U.S. market, and that perhaps some of these discs represent "gray market" copies. Thus, before assuming that a corresponding streaming offering should be available for every DVD title that has managed to find its way into a school's collection, the Register should probably make a more thorough evaluation of the relevant collections and the titles actually at issue. More importantly, any alleged gap (*i.e.*, the absence of these titles from streaming services) cannot reasonably be considered a shortcoming or "failure" of the still relatively young U.S. streaming services market, because streaming services may never be able to overcome territorial distribution rights and segmentation of offerings by national markets.

¹ Using the advance search feature on CLIO (Columbia University Libraries search engine) with the call sign indicated as "DVD" and format is "video" the result was 6,889 titles on May 14, 2021.

A Normal Market Does Not Reach 100% Supply (or Demand)

But, even if territory or geography did not impose limits on the distribution of copyrighted works, the blanket assumption that all titles should be available in a normal functioning licensing market is a false premise. Copyright law has long recognized that, in the absence of compulsory licenses, even mature markets will leave some potential licensing transactions unrealized. The effect of unrealized transactions results in some works not being made available for licensing. Consequently, the unavailability of certain titles, referred to by proponents as “gaps in the marketplace,” are not necessarily market failures, even in a mature market.

The Young Streaming Market Offers an Amazing Number of Titles

Although the licensing market for full-length motions pictures for educational purposes is still relatively young, the number of titles available for licensing is simply astounding. First, and as can be expected, Swank Motion Pictures, with its preexisting relationships with the studios, has created a platform that both content providers and the education community can have confidence in. Swank’s position with the studios certainly has incentivized creators to adopt the streaming platform sooner than they otherwise might have. In fact, Swank has ramped up its offering of titles as creators have decided to come on board, reflecting the industry’s recognition that traditional distribution of motion pictures is now more fully embracing distribution via online streaming platforms, even while continuing to distribute titles on physical media to meet consumer demand.

Number of Titles Offered on Streaming Services Will Catchup to those Distributed Lawfully on DVDs

DVD CCA and AACCS LA have every reason to believe that, if rightsholders chose to distribute their titles in the United States on discs, then they will similarly choose to exploit the same works via lawful online streaming platforms. This general expectation, however, does not logically extend to unauthorized, pirated, or gray-market DVD copies of works, even if they ultimately find their way into U.S. libraries. Nor should it.

In fact, the actions of smaller distributors further evidence this shift to online streaming as well. For example, Canyon Cinema, which offers a unique collection of artist-made films, states in the attached letter² it “began offering digital streaming licenses, which include the ability to stream the work to a student or library patron in 2020.” Importantly, Canyon notes that its “licenses are particularly sought out by university libraries because [its] catalog offers a wide array of works appropriate to film and media studies and art history classes.”

Additionally, Canyon Cinema’s circumstances are helpful to the Office’s question because it notes that, “[s]ince the pandemic licensing has significantly increased.” Indeed, even though Canyon only began offering streaming licenses in 2020, Canyon suggests that – as a result of the pandemic – the number of licenses it provided exceeded all prior expectations. DVD CCA and AACCS LA believe that the pandemic has increased the demand for licensing, which in turn, spurred the increased offering of more online streaming of titles sooner than there would have been otherwise been the case.

The provision of more licenses to meet increased demand is the logical outcome of the circumstances around the pandemic. However, that increased demand would likely not have existed if proponents’ proposed exemption was already granted. In other words, if a university had an exemption to circumvent the DVDs over this recent period, then libraries may not have been so inclined to seek out licenses, such as those Canyon has recently had the opportunity to provide as a direct result of the increased demand.

The Current Alleged Gap Is No Fault of the Rightsholders and Demand for More Titles May be Unreasonable

There is no evidence supporting the suggestion that rightsholders are unwilling to license their works or are demanding too high a price for a license. Instead, proponents seem to be asserting that some (unidentified) titles are not readily available for streaming on some (unidentified) services. As mentioned earlier, the failure to identify specific titles consistent with these claims prevents opponents from

² While the letter is attached for completeness, we recognize the Office requested no further exhibits, and understand the Office may therefore choose to disregard the attachment.

meaningfully examining the claims to (i) determine whether the specific university has the work on DVD, (ii) determine whether the titles are available on a streaming service, and (iii) assess the willingness of the rightsholder to license the work for educational streaming. In the absence of this information, DVD CCA and AACSLA suggest that proponents' insistence that titles be readily and conveniently served up to them on a single streaming service is likely an expectation fueled by the ubiquity of digital content offered already on popular consumer online streaming platforms. This is the direct result of the DMCA working, including the prohibition against circumvention of access controls, which has fostered the marketplace that Congress envisioned.

The corollary to that is permitting circumvention, including under the guise of well-intentioned exemptions, which risks interfering with the further development of the marketplace. If universities are more incentivized to circumvent the access controls on the DVDs they already own in order to space-shift the work to their preferred format, namely online streaming on internal servers, then there will be less demand for these titles in other formats. In the absence of demand for specific titles, then decision of a rightsholder to license a work may never be made. So, in fact, university demand for certain titles that are not already on streaming platforms make it more likely that a requested title will make its way on to the streaming platform as the rightsholder seek to exploit the work to meet this demand.

Undoubtedly, the ability of rightsholders to collect a license fee is the engine to the distribution of copyrighted works. Canyon Cinema – interestingly a nonprofit entity – clearly evidences this understanding, stating:

We fully expect the revenue from licenses to schools and libraries to grow particularly as the market moves to streaming distribution models. This revenue stream is essential if we are to continue to make these works available to our clients and fulfill our mission to serve the education and library communities.

As Canyon demonstrates, even a nonprofit entity relies on licensing revenue to cover the intrinsic costs incurred to make more works available lawfully.

Creators Should Not Disproportionately Bear the Burden of the Pandemic

This proceeding has so far been almost entirely concerned with how universities and schools are struggling to fulfill their mission. Everybody agrees that meeting educational goals during the pandemic is of paramount importance. To this end, rightsholders worked to make their high-quality content – including education-oriented material – freely available to teachers and families. For example, the attached release³ from the Motion Picture Association (MPA) titled, “The Film, Television and Streaming Industry Responds to COVID-19” identifies some of those offerings, which include:

- Netflix offering some of its documentaries to be streamed for free from its YouTube Channel; and
- Comcast NBCUniversal, through Xfinity, making educational programming available for free streaming, organized by grade level, for both teachers and students.

The same release notes that the studios have provided over a billion dollar to relief funds providing direct aid to studio employees, industry partners, and unions.

While program offerings and relief funds are only part of the response studios have made, all of the studios’ efforts have – most importantly – been made as the pandemic continues to harm their bottom-line, threatening the well-being of the entire motion picture industry. Just as countless other industries and institutions have suffered losses and setbacks, the creative industries are suffering too. Filming on most productions came to a total halt and theaters nationwide were shuttered indefinitely, with the real prospect of losing some theater houses forever looming throughout the pandemic. Some major motion picture releases have had to be postponed or shifted to debuting to the public on unproven streaming services. In fact, some studios have reported losing billions in income.

DVD CCA and AACCS LA have consistently supported education in this country and have done so by not unnecessarily objecting to reasonable education-related requests. However, in this instance, the proponents simply have not proffered compelling evidence that their proposed sweeping expansion is

³ While the release is attached for completeness, we recognize the letter requested no further exhibits, and understand the Office may choose to disregard the attachment.

warranted, even in the context of the pandemic, and certainly not beyond the – hopefully soon-to-be-realized – return to normal life post-pandemic.

REQUEST 1 (cont.)

b. Please provide your views on regulatory language that would address any disruption to the educational licensing of full-length motion pictures during the pandemic.

RESPONSE TO REQUEST 1b.:

DVD CCA and AACCS LA do not believe an exemption should be premised solely on this pandemic. First, as shown, there has been no disruption to educational licensing of full-length motion pictures during the pandemic. In fact, to the contrary, the pandemic moved more schools to licensing platforms enabling remote viewings, as the pandemic mainly disrupted the in-classroom learning that takes place when students attend class in person. Further, although historically, in-classroom learning has been accomplished with the classroom performance of motion pictures on DVDs, which does not usually require a license, even the typical in-classroom experience is shifting from disc playback to online streaming.

Thus, even considering this disruption to in-classroom learning and the ability to use the DVD in the classroom setting, an exemption conditioned on the pandemic is not warranted. Indeed, there is far more convincing evidence that the market - through online streaming platforms - has been able to respond to shifting educational needs when in-classroom learning was impossible than evidence that educational needs were not met. Even before the rise of this pandemic, online streaming platforms such as Swank were already meeting the needs of educators and educational institutions. The pandemic merely resulted in incentivizing schools to adopt the preexisting online streaming platforms more quickly than perhaps they otherwise would have.

Early adopters were rewarded with reduced disruption. In fact, even newly or recently subscribing schools were swiftly vindicated in their decision to utilize these services. In addition, for those schools previously equivocating on subscribing to online streaming platforms such as Swank, the pandemic surely resolved any lingering doubts in favor of adopting online streaming. Proponents have failed to submit any clear evidence that the market was unable to meet educational needs during the disruption to in-classroom teaching.

Notwithstanding the evidence weighing against the need for an exemption premised on the pandemic, if the Register nonetheless feels compelled to recommend an exemption, this rulemaking limits the Register's authority to addressing the harm caused by technological measures as established on the record.

Accordingly, an exemption will not solve any perceived problems in the licensing marketplace of full-length motion pictures for education purposes. The expectation - that an exemption would result in the licensing of more works - is simply wrong. Moreover, an exemption premised on the expectation would defy the statutory requirement that the alleged harm be the result of the employment of access controls. Simply technological protection measures are not keeping the works from being licensed. To the contrary, as access controls keep copies of works distributed on discs from being space-shifted to other formats, these access controls encourage the licensing of the work so that the works may be distributed in other formats lawfully. Furthermore, permitting the space-shifting of DVD copies to server copies for streaming purposes would only serve to disrupt the successful and evolving marketplace for the licensing of full-length films on these platforms. The majority of works that schools have on DVD are indeed available on streaming platforms. Thus, the exemption will likely only enable

the use of a few additional titles, but it would do so at great risk to the majority of titles that are, or might become, available on streaming platforms.

Even an exemption limited to the alleged “gap-filling” would be disruptive to rightsholders who may never have intended their works to be distributed on DVD or who never intended “gray-market” copies of their work on DVD to serve as the basis for further distribution of their work in the United States, which would be a result of this exemption.

Finally, assuming that a particular title has been lawfully distributed on DVD in the United States with the authority of the rightsholder (*i.e.*, the case where the rightsholder has not yet moved to exploit the work on streaming platforms), even a limited “gap-filling” exemption would interfere with the traditional rights clearing process that affords the creator, particularly in the case of titles that are not from the major studios or not already aligned with a large distributor, the opportunity to exploit their work in a new medium.

Nevertheless, the Register could confine the exemption to the circumstances where in-classroom learning is not permitted due to the order of an applicable government authority because of a pandemic. To this end, circumvention should only be premised on (i) a market-check (to ensure the cited titles are not already available to license from online streaming platforms) and (ii) limited to those titles lawfully distributed in the United States (thereby excluding unauthorized or “gray-market” copies). The Register should also consider how circumvented copies of works would be transmitted and stored securely during the pandemic, and how subsequent copies created from the circumvented disc copy would not be available for use when the applicable government authority’s order is lifted and schools are able to return to in-classroom learning.

RREQUEST 2. Joint Educators reference a number of educational institutions/organizations in its written comments and testimony (e.g., CSforALL, LinkedIn Learning, Osmosis), though the record is somewhat unclear as to their accreditation or for-profit status. Accordingly, for each educational institution/organization already referenced in the record, please indicate whether the institution/organization is for-profit or nonprofit and unaccredited or accredited. In addition, Joint Educators provide some examples of proposed use but do not indicate which educational institution/organization would like to engage in such proposed use (e.g., use of the clip from “The King’s Speech”). For examples already in the record not attributed to a specific educational institution/organization, please indicate which educational institution/organization would like to engage in such proposed use.

RESPONSE TO REQUEST 2:

AACS LA and DVD CCA respectfully refer the Copyright Office to their written comments, which addressed the status of the various named learning platforms.

AACS LA and DVD CCA point out that any examples of use, including a clip from the “The King’s Speech”, can be more than adequately accomplished through screen capture technology which this rulemaking has repeatedly recognized as adequate for various uses such as those proposed by proponents.

AACS LA and DVD CCA proffer the clip available at <https://bit.ly/3y9Ngw7>, which demonstrates a high-quality capture of a scene recorded from *The King’s Speech* by OBS Studio, which is open source software made available to the public for free.

Respectfully submitted,

/s/ Michael B. Ayers

Michael B. Ayers
Michael B. Ayers Technology Law
5256 S. Mission Rd., Suite 703-2215
Bonsall, CA 92003-3622
michael@ayerstechlaw.com
(760) 607-6434

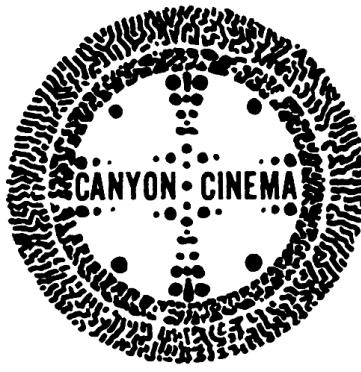
/s/ Dean S. Marks

Dean S. Marks
13236 Weddington St.
Sherman Oaks, CA 91401-6036
deansmarks@yahoo.com
(818) 469-7185

/s/ David J. Taylor

David J. Taylor
Right Size Law PLLC
621 G ST SE
Washington, DC 20003
david.taylor@rightsize.com
202-546-1536

COUNSEL TO DVD CCA AND AACS LA:



February 10, 2021

Honorable Shira Perlmutter
Register of Copyrights
U.S. Copyright Office
101 Independence Ave. S.E.
Washington, D.C. 20559-

Re: Eighth Triennial 1201 Rulemaking

Dear Register Perlmutter:

On behalf of Canyon Cinema Foundation, I would like to offer several observations about the licensing of moving image works to schools and libraries.

Canyon Cinema offers a unique collection of artist-made films – comprised of digital media, 8mm, Super 8, 16mm, and 35mm prints – and the catalog traces the vital history of the experimental and avant-garde filmmaking movements from 1921 to the present. With a strong emphasis on American West Coast and San Francisco Bay Area filmmakers, we are the access point to approximately 3,400 ground-breaking works representing more than 280 artists.

Formerly structured as an artist-run distribution co-operative, in 2012 the member artists voted to become a nonprofit. Today, Canyon Cinema Foundation continues to serve as an essential resource for educators, curators, researchers, and enthusiasts through our robust distribution program and online catalog.

In many cases, and especially in light of the widespread move to remote instruction, making these works available for educational purposes is only possible by offering licenses. Canyon has offered public performance licenses for exhibition purposes, spanning numerous formats (DVD, 16mm film, 35mm film, etc.) for many decades. We began offering digital streaming licenses, which include the ability to stream the work to a student or library patron in 2020.

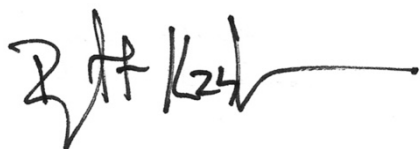
Our licenses are particularly sought out by university libraries because our catalog offers a wide array of works appropriate to film and media studies and art history classes. These licenses are available for one, three, and five years.

Canyon Cinema Foundation
1777 Yosemite Ave., Ste. 210 San Francisco, CA 94124
415-626-2255 | info@canyoncinema.com | www.canyoncinema.com

Canyon Cinema Foundation is a 501c3 tax-exempt organization – EIN 46-0649341

Since the pandemic, licensing has significantly increased. We fully expect that the revenue from licenses to schools and libraries to grow particularly as the market moves to streaming distribution models. This revenue stream is essential if we are to continue to make these works available to our clients and fulfill our mission to serve the education and library communities.

Sincerely,

A handwritten signature in black ink, appearing to read "Brett Kashmere", followed by a long horizontal flourish line.

Brett Kashmere, Executive Director
Canyon Cinema Foundation

The Film, Television, and Streaming Industry Responds to COVID-19

The ongoing COVID-19 pandemic presents unprecedented challenges for our nation's public health and economy. The film, television, and streaming industry stands ready to assist efforts to protect the health, safety, and wellbeing of our employees, our customers, and the public during this difficult time.

The Motion Picture Association and its member companies have taken a leading role in supporting the industry and its workforce through direct aid as well as through federal, state, and local advocacy:

Over a Billion Dollars to Hardship Relief Funds

Relief funds provide direct aid to studio employees, as well as relief to industry partners and unions to ensure a strong workforce is ready to return to work as soon as possible.

MPA member studios [Netflix](#) and [NBCUniversal](#) have established hardship funds of \$150 million each.

MPA studio parent companies, including [Comcast](#), [Sony Corporation](#), [ViacomCBS](#), and [WarnerMedia](#), have established hundreds of millions of dollars in relief funds.

Beyond MPA member companies, other industry groups have developed hardship funds, including the [Academy of Motion Picture Arts and Sciences](#), [Actors' Equity Association](#), [Directors Guild Foundation](#), [Entertainment Industry Foundation](#), [International Alliance of Theatrical Stage Employees \(IATSE\)](#), [International Cinematographers Guild](#), [National Association of Theatre](#)

Owners/Motion Picture Pioneers Foundation, POV, Producers Guild of America, and SAG-AFTRA, as well as many celebrities who work in the industry.

Stay-At-Home Resources – Free of Charge

MPA members are providing resources to teachers and families who are self-distancing at home during this time.

Disney partnered with the Khan Academy to launch Imagineering in a Box – a 32-course online curriculum showing kids how the company’s legendary Imagineers create immersive entertainment experiences.

Netflix has a selection of documentary features and series available on the Netflix US YouTube channel to allow students and teachers easier access. Additionally, each title has educational resources available, including Q&As with some of the creators behind the projects.

Paramount and ViacomCBS launched #AloneTogether and #KidsTogether offering news and information as well as free kid-focused entertainment and educational resources across all their platforms.

Sony Pictures launched a YouTube Channel, Sony Pictures Kids Zone, providing parents and kids with a one stop central destination for interactive fun, physical movement, learning, and hands-on activities.

Comcast NBCUniversal, through Xfinity, has educational programming available for free, organized by grade level for teachers and students.

WarnerMedia has launched CNCheckIn through Cartoon Network. The program offers educational and entertainment programming to children for free.

The Motion Picture Association is bringing its “Film School Friday” program online. The program will connect students with industry leaders and creators behind some of today’s biggest films and television shows.

Personal Protective Equipment (PPE) and Other Direct Aid

From critical PPE to storage for healthcare facilities, as well as direct donations to local communities, MPA members have provided available resources wherever possible.

MPA member studios donated important PPE and direct aid to first responders and healthcare providers, including medical masks, gloves, respirator filters, ponchos, and other equipment from their medical-themed productions.

Disney, NBCUniversal, Warner Brothers, and other studio properties are donating food to local food banks.

Sony Pictures is providing warehouse space for manufacturers to store component parts for critical medical and first-responder protective equipment and donating 800 Sony Headphones for Communities in Schools to distribute to students in the Los Angeles Unified School District.

The broader creative community beyond MPA members has also been donating critical equipment, including IATSE's Locals and Costume Designers Guild, which has been sewing protective masks and organizing and participating in film community drives to collect/donate PPEs.

Public Service Messaging

MPA member studios and others in the industry have lent their voices and resources to communicate critical public health messages during the pandemic. NBCUniversal, Disney, ViacomCBS, and WarnerMedia are running Public Service Ads in coordination with the Ad Council and the U.S. government. Numerous shows, networks, and individuals have contributed to PSAs, informational videos, online ads, and social posts on a range of issues related to the COVID-19 response, including social distancing, mental health, hygiene, and community spirit.

Continuing to Serve Audiences at Home

Lastly, as millions of people around the world remain isolated at home during this unprecedented situation, the film, television, and streaming industry has played an important role in keeping everyone entertained, inspired, and connected. The industry as a whole is making more content available online and on-demand, including changing distribution plans due to COVID-19 and related theater closures.

[Download this page as a PDF](#)

©2021

PRIVACY

[Terms of Use](#)

[Privacy Policy](#)

[Privacy Shield Policy](#)

[California Consumer Privacy](#)

[Statement](#)

[CA: Don't Sell My Info](#)

[Cookie Notice](#)