



UNITED STATES COPYRIGHT OFFICE

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

**Comments of the Electronic Frontier Foundation, New Media Rights, Organizational for Transformative Works on Proposed Class 1 – Audiovisual Works – Criticism and Comment**

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

### ITEM A. COMMENTER INFORMATION

Electronic Frontier Foundation (“EFF”) is a member-supported, nonprofit public interest organization devoted to maintaining the traditional balance that copyright law strikes between the interests of copyright owners and the interests of the public. Founded in 1990, EFF represents thousands of dues-paying members, including artists, consumers, hobbyists, students, teachers, and researchers, who are united in their reliance on a balanced copyright system that ensures adequate protection for copyright owners while facilitating new creativity, innovation, and broad access to information in the digital age.

*Contact:*

Corynne McSherry  
Electronic Frontier Foundation  
815 Eddy Street  
San Francisco, CA 94110  
[corynne@eff.org](mailto:corynne@eff.org)  
415-436-9333 x 122

New Media Rights (“NMR”) is a non-profit public interest program that provides legal services to creators and Internet users whose projects require specialized internet, intellectual property, privacy, and media law expertise. These legal services include counsel regarding section 1201 of the DMCA. NMR also engages in education and policy advocacy to benefit these clients. NMR is an independently funded program of California Western School of Law, a 501(c)3 non-profit. Further information regarding NMR’s mission and activities is available at <http://www.newmediarights.org>.

*Contact:*

Art Neill & Erika Lee  
New Media Rights  
1855 1<sup>st</sup> Ave. Suite 102  
San Diego, CA 92101  
[art@newmediaright.org](mailto:art@newmediaright.org)  
619-591-8870

The Organization for Transformative Works (“OTW”) is a nonprofit organization established in 2007 to protect and defend fanworks from commercial exploitation and legal challenge. “Fanworks” are new, noncommercial creative works based on existing media. The OTW’s nonprofit website hosting transformative noncommercial works, the Archive of Our Own, has over 770,000 registered users and receives over 115 million page views per week. We represent artists who make works commenting on and transforming existing works, adding new meaning and insights—from reworking a film from the perspective of the “villain” to retelling the story as if a woman, instead of a man, were the hero.

*Contact:*

Betsy Rosenblatt  
Organization for Transformative Works  
228 Park Ave S #18156  
New York, New York 10003-1502  
[legal@transformativeworks.org](mailto:legal@transformativeworks.org)  
(323) 822-4033

In filing these comments, we collectively represent the interests of artists, educators, students, filmmakers and ordinary citizens who seek to make fair use of motion pictures for purposes of criticism and commentary.

*Note:* the American Library Association, the Association of Research Libraries, the Association of College and Research Libraries, and the Authors Alliance support this submission, as does Professor Peter Decherney, who has participated in these proceedings since 2006 on behalf of educators. Other organizations may be offering support via separate submissions.

**ITEM B. PROPOSED CLASS ADDRESSED**

*Proposed Class 1:* Motion Pictures (including television shows and videos), as defined in 17 U.S.C. 101, where circumvention is undertaken solely in order to make use of short portions of the works for the purpose of criticism or comment, where the motion picture is lawfully made and acquired on a DVD protected by the Content Scrambling System, on a BluRay disc protected by the Advanced Access Control System, via a digital transmission protected by a technological measure, or a similar technological protection measure intended to control access to a work, where the person engaging in circumvention reasonably believes that non-circumventing alternatives are unable to produce the required level of high-quality source material.

**ITEM C. OVERVIEW**

As repeat players in these proceedings, particularly with respect to video excerpt exemptions, EFF, NMR, and OTW notice that a pattern has emerged: a set of proponents submit ideas for exemptions to cover a variety of practical, socially valuable and otherwise lawful activities, a coalition of entertainment entities object – insisting, without evidence, that the proposed exemption might harm the continued growth of video markets – and then, eventually, the Librarian adopts a set of exemptions that recognize the need for an exemption, but are nonetheless both narrow in concept and often confusing in practice for users and copyright holders alike.

The proposed exemption gives the Copyright Office and the Librarian an opportunity to rethink this unnecessarily complicated approach. With respect to video excerpts in particular, a more streamlined approach will bring us closer to Congress' intent, while making the rules clearer for both users and copyright holders. The proposed class will provide one clear exemption for video excerpts— removing confusion while maintaining critical protections for educators, libraries, professional filmmakers (including documentarians), remix artists, and others.

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

The TPMS in question vary depending on the technology. For DVDs, the most common TPM is the Content Scrambling System; for BluRay discs, the Advanced Access Control System. Content providers employ a variety of TPMs for digital transmissions. As the Office has found in past proceedings, a wide variety of hardware and software programs are widely available that permit access to works encrypted using these TPMs. The situation is still essentially the same as it was in 2015, though the Office has also accurately noted that “the landscape for access controls protecting motion pictures offered via online distribution services is constantly changing.”<sup>1</sup> As for methods of circumvention, many tools are already widely available, including: MacTheRipper 4.1 (see [www.videohelp.com](http://www.videohelp.com)); DVD Decrypter (<http://www.dvddecrypter.org.uk/>), Mac DVDRipper Pro ([www.macdvdripperpro.com](http://www.macdvdripperpro.com)), Handbrake, (<https://handbrake.fr/downloads.php>), MakeMKV (<http://www.makemkv.com/>) and Aunsoft (<http://www.aunsoft.com/blu-ray-ripper>).

#### **ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES**

Commenters are aware that other organizations and private citizens will be filing detailed comments and evidence regarding various specific activities this proposed class would encompass. Those submissions will address the statutory factors and provide arguments supporting the expansion and clarification of those particular exemptions. We are also aware that most of the remaining activity that will be covered by the proposed class is addressed by the existing exemptions that the Register is already recommending for renewal. Accordingly, our comments here will not focus on whether the uses in the proposed class are entitled to an exemption, but rather on how best to implement the protection Congress intended to grant noninfringing uses that would otherwise be suppressed. Specifically, we will focus on the value of adopting a simple overarching exemption that would embrace multiple audiovisual classes.

##### **I. The DMCA §1201 Exemption Process Is Intended to Protect Fair Uses**

The legislative history indicates that preserving fair use should be paramount in triennial rulemaking proceedings. In 1998, as Congress was considering the DMCA anti-circumvention provisions as HR 2281, the House Committee on Commerce received testimony regarding fair use, and characterized the importance of fair use as follows:

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<sup>1</sup> Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights, at p. 126 n.731 (2012).

Fair use . . . provides the basis for many of the most important day-to-day activities in libraries, as well as in scholarship and education. It also is critical to advancing the personal interests of consumers. Moreover, as many testified before the Committee, it is no less vital to American industries, which lead the world in technological innovation. As more and more industries migrate to electronic commerce, fair use becomes critical to promoting a robust electronic marketplace. The Committee on Commerce is in the midst of a wide-ranging review of all issues relating to electronic commerce, including the issues raised by this legislation. The digital environment forces this Committee to understand and, where necessary, modernize the rules of commerce as they apply to a digital environment—including the rules that ensure that consumers have a stake in the growth in electronic commerce.

The Committee was therefore concerned to hear from many private and public interests that H.R. 2281, as reported by the Committee on the Judiciary, would undermine Congress' long-standing commitment to the concept of fair use.<sup>2</sup>

The Committee made special note of a June 4, 1998, Consumers Union letter urging the House Committee on Commerce to actively preserve fair use:

These newly-created rights will dramatically diminish public access to information, reducing the ability of researchers, authors, critics, scholars, teachers, students, and consumers to find, to quote for publication and otherwise make fair use of them. It would be ironic if the great popularization of access to information, which is the promise of the electronic age, will be short-changed by legislation that purports to promote this promise, but in reality puts a monopoly stranglehold on information.<sup>3</sup>

The Committee on Commerce then “felt compelled to address these risks, including the risk that enactment of the bill could establish the legal framework that would inexorably create a “pay-per-use” society.”<sup>4</sup> The result was this exemptions process.<sup>5</sup> When the Copyright Office conducts this assessment of what to exempt from the broad prohibition on circumvention, Congress intended that the Office closely follow the contours of fair use. As it laid out the process for the triennial exemption proceedings, the Committee said this about fair use’s place in the DMCA anti-circumvention provisions:

The Committee considers it particularly important to ensure that the concept of fair use remains firmly established in the law. Consistent with the United States commitment to implement the two WIPO treaties, H.R. 2281, as reported by the

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<sup>2</sup> Report of the House Committee on Commerce on the Digital Millennium Copyright Act of 1998, H.R. Rep. No. 105–551, pt. 2, at 26 (1998).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 37 describing the process as an inquiry as to “whether the implementation of technological protection measures that effectively control access to copyrighted works is adversely affecting the ability of individual users to make lawful uses of copyrighted works.”

Committee on Commerce, fully respects and extends into the digital environment the bedrock principle of ‘balance’ in American intellectual property law for the benefit of both copyright owners and users.<sup>6</sup>

Indeed, while recognizing the increased availability of creative works in 1998 via the Internet, the Committee was wary of a digital future where technologies were used to lock up works in a way that would unjustly limit fair use:

[T]he Committee is concerned that marketplace realities may someday dictate a different outcome, resulting in less access, rather than more, to copyrighted materials that are important to education, scholarship, and other socially vital endeavors. This result could flow from a confluence of factors, including the elimination of print or other hard-copy versions, the permanent encryption of all electronic copies, and the adoption of business models that depend upon restricting distribution and availability, rather than upon maximizing it. In this scenario, it could be appropriate to modify the flat prohibition against the circumvention of effective technological measures that control access to copyrighted materials, in order to ensure that access for lawful purposes is not unjustifiably diminished.<sup>7</sup>

As it crafted the triennial exemptions, the Copyright Office then acknowledged this legislative history and that Congress gave the Office the responsibility of preserving fair use in the triennial rulemaking. In its first final rule regarding exemptions in 2000, the Office stated that “Congress found it appropriate to modify the prohibition to assure that the public will have continued ability to engage in noninfringing uses of copyrighted works, such as fair use.”<sup>8</sup> The Copyright Office also acknowledged that the triennial proceedings were the “fail-safe” that would preserve fair use,<sup>9</sup> and directly cited some of the language above.

## II. How We Got Here

The legislative history suggests that Congress intended the rulemaking process to be a relatively straightforward means for lawful users to get legal clarity. However well-intentioned, our current video-related exemptions incorporate various criteria that add unnecessary complexity beyond the contours of fair use, and thus undermine Congress’ fundamental concern of making fair use available to individual users in the digital age. The Copyright Office has made efforts, particularly in this round, to simplify the process somewhat. It is equally important that we

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<sup>6</sup> *Id.* at 27.

<sup>7</sup> H.R. Rep. No. 105-551, pt. 2, at 36 (1998).

<sup>8</sup> 37 CFR Part 201 Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule at p. 64556 (2000) (citing H.R. Rep. No. 105-551, pt. 2, at 36 (1998)).

<sup>9</sup> *Id.* at 64558 (citing H.R. Rep. No. 105-551, pt. 2, at 36, which stated, “This mechanism would monitor developments in the marketplace for copyrighted materials, and allow the enforceability of the prohibition against the act of circumvention to be selectively waived, for limited time periods, if necessary to prevent a diminution in the availability to individual users of a particular category of copyrighted materials”).

simplify the exemptions themselves.

Part of the problem can be traced to 2006, when the Register began to define some classes of works by the type of user or use. This approach introduced valuable and much-needed flexibility to what had been an overly rigid and narrow approach. But it also resulted in heightened complexity. In the next two rounds, the ultimate exemptions granted for videos were both complicated and (still) narrow, making them less useful and more difficult to explain and apply with certainty. To determine whether an exemption applied, a user would need to analyze both their intended use beyond the requirements of fair use and their status as a type of user, also beyond the requirements of fair use. For example, an attorney seeking to counsel an artist in 2010 regarding using excerpts would have to inquire whether the artists had any commercial support, and assess whether a particular use qualified as “commercial.” If the user were a student, they would have to consider whether the student qualified as one engaged in “film and media studies.” This approach may have also led to the multiplication of proponents – every distinct type of user must apply for an exemption, or risk being excluded from the final class.

There’s also been an increase in the sheer number of words – a simple metric but telling if you believe that fair users shouldn’t have to hire a lawyer to figure out whether a fair use is nonetheless an unlawful 1201 violation. The exemption for using excerpts of audiovisual works increased from 100 words in 2010 to 752 words in 2013. The average number of words per exemption increased from 17.5 in 2000 to 234.5 in 2013.

There are many reasons for this increasing complexity. Jonathan Band, a repeat player in the process (representing the library associations), suggests that it is a natural result of the conflicting pressures stakeholders place on the Copyright Office:

Libraries, educators, and consumers request the renewal and expansion of existing exemptions, as well as the adoption of new ones. The copyright owners, for their part, vigorously oppose the exemptions, typically arguing that alternatives to circumvention exist.<sup>10</sup>

For example, the MPAA and related organizations insisted for years that video exemptions were unnecessary because secondary users could capture clips by pointing camcorders, and later iPhones, at a high definition television screen. This argument, in turn, required secondary users to marshal mountains of evidence to explain why they did in fact need high-quality source video, which could only be captured by ripping clips directly from the source. For many, such as remix artists and filmmakers, this effort amounted to a requirement that they establish that their work was as artistically and socially important as the original work on which they wished to comment, which continues to strike many as insulting.

The Copyright Office has attempted to reconcile these competing arguments by “splitting the baby,” recommending exemptions but then circumscribing them in detail, regardless of the evidence. As Band also notes, this leads to some irrational distinctions, such as exempting college students but not high school students doing the exact same work in Advanced Placement

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<sup>10</sup> J. Band, *The Complexity Dialectic: A Case Study from Copyright Law*, InfoJustice.org (Mar. 10, 2015), <http://infojustice.org/archives/34061>.

classes, or, in the case of jailbreaking, exempting iPhones but not iPads.<sup>11</sup> It also leads to exemptions whose contours are unrelated to preserving the effectiveness of DRM; there has never been any evidence presented that the wording of the exemptions affects the behavior of those who engage in unfair uses or traffic in decryption technologies. Above all, it leads to exemptions that are difficult for most people to understand, as set forth below.

### **III. The Need for A Simpler Approach**

The current video-related exemptions pose steep readability challenges for individual users. Current exemptions also add enough layers of analysis beyond the fair use factors that they are a challenge for clients and attorneys alike to apply in practice, contrary to the Office's well-justified goal of crafting regulations that ordinary people can understand and apply.<sup>12</sup>

#### **A. The current exemptions are practically unreadable for most users**

While many individual users don't realize the 1201 anti-circumvention provisions and related exemptions exist all, those who are aware of the provisions must decipher complicated text. The current video-related exemption language, with its 8 subclasses, comes in at about 958 words.<sup>13</sup> The discussion of those provisions in the rule comes in at 4,212 words. The challenge is not length alone: a linguistic analysis reveals that the rule is written in language suitable for a grade level of 19.6, or third-year graduate school,<sup>14</sup> meaning that most people who need to rely on the exemptions will not have the educational level required to understand them. Attempts to translate the rules into simpler form therefore spawn explanatory articles across the Internet of varying accuracy,<sup>15</sup> the most succinct and accessible of which themselves number in the thousands of words.

#### **B. The current exemptions are difficult for individual users and even attorneys to apply**

In addition to the excessive density and volume of the current language, the eight subclasses

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<sup>11</sup> *Id.*

<sup>12</sup> See Section 1201 of Title 17, A Report of the Register of Copyrights, June 2017 at page vii (describing Office's commitment to "simplified regulatory language") and p. 151 ("[D]rafting the section 1201 regulatory language in plain language is a worthy goal, echoing efforts from the Legislative and Executive Branches to promote clear communication to the public ....").

<sup>13</sup> See 37 CFR Part 201 Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule at p. 65961-62 (2015).

<sup>14</sup> *Id.* at 65946-50.

<sup>15</sup> See Brandon Butler, *Fair Use, MOOCs, and the Digital Millennium Copyright Act: Frequently Asked Questions*, American University Washington College of Law (Jan. 22, 2016), <https://ipclinic.org/2016/01/22/fair-use-moocs-and-the-digital-millennium-copyright-act-frequently-asked-questions/> (a 3-page FAQ regarding the MOOC exemption); *2015 DMCA Exemption for Filmmakers*, International Documentary Association (last visited Dec. 14, 2017), <https://www.documentary.org/advocacy/dmca-exemption> (similarly lengthy FAQ regarding filmmaking exemption); *Letting Us Rip: Our New Right to Fair Use of DVDs*, The Chronicle (July 27, 2010), <https://www.chronicle.com/blogs/profhacker/letting-us-rip-our-new-right-to-fair-use-of-dvds/25797> (blog post from a Film and Culture professor explaining the 2009 video exemptions).

leave gaps for a variety of legitimate fair uses when individual users want to make use of short clips for commentary or criticism. Commenter New Media Rights fields nearly 60 requests for legal services related to copyright law per month, many from those who want to reuse short clips of video works for fair use purposes. Other commenters in this proceeding also work directly with clients that may need to rely on section 1201 exemptions to make fair use of protected works.

Many clients seeking legal services related to content uses such as fair use don't realize that the 1201 circumvention prohibitions or related exemptions exist. Indeed, interim results of a study by the Center for Media and Social Impact showed that 63% of those surveyed (documentary filmmakers; film, communications and media literacy academics; and remix artists) didn't know the audiovisual exemptions existed, only 29% felt they understood the exemptions, and only 16% were confident in applying them.<sup>16</sup> Moreover, not using the exemptions directly affects their work: 31% have avoided using copyrighted material because of encryption, and 20% have changed their work.<sup>17</sup>

Overly specific requirements are useless to them and serve only to put them in legal jeopardy even when they make fair uses. Of those who know that section 1201 exists, some incorrectly believe they do or do not qualify for the video related exemptions. For example, individuals who create and share nonfiction videos on YouTube related to pop culture criticism that utilize short clips of motion pictures for commentary or criticism may not consider themselves engaged in traditional "documentary filmmaking." They may then believe they aren't covered by the current exemptions, even though their use was entirely within that section. Because the language of the exemptions is not sufficiently coextensive with fair use, however, individuals could believe that they are categorically exempted without reference to fair use. To the extent that opponents worry that users may misunderstand the 1201 exemptions, they should welcome exemptions that are firmly and clearly grounded in fair use, so that users can easily understand the relationship between the exempted activity and fair use.

If individual users make it to an attorney, attorneys must then advise individual users regarding a variety of criteria beyond the four factors of fair use. These criteria include whether the clip will be used in (i) documentary filmmaking, (ii) a "noncommercial" video (which carries its own contours regarding noncommercial commissions beyond the fair use analysis), (iii) nonfiction multimedia e-books offering film analysis, by college and university faculty and students, (iv) for educational purposes in film studies or other courses requiring close analysis of film and media excerpts; (v) by faculty of massive open online courses (MOOCs) offered by accredited nonprofit educational institutions to officially enrolled students through online platforms (which platforms themselves may be operated for profit) for educational purposes in film studies or other courses requiring close analysis of film and media excerpts;<sup>18</sup> (vi) By kindergarten through

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<sup>16</sup> P. Aufderheide, *The Right to Decrypt Media Needs to be More User-Friendly*, (December 16, 2017), <http://cmsimpact.org/general/right-decrypt-media-needs-user-friendly/>

<sup>17</sup> *Id.*

<sup>18</sup> 37 CFR Part 201 Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule at p. 65962 ("where the MOOC provider through the online platform limits transmissions to the extent technologically feasible to such officially



twelfth grade educators, including of accredited general educational development (GED) programs, for educational purposes in film studies or other courses requiring close analysis of film and media excerpts; or perhaps fits into one of two subclasses that address screen capture only.

In the best cases, where an individual has made it to an attorney, an attorney must counsel with little or no case law available, as to where the lines of documentary filmmaking or noncommercial video end and narrative film or commercial videos begin, what constitutes film analysis in a multimedia e-book, what constitutes a course that requires “close analysis” of film and media excerpts (not merely “film analysis”), what constitutes a qualifying MOOC, what constitutes a qualifying kindergarten through twelfth grade educator, among other criteria. To take just one example, in 2013, the USC Intellectual Property and Technology Law Clinic gave a presentation to over 100 documentary filmmakers with the goal of explaining to them how to use the exemption granted in 2012. The exemption was so complicated and confusing that even the process the clinic developed for them was seven steps long.<sup>19</sup>

At the same time, courts have not addressed these issues because they are not important distinctions for copyright law outside the 1201 process—nor, in fact, has the Copyright Office. Contrast this to counseling regarding fair use, an area that is heavily litigated and therefore generates case law that provides some guidance, and in which the Office has begun to offer resources.

The counseling experience suggests that many other individual users are either unaware or misinformed regarding the current 1201 categories. Simplified language could lessen confusion when individual users and attorneys interpret the provisions, and it could lessen the possibility that a use that otherwise qualifies as fair use might be later found to violate federal law.

#### **IV. A Better Way Forward**

Congress did not intend for the 1201 exemption process to become a legal specialty – but it has become just that. Every few years, clinics, public interest groups, a few well-paid lawyers and Copyright Office staffers invest hundreds of hours crafting and disputing ever more complicated exemptions. Over the following few years, they invest many more hours explaining them to artists, educators and other members of the public – all of whom are simply trying to make fair use of copyrighted works. And then we all come back to do it again.

It’s past time to simplify the process, and proponents are grateful that the Copyright Office is already taking steps along those lines. The proposed class complements those efforts, at least with respect to video, by simplifying the class itself.

The Librarian of Congress, the Copyright Office and the stakeholders now have close to two decades of experience with the video exemptions. Exemption opponents have never offered a

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enrolled students, institutes copyright policies and provides copyright informational materials to faculty, students and relevant staff members, and applies technological measures that reasonably prevent unauthorized further dissemination of a work”).

<sup>19</sup> Personal communication from K. Trendacosta, former USC clinical student.

shred of evidence that the video exemptions have interfered with their ability to create or distribute copyrighted works, or that the limits on the exemption protect encryption technologies or deter infringement. On the other hand, proponents have repeatedly shown how the various video exemptions foster new creativity, research and education – all classic fair uses. But valuable as the exemptions have been, their complexity is undermining their beneficial purpose.

The proposed class offers a better way forward for creators, educators, students and ordinary people. First, it largely mirrors and consolidates already well-established exempted activities that haven't harmed anyone. Second, as in past years, it addresses concerns about intentional and unintentional abuse by tying the class definition to key fair use factors: purpose (criticism and comment) and amount used (short clips). It retains the requirement that the user must reasonably believe circumvention is necessary and most importantly must have lawfully acquired the content from which she is extracting the clip. Third, while we invite suggestions for further simplification of the language, all of the elements are ones ordinary users can likely discern: the purposes of the first work and her work, the length of the clip she extracted, whether she acquired the work lawfully, and whether the use of high-quality source material is justified (a query which is at heart a facet of the first factor). Fourth, the proposed class would simplify the video-related exemptions to 139 words, a far more accessible length for individual users to interpret.

Finally, because it adheres more closely to Section 107's factors, the proposed class also adapts to the pervasive use of video beyond the specific use cases and examples specific proponents provide. New situations keep arising, such as the use of clips in litigation. In one case, in order to explain actual bank robbers' modus operandi, four clips from the movie *The Town*, a 2010 crime drama about a group of Boston bank robbers, were edited and burned to DVD. Three clips, with pauses between them, were played to the jury from laptops at trial, for a total of 1 minute and 7 seconds.<sup>20</sup> Prosecutors also submitted these edited clips to the Second Circuit.

This series of clips would not necessarily fall into the 2015 remix exemption, but the government's use was clearly transformative, noncommercial, reasonable in light of its purpose (which the Second Circuit held to be "narrowly tailored to show only the parts of the movie that are relevant to the 2012 robbery") and not an interference with the copyright owner's legitimate markets.<sup>21</sup>

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<sup>20</sup> *United States v. Monsalvatge*, 850 F.3d 483, 489 (2d Cir. 2017); Personal communication with Tiana Demas, Assistant U.S. Att'y, E.D.N.Y., Nov. 15, 2017 (describing process; prosecutors considered fair use but not anticircumvention law in deciding to make the clips).

<sup>21</sup> *Monsalvatge*, 850 F.3d at 495; *see also United States v. Wills*, 346 F.3d 476, 489, 497 (4th Cir. 2003) (prosecution and defense each used different clips from the movie *Casino* used to help explain the defendant's reference to the film during a tape-recorded conversation); Personal communication with Jim Trump, Senior Litigation Counsel, E.D. Va., Nov. 20, 2017 (the prosecution and defense ripped different short clips from the film to explain defendant's reference). *See also United States v. Schneider*, 801 F.3d 186, 199-200 (3d Cir. 2015) (involving excerpts from the film *Nijinsky*, which showed a famous ballet dancer and his older patron and lover, because the sexual abuse victim testified that the defendant had shown him the film); *United States v. Smith*, 749 F.3d 465, 495-96 (6th Cir. 2014) (trial on mail fraud charges arising

Situations like this one—reasonable, but occurring to people who are not experts in §1201—demonstrate the wisdom of copyright’s flexible fair use standard, and the need to conform §1201 exemptions for audiovisual works as nearly as possible to the contours of §107 now that we have 20 years of experience with the operation of the law. In a world without videotape, even if criminal lawyers know about §1201 (which they almost never do), they need an exemption that covers creating clips in similar transformative use situations, unless they are willing to risk a lawsuit every time they use relevant evidence of this type.

There are undoubtedly dozens of other communities that occasionally, with varying but legitimate justifications, make fair use of video that requires circumvention. They don’t know about §1201, and so they don’t know that they need to participate in these proceedings or face legal risk given the Office’s past approach of multiplying different subclasses, each with slightly different requirements. Like the prosecutors and defense attorneys in the cases discussed in the previous paragraph—trained lawyers, but not experts in Title 17’s paracopyright provisions—they reasonably think that their uses are fair, that they did what they needed to do to ensure that their uses were legal, and that no further analysis is required. Of course, if their uses are not fair, they can be held accountable for infringement, but in these situations adding 1201 liability is truly a trap for the unwary, not a deterrent.

Opponents may be concerned that the proposed class does not explicitly forbid commercial uses. If so, any such concerns are misplaced. As EFF and OTW explained in 2014, it continues to be unlikely that the proposed exemption will have any demonstrable effect on the market for DVDs, Blu-Ray discs, etc. From the 2009 proceedings on, the Office has found no harmful effect on the market from existing exemptions and their expansion to more uses, and opponents have never provided any evidence that any exemption has affected the market. Indeed, there has never been any evidence presented that the *wording* of the exemption could change the number of actually infringing and therefore illegitimate uses, or the extent of the dissemination of circumvention technology.

Moreover, as the Register noted in her 2009 recommendations, the uses in question are transformative and, therefore unlikely to affect the markets for the original works.<sup>22</sup> Further, vidders, educators and other creators pay to acquire source material, supporting rather than harming markets. Finally, it has long been uncontested in these proceedings that camcording and other alternatives to circumvention, while insufficient for many purposes, do create first-generation digital copies watchable enough for pure consumption.<sup>23</sup> A pirate interested only in

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from a scheme to defraud investors involving clips from the movie *The Boiler Room* that depicted salesmen deceiving potential investors, where former employees of the defendants’ company testified that the movie was provided to employees for training purposes) (personal communication with Frances Catron, former Assistant U.S. Att’y, Nov. 22, 2017 (clips were created on computer from DVD seized from defendants; prosecution considered fair use, but not §1201).)

<sup>22</sup> Section 1201 Rulemaking: Recommendation of the Register of Copyrights, at p. 70-71 (2010)

<sup>23</sup> See R. Tushnet, I Put You There: User-Generated Content and Anticircumvention, 12 V and J. Ent. & Tech. L. 889, 929 (2010).

distributing full copies of a work can easily use those alternatives; the proposed class will neither help nor impede them.

## **V. Conclusion**

For the foregoing reasons, proponents urge the Register to recommend, and the Librarian to adopt, the proposed class.

## **DOCUMENTARY EVIDENCE**

Please see footnotes.