



UNITED STATES COPYRIGHT OFFICE

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

Reply Comment on Proposed Class 1
Audiovisual Works—Criticism and Comment

of

Authors Alliance

The American Association of University Professors (AAUP)
Organization for Transformative Works (OTW)
The Interactive Fiction Technology Foundation (IFTF)
Bobette Buster

Representatives:

**UCI Intellectual Property, Arts, and
Technology Clinic**

UC Irvine School of Law

Counsel to AAUP

Jack I. Lerner, Director

Brian Tamsut and Jovan Ardy,
Certified Law Students

University of California, Irvine
School of Law

401 East Peltason Drive, Irvine, CA 92697

(949) 824-7684

dmcaebooks@law.uci.edu

**Samuelson-Glushko Technology Law
& Policy Clinic (TLPC)**

Colorado Law

Counsel to Authors Alliance

Blake E. Reid, Director

Susan Miller and Angel Antkers,
Student Attorneys

Robert & Laura Hill Clinical Suite
404 UCB, Boulder, CO 80309-0404

(303) 492-0548

blake.reid@colorado.edu

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Discussion

Authors Alliance, the American Association of University Professors, the Organization for Transformative Works, the Interactive Fiction Technology Foundation, and Professor Bobette Buster respectfully submit this Reply Comment in response to comments in favor of and objections to modifications that would remove several limitations from the proposed Class 1 exemption for criticism and comment on audiovisual works from the anti-circumvention provisions of Section 1201 of the Digital Millennium Copyright Act (DMCA).¹

Proposed Class 1 includes:

Motion pictures (including television shows and videos), as defined in 17 U.S.C. § 101, where circumvention is undertaken solely to make use of short portions of the motion pictures for the purpose of criticism or comment in multimedia e-books where the motion picture is lawfully made and acquired on a DVD protected by the Content Scramble System, on a Blu-ray disc protected by the Advanced Access Control System, or via a digital transmission protected by a technological measure.²

This proposed class is a modification of the exemption granted by the Librarian in the sixth triennial review and the exemption provisionally recommended for renewal in the 2017 Notice of Proposed Rulemaking (NPRM);³ it proposes to remove the limitations restricting the exemption to nonfiction e-books and to e-books that offer film analysis, and to remove the screen-capture requirement.⁴

The proposed modification to the exemption will allow authors to further express their First Amendment rights through artistic expression and fair use. The provisionally granted exemption allows creators to criticize, comment on, and remix content from lawfully acquired DVDs, Blu-Ray discs, and digitally transmitted video for fair use purposes. The proposed modification removes the limitations restricting the current exemption to non-fictional e-books and to e-books that “offer film analysis.” The modification also removes the burdensome and unworkable screen capture requirement.

We have demonstrated that

- (1) The multimedia e-book community is continuing to flourish;

¹ 17 U.S.C. § 1201(a) (2018).

² Exemption to Permit Circumvention of Access Controls on Copyrighted Works, 82 Fed. Reg. 49,550, 49,559 (proposed Oct. 26, 2017) (to be codified at 37 C.F.R. pt. 201) (“2017 NPRM”).

³ *Id.*

⁴ *Id.*

- (2) We have met the “more than *de minimus*” standard required to grant the proposed modifications;
- (3) Fanfiction is often fair use;
- (4) The prospective uses are non-infringing;
- (5) Alternatives to circumvention are woefully inadequate for creators; and
- (6) Fair use protects authors’ First Amendment right to criticize and comment.

Other commenters, including the Electronic Frontier Foundation (EFF) and Joint Filmmakers (including Film Independent, Kartemquin Films, and the International Documentary Association), have also voiced their support for a similar proposed Class 1 exemption. For example, EFF and others, including OTW (which joins in the present reply), seek to create one straightforward exemption for motion picture excerpts, which is line with the reasoning we have offered for modifying the exemption for multimedia e-books.⁵ Joint Filmmakers request a modification to the exemption for documentary filmmakers to include all filmmakers, not just documentarians, similar to the modification we seek.⁶

The proposed modifications are also consistent with the Copyright Office’s recommendations in previous triennial reviews. The Register has already recommended an exemption that allows the incorporation of short motion picture clips into new works engaging in criticism and comment in the contexts of educational use by professors and students, documentary filmmaking, and noncommercial videos.⁷ Multimedia e-book authors engage in criticism and commentary in a similar context.

Nothing in the comments opposing these modifications calls into question their necessity.⁸ Contrary to opponents’ arguments, the e-book industry continues to flourish and

⁵ Comments of the Electronic Frontier Foundation, New Media Rights, Organization for Transformative Works on the Exemptions to Permit Circumvention of Access Controls on Copyrighted Works, 2–3 (December 18, 2017) (“EFF Comment”).

⁶ Comments of Film Independent, the International Documentary Association, Kartemquin Films, Independent Filmmaker Project, University of Film and Video Association, and The Alliance for Media Arts + Culture on the Exemptions to Permit Circumvention of Access Controls on Copyrighted Works, 4–5 (December 18, 2017) (“Joint Filmmakers Comment”).

⁷ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43,825, 43,827 (July 27, 2010) (“2010 Final Rule”).

⁸ See Comment of the Advanced Access Content System Licensing Administrator, LLC on the Exemptions to Permit Circumvention of Access Controls on Copyrighted Works (February 12, 2018) (“AACSLA Comment”), Comment of the DVD Copy Control Association and the Advanced Access Content System Licensing Administrator, LLC on the Exemptions to Permit Circumvention of Access Controls on Copyrighted Works (February 12, 2018) (“DVD CCA and AACSLA Comment”); Comment of the Motion Picture Association of America, Inc., the Entertainment Software Association, the Recording Industry Association of America, and the Association of American Publishers on the

e-books have become ubiquitous in modern American literature. Moreover, the use of videos in these works, including the specific context of fanfiction, is typically not a copyright-infringing use and is often transformative in nature. Finally, the proposed alternatives to circumvention remain inadequate, and no substitute to circumvention for authors desiring to practice their constitutionally protected right to fair use exists.

The Register has instructed that the applicable standard for an exemption in this rulemaking is met when persons can show that Section 1201 has had more than a *de minimus* impact on their non-infringing uses.⁹ With this Reply Comment, in conjunction with our previous comment, we have well exceeded that threshold. We respectfully request that the Register recommend that the Class 1 exemption be modified to remove the “non-fiction” and “film analysis” limitations, and the screen capture requirements.

I. Author interest in new creative forms has fostered and will continue to foster a blooming e-book community over the next three years.

Only DVD Copy Control Association (DVD CCA) and Advanced Access Content System Licensing Administration (AACCS LA) contend that technological protection measures, such as Content Scramble System and Advanced Access Content System, are not causing adverse effects to authors in their ability to create non-infringing multimedia e-books.¹⁰ Instead, DVD CCA and AACCS LA claim that the lack of a market for multimedia e-books is the true harm that adversely affects authors.¹¹

However, as we demonstrated in our Initial Comment, the multimedia e-book industry continues to flourish and evolve to meet the needs of authors and readers.¹² Since its inception, e-book technology has continued to adapt and thrive due to both technological innovation and the creative authors the platform attracts.

First, traditional publishers and platforms continue to have a strong market that allows authors of e-books to incorporate video and other multimedia into their e-books. Traditional e-book platforms, such as Amazon, Google, and Apple, continue to sell e-books profitably

Exemptions to Permit Circumvention of Access Controls on Copyrighted Works (February 12, 2018) (“Joint Creators and Copyright Owners Comment”).

⁹ 2017 NPRM, 82 Fed. Reg. at 49,551–52; U.S. Copyright Office, Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights, 16 (October 8, 2015) (“2015 Recommendation”).

¹⁰ See DVD CCA and AACCS LA Comment at 23.

¹¹ *Id.* (“Essentially, there is no such market for such books.”).

¹² Comment of Authors Alliance et al. on the Exemptions to Permit Circumvention of Access Controls on Copyrighted Works, 1–2 (December 18, 2017) (“2017 Comment”).

for use on e-readers or personal devices.¹³ Major corporations, such as Amazon through Kindle, Apple through iTunes, and Google through the Google Books App, have made it easier to create and distribute e-books. As the e-book industry has matured, innovations, such as the ability for authors to include video and other interactive materials, have steadily improved the desirability of the medium.¹⁴ Even mainstream authors such as J.K. Rowling and George R.R. Martin are taking advantage of e-book technology to make their works interactive,¹⁵ and mainstream publishers such as Hachette Group are actively exploring multimedia and 3D opportunities for e-books.¹⁶ Finally, major journal publishers often produce online versions of their print publications, providing an opportunity for embedded video to further enhance scholarly arguments.¹⁷

Meanwhile, scholars have begun to recognize the importance of including digital history in scholarship, including by “embedding content in e-book and online book formats.”¹⁸ The Andrew W. Mellon Foundation and the National Historical Publications and Records Commission (NHPRC) have issued a call for proposals for Digital Edition Publishing Cooperatives, further supporting the call for innovative publishing and creation in digital mediums.¹⁹ Additionally, numerous grants are available for authors in film, television, or

¹³ *Id.*; February 2017 Big, Bad, Wide & International Report: Covering Amazon, Apple, B&N, and Kobo E-book Sales in the US, UK, Canada, Australia and New Zealand, Author Earnings, <http://authorearnings.com/report/february-2017/> (last visited Mar. 9, 2018).

¹⁴ *The new frontier: Enhanced ebooks*, Digital Publishing 101, <http://digitalpublishing101.com/digital-publishing-101/digital-publishing-basics/enhanced-ebooks/> (last visited Mar. 11, 2018).

¹⁵ Julia Alexander, *Harry Potter Enhanced Editions now available on iBooks*, Polygon (Oct. 9, 2015) <https://www.polygon.com/2015/10/9/9478215/harry-potter-enhanced-editions-now-available-on-ibooks>; Sara Boboltz, *Interactive ‘Game of Thrones’ Books Make Westeros Way Less Complicated*, Huffington Post (Sep. 30, 2016), https://www.huffingtonpost.com/entry/a-song-of-ice-and-fire-game-of-thrones-enhanced-editions-apple-ibooks_us_57eaa361e4b0c2407cd9cd2b.

¹⁶ Harsimran Gill, *‘The ebook is a stupid product: no creativity, no enhancement,’ says the Hachette Group CEO* Scroll.in (Feb. 17, 2018), <https://scroll.in/article/868871/the-ebook-is-a-stupid-product-no-creativity-no-enhancement-says-the-hachette-group-ceo> (“We need to offer different experiences to our consumers.”).

¹⁷ Roy Rosenzweig Center for History and New Media, *Digital History and Argument*, 25-26 (Nov. 13, 2017) <https://rrchnm.org/wordpress/wp-content/uploads/2017/11/digital-history-and-argument.RRCHNM.pdf> (“The print orientation of historical publication is an obstacle to incorporating any form of visualization into historiographical conversations.”).

¹⁸ *Id.* at 1-3, 26

¹⁹ Digital Publications Group Winners (Feb. 14, 2018), <https://mellon.org/resources/news/articles/digital-publication-grant-winners/> (last visited Mar. 14, 2018). *Digital Publication Grant Winners*, (Feb. 14, 2018),

radio to create projects in innovative formats.²⁰ Today, a wide range of creators use multimedia e-books to express themselves in innovative ways that were unimaginable in the era of print books.

Second, as e-books have become more accessible on smartphones and tablets, the development of new interactive and multimedia e-book platforms, such as applications (apps), has increased. Consumers continue to download millions of e-books every year.²¹ To date, there are over 5 million e-books available for Amazon's Kindle.²² There are also over 2.5 million e-books available on Apple's iTunes bookstore.²³ Google's Android bookstore has well over 5 million titles.²⁴ Public libraries also experienced record growth in their e-book lending in 2017, with an 11 percent increase in e-book rentals.²⁵ Thus, the e-book market is certainly far from dead and does not adversely affect authors of multimedia e-books.

Third, the growth of different forms of e-book publishing has allowed more independent authors, such as fanfiction authors, to engage in innovative digital publication. These independent e-book platforms include Ren'Py and Fulcrum. These platforms are centered around their multimedia capabilities, attracting authors who wish to create interactive works.²⁶

Ren'py is a Visual Novel Engine, a suite of software tools allowing e-book authors to create highly sophisticated e-books that incorporate words, images, sounds, video, and

<https://mellon.org/resources/news/articles/digital-publication-grant-winners/> (last visited Mar. 14, 2018).

²⁰ *Media Projects: Production Grants*, National Endowment for the Humanities, <https://www.neh.gov/grants/public/media-projects-production-grants> (last visited Mar. 14, 2018).

²¹ *February 2017 Big, Bad, Wide & International Report: Covering Amazon, Apple, Be&N, and Kobo E-book Sales in the US, UK, Canada, Australia and New Zealand, Author Earnings*, <http://authorearnings.com/report/february-2017/> (last visited Mar. 9, 2018) (showing as of February 2017 that the annual sale of e-books in the U.S. is 487,298,000 e-books).

²² Derek Haines, *There are Now Over 5 Million Kindle Ebooks*, Just Publishing Advice (Feb. 27, 2018), <https://justpublishingadvice.com/there-are-now-over-5-million-kindle-ebooks/>

²³ *Shop iBooks*, Apple, <https://www.apple.com/ibooks/> (last visited Mar. 10, 2018) (“The iBooks Store features over 2.5 million books and counting.”).

²⁴ Darrell Etherington, *Google Play Offers Over 5M eBooks and More Than 18M Songs, One Year After Its Rebranding*, TechCrunch (Mar. 6, 2013), <https://techcrunch.com/2013/03/06/google-play-offers-over-5m-ebooks-and-more-than-18m-songs-one-year-after-its-rebranding/>.

²⁵ *Public libraries lend record numbers of eBooks and audiobooks in 2017*, Press Release PR Newswire (Jan. 11, 2018), <http://markets.businessinsider.com/news/stocks/public-libraries-lend-record-numbers-of-ebooks-and-audiobooks-in-2017-659905>.

²⁶ *What is Ren'Py?*, Ren'Py, <https://www.renpy.org/> (last visited Mar. 10, 2018); *Fulcrum*, <https://www.fulcrum.org/> (last visited Mar. 10, 2018).

music.²⁷ A hybrid between a graphic novel and a choose-your-own-adventure video game, Ren'Py and the e-books created with it demonstrate the breakthroughs in innovation fostered by a continuing effort to improve and disseminate e-book technology.

Another innovative new platform is Fulcrum.²⁸ Already in use by the University of Michigan, Fulcrum is a new media platform that promises to allow creators and authors to express themselves in ways traditional books simply cannot by allowing the sharing of media that cannot be printed on a piece of paper. Through Fulcrum, authors can incorporate animations and archived multimedia materials into books, enhancing the reading experience for consumers.

DVD CCA and AACLS LA claim that technical issues such as video file and storage capacity also limit the market for multimedia e-books.²⁹ However, as examples above show, numerous independent e-book publishers have entered the market specifically for multimedia e-books. Additionally, many e-book platforms allow readers to store e-books in their cloud library, which negates the argument that the e-book market is hindered by file size and storage capacity.³⁰

Finally, the growth of websites and apps for e-books has allowed independent authors to engage in innovative digital publication. New platforms exist that allow independent authors, such as fanfiction authors, to share their works for free. One such platform is Feedbooks. Feedbooks is a cloud-based web publishing service that allows consumers to download e-books in EPUB format that supports audio and video content.³¹ Not only does Feedbooks sell licensed e-book adaptations of mainstream books, such as *To Kill a Mockingbird*, the site also offers many fanfiction e-books for free.³² As of 2011, the site boasts distribution of over 3 million e-books a month.³³

²⁷ *Why Ren'Py?*, Ren'Py, <https://www.renpy.org/why.html> (last visited Mar. 10, 2018).

²⁸ *Fulcrum*, <https://www.fulcrum.org/> (last visited Mar. 10, 2018).

²⁹ See DVD CCA and AACLS LA Comment at 27.

³⁰ Carolyn Nicander Mohr, *How to Delete Kindle Books from the Cloud vs. Your Device*, The Wonder of Tech (Jan. 7, 2015), <https://www.wonderoftech.com/kindle-cloud-device/> (“Your Kindle books are stored for you by Amazon in the Cloud and Amazon gives you unlimited space to store those Kindle books.”).

³¹ Matt Garrish, *Multimedia Support in EPUB 3*, EPUBZone (Feb. 6, 2014), <http://epubzone.org/news/multimedia-support-in-epub-3>.

³² *To Kill a Mockingbird*, Feedbooks, <http://www.feedbooks.com/item/780290/to-kill-a-mockingbird> (last visited Mar. 10, 2018).

³³ Olivia Snaije, *France's Feedbooks: Three Million E-books Served Monthly*, Publishing Perspectives (Jan. 10, 2011), <http://publishingperspectives.com/2011/01/frances-feedbooks-three-million-e-books-served-monthly/>.

Feedbooks is not the only site publishing fanfiction in e-book format. There are many others such as FanFiction.net,³⁴ Widbook,³⁵ and Wattpad.³⁶ Traditional fanfiction websites also allow fanfiction to be downloaded for free in e-book friendly formats such as EPUB, MODI, PDF, and HTML.³⁷ Websites such as AO3, Fanfiction.net, Commaful, and Wattpad allow authors from numerous fandoms to post their fanfiction in one location.³⁸ Additionally, just as conventional e-book sites have become commonplace on the internet, so too have sites offering fanfiction. For example, the iTunes App Store³⁹ and the Google Play Store⁴⁰ have their own suite of apps pertaining to fanfiction.

There are numerous examples of e-book publishing platforms: from Amazon's Kindle to the multimedia focused Fulcrum to fanfiction apps. These e-book platforms continue to

³⁴ *Fanfiction*, <http://www.fanfiction.net> (last visited Mar. 10, 2018).

³⁵ *Fanfiction*, Widbook, <http://www.widbook.com/ebooks/fanfiction> (last visited Mar. 10, 2018).

³⁶ *Wattpad*, <https://www.wattpad.com/> (last visited Mar. 10, 2018).

³⁷ *Archive FAQ: Downloading Fanworks*, AO3, https://archiveofourown.org/faq/downloading-fanworks?language_id=en (last visited Mar. 10, 2018).

³⁸ *Stories about Fanfiction*, Commaful, <https://commaful.com/tags/fanfiction/> (last visited Mar. 10, 2018); *Home*, Archive of Our Own, <https://archiveofourown.org/> (last visited Mar. 10, 2018); *Fanfiction*, Fanfiction.net, <http://www.fanfiction.net> (last visited Mar. 10, 2018); *Wattpad – Stories You’ll Love*, Wattpad, <https://www.wattpad.com/> (last visited Mar. 10, 2018); see also Aja Romano, *Canon, fanon, shipping, and more: a glossary of the tricky terminology that makes up fan culture*, Vox (June 7, 2016, 1:00 PM) <https://www.vox.com/2016/6/7/11858680/fandom-glossary-fanfiction-explained>.

³⁹ *FanFiction.Net*, App Store Preview, <https://itunes.apple.com/us/app/fanfiction-net/id1192753879?mt=8> (last visited Mar. 10, 2018); *FanFiction Chats*, App Store Preview, <https://itunes.apple.com/us/app/fanfiction-chats/id1078158518?mt=8> (last visited Mar. 10, 2018); *Fanfic Pocket Library Reader*, App Store Preview, <https://itunes.apple.com/us/app/fanfic-pocket-library-reader/id1047221122?mt=8> (last visited Mar. 10, 2018); *ReadUp FanFiction eBook Reader*, App Store Preview, <https://itunes.apple.com/us/app/readup-fanfiction-ebook-reader/id808565332?mt=8> (last visited Mar. 10, 2018).

⁴⁰ *Fanfiction Reader*, Google Play, <https://play.google.com/store/apps/details?id=com.spicymango.fanfictionreader> (last visited Mar. 10, 2018); *Free Books – Spirit Fanfiction and Stories*, Google Play, <https://play.google.com/store/apps/details?id=br.com.socialspirit.android> (last visited Mar. 10, 2018); *Movellas Stories & Fanfiction*, Google Play, <https://play.google.com/store/apps/details?id=com.movellas.app> (last visited Mar. 10, 2018); *FanFiction Plus Pro*, Google Play, <https://play.google.com/store/apps/details?id=com.animaonline.fanfictionplus> (last visited Mar. 10, 2018).

adapt to the changing needs of authors and the changing habits of readers. These varied platforms show that the e-book market is thriving. Multimedia e-books continue to be a useful tool for authors to express new ideas and educate others. However, fiction authors and authors not offering film analysis are unable to make fair use in multimedia e-books for criticism and commentary due to TPMs on DVDs, Blu-ray, and online video services. Thus, contrary to DVD CCA and AACS LA's claim, the e-book market is not the cause of adverse effects that multimedia e-book authors face.

II. We have demonstrated a likelihood of adverse impacts on non-infringing uses sufficient to meet the “more than *de minimus*” standard.

DVD CCA, AACS LA, and MPAA et al. claimed that we have failed to provide sufficient evidence to support the proposed modifications.⁴¹ For example, DVD CCA and AACS LA point to their inability to find the multimedia e-books that constituted “proposed uses” we offered in our 2015 Comment in the market to suggest that “there is no reason to indulge” our proposed modifications.⁴² “In the absence of actual use,” according to DVD CCA and AACS LA, “evaluating the use is all but impossible.”⁴³

Although the Register has suggested that a higher evidentiary burden for adverse impacts on prospective uses may be appropriate,⁴⁴ the Register nevertheless considers evidence of adverse impacts based on prospective uses.⁴⁵ In fact, Congress and the Register have identified two types of adverse impacts to be considered in granting an exemption: present and prospective.⁴⁶ A lack of actual use, rather than being evidence of a lack of adverse impact, suggests that Section 1201's anti-circumvention measures discourage authors from creating non-infringing works using materials protected by TPMs until they are more certain that they will not be in violation of the law.

Furthermore, the standard for the rulemaking procedure only requires proponents to prove that the record is sufficient to demonstrate that authors' inability to circumvent TPMs is causing, or is likely to cause, an adverse effect on non-infringing uses by a preponderance

⁴¹ See DVD CCA and AACS LA Comment at 20–23; Joint Creators and Copyright Owners Comment at 5, 16, 26.

⁴² DVD CCA and AACS LA Comment at 21–22.

⁴³ *Id.* at 21.

⁴⁴ 2015 Recommendation at 16 (requiring evidence that is “highly specific, strong, and persuasive” for exemptions based on prospective adverse impacts).

⁴⁵ See *id.* at 100 (considering evidence of proposed uses in determining if an expansion is warranted).

⁴⁶ 17 U.S.C. § 1201(a)(1)(C) (2018) (identifying two classes of users who may be exempted by the rulemaking process: (1) users who **are** adversely affected by § 1201(a) and (2) users who **are likely to be** affected by § 1201(a).) (emphasis added); 2015 Recommendation at 14–15 (requiring that proponents show that § 1201(a) prohibition is (1) causing an adverse impact or (2) is likely to cause an adverse impact on proponents' non-infringing uses).

of the evidence.⁴⁷ Although the rulemaking focuses on “distinct, verifiable, and measurable impacts,” these impacts only need to be “more than *de minimus*.”⁴⁸

We fulfill this requirement simply by demonstrating that TPMs will, more likely than not, create a “more than *de minimus*” adverse effect on multimedia e-book authors’ ability to make non-infringing uses of copyrighted works. We have established that it is more likely than not that multimedia e-book authors will experience adverse effects that are “more than *de minimus*” because of their inability to circumvent TPMs.

In our Initial Comment, we offered various examples identifying authors of fictional multimedia e-books or authors of multimedia e-books not discussing film analysis who will be adversely affected by the DMCA prohibition. Kirby Ferguson is an author who wishes to make a multimedia e-book in the form of “online video essays based on *This is not a Conspiracy Theory*.”⁴⁹ However, Mr. Ferguson is deterred from creating his work because he is unsure if his work would be exempted from the DMCA prohibition on circumventing TPMs as it is unclear if his work will be considered “film analysis.”⁵⁰ Mr. Ferguson’s project, *This is not a Conspiracy Theory*, focuses on “hidden forces that shape our lives.”⁵¹ Although the work intends to comment and criticize on audiovisual material, the comment and criticism may not take the form of analysis, but instead be in the form of “transforming” and “combining,” which may not fall under the strict definition of “analysis.”⁵²

Similarly, an author who goes by the pseudonym Holdt is unable to create an e-book which would “tak[e] characters from [an] original canon and put[] them in a different movie universe” in order to present a provocative commentary on both original works.⁵³ Although it may involve stories and characters from a film universe, Holdt’s proposed multimedia e-book would create a fictional story that may not fall under the umbrella of “film analysis.” Even if authors like Mr. Ferguson and Holdt fully intend to comply with fair use best practices and create works that would be non-infringing, it is quite difficult for such authors to know *ex ante* whether their works will be exempted under the current exemption language.

Additionally, our Initial Comment also provides examples of authors of fanfiction in the form of multimedia e-books, whose works will likely constitute non-infringing uses, *infra*, and who will be adversely affected by the DMCA prohibition. For example, Heidi Tandy is an attorney and an avid author of fanfiction. She wants to create an “in-universe”

⁴⁷ 2017 NPRM, 82 Fed. Reg. at 49951–52; Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 80 Fed. Reg. 65,944, 65,945 (October 28, 2015) (to be codified at 37 C.F.R. pt. 201) (“2015 Final Rule”); *See* 2015 Recommendation at 14–15.

⁴⁸ 2017 NPRM, 82 Fed. Reg. at 49,551–52; 2015 Recommendation at 16.

⁴⁹ 2017 Comment at 17.

⁵⁰ *Id.* at 18.

⁵¹ *Id.*

⁵² *See id.* at 17–18.

⁵³ *See id.*

multimedia e-book as if it was written by a character within the universe of the television series *Supernatural* to “teach people about fair use.”⁵⁴ Like Holdt’s proposed work, Ms. Tandy’s work falls in a gray area between “film analysis” and non-“film analysis.” Under the current exemption language, it is unclear whether she will be able to access materials with the level of details that she needs from DVDs, Blu-rays, or digitally transmitted video to engage in the creation of a high-quality, non-infringing work.

Another author, who chose to be anonymous, feels “discourage[ed] and stifl[ed] to have ideas and know that they cannot use [fanfiction] to express these ideas” because of the uncertainty surrounding the DMCA prohibition.⁵⁵ Despite making an “archetypal fair use,” the DMCA prohibition creates additional obstacles in the author’s speech that is independent of Congress’s fair use carve-out of copyright law.⁵⁶

Although these examples might not have the specificity that the opponents wish to see, this rulemaking process does not require specific evidence of actual non-infringing uses that are currently illegal, but rather whether we will be able to demonstrate a likelihood that “implementation of access controls impairs the ability of individuals to make non-infringing uses of copyrighted works.”⁵⁷ Moreover, the standard is preponderance of the evidence. Here, we have offered substantial evidence that it is more likely than not that TPMs impair the ability for users to make uses that are more likely than not non-infringing. Although the Copyright Office is hesitant to grant exemptions based on future impacts and individual cases,⁵⁸ the examples we have provided clearly show that the prohibition is more than a mere inconvenience to a range of authors from different fields and backgrounds. Collectively, they present a highly specific, strong, and persuasive story of the DMCA’s prohibition on authors’ efforts to create non-infringing works using materials that are protected by TPMs.

III. Traditional fanfiction and multimedia fanfiction are salient examples of non-infringing uses.

DVD CCA and AACS LA contend that since the uses proposed by Mr. Ferguson, Ms. Tandy, and other anonymous and pseudonymous authors are prospective in nature, there is no demonstration of non-infringing uses.⁵⁹ According to DVD CCA and AACS LA, these stories do not represent “actual use” due to their prospective nature.⁶⁰ The MPAA also assert the proposed fictional uses of multimedia in e-books would infringe upon the rights of the copyright holders.⁶¹ As we demonstrated above, however, we have met the necessary

⁵⁴ *Id.* at 20–21.

⁵⁵ *Id.* at 20.

⁵⁶ *Id.*

⁵⁷ 2015 Final Rule, 80 Fed. Reg. at 65,944.

⁵⁸ 2015 Recommendation at 16.

⁵⁹ DVD CCA and AACS LA Comment at 20.

⁶⁰ *Id.* at 20–21.

⁶¹ Joint Creators and Copyright Owners Comment at 15.

standards required for the proposed modification to issue. In addition, the proposed uses illustrate common potential non-infringing uses for both fictional and non-fictional multimedia e-books and for e-books not offering film analysis.⁶² Furthermore, the plain language of Section 1201 makes it clear that it anticipates prospective uses “. . . are, *or are likely* to be in the succeeding 3-year period, adversely affected by the prohibition”⁶³

The opponents contend that the proposed fictional uses of multimedia in e-books would infringe upon the rights of the copyright holders.⁶⁴ However, opponents have not demonstrated how the use of video clips in the proposed fictional uses would be infringing. The fanfiction examples provided in our Initial Comment, in addition to common fanfiction practices and the Register’s previous acknowledgment of creative works engaging in fair use in the context of video remixing, show the non-infringing nature of many fanfiction works.

Fanfiction is not a new phenomenon. In the 1960s, *Star Trek* fans began reimagining and recreating their favorite show by creating noncommercial stories in fanzines.⁶⁵ The Internet has allowed both authorship and readership of fanfiction to grow.⁶⁶ Today, fanworks encompass a variety of media in popular culture including movies, anime, television shows, cartoons, and video games.⁶⁷ Examples include *The Shoebox Project*, a popular epistolary fanfiction story set in the world of Harry Potter, and *Fortitude*, a videogame romance fanfiction from the point of view of the videogame character, *Zelda*.⁶⁸ Additionally, our Initial Comment describes a proposed fanfiction work by Ms. Tandy set in the *Supernatural* universe.⁶⁹ Gender and sexual minorities have dominated the fanfiction community because fanfiction allows the telling of empowering and subversive narratives within mainstream

⁶² 2017 Comment at 17-22.

⁶³ 17 U.S.C. § 1201(a)(1)(C) (2018) (emphasis added).

⁶⁴ DVD CCA and AACS LA Comment at 20 (“[T]he Joint Authors have not demonstrated that the fictional uses or other nonfiction uses are noninfringing.”); Joint Creators and Copyright Owners Comment at 15 (“[S]uch works would frequently infringe the right to prepare derivative works.”).

⁶⁵ Brittany Johnson, Note, *Live Long and Prosper: How the Persistent and Increasing Popularity of Fan Fiction Requires a New Solution in Copyright Law*, 100 Minn. L. Rev. 1645, 1649–50 (2016); *Fanzines*, Star Trek the Original Series, <http://www.sttos.net/sttos/eng/zines.php> (last visited Mar. 8, 2018) (“Fanzines are made for fans by fans without commercial purposes. They contain mostly stories, poems and art but sometimes also articles and letters to the editor are included as well.”).

⁶⁶ *Id.* at 1651 (“[F]an fiction is published online, free for both the author and the consumer and open to a large and diverse group of individuals.”).

⁶⁷ FanFiction, <https://www.fanfiction.net/> (last visited Mar. 6, 2018).

⁶⁸ Dorkorific & LadyJaida, *The Shoebox Project*, Shoebox Project in PDF, <http://shoebox.lomara.org/shoebox-pdf-chapters/> (last visited Mar. 8, 2018). Ingie, *Fortitude*, FanFiction, <https://www.fanfiction.net/s/3550998/1/Fortitude>.

⁶⁹ 2017 Comment at 20–22.

media.⁷⁰ For example, in 2013, 90% of 10,000 surveyed Archive of Our Own members identified as female and only 38% identified as heterosexual.⁷¹

Fanfiction also allows creators to explore themes often considered inappropriate by major production publishing houses and studios, such as erotica and explicit slash fiction.⁷² Because numerous fanfiction worlds and online platforms exist, fanfiction has a large and diverse following with thousands of authors and readers.

Moreover, many works of fanfiction are fair uses or other types of non-infringing uses. As we explained in the Initial Comment, fanfiction is a form of literary remix that breathes creative new meaning into old works.⁷³ Transformative works, such as fanfiction, are often recognized as a non-infringing fair use.⁷⁴

⁷⁰ Rebecca Tushnet, *The Romantic Author and the Romance Writer: Resisting Gendered Concepts of Creativity*, in *Diversity in Intellectual Property*, 19–21 (Irene Calboli and Srividhya Ragavan eds., Cambridge Univ. Press, 2015); Kass, *Why I Write Fanfiction*, *The Fanfic Symposium* <http://www.trickster.org/symposium/symp15.htm> (“[W]riting is . . . a subversive act . . . women haven't been in control of our bodies for very long. So writing about sex is twice as subversive as writing. Writing slash fiction is radical.”).

⁷¹ @centrumlumina, *Gender*, Tumblr (Oct. 1, 2013, 5:22 PM), <http://centrumlumina.tumblr.com/post/62816996032/gender> (showing the largest responses as follows: 90% female, 7.3% genderqueer, 4.2% male, 2.4% androgynous, and 2.3% transgender); @centrumlumina, *Sexuality*, Tumblr (Oct. 1, 2013, 10:28 PM) <http://centrumlumina.tumblr.com/post/62840006596/sexuality> (showing the largest responses as follows: 38% heterosexual, 30.6% bisexual, 15.9% pansexual, 11.4% asexual, and 11.6% queer); Charles Sendlor, *Fan Fiction Demographics in 2010: Age, Sex, Country*, *Fan Fiction Statistics* (Mar. 18, 2011), <http://ffnresearch.blogspot.ca/2011/03/fan-fiction-demographics-in-2010-age.html> (identifying 78% of a sampling of FanFiction.Net users as female); *Home*, Archive of Our Own, <https://archiveofourown.org/> (last visited Mar. 10, 2018) (describing Archive of Our Own as a “fan-created, fan-run, non-profit, non-commercial archive for transformative fanworks, like fanfiction, fanart, fan videos, and podfic.”).

⁷² Sharon Cumberland, *Private Uses of Cyberspace: Women, Desire, and Fan Culture*, *Media In Transition* (Jan. 25, 2000), http://web.mit.edu/m-i-t/articles/index_cumberland.html (discussing how women use the anonymity of the internet to tell taboo and transgressive stories through fanfiction); Anita Chaudhuri, *The Rise of Slash Fiction*, *The Guardian* (Sep. 26, 2000), <https://www.theguardian.com/technology/2000/sep/26/internet.books> (defining slash fiction as a “homoerotic relationship between two characters from a cult TV show or film.”).

⁷³ 2017 Comment at 9.

⁷⁴ See Betsy Rosenblatt and Rebecca Tushnet, *Transformative Works: Young Women's Voices on Fandom and Fair Use in eGirls, eCitizens* 385, 396–97 (Jane Bailey and Valerie Steeves eds., 2015).

A. Fanfiction is often noncommercial and transformative.

Most fanfiction is noncommercial in nature and this non-commerciality is a widely accepted norm in the fan community.⁷⁵ Fanfiction has traditionally been available to read for free online.⁷⁶ Fanfiction can also be downloaded free of charge in other formats for e-readers, either directly from fanfiction websites such as Archive of Our Own or in other apps.⁷⁷

The benefits of the fanfiction's noncommercial nature for the fanfiction community include the culture of providing feedback free of charge in addition to writing about conventionally taboo or content traditionally gatekeepers are unlikely to publish.⁷⁸ The noncommercial nature of fanfiction engenders a cooperative environment, which would drastically change if fanfiction authors began charging readers. In fact, a fanfiction author who attempted to commercialize her work was ostracized and ridiculed by the fan community in 2006 for violating the unspoken norms in the fanfiction community.⁷⁹ Thus, fanfiction's noncommercial nature is unlikely to change, even when the fanfiction work includes embedded video.

Nor is fanfiction a market substitute for original copyrighted works. Most fanfiction works are intended to offer a new perspective on popular narratives. In most, if not all, cases, these perspectives will be unintelligible without first understanding the underlying work and then fitting in the new perspectives into the existing universe. Therefore, it is extremely unlikely that consumers will buy less of the original work because fanfiction of it exists.

Fanfiction is also often transformative in nature since most fanfiction authors are altering popular narratives in order to create unique new stories, not supplanting the existing market.⁸⁰ Fanfiction often includes altering plotlines, creating new characters, inventing cross-over scenarios, or writing slash fiction. When fanfiction authors reinterpret a story to

⁷⁵ Casey Fiesler, *Everything I Need to Know I Learned from Fandom: How Existing Social Norms Can Help Shape the Next Generation of User-Generated Content*, 10 Vand. J. Ent. & Tech. L. 729, 749 (2008).

⁷⁶ See Betsy Rosenblatt and Rebecca Tushnet, *Transformative Works: Young Women's Voices on Fandom and Fair Use*, eGirls, eCitizens, at 398 (“[F]anworks are free to consume. . .”).

⁷⁷ See *supra* Part I.

⁷⁸ See Betsy Rosenblatt and Rebecca Tushnet, *Transformative Works: Young Women's Voices on Fandom and Fair Use*, eGirls, eCitizens, at 398–99.

⁷⁹ Casey Fiesler, *Everything I Need to Know I Learned from Fandom: How Existing Social Norms Can Help Shape the Next Generation of User-Generated Content*, 10 Vand. J. Ent. & Tech. L. at 730–31.

⁸⁰ Betsy Rosenblatt and Rebecca Tushnet, *Transformative Works: Young Women's Voices on Fandom and Fair Use in eGirls, eCitizens* 399-400 (Jane Bailey & Valerie Steeves eds., 2015).

create new relationships between characters, they are adding new expression, meaning, or message.⁸¹

One of the reasons authors choose to create fanfiction is because many fanfiction works engage in topics often too taboo or progressive for mainstream publishers.⁸² Just as a parody can be considered a fair use of copyrighted works, so too should most fanfiction.⁸³

B. The Register has previously recognized the legitimacy of fair use in fanfiction.

Granting the proposed modification to include fictional use is consistent with past precedent that has recognized other fictional creations. In the previous Triennial Rulemaking, the Register acknowledged the legitimacy of creative works engaging in fair use in the context of video remixing.⁸⁴ In 2010 and 2015, the Register recommended an exemption that allows the incorporation of short motion picture clips into new works engaging in criticism and comment in the contexts of:

- (1) Educational use by professors and students;
- (2) Documentary filmmaking; and
- (3) Noncommercial videos.⁸⁵

Multimedia e-book authors, who engage in criticism and commentary similar to the three contexts, should have the same ability to incorporate short clips into their medium of choice: multimedia e-books.

The Register found that creators of noncommercial videos, also known as “vidders,” will frequently make noninfringing uses of short motion picture clips for the purpose of comment or criticism.⁸⁶ Many such uses include fictional content. Under this exemption, the uses of media may be used to illustrate or convey a certain point. The Register recognized that a substantial number of remixing videos were likely non-infringing.⁸⁷

⁸¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (“The central purpose of this investigation is to see . . . whether the new work . . . adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message. . .”).

⁸² Sharon Cumberland, *Private Uses of Cyberspace: Women, Desire, and Fan Culture*, Media In Transition (Jan. 25, 2000), http://web.mit.edu/m-i-t/articles/index_cumberland.html.

⁸³ See *Campbell*, 510 U.S. at 580–81.

⁸⁴ 2015 Final Rule, 80 Fed. Reg. at 65,459.

⁸⁵ 2010 Final Rule, 75 Fed. Reg. at 43,828.

⁸⁶ U.S. Copyright Office, Recommendation of the Register of Copyrights in RM 2008-8; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 70 (June 11, 2010) (“2010 Recommendation”).

⁸⁷ 2015 Recommendation at 83.

The Register noted that in this context such uses were typically engaged with comment and criticism, and as such this use could be considered a form of quotation.⁸⁸ Vidders often use fictional content in order to criticize and comment on society, just like fanfiction authors.⁸⁹ There is substantial overlap between vidders and fanfiction authors since vidding is often seen as a visual form of fanfiction.⁹⁰ The Register has also acknowledged this as the paradigmatic use, which is at the core of fair use's function as a free speech safeguard.⁹¹ The Register further held that

Literary quotation often includes references to novels to make a point (fair use quotation is not limited to quotations of non-fiction works), and there appears to be no reason why short clips from creative motion pictures should not be able to serve a similar purpose when the use of the motion picture is transformative.⁹²

E-book creators are similarly interested in implementing the use of short motion picture clips in order to transform their works; in fact, the same sorts of users who wish to engage in video remixing are interested in making transformative uses in other contexts such as multimedia e-books.

IV. The prospective non-fictional uses are also non-infringing.

The opponents also contend that we do not provide evidence of actual use of movie clips in non-fictional multimedia e-books.⁹³ The examples of authors provided in our Initial Comment meet the applicable standard of “more than *de minimus*” as we demonstrated above. In addition, the proposed non-fictional uses will likely be non-infringing. Non-fictional works by scholars and educators, including the video essays proposed by Mr. Ferguson, are commonly critiquing and commenting on specific areas of study.

Authors engaged in academic and educational writing beyond film analysis are interested in creating multimedia e-books. Teachers and professors already use multimedia in the classroom in the form of PowerPoints and interactive websites in order to engage their students.⁹⁴ The work of Mr. Ferguson, who would like to use multimedia in e-books to share

⁸⁸ 2010 Recommendation at 50.

⁸⁹ *Id.* at nn.180 & 182 (noting the commentary on violence against women, racism, and copyright itself in remixed videos).

⁹⁰ Katharina Freund, *Becoming a Part of the Storytelling: Fan Vidding Practices and Histories in A Companion to Media Fandom and Fan Studies*, 213 (Paul Booth ed., 2018).

⁹¹ *Id.*

⁹² *Id.* at 51.

⁹³ DVD CCA and AACSLA Comment at 21; Joint Creators and Copyright Owners Comment at 16.

⁹⁴ Ellen McCracken, *Enticing Students to Read Again*, *The Chronicle of Higher Education* (May 31, 2017), <https://www.chronicle.com/article/enticing-students-to-read/240199>.

his ideas with scholars and students, is just one example of a scholar or educator who would benefit from this modification.⁹⁵

Other authors and educators have expressed the importance of using multimedia e-books for teaching, especially for maintaining student engagement with literary texts.⁹⁶ Fulcrum, for example, recognizes the need for multimedia e-books in a variety of areas beyond film analysis and offers a platform that authors can use to enrich their scholarship. Additionally, the collaborative multimedia e-book, *Digital Dubliners*, is just one example of how the study of literature or history can be enhanced through the inclusion of video clips.⁹⁷ This multimedia e-book allows readers to become fully immersed in the world of James Joyce's *Dubliners* with video commentary and digital multimedia archived material such as contemporary films and photographs.

The growth of the multimedia e-book market in higher education and the collaborative efforts that can be found online make clear that a modification to the multimedia e-book exemption would allow educators to provide engaging textbooks that bring subjects to life for students.

V. The proposed alternatives to circumvention remain inadequate.

The opponents suggest that the proposed modifications should be rejected in light of alternatives to circumvention such as screen capture and licensing. The Register, however, has previously determined that screen capture and licensing are often not viable alternatives.⁹⁸ The screen capture alternatives should be eliminated from the exemption altogether; they remain unduly burdensome, inadequate, and a hidden trap for most authors who seek to use the exemption. Nor is licensing a reasonable or practicable alternative to the proposed modifications.

A. Screen capture is not a viable alternative to circumvention.

Opponents propose that screen capture technology can be utilized as an alternative to circumvention and allege that it can be sufficient for some noninfringing uses.⁹⁹

Yet screen capture remains unacceptable as an alternative for use in multimedia e-books. Indeed, screen capture remains unfeasible for many audiovisual products, as digital rights

⁹⁵ 2017 Comment at 17.

⁹⁶ Ellen McCracken, *Enticing Students to Read Again*, The Chronicle of Higher Education (May 31, 2017), <https://www.chronicle.com/article/enticing-students-to-read/240199>; Jacob L. Wright, *What Enhanced E-Books Can Do for Scholarly Authors*, The Chronicle of Higher Education (Apr. 21, 2014), <https://www.chronicle.com/article/What-Enhanced-E-Books-Can-Do/145969>.

⁹⁷ *About*, Digital Dubliners, <https://digitaldubliners.com/about/> (last visited Mar. 9, 2018).

⁹⁸ 2015 Recommendation at 84–85.

⁹⁹ DVD CCA and AACLS Comment at 39; Joint Creators and Copyright Owners Comment at 25.

management technology on those products is designed to render them immune to capture. Use of screen-capture or general-purpose screen recording software for these products yields just a black screen.¹⁰⁰ Even with products for which screen capture is feasible, the content and quality of captured material are significantly worse than that of material obtained through circumvention. This difference is notable and discernible to the naked eye.

Problems with screen capture are well-documented, and numerous. Among other defects, screen capture often results in frame rate issues and insufficient resolution.¹⁰¹ Loss of audio sync may be another issue that arises in screen capture,¹⁰² as well as problems with stuttering and dropped frames.¹⁰³ Though free trial periods may exist for screen capture technology, ultimately they will still end. Some of these programs still may not offer HD quality, which is necessary for capturing finer detail. Further, free recorders often “add unsightly watermarks to your clips or let you record only a handful of videos before demanding payment” which is encountered when utilizing free screen capture technology.¹⁰⁴

Some screen capture technology may claim to handle higher quality content like HD video yet these programs may be limited to only expensive, high powered computer processors.¹⁰⁵ The fact that such processors are limited to PCs, combined with the fact that some screen capture software are only available on Windows operating systems, means that the proposed screen capture alternative entirely ignores authors who use Mac platforms.¹⁰⁶

¹⁰⁰ *How to take screenshots in Mac OS X's DVD Player application*, Knowledge Base <https://www.dvd-cloner.com/knowledge/about-dvd-copy-for-mac/how-to-take-screenshots-in-mac-os-x-s-dvd-player-application.html> (last visited Mar. 14, 2018); *Snagit (Mac): Cannot capture DVD video on OS 10.7 or later*, TechSmith Support (October 18, 2017), <https://support.techsmith.com/hc/en-us/articles/203732478-Snagit-Mac-Cannot-capture-DVD-video-on-OS-10-7-or-later>; David Nield, *How to Take Screenshots of Anything (Even When They're Blocked)*, Gizmodo (Jan. 23, 2017), <https://fieldguide.gizmodo.com/how-to-take-a-screenshot-of-anything-even-when-theyre-1791505218>; *Recording Netflix get sound but only black screen video*, Open Broadcaster Software, (Sept. 19, 2017), <https://obsproject.com/forum/threads/recording-netflix-get-sound-but-only-black-screen-video.74657/>; *see also iOS 11 Prevent Screen Record like Netflix*, Stack Overflow (last visited Mar. 12, 2018), <https://stackoverflow.com/questions/46319665/ios-11-prevent-screen-record-like-netflix/46370265#46370265> (explaining the technical steps used by Netflix and others on iOS).

¹⁰¹ 2015 Recommendation at 84.

¹⁰² Joint Filmmakers Initial Comment Letter from Jim Morrissette, Kartemquin Films, 1 (December 4, 2017), Appendix B (“Joint Filmmakers Comment”).

¹⁰³ *Id.*

¹⁰⁴ See Cat Ellis, *The Best Free Screen Recorder 2018*, TechRadar, available at <http://www.techradar.com/news/the-best-free-screen-recorder>.

¹⁰⁵ Joint Filmmakers Comment at Appendix B.

¹⁰⁶ *Id.*

If the requirement of screen capture is imposed it would create an adverse effect upon authors interested in creating multimedia e-books. Authors may be unable to illustrate an example, point, or specific detail in a video if they do not have high quality content. Without adequate quality, fine details and clarity may be entirely lost in a final creation.

In 2015, the Register noted that screen capture, though making some improvements over the last several years, was still lacking in quality, especially in comparison to content obtained via circumvention on access controls in motion pictures.¹⁰⁷ Moreover, the Register acknowledged that adverse effects were present for e-book authors if they were unable to obtain higher quality media.¹⁰⁸ The Register noted an adverse effect especially in the case where higher quality is necessary to highlight a detail in the captured media being critiqued upon or featured.¹⁰⁹ Many such cases exist, of course, with authors who seek to make fair use in fictional works and those that do not offer film analysis.

Furthermore, authors who self-publish may also not have the technical expertise to engage in screen capture technology. For those who do, the resulting degraded content could connote a lack of professionalism and diligence on part of the author, undermining the power and effectiveness of her expression.

If the screen capture requirements are not removed from the exemption, it will foster two divergent classes of creators: those who have the financial means to negotiate licenses to incorporate higher quality content into their work and those of lesser means who have no option but to rely on the lower quality content that screen capture provides them.

B. Licensing remains an inadequate alternative to circumvention.

DVD CCA and AACCS LA also contend that the modification to the multimedia e-book exemption will harm the market to license clips to multimedia e-book authors,¹¹⁰ and the MPAA and other groups contend that other alternatives to circumvention exist such as licensed clips.¹¹¹

Despite these claims, these commenters have not provided any evidence of harm caused by authors making non-infringing and transformative uses of video clips. Instead, opponents argue that multimedia e-book authors would miss out on the opportunity to license their own work.¹¹² Thus, authors are highly unlikely to harm the clip licensing market.

Additionally, requiring fictional multimedia e-book authors and those not offering film analysis to acquire licenses is unduly burdensome and impracticable. First, in the 2015

¹⁰⁷ 2015 Recommendation at 85.

¹⁰⁸ *Id.* at 86.

¹⁰⁹ *Id.*

¹¹⁰ DVD CCA and AACCS LA Comment at 30.

¹¹¹ Joint Creators and Copyright Owners Comment at 26–27.

¹¹² DVD CCA and AACCS LA Comment at 30.

Recommendation, the Register concluded that licensing clips was not a viable alternative for the proposed non-infringing uses.¹¹³ That remains true.

Second, there are many reasons why clip licensing is impracticable for multimedia e-book authors, including: (1) the difficulty in finding the rights holders or getting them to respond if found, (2) lengthy negotiations, and (3) denials, if the rights holder disapproves of a non-infringing use.¹¹⁴ Another reason clip licensing is impracticable is that requiring licensing as an alternative to circumvention would also compromise the importance of fair use as copyright law's constitutional "safety valve."¹¹⁵

Finally, the rights holder could simply not respond to licensing requests or refuse to grant the license in instances when the rights holder disagrees with message of the transformed clip. The Supreme Court held that since it was unlikely that rights holders would "license critical reviews or lampoons of their own productions," harm to a potential licensing market is unlikely.¹¹⁶

VI. The proposed modifications are critical to ensure that Section 1201 does not impinge on the First Amendment rights of authors.

DVD CCA and AACCS LA contend that the Register should not decide if prospective uses would be non-infringing.¹¹⁷ The MPAA and other organizations likewise contend that the proposed fictional uses would infringe on the right to prepare derivative works.¹¹⁸ As we have demonstrated, however, fanfiction and nonfictional uses are often non-infringing and the opponents have not shown any evidence of harm caused by the proposed uses.

Traditionally, both fiction and non-fiction authors have relied on the doctrine of fair use to create non-infringing works of commentary and criticism.¹¹⁹ E-book authors who wish to create fictional multimedia e-books and e-books not offering film analysis are not able to rely on this constitutionally important doctrine. These authors may have elaborate concepts of transformative multimedia e-books but they cannot rely on fair use to overcome the chilling effect created by the DMCA's anticircumvention provisions.

¹¹³ 2015 Recommendation at 84.

¹¹⁴ *Id.*

¹¹⁵ The Purpose and Role of Fair Use, 4 Patry on Copyright § 10:1.50.

¹¹⁶ *Campbell*, 510 U.S. at 592.

¹¹⁷ DVD CCA and AACCS LA Comment at 23.

¹¹⁸ Joint Creators and Copyright Owners Comment at 15.

¹¹⁹ See *Campbell*, 510 U.S. at 576; see *Suntrust Bank v. Houghton Mifflin*, 268 F.3d. 1257, 1276 (11th Cir. 2001) (finding that *The Wind Done Gone* was fair use as a parody of *Gone with the Wind*); 2017 Comment at 17 (statement by author Kirby Ferguson) ("I relied on fair use for both these series.").

Fair use is constitutionally important because it is copyright’s “safety valve” for the First Amendment and free speech.¹²⁰ The Register previously recognized Congress’s intent to protect non-infringing uses, such as fair use.¹²¹ Since fair use is an affirmative defense, authors do not need to seek advance permission by the courts or by copyright holders to engage in fair use. Fanfiction authors rely on fair use when they transform works by challenging and subverting cultural norms. Scholars rely on fair use when they comment on literature, history, or politics.

Authors engaging in fair use are often critiquing the original work. Content creators who are fearful of negative commentary would likely deny authors the use of their works. Fair use protects an author’s First Amendment right to criticize and comment on other works, thereby furthering the goal of distributing new ideas and expression.

In light of these important constitutional considerations, we urge the Register to recommend that the proposed modifications be adopted.

Conclusion

Multimedia e-book technology presents enormous opportunities for innovation and creativity, not only for academics and established authors, but for marginalized and non-professional users. The uses we have outlined, like fanfiction and scholarly criticism, frequently make fair use and exemplify the need for the proposed modifications to the exemption. We have demonstrated that creators are interested in exercising their fair use rights by engaging in criticism and commentary in their creations—and the Register has already recognized the legitimacy of these uses in granting previous exemptions.¹²² We have provided more than sufficient evidence to show that creators of content have been and will continue to be harmed absent the proposed modifications. Alternatives that opponents propose simply remain inadequate and unduly burdensome. For these reasons, we respectfully request the Register recommend the proposed modification to the current exemption.

¹²⁰ See *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (“[C]opyright law contains built-in First Amendment accommodations.”); See also *The Purpose and Role of Fair Use*, 4 Patry on Copyrights § 10:1.50.

¹²¹ 2015 Recommendation at 15 (noting that fair use is one of several factors in determining whether a use is non-infringing); Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65,260, 65,261 (October 26, 2012) (to be codified at 37 C.F.R. pt. 201) (“2012 Final Rule”) (noting that fair use is relevant in determining exempted classes).

¹²² 2015 Final Rule, 80 Fed. Reg. at 65,949.