

Petition for Proposed Exemption Under 17 U.S.C. § 1201

Item 1. Submitter and Contact Information

Clearly identify the submitter, and, if desired, provide a means for others to contact the submitter or an authorized representative of the submitter by email and/or telephone. (Parties should keep in mind that any private, confidential, or personally identifiable information appearing in this petition will be accessible to the public.)

This petition is submitted by Sarah O'Connor and Mark Patrick, student attorneys with the Glushko-Samuelson Intellectual Property Law Clinic at the American University Washington College of Law, on behalf of Peter Decherney, Professor of Cinema Studies and English at the University of Pennsylvania, the College Art Association (CAA), the International Communication Association (ICA), and the Society for Cinema and Media Studies (SCMS). Parties interested in contacting the submitter should contact Sarah O'Connor and Mark Patrick at (202) 274-4148 or by email at so6921a@student.american.edu or mp9853a@student.american.edu.

Item 2. Brief Overview of Proposed Exemption

Provide a brief statement describing the proposed exemption (ideally in one to three sentences), explaining the type of copyrighted work involved, the technological protection measure ("TPM") (or access control) sought to be circumvented, and any limitations or conditions that would apply (e.g., a limitation to certain types of users or a requirement that the circumvention be for a certain purpose).

This petition proposes to exempt audiovisual works embodied in physical media (such as DVDs and Blu-Ray Discs) or obtained online (such as through online distribution services and streaming media) that are lawfully made and acquired and that are protected by various technological protection measures, where the circumvention is accomplished by college and university students or faculty (including teaching and research assistants) or students and faculty participating in Massive Open Online Courses (MOOCs) for the purpose of criticism or comment.

<p>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 pursuant to 17 U.S.C. § 1201(a)(1). NOTE: No other advisory statement will be given in connection with this application. Please keep this statement and refer to it if we communicate with you regarding this petition.</p>
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Item 3. Copyrighted Works Sought to be Accessed

Identify the specific class, or category, of copyrighted works that the proponent wishes to access through circumvention. The works should reference a category of work referred to in section 102 of title 17 (e.g., literary works, audiovisual works, etc.). Unless the submitter seeks an exemption for the entire category in section 102, the description of works should be further refined to identify the particular subset of work to be subject to the exemption (e.g., e-books, computer programs, motion pictures) and, if applicable, by reference to the medium or device on which the works reside (e.g., motion pictures distributed on DVD).

This petition is for motion pictures and other audiovisual works as identified in 17 U.S.C. § 102(a)(6) and as defined in 17 U.S.C. § 101. This class incorporates any and all works for which short clips may be needed for educational purposes. This includes clips and still images from full-length films, short films, television programs, music videos, video games, and slide presentations.

Additionally, the class of copyrighted works this petition is seeking to access through circumvention explicitly includes high-definition formats as well as the standard definition formats for which an exemption was previously granted. High-definition formats have become the prevailing format for audiovisual works distributed today. As technology advances, the means available to faculty and students at educational institutions must also advance to incorporate high-definition images and clips into their classrooms. As a result, this petition is proposing an exempted class specifically including high-definition media as well as standard definition media.

This petition includes audiovisual works obtained online. Digital media is a staple in the modern classroom. The prevalence of online distribution services and the massive library of audiovisual works available online necessitates an exemption for audiovisual works obtained online.

Item 4. Technological Protection Measure

Describe the TPM that controls access to the work. The petition does not need to describe the specific technical details of the access control measure, but should provide sufficient information to allow the Office to understand the basic nature of the technological measure and why it prevents open access to the work (e.g., the encryption of motion pictures on DVD using the Content Scramble System or the cryptographic authentication protocol on a garage door opener).

Access to the audiovisual works for the purposes listed, in the various media listed, is controlled by numerous technological protection measures (TPMs). For instance, entirely different TPMs are employed to protect audiovisual works embodied in physical media (such as DVDs and Blu-Ray Discs) and audiovisual works distributed online (such as through online distribution services and streaming media).

Almost all DVDs employ the Content Scramble System (CSS), for which the Library of Congress granted an exemption in the previous iteration of this proceeding. The encryption scheme in CSS employs an algorithm configured by a set of security “keys” to encrypt a DVD’s contents. The video content is rendered unusable and unplayable unless the content is decrypted with CSS keys. Manufacturers of DVD players are authorized to utilize CSS technology under the CSS License Agreement. Millions of DVD players and computers worldwide implement CSS technology, and it is used to protect the content on hundreds of millions of DVDs.

The Advanced Access Content System (AACS) is the successor to CSS and is the standard TPM on Blu-Ray Discs. AACS encrypts discs using title keys. These title keys can only be decrypted using a media key in combination with the Volume ID of the media itself. Decryption keys are distributed over a broadcast channel, which enables licensors to “revoke” access to individual Blu-Ray players. AACS also incorporates “traitor tracing” techniques, which allows short sections of movies to be encrypted with different keys so that if a key is compromised, it can be identified and revoked without disrupting access completely.

A variety of entirely different TPMs protect audiovisual works distributed online through distribution services or streaming media. For example, Protected Streaming is a TPM developed by Adobe and employed by various online distribution services. Protected Streaming utilizes both encryption and SWF verification to protect audiovisual works. Other examples include Microsoft PlayReady and Apple’s FairPlay.

Item 5. Noninfringing Uses.

Identify the specific noninfringing uses of copyrighted works sought to be facilitated by circumvention (e.g., enabling accessibility for disabled users, copying a lawfully owned computer program for archival purposes, etc.), and the legal (statutory or doctrinal) basis or bases that support the view that the uses are or are likely noninfringing (e.g., because it is a fair use under section 107, it is a permissible use under section 117). Include a brief explanation of how, and by whom, the works will be used.

This petition proposes an exemption to allow for the continued use of audiovisual works by college and university students or faculty for the purpose of criticism or comment. Professors incorporate short portions of video into lectures and presentations as well as to facilitate discussion both inside and outside the classroom. Students incorporate excerpts from these works into assignments, presentations, research, and other coursework. These uses pervade both the in-person classroom and online education, which itself has expanded from merely enabling traditional coursework in an online forum to the development of Massive Open Online Courses (MOOCs). MOOCs allow for large-scale participation in online education. MOOCs typically consist of pre-recorded lectures that may be illustrated, as appropriate, with short clips and still images from audiovisual works, thus further necessitating access to these works.

Section 107 of the Copyright Act provides that the fair use of a copyrighted work for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. Whether a use is considered a fair use is typically determined by looking at the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the use upon the potential market for or value of the copyrighted work.

The uses facilitated by this proposed exemption are those Section 107 was written to protect. The proposed class of works in this petition are limited to audiovisual works used by college and university students or faculty for the purpose of criticism or comment, which would satisfy the purpose and character prong of a fair use analysis. The audiovisual works sought generally are created for entertainment value, and the faculty and students utilizing the works are repurposing them for educational use, rendering the use transformative. When a use is considered transformative, it strongly favors a finding of fair use. Additionally, circumvention is necessary to allow college and university faculty to seamlessly incorporate short portions of clips and isolated still images directly into lectures and presentations. This serves to limit wasting valuable class time scrubbing through the work to locate a particular clip. Moreover, a purpose of the exemption is to prevent faculty and students having to show an entire copyrighted work, and instead allow them to show just the segment needed for a specific purpose. As such, the amount and substantiality of the portion of the copyrighted work used would favor a finding of fair use. And finally, since the use of these works should be considered transformative, the use has no effect on the potential market for or value of the copyrighted work itself. Transformative uses create a new purpose for the work itself and thus create a new audience. Such uses therefore do not act as mere substitutes in the original markets for the work. Uses that repurpose no more of a work than is needed to make the point, or achieve the purpose, are generally fair use.

Item 6. Adverse Effects.

Explain how the inability to circumvent the TPM has or is likely to have adverse effects on the proposed noninfringing uses (e.g., the TPM limits wireless connection to the network of the mobile carrier from which the cellphone was originally purchased or prevents an electronic book from being accessed by screen reading software for the blind). The description should include a brief explanation of the negative impact on uses of copyrighted works. The adverse effects can be current, or may be adverse effects that are likely to occur during the next three years, or both. While the petition must clearly and specifically identify the adverse effects of the TPM, it need not provide a full evidentiary basis for that claim.

The inability to circumvent technological protection measures limits both students' and professors' ability to participate in the highest quality instruction, analysis, commentary, and criticism. A lack of technological alternatives, the necessity for video quality and clarity that only digital video can provide, and the ever-present constraints on classroom time are the primary reasons an exemption is necessary.

When professors are unable to circumvent TPMs, they must employ methods of capturing the content that result in low-quality images and low-quality education. Manual alternatives to circumventing technology may require professors to load up a disc or video and scrub through all of the content to reach the desired clip, wasting the time of the professor and the attention span of the students. The time associated with this process creates a detrimental chilling effect on the academic use of audiovisual works. Although certain commercial alternatives like screen capture software exist, the output of this process is of unacceptably low quality. In addition, professors often use the clips they make in a transformative way, such as incorporating multiple clips on a single slide or adding audio commentary to video clips. These activities necessarily require copying and editing protected works, which in turn requires circumvention of the relevant TPMs.

Students and faculty have also been adversely affected by their inability to use Blu-Ray Discs and other high-definition formats. Without access to the highest quality images available, certain modes of close analysis are unavailable to professors and students who seek to examine any number of things best revealed (or only revealed) by high definition images and clips. For example, only high definition images, clips, and stills can reveal certain aesthetic strategies of filmmakers or minute levels of historical detail within a shot.

Online media services are also increasingly developing proprietary and exclusive programming. Without the ability to circumvent the full range of protection measures employed by online media services, students and professors will be precluded from incorporating an entire group of works into their teaching, research, illustration, and scholarship. This in turn restricts their ability to fully utilize and learn from information that is not otherwise available in unprotected formats.