

Before the
U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS

**In the Matter of exemption to prohibition on circumvention
of copyright protection systems for access control technologies**

Docket No. RM 2008-8

Comment of

**Renee Hobbs, Professor of Broadcasting, Telecommunication and Mass Media
Founder, Media Education Lab, Temple University.**

I. Requested Classes of Work for Exemption

Class One: Audiovisual works that illustrate and/or relate to contemporary social issues used for the purpose of teaching the process of accessing, analyzing, evaluating, and communicating messages in different forms of media.

Class Two: Audiovisual works that illustrate and/or relate to contemporary social issues used for the purpose of studying the process of accessing, analyzing, evaluating and communicating messages in different forms of media, and that are of particular relevance to a specific educational assignment, when such uses are made with the prior approval of the instructor.

II. Introduction

Commenter is one of the nation's leading authorities on Media Literacy Education and has worked in the field for over twenty years. She is a Professor of Communication at Temple University's School of Communication and Theater, where she founded the Media Education Lab. She also created the Harvard Institute on Media Education at the Harvard Graduate School of Education, the nation's first national-level teacher education program in Media Literacy, and is the author of *Teaching the Media: Media Literacy in High School English*. She recently created, with support from the U.S. Office on

Women's Health, *My Pop Studio*, an award-winning edutainment website that introduces young teenage girls to Media Literacy concepts in the form of an engaging online game.

In today's digital society where everyone is inundated with information from countless sources, it has become increasingly hard to distinguish between what is reliable and what is biased. Before the next generation of citizens and consumers can truly harness this behemoth of information for good, they must have knowledge and skills to understand how media messages are constructed, how they transmit values, and how they reflect and shape attitudes and behaviors. They must have the skills to compose messages using images, language, sounds and digital tools for expression, communication, and advocacy. Thus, Media Literacy Education has become a vital part of contemporary teaching and learning at every level, from kindergarten through college. Both print and audiovisual media are used as subject matter of Media Literacy Education, with a strong emphasis on the products of mass media and popular culture. In particular, Media Literacy teachers and learners focus their attention on the genres of news, advertising, television programming, and commercial motion pictures.

Digital media has trumped its analog counterparts in versatility, efficiency, quality, and ease of use. The proliferation and obvious appeal of digital media, combined with the increasing transition to the use of digital media in school settings, has encouraged Media Literacy teachers and learners to look to Digital Versatile Discs ("DVDs") as a source of relevant quotations for use in both in classrooms and for student media production assignments. However, most media distributors use the Content Scrambling System ("CSS"), a Digital Rights Management technology ("DRM"), to control access to copyrighted material on these DVDs. In the terms of section 1201(a)(3)

of the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. Sec. 1201(a)(3), CSS “effectively prevents” Media Literacy teachers and learners from “gain[ing] access” to media clips on DVDs for various educational purposes. Media Literacy teachers and learners are left with few alternatives to the audiovisual works on DVDs. DRM compliance under the DMCA is a barrier to the effective teaching of Media Literacy Education.

If he or she were able to do so, a teacher would typically use clips from films in order to demonstrate key concepts of Media Literacy and the methods through which these messages are conveyed.¹ Learners are also given the opportunity to hone their Media Literacy skills by creating media production projects related to classroom lessons, under the supervision of their instructors. In some cases, these uses of film clips in Media Literacy Education fall under Section 110(1) of the Copyright Act, 17 U.S.C. 101(1); in addition, all are legitimate fair uses of copyrighted materials under Section 107 of the Copyright Act, 17 U.S.C. Sec. 107.

Due to the digital transition in content distribution, Media Literacy teachers do not have access to contemporary entertainment content in the open VHS format; today, most new motion pictures and television programs are released for purchase or rental only on DVD, and thus VHS is no longer a viable alternative for Media Literacy Education. Furthermore, while the technology that allows for analog-to-digital transfers exists, schools and teachers often do not have the needed equipment or resources to take advantage of it.

¹ National Association for Media Literacy Education, Core Principles of Media Literacy Education, located at <http://www.amlainfo.org/core-principles>.

Therefore, in order to assure the effectiveness of Media Literacy Education, as well as to encourage even more educators to participate in teaching what may become the most important skill set for the next generation, we respectfully request a pair of exemptions that would allow teachers and learners to lawfully circumvent CSS and extract media clips from DVDs for use in Media Literacy Education.

III. Defining Media Literacy and Its Significance in Education

Media Literacy is the ability to access, analyze, evaluate, communicate and create messages in a wide variety of forms.² Like conventional Literacy Education, in general, it is an ability that can be taught and learned. Also, like conventional print Literacy Education, Media Literacy Education involves the development of productive and receptive abilities; however, Media Literacy Education expands and applies these skills beyond print to all forms of media.³ Media Literacy Education can occur at different levels of study. In the K-12 grades, as well as at the college and university levels, it takes place in a stand-alone course, or can be incorporated into other subjects, as many teachers have begun to do.⁴

² American University: Center for Social Media, Code of Best Practices in Fair Use for Media Literacy Education 2 (2008); Center for Media Literacy, located at http://www.medialit.org/faq_best.html#terms; National Association of Media Literacy Education, located at <http://www.aamlainfo.org/media-literacy>.

³ Code of Best Practices at 2; American University, School of Communication: Center for Social Media, “The Cost of Copyright Confusion for Media Literacy”, 4 (Sept. 2007) http://www.centerforsocialmedia.org/files/pdf/Final_CSM_copyright_report.pdf.

⁴ Alliance of Civilizations, “Integrating Media Literacy into High School English”, located at www.aocmedialiteracy.org/index.php?option=com_content&task=view&id=34&Itemid=31; Bill Walsh, “Expanding Media Literacy”, Media Literacy Review: Center for Advanced Technology in Education, College of Education, University of Oregon- Eugene, located at http://interact.uoregon.edu/medialit/JCP/articles_mlr/walsh/Expanding_Media_lit.html; The Henry J Kaiser Foundation, Key Facts: Media Literacy, <http://www.kff.org/entmedia/upload/Key-Facts-Media-Literacy.pdf> (2003).

In a media-saturated culture, Media Literacy Education has become an increasingly important way for students and other learners to navigate through the often-conflicting messages they receive. Thus, Media Literacy Education enables people to move beyond being media consumers and become active participants in the media environment, who, among other things, recognize that they live in a mediated society, that messages in the media are constructed and that these messages can shape beliefs and behaviors.⁵ For instance, a teacher might ask her class to explore how and why the portrayal of scientists in popular movies and television shows has changed over a specific time period. During an election year, a student might create an online presentation that demonstrates the differences in language, music, and images featured in negative and positive political advertisements or examine how visual tropes or stereotypes are used for persuasion. Media Literacy educators often use popular movies and television shows in teaching because learners are often heavily immersed in the contemporary culture.⁶ By connecting new information and ideas to materials that is familiar to learners, learning is enhanced. For learners to transfer and apply Media Literacy critical thinking skills to the world outside the classroom, the use of familiar, relevant examples is instructionally effective.

Media Literacy Education encourages active involvement in the culture. As one Media Literacy educator explains, "Media literate people know how to act, rather than

⁵ Code of Best Practices at 2.

⁶ *See generally* National Council of Teachers of English (NCTE) Survey Responses (2008); *see also* Media Education Lab at Temple University Survey Responses (2008); Both surveys, which included very similar questions, asked Media Literacy educators at the K-12 and university levels about the challenges that the DMCA posed for them and their learners. The NCTE survey is an online poll that was emailed to survey panel participants on November 18, 2008. The Temple survey is also an online poll that was emailed to Media Literacy teachers from the Media Education Lab on November 15, 2008. Full survey results are on file with commenter.

being acted upon."⁷ As a high school Library and Media Technologist points out, "Learners are not only content consumers, but they are also are creators."⁸ Through Media Literacy Education, learners have the ability to comment on and demonstrate how they interpret the messages in the media. Today's learners are "digital natives," adds the Director of General Program at the John D. Catherine T. MacArthur Foundation, which funds programs in Media Literacy Education, adding that she believes that it is vital for young people to develop a critical eye in consuming digital media.⁹ She also stresses that Media Literacy Education must examine how media messages affect learners.¹⁰

It is important to note that the use of audiovisual materials in Media Literacy Education is distinct from the use of similar media in education generally.¹¹ When an educator allows learners to vote for a movie to watch as a reward for good classroom behavior or shows Ken Burns' *The Civil War* as a visual aid while the class is learning about that period in American history, that teacher is using media purely for entertainment or passive instructional purposes (i.e., as a convenient way of conveying informational content).¹² The materials are being used in the way in which they originally were intended. Media Literacy Education by contrast, is limited to activities that involve the critical analysis of media, including ones which enable the learners and teachers to

⁷ Media Awareness Network, located at http://www.media-awareness.ca/english/teachers/media_literacy/why_teach_media_liter.cfm.

⁸ Joyce Valenza, Springfield Township High School, address at the release of the Code of Best Practices in Fair Use for Media Literacy Education at Temple University (Nov. 11 2008).

⁹ Kathy Im, address at the release of the Code of Best Practices in Fair Use for Media Literacy Education at Temple University (Nov. 11 2008).

¹⁰ Id.

¹¹ Code of Best Practices at 3.

¹² Renee Hobbs, Non-optimal uses of video in the classroom. *Learning, Media and Technology* 31(1), 45 – 50 (2006).

engage in their own media-making to demonstrate how media messages work as cultural artifacts. Therefore, uses of existing media content in Media Literary Education are undertaken for “criticism” or “commentary” -- purposes that enjoy special status under the copyright “Fair Use” doctrine, as will be explained more fully below.

IV. Lost Opportunities in Media Literacy Education Due to the DMCA

Media Literacy teachers and learners rely on access to audiovisual works for many purposes, including the preparation of compilations for comparison-contrast and analysis; the creation of new works in order to understand and apply Media Literacy concepts; and the implementation of media production projects designed to ensure that learners are effectively learning the process of accessing, analyzing, evaluating and communicating messages in different forms of media. Because the teaching of Media Literacy puts a premium on critiquing today’s dominant media forms of electronic and digital media, contemporary movies and television shows are a special focus of attention. Current movies and television are especially important because, from the perspective of learners in today’s classrooms, older movies and television shows may seem outdated, unfamiliar and increasingly irrelevant.¹³ As already noted, most contemporary motion picture and episodic television content resides on DVD, and thus, teachers and learners are prevented from making effective use of current copyrighted material by the legal provisions that prohibit the circumvention of CSS to gain access to DVD content. This creates lost opportunities for effective Media Literacy Education.

In a recent survey, many Media Literacy teachers reported that they had wanted to extract video from DVDs for use in teaching, but had decided against it because they

¹³ Spiro Bolos, Email Statement on Media Literacy (November 29, 2008).

feared violating the law. In particular, they cited examples that focus on issues regarding the DMCA restrictions on circumventing encryption on DVDs.¹⁴ One teacher also commented that their local department of education “has clear policies [against] doing this.”¹⁵ Some teachers, who replied that they sometimes did rip DVDs despite the practice’s illegality, said they did so only when “it’s truly essential.”¹⁶ Others said they did so only because they needed to do “whatever it takes” to “reach [their] students.”¹⁷ In a separate communication, The New Mexico Media Literacy Project, one of the oldest such organizations in the United States, whose goal is to create multimedia teaching resources for use in classrooms across the country, has reported that they have “occasionally been prevented (for technological reasons and concerns for legal liability) from using movie clips from DVDs protected by CSS.”¹⁸ This has effectively restricted their “ability to employ the best practices to produce quality teaching resources.”¹⁹

When asked whether learners ever wanted to rip commercial DVDs for use in Media Literacy projects assigned for class, most teachers responded that their learners did

¹⁴ When asked in the NCTE survey, “Have you ever wanted to extract TV or movie clips for use in teaching but decided against it because of copyright issues?” Explanations from teachers that answered “Yes” include, “I’ve wanted to download clips. . . from library copies of. . .DVD [but I wasn’t able to](Respondent #33),” “Our technology department would not help me extract the piece [from DVD](Respondent #49),” “I consider this a copyright issue because the copy-prevention software exists. . . in order to protect copyright. But copy-prevention (or DRM) software in fact seems to prevent fair use as well as illegal copying. . . Yet, of course, if I should succeed in defeating DRM. . . to obtain the clip I’m seeking, then private corporations. . . will prosecute me to the max. (Respondent #56).

¹⁵ See Media Education Lab at Temple University Survey, Anonymous response from a “teacher in a small magnet school in a large city.” (2008).

¹⁶ NCTE Survey at Respondent #49 (“When film or other media are the subject of a discussion, for example in a media literacy course, I see it as essential to use video.”).

¹⁷ Id at Respondent #37 (“It’s not that I want to throw out any sense of integrity here, but I am a teacher who desperately want sot reach my learners. I will do whatever it takes.”).

¹⁸ See Letter In Support of Media Literacy Exemption from the New Mexico Media Literacy Project (November 20 2008).

¹⁹ Id.

want to do this, but were prohibited from it. One teacher noted that her learners frequently make presentations in class and need diverse “examples of communication styles.”²⁰ They’re limited to YouTube clips, “but that [use] sometimes wanders further from their purpose than professional film...”²¹

Fear of legal consequences has caused many teachers and learners to lose opportunities to pursue new avenues of Media Literacy Education. One teacher wrote that he would love to show clips of movies that depict differing perspectives about World War II to incorporate Media Literacy into his Social Studies/History course, but would not do so while it is against the law.²² Another teacher wrote that her learners often want to use clips of movies in their projects, but usually can’t because of the technological protection mechanisms on DVDs.²³ In order to prevent these opportunities from being continuously lost in the future, along with many more that will be generated as technology advances, the requested exemption should be granted.

V. The Lawfulness of Teachers’ and Learners’ Frustrated Purposes

The uses of commercially available DVDs for uses that conventionally occur in the course of Media Literacy Education are themselves legal under educational statutory exemptions and the Fair Use doctrine. Showing compiled excerpts from a commercial film on DVD, for example, falls under the face-to-face performance exemption of Section

²⁰ NCTE Survey at Respondent #82.

²¹ *Id.*

²² *See* Media Education Lab at Temple University Survey Respondent #1(2008).

²³ *Id.* at Respondent #4 (learners wanting to rip DVDs for class projects on Media Literacy but couldn’t); Respondent #3 (“I’m sure they wanted to, but they didn’t because we preached copyright.”).

110(1). This exception applies to both instructors and learners in the academic environment.²⁴ Notably, learners interact with and display media in the Media Literacy classroom just as teachers do.²⁵

The actual creation of audiovisual compilations and other derivatives, accomplished by extracting content from DVDs, falls under the Fair Use doctrine. Section 107 of the Copyright Act lists four factors relevant to determining whether the use of a copyrighted work is a fair use: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.²⁶ When subjected to this analysis, characteristic practices in Media Literacy Education emerge as clear examples of fair use.

Whether a teacher is creating a compilation or a student is producing a video class assignment, the intended use is for “criticism” and “comment,” two uses singled out in the preamble to section 107. It is also a use for a nonprofit educational purpose. Under the first factor of section 107, this inclines toward a finding of fair use. While it is important to note that such a finding, in itself, does not guarantee that a given use is fair

²⁴ 17 U.S.C. § 110(1); *see also* Nimmer on Copyright § 8.15 (“The fact that the performer is an instructor or pupil in an educational institution does not exempt the performance, unless it in effect constitutes a teaching activity.”).

²⁵ *See* Code of Best Practices at 12, (“Learners strengthen media literacy skills by creating messages and using such symbolic forms as language, image, sound, music, and digital media to express and share meaning. Learners include excerpts from copyrighted material in their own creative work for many purposes, including or comment and criticism, for illustration, to stimulate public discussion, or in incidental or accidental ways).

²⁶ 17 U.S.C. § 107.

use, it does weigh strongly for a determination that the first factor favors the user.²⁷ In Higgins v. Detroit Educational TV Foundation, an educational television station used the plaintiff's musical composition in the introductory and concluding scenes of a television show without permission.²⁸ In granting summary judgment for the defendants, the court held that defendant's use was a valid fair use, in part, because "the purpose and character of Defendants' use was a non-profit teaching purpose" and because defendants had made use of the copyrighted material was a "transformative use."²⁹ The use of audiovisual works in Media Literacy Education should be analogized to Higgins because the use is non-profit teaching purpose and should be considered a transformative use.

In the past twenty years, the question of whether a use is "transformative" or not has emerged as a key to the analysis of the first factor.³⁰ In determining whether a defendant has made a "transformative" use of copyrighted material, the question is whether the defendant's work "adds something new, with a further purpose, or different character, altering the first with new expression, meaning or message."³¹ The uses of copyrighted content that occur in the context of Media Literacy Education are core examples of "transformative use," in that uses of copyrighted content are not used for the

²⁷ See generally Marcus v. Rowley, 695 F.2d 1171, 1175 ("The first factor to be considered in determining the applicability of the doctrine of fair use is the purpose and character of the use, and specifically whether the use is of a commercial nature or is for a nonprofit educational purpose. It is uncontroverted that Rowley's use of the LAP was for a nonprofit educational purpose and that the LAP was distributed to learners at no charge. These facts necessarily weigh in Rowley's favor").

²⁸ See generally Higgins v. Detroit Educ. TV Found., 4 F. Supp. 2d 701.

²⁹ Id at 705.

³⁰ See generally Campbell v. Acuff-Rose 510 U.S. 569 ("the goal of copyright, to promote sciences and the arts, is generally furthered by the creation of transformative works"); Bill Graham Archives v. Dorling Kindersley Limited, 448 F.3d 605 ("Most important to the court's analysis of the first factor is the "transformative" nature of the work"); Nimmer on Copyright § 13.05.

³¹ Higgins at 706 (citing Campbell v. Acuff-Rose).

same intrinsic purpose as the one the copyright owner intended. Rather, the copyrighted content is either used to illustrate key concepts of Media Literacy, to deconstruct and critically analyze media messages, to identify specific production techniques employed in commercial motion pictures or TV shows, or as a foundation for derivative works that demonstrate those techniques at work – i.e., as a form of “criticism” or “comment.” None of these uses reproduces the original “entertainment” purpose for which those films and programs were designed by their producers. For example, one Media Literacy teacher said that he made a compilation of recent “teacher films” in order to teach and encourage learners to critique media portrayals of teaching styles.³² His clip compilations are designed for use in an academic setting and are designed to instruct rather than to entertain. This use, like others in Media Literacy Education, is obviously transformative. Thus, the first factor favors a finding of fair use in such situations.

Under the second factor, the nature of the copyrighted work determines whether it should be accorded more or less protection in connection with a fair use analysis. The works on DVD that Media Literacy Educators wish to access are ones that illustrate contemporary social issues, a consideration that should weigh in favor of fair use. However, all were created primarily for entertainment purposes, which would conventionally count against the user.³³ In any event, it is widely acknowledged this factor “typically recedes into insignificance in determining fair use.”³⁴

Under the third factor, the purpose for which copyrighted material is used, as well as the amount taken, figures into the analysis. In Campbell v. Acruiff-Rose, the Supreme

³² NCTE Survey at Respondent #41, Michael George, Fordham University.

³³ See Michael J. Madison, A Pattern-Oriented Approach to Fair Use, 45 Wm. & Mary L. Rev. 1525, 1670 (2004).

³⁴ FMP Corp v. Control Solutions, Inc 369 F. Supp. 2d 539, 579.

Court held that despite allegations that defendant’s use of parts of plaintiff’s song went to the “heart” of the original work, the copying was not excessive in relation to the song’s parodic -- and transformative -- purpose.³⁵ In Media Literacy Education practice, teachers and learners use only the material that is necessary to fulfill an educational purpose. Typically, the portions sampled from these works are short relative to length of the entire audiovisual work. However, if longer clips are employed it is because their length is justified by the learning objective. Again, this factor favors a finding of fair use.

Finally, under the fourth factor, the court balances “the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied.”³⁶ In Bill Graham Archives v. Dorling Kindersley Limited, the court held that in assessing the effect of the use upon the market, one should “look at the impact on potential licensing revenues for traditional, reasonable, or likely to be developed markets.”³⁷ Specifically, the court distinguished between “traditional” markets and “transformational” markets – concluding finds that “a copyright holder cannot prevent others from entering fair use markets merely by developing or licensing a market for parody, news reporting, educational, or other transformative uses of its own work.”³⁸ As previously demonstrated, Media Literacy teachers and learners use audiovisual works for purposes of criticism and comment, exclusively in fundamentally transformative ways, in connection with non-profit educational activities designed to build learners’

³⁵ Campbell v. Acuff-Rose 510 U.S. 569, 579.

³⁶ Bill Graham Archives v. Dorling Kindersley Limited, 448 F.3d 605, 614.

³⁷ *Id.*

³⁸ *Id.* at 614-615.

understanding.³⁹ These works are used for the exclusive purpose of teaching and learning the processes of accessing, analyzing, evaluating and communicating media messages, and do not function as market substitutes for the originals.⁴⁰ Because these uses represent a transformational market, national losses of licensing revenues in connection with them are irrelevant for purposes of the fourth factor analysis. Overall, the owners of these copyrighted works will suffer no relevant losses from uses under consideration. This should incline this factor substantially toward fair use.

Thus, it is reasonable to conclude that Media Literacy Educators and learners are permitted under copyright law (pursuant to the Sec. 110(1) exemption and/or fair use) to make a range of uses of copyrighted content for the advancement of education. This reinforces studies done within the Media Literacy Education world that have concluded that activities performed by teachers and learners in furtherance of Media Literacy fall under fair use.⁴¹ However, as already stated, these uses are frustrated because Section 1201(a)(1) of the DMCA stands as a barrier to otherwise lawful usage.

VI. The Infeasibility of Video Home Cassette as a Viable Alternative

The only potentially meaningful alternative to DVDs for Media Literacy teachers and learners seeking access to motion picture or television content is recordings in the video home cassette (VHS) format. However, this alternative falls short of fulfilling access needs for several reasons. VHS has been obsolete since 2006, which was when the

³⁹ *See generally* Code of Best Practices (listing various Media Literacy examples with audiovisual works that fall under fair use).

⁴⁰ *Id.*

⁴¹ *See generally* *Id.* (listing Media Literacy activities that fall within fair use).

last major movie studio produced VHS versions of current entertainment release.⁴² In addition, most major entertainment retailers have stopped carrying VHS altogether. Thus, their movie and TV series selections are now exclusively on DVD. Since Media Literacy Education focuses on recent audiovisual content to foster efficient teaching of media analysis techniques, it has become increasingly hard to acquire relevant works in a format that is not subject to technological protection measures.⁴³

As previously mentioned, effective Media Literacy Education requires substantial manipulation of audiovisual works. In itself, the VHS format allowed this only to a limited extent, and the process was both slow and difficult; typically it involved several VCRs (and monitors) hooked up to each other, so that compilations could be created from multiple sources on one destination tape. Theoretically, content also can be migrated from the analog VHS format to digital media. However, this too, requires substantial equipment and expertise to which many teachers do not have access.⁴⁴ By contrast, the ubiquitous powerful personal computer makes it easy to create and

⁴² See Jen Chaney Parting Words for VHS Tapes, Soon to Be Gone With the Rewind located at <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/26/AR2005082600332.html> (reporting in 2005 on the death of the VHS cassette and mentioning that reports that 2006 would be the last year that there are major releases on VHS).

⁴³ See Spiro Bolos, Email Statement on Media Literacy, “Is VHS a viable medium for media literacy? I’d say probably not, as it is a “degrade-able” medium and a dead-end media type with regard to the release of the latest, cutting edge materials... Yet, do teachers still use VHS? Absolutely, but ONLY because of its relative convenience under the constraints of the DMCA. Again, flow and expediency rules because of the constraints of the timed class period (be it 40-minutes or longer). A teacher can “cue up” a VHS tape before class begins – s/he cannot do the same with a DVD, unless it has been (illegally) modified in some way.” (November 29 2008).

⁴⁴ See TopTenReviews Copying VHS to DVD located at <http://video-editing-software-review.toptenreviews.com/copy-vhs-to-dvd.html> (noting that in order to transfer VHS to digital you must have either a video capture card, an external capture device, or a graphics card with video capturing capabilities, in addition you need special video editing software that can capture the analog format and convert it to a digital format).

manipulate DVD video with little formal training required.⁴⁵ In addition, the image quality of native digital DVD content is considerably higher than that found on VHS tapes.⁴⁶ For all the reasons just given, VHS recordings are no longer a practical alternative to DVDs for teachers and learners.

Arguably, for some exercises some teachers can use DVDs in the classroom without creating compilations. However, many teachers have said that attempting to engage in comparison-contrast activities to examine different portrayals of media messages by physically switching DVDs in a player is both difficult and ineffective.⁴⁷ In addition, this alternative does not address the fact that many Media Literacy teachers and learners seek to use excerpts from motion pictures and TV shows to create derivative works for class-related purposes and are frustrated by their lack of access to the digital content of DVDs.

VII. Exemptions Requested and Supported Rationale

a. Proposed Exemptions

Commenter therefore proposes two new exemptions to Sec. 1201(a)(1). The first authorization circumvention of technological protection measures applied to:

⁴⁵ See Online Tech Tips [How to rip DVDs to your hard drive](http://www.online-tech-tips.com/computer-tips/rip-a-dvd/) located at <http://www.online-tech-tips.com/computer-tips/rip-a-dvd/> (“The process is relatively simple, so even if you are not technically savvy, you should be able to rip all of your DVDs without an issue.”).

⁴⁶ See Adequacy.com [DVD Versus VHS: The Surprising Truth](http://www.adequacy.org/stories/2001.8.24.112921.289.html) located at <http://www.adequacy.org/stories/2001.8.24.112921.289.html> (explaining the reasons why DVD picture quality is better than VHS).

⁴⁷ NCTE Survey at Respondent #51 (“Sometimes 5 minutes of a film perfectly exemplifies a point. It’s too cumbersome [however] to switch from DVD to PPT [Powerpoint Presentation] and back.”).

1. Audiovisual works that illustrate and/or relate to contemporary social issues used for the purpose of teaching the process of accessing, analyzing, evaluating, and communicating messages in different forms of media.

The second exemption authorizes circumvention of technological protection measures applied to:

2. Audiovisual works that illustrate and/or relate to contemporary social issues used for the purpose of studying the process of accessing, analyzing, evaluating and communicating messages in different forms of media, and that are of particular relevance to a specific educational assignment, when such uses are made with the prior approval of the instructor.

b. Argument for Proposed Exemption

Both proposed exemptions focus on audiovisual works related to contemporary social issues. The goal of using audiovisual works in Media Literacy Education is to gain insights into the role and impact of media on individuals and society, by examining techniques of messaging to understand how messages are constructed and how they communicate meanings. Restricting the class to socially relevant contemporary works is appropriate and legitimate because these are the works that learners need to analyze as they examine the interactions between their own internal needs and desires and the portrayal of those same values in contemporary media, which may offer (or impose) a different interpretation of the same.

The proposed exemptions do not apply to the use of audiovisual works for recreational purposes or as simple teaching aids for conveying substantive knowledge content. As mentioned above, Media Literacy Education does not revolve around the activity of passively watching media. Learners and teachers must actively participate in the deconstruction of media through appropriate techniques used to extract messages and analyze messaging techniques. To accomplish this participation necessitates creating compilations of clips and making derivatives, along with other activities that are more complicated than simply watching a film in a classroom.

The second exemption focuses on audiovisual works used for student projects. The limitation that audiovisual works have “particular relevance to a specific educational assignment” means that circumvention in connection with learners’ recreational uses of works will never be exempt. In addition, Media Literacy learners would be further restricted from circumventing to gain access to works if their proposed uses were not germane to an assignment. Therefore, for example, even when a student wished to create a film clip reel examining a social issue as a purely personal project, this activity would still fall outside of the exemption if it was not created for and relevant to a specific class assignment. Furthermore, teachers would act as gatekeepers and actively evaluate what the learners were proposing in order to make sure that the uses they contemplated making after circumvention were within the bounds of the exemption itself, and, in particular, whether the proposed use of the underlying material to which access is sought would, in fact, constitute fair use.

VIII. Conclusion

We respectfully conclude as follows:

- a) Media Literacy is the ability to access, analyze, evaluate, communicate and create messages in a wide variety of forms and modes and has become an increasingly important way for learners to navigate through the complex and often-conflicting messages they receive in a media-saturated environment.
- b) Media Literacy succeeds most when teachers and learners have access to contemporary audiovisual works for critical analysis, dissection and discussion. This includes using works for the production of teaching compilations and for the creation of student media production products used exclusively for teaching and learning.
- c) The availability for use of copyrighted works in DVD format has been hindered by the DMCA and its prohibition against circumventing CSS protection to gain access to commercial audiovisual works. There are no viable alternatives to circumventing the CSS.
- d) The lack of a means of lawful access to contemporary copyrighted audiovisual works has forced Media Literacy teachers and learners to engage in inefficient and ineffective practices. This has a dramatic impact on the overall quality of Media Literacy Education.
- e) The granting of an exemption for Media Literacy teachers and learners will not have an adverse effect on the market for or value of copyrighted works, because the only uses of copyrighted content that the exemption would facilitate are educational and transformative ones that are already exempt or are fully covered

by fair use.

- f) Media Literacy will grow in importance as society's habits of information consumption change. Without appropriate exemptions, teachers will be less able to teach, and learners less able to learn, Media Literacy skills in years to come. We respectfully ask the Library of Congress to ensure that Media Literacy Educators can continue to prepare new generations of media-savvy citizens.

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