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Lessons in Copyright Activism:
K-12 Education and the DMCA 1201 Exemption Rulemaking Process

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ABSTRACT

Digital learning is being transformed by changes in copyright law. This article discusses the author's personal journey as a copyright education activist through two rounds of rulemaking proceedings before the Copyright Office concerning the anti-circumvention provisions of one part of the copyright law, the Digital Millennium Copyright Act (DMCA), which is the law that exempts YouTube and other ISPs from liability from copyright claims and criminalizes the circumvention of digital rights management (DRM) software that protects DVDs from being copied. Every three years, petitioners can claim their rights have been compromised by the current law; the Copyright Office pores over the petitions, weighs the pros and cons, and then offers recommendations to the Librarian of Congress, who ultimately grants or denies the exemptions. The author was successful in expanding the rights of K-12 teachers to legally "rip" DVDs by using the Section 1201 rulemaking process, which is one of the only significant ways that educators can expand their rights to use copyrighted material for teaching and learning purposes. By asserting the rights of K-12 educators to circumvent encryption to make fair use of copy-protected DVDs and online digital media for teaching and learning, the law begins to move beyond the needs of large-scale content owners to include the rights of educators and students.

KEYWORDS

Copyright, Digital Learning, Digital Millennium Copyright Act (DMCA), Education, Fair Use, Law, Learning, Teaching

INTRODUCTION

Teachers and learners have always used bits of copyrighted materials in the process of learning and teaching. Many teachers collect, compile, use, and save media texts that work well in the classroom to address particular types of learning objectives, whether that be to better teach principles of multiplication, cell mitosis or the history of the French revolution. Research with European elementary and secondary teachers finds that the most commonly valued resources include publishers'

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open educational materials, educational materials created by colleagues, news and current events, scientific reports and visual materials -- pictures, videos, images, drawings and illustrations (Halme & Somervuori, 2012), and it is likely that American teachers have similar priorities. The use of resources including movie DVDs, digital media and the Internet is now normative current practice in education from K-12 to higher education. But does their acquisition and use qualify as legal practice under copyright law?

It is ironic that at a time when online digital technologies are enabling educators to create and share an ever-widening array of texts, sounds, still and moving images, music, and graphic art, there has been a rise in the climate of confusion and fear among educators concerning the use of copyrighted materials as tools for teaching. Sadly, much of the language about "sharing" and "stealing" found in mainstream media has left educators, artists, school librarians, technology specialists, youth media leaders and others confused and fearful (Hobbs, Jaszi & Aufderheide, 2009). And because fear tends to stifle innovation, those who promote the use of digital media as tools for teaching and learning take notice of these developments and aim to address them.

Some educators want to do more than use copyrighted material as a vehicle for transmitting content. They may want students to critique or comment on excerpted media texts as a literacy practice; to memorialize their personal encounters with media texts, or use film clips as a stimulus for charged discussions about how technology and media affect cultural participation, identity development, social power, and political or economic agency. To create and share ideas with colleagues, some educators want to create curriculum materials that employ excerpts from copyrighted works. To promote professional development, others want to distribute samples of student work to inspire and motivate educators and show what students can do in various types of learning environments (Hobbs, 2011).

In the United States, citizens have substantial legal rights as both creators and as users of copyrighted materials for teaching and learning. Under the law, creators are entitled to the full force of copyright law as soon as the original works of authors are produced in fixed and tangible form. Although some educators have signed contracts to work in institutions where their creative work has been declared a work-for-hire arrangement, most educators are legally entitled to claim copyright of their own creative work—lesson plans, activities, etc. (Russell, 2012). And as users of the copyrighted works of others, the *fair use doctrine*, enshrined in Section 107 of the Copyright Law of 1976, permits people to use copyrighted materials without payment or permission under some circumstances, depending on the specific context and situation of the use. Determinations as to whether the copying or reproduction of the original works of others is a violation of copyright begins with the act's broad exemption that "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research is not an infringement of copyright" (Copyright Act, § 107). While the doctrine of fair use allows for the use of copyright protected material for a wide range of purposes, courts generally consider four fair use factors: the purpose and character of the use, including whether it is of a commercial nature or is for nonprofit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used; and the effect of the use upon the potential market for or value of the copyrighted work. (Copyright Act, § 102).

Like many media literacy educators, I make considerable use of copyrighted materials under the doctrine of fair use. To build learners' critical thinking, creativity, collaborative, and communication skills, I use copyrighted materials tend from mass media, digital media and popular culture, including those owned by Viacom, Disney, News Corporation, YouTube, Time Warner and others. In general, I use copyrighted content to illustrate key concepts of media literacy. I help students to deconstruct and critically analyze media messages; to recognize and examine specific production techniques employed in moving image media; to explore economic, political, or social issues or the cultural values depicted in the representations; or as part of the process of building skills and knowledge through

the creation of student-produced print, visual, digital or video-based works to demonstrate ideas, techniques, competencies, and skills. Because these goals are central to my work as an educator, over time I have found it necessary to not only gain knowledge about the law; I have also learned to "rip" DVDs using a variety of software tools (Mittel, 2010). I have also sought to make the law responsive to the changing nature of educational practice in relation to digital learning.

In this paper, I reflect on my own personal journey as a copyright education activist through two rounds of rulemaking proceedings before the Copyright Office concerning the anticircumvention provisions of one small part of the copyright law, the Digital Millennium Copyright Act (DMCA), which is the law that exempts YouTube and other ISPs from liability from copyright claims and criminalizes the circumvention of digital rights management (DRM) software that protects DVDs from being copied (Herman & Gandy, 2006; Pauken, 2010). Every three years, citizens can claim their rights have been compromised by the current law; the Copyright Office pores over the petitions, weighs the pros and cons, and then offers recommendations to the Librarian of Congress, who ultimately grants or denies the exemptions. The 1201 rulemaking process is one of the ways that user-generated content finds a place in the law because "[r]ulemaking, with all its flaws, offers the possibility of being more flexible and accessible than lobbying Congress currently allows" (Tushnet, 2010, p. 895). In asserting the rights of K-12 educators to circumvent encryption to make fair use of film and digital media for teaching and learning, these efforts have made a small contribution in copyright law as it begins, ever so slowly, to move beyond the needs of large-scale content owners to include the rights of educators and citizens.

THE JOURNEY BEGINS

I first began my journey as a copyright education activist as a result of an important collaboration with Peter Jaszi of Washington College of Law and Patricia Aufderheide of the Center for Media and Social Impact at American University, who worked with me to develop a "best practices" model for media literacy educators in 2007. With support from the John D. and Catherine T. MacArthur Foundation, we brought together groups of educators (from higher education, K-12 settings, and youth media organizations) in ten cities across the United States including Chicago, Austin, Philadelphia, Boston, and New York. The consensus principles that emerged from these discussions are reflected in the *Code of Best Practices in Fair Use for Media Literacy Education* (2007) which was rigorously reviewed by a team of legal experts and adopted by several national membership organizations, including the National Association for Media Literacy Education (NAMLE), the Action Coalition for Media Education (ACME), the Visual Communication Studies Division of the International Communication Association (ICA), the Media Education Foundation, and the Association of College and Research Libraries (ACRL). Significantly, the 60,000-member National Council of Teachers of English (NCTE) also adopted the Code as its official policy in November 2008, replacing an earlier policy from 1980.

The Code identifies five principles, each with limitations, representing the community's current consensus about acceptable practices for the fair use of copyrighted materials. As stated in the Code, educators can, under some circumstances: (1) make copies of newspaper articles, TV shows, and other copyrighted works, and use them and keep them for educational use; (2) create curriculum materials and scholarship with copyrighted materials embedded; and (3) share, sell, and distribute curriculum materials with copyrighted materials embedded. Learners can, under some circumstances (4) use copyrighted works in creating new material; and (5) distribute their works digitally if they meet the transformativeness standard (Media Education Lab, Program on Information Justice and Intellectual Property, Center for Media and Social Impact, 2007). When someone uses an appropriate amount of a copyrighted work and re-purposes or adds value, they arc using the work transformatively. The success of this project led me to want to contribute more to advance the interests of educators in the sphere of copyright, fair use and education.

HOW THE DMCA AFFECTS EDUCATORS

The Digital Millennium Copyright Act of 1998 (DMCA) has been controversial since its passage because, in protecting ISPs from copyright infringement via the automatic takedown process and criminalizing the trafficking of technologies designed to circumvent access control devices protecting copyrighted material from unauthorized copying or use, the law struck a serious blow to the principle of fair use. While the act of copying a file may be legal according to fair use, breaking digital rights management (DRM) technology became illegal when the law went into effect (Tushnet, 2010).

Because many educators and learners depend on clips from film DVDs for use in both classroom teaching and student media production assignments, the law has had a negative impact on digital learning and, in particular, has discouraged educators from using film as a teaching resource. Few educators still use VHS tapes, as this equipment has become obsolete. Many have migrated their clip compilations to disk, while others use YouTube video clips, uploaded by others. But these are often of poor visual and sound quality, making it difficult to do the kind of close analysis required for media literacy education. When teachers select clips by directly using a DVD, they have found that the players are slow to load content. Some DVDs automatically play trailers for other movies every time they are played. Some DVDs can't be easily cued up, which means teachers have to skim through all the chapters to find the precise scene they need.

When teachers use multiple DVDs to show clips in class, this practice is time-consuming and often ineffective, which may lead to non-optimal use of video in the classroom (Hobbs, 2006).

The DMCA prohibits the circumvention of technological access controls and limits the degree to which educators and students may make fair uses of copyrighted works. Under the law, "ripping" videos for educational use is unlawful and the penalties for violation can be substantial, as persons who are injured may bring civil actions for equitable and monetary damages, as well as criminal sanctions.[1] But because the law unfairly criminalizes the legal fair use of copyrighted material, there is a special provision in the law that grants the Librarian of Congress the authority to exempt users who "are, or are likely to be in the succeeding three-year period, adversely affected ... in their ability to make noninfringing uses ... of a particular class of copyrighted works" (Kasunic, 2009). This special provision, articulated in Section 1201 of the law, mandates a rulemaking process that was expressly implemented to "ensure that the public [would] have continued ability to engage in noninfringing uses of copyrighted works" (DMCA, 1998).

So every three years, the U.S. Copyright Office considers exemptions to the law for groups or individuals who can prove that the law adversely affects their ability to make lawful, non-infringing uses of copyrighted works. As part of the rulemaking process, the Copyright Office puts the burden on exemption seekers, requiring them to bring evidence of how the law limits their need to bypass DRM software. The first two proceedings in 2000 and 2003 produced only extremely narrow exemptions--for example, allowing circumvention of obsolete 'dongles' controlling access to physical copies of software such as games on floppy disks.

But in 2006, Professor Peter DeCherney of the University of Pennsylvania and his colleagues successfully argued before the U.S. Copyright Office that film professors should be entitled to an anti-circumvention exemption. He established the first-ever educational exception to the DMCA's anticircumvention provisions. He argued that possible alternatives to circumvention, such as using VHS cassettes, recording with a digital video recorder, or playing individual DVDs in succession, were inadequate instructional practices. He further contended that the proposed exemption would have little to no effect on the market for copyrighted audiovisual works and would therefore be properly tailored to minimize adverse consequences to copyright holders (DeCherney, 2006). For these reasons, the Register of Copyright granted the exemption to film professors to rip videos of audiovisual works included in departmental library of a college or university's film or media studies program. When I first learned about the rulemaking process, I was proud of Professor DeCherney's accomplishments but frustrated that the exemption granted was so narrowly written as to exclude

elementary and secondary teachers who also need to use film clips to promote learning, critical thinking and communication skills among learners.

THE RULEMAKING PROCESS IN 2009

In 2009, I submitted a petition to the U.S. Copyright Office requesting an exemption for educators (from any field or discipline, at any level, including those working in nonprofit organizations that offer youth media programs) for a similar exemption. My petition also requested an exemption for learners so they can use DVD clips for specific educational assignments, including student media productions, because media production is such an essential component of media literacy education. To develop the petition, I used a process that involved phone and email communication with the team of student attorneys at American University Washington College of Law. Law students Eric Ford and Azizi Jones served as my student attorneys from the Glushko-Samuelson Intellectual Property Law Clinic at Washington College of Law, American University. They assisted in gathering of evidence and information and helped in the development of a formal petition arguing why an exemption should be granted, under the direct supervision of law professors Victoria Phillips and Peter Jaszi.

My first formal petition requested two use-based exemptions, one for teachers and one for learners. I asked to exempt (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; and (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 (Hobbs, 2009a). In the petition, I primarily explained the value of media literacy education and its lawful use of copyrighted materials as the use of existing media content in media literary education undertaken for "criticism" or "commentary." I gathered data from more than 80 teachers who responded to a survey, distributed to members of the National Council of Teachers of English (NCTE) that asked, "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 who answered "Yes" include, "I've wanted to download clips. . . from library copies of. . . DVDs but I wasn't able to." Another stated, "Our technology department would not help me extract the piece." 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, reported that they have "occasionally been prevented (for technological reasons and concerns for legal liability) from using movie clips from DVDs" (Hobbs, 2009b).

In describing the fear of legal consequences that has caused many teachers and learners to lose opportunities to pursue new approaches to digital learning and media literacy education, I described one teacher who 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. He stated he would not do so because he believes it is against the law. 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. These uses were clearly transformative uses of copyrighted material since the educational purpose is clear and none of these uses merely reproduced the original entertainment purpose of those films and programs.

My 2009 petition was one of eight new proposals that were received by the Copyright Office. Some proponents argued that the exempted class should be expanded beyond the departmental library to include audiovisual works in any college or university library. Others sought to eliminate the exclusive privilege given to film professors and widen the user group to include all college faculty including those teaching in foreign language, criminal justice, law, and medical programs.

As to be expected, some aspects of the rulemaking process seemed to me, as an outsider, to be peculiar, convoluted and absurd. For example, the Library of Congress is authorized to exempt non-infringing users of "classes of works" from the circumvention prohibition. Each petitioner needed to identify what types of works should be exempted. This posed a conundrum for me, since I was interested in enabling a group of users (educators and students) the ability to use a wide range of copy-protected audiovisual works. The term "classes of work" didn't make sense to me. Fortunately, as Congress envisioned when it instituted the process of triennial rulemaking, the interpretation of the term "classes of work" has evolved. Because the 2006 rulemakings considered and approved *use-based classes of work*, I was able to request an exemption for both teachers and learners to use 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.

On May 6, 2009, I presented an 8-minute presentation to summarize my petition and responded to questions, seated near to representatives from Time Warner and the Motion Picture Association of America (MPAA), and directly behind Peter DeCherney, who was there to ensure that his exemption was maintained and broadened. This experience solidified my feeling that copyright law is drafted by private entities seeking their own best advantage. As Jessica Litman noted, "User groups are rarely at the negotiating table, and those that are--libraries, educational institutions, electronics manufacturers, cable companies--tend to have specific interests that targeted, highly detailed statutory carve-outs from otherwise expansive copyright rights. Ordinary readers, viewers, and artists are not among those whose interests are directly represented" (2006, p. 891). The hearings did not feel like a public event, although there were some graduate law students and other unknown persons texting and twittering in the back rows, and I was able to capture and retransmit the Twitter stream on my website to help other educators understand more about the rulemaking process (Hobbs, 2010). In addition to the petitioners in attendance, there were representatives of advocacy groups including the Electronic Freedom Foundation (EFF). Clearly, as an educator representing the interests of elementary and secondary teachers, I was a new (but not particularly welcome) voice in the debate.

The Need for High Quality Clips

One of the major points of discussion was whether teachers and learners really needed to have access to high-quality clips. The media industry had claimed, in their petition, that my proposed exemption for K-12 teachers and students was too broad, potentially leading to a "slippery slope" effect. At the hearing, I was startled to see the Motion Picture of America Association (MPAA) play a videotape that demonstrated a presumable alternative. Their video showed a teacher using a high-end video camera to make a recording of a film by videotaping the screen in a very quiet, very darkened room as an alternative to bypassing encryption. Merely pointing a properly tripod-mounted camcorder an appropriate distance away from a high-definition screen playing a DVD in a perfectly darkened room would result in a digital recording that the media industry lawyers claimed was not circumvention, but would suffice for fair use purposes. The immediate response from all of us at the hearing was shock and disbelief; later, the response from the technology community was dominated by withering criticism. According to Selzer (2009), "The proceedings jumped the line to farce when Fritz Attaway and a colleague from the MPAA pulled out a cinematic demonstration of just how to camcord a movie from your television screen. (You start with a $900 HD video camera, a tripod, a flat-screen television, and a room that can be completely darkened.) Mind you, this is the same industry that has lobbied to make a crime of camcording in movie theaters."

In the rulemaking process, petitioners were explicitly asked to justify why digital clips were needed if there were these types of noninfringing ways to make clips for classroom use. Jonathan Band, the lawyer representing the American Library Association (ALA) explained that there are examples where the sharpness of image quality are needed for effective classroom use. For some learners, the lack of quality distracts from the ability to understand what's going on or to pay attention. People are used

to high-quality images and blurry images distract from the educational message. In my response to questioning, I talked about the importance of context in addressing the need for image quality: it's one thing to work in a classroom where you can turn off all the lights with one button. If you work in a public school where the blinds are broken, your experience is different. Image quality needs to be superior for it to even be visible when you're working in an imperfectly lighted room, or using outdated projection equipment, as many teachers are.

How Much to Use?

After the hearings were over, on August 29, 2009, the Copyright Office sent the petitioners a question via email. They asked: "Is there a limitation, either in terms of duration or percentage (or both), which could be incorporated into the definition of an exempted class of works?" After discussing the question on a conference call, all the petitioners strongly objected to a time or percentage measure since the permissible amount of use of a copyrighted work depends on the specific context of each use case. We argued that a "bright line" ruling specifying a certain amount or percentage would likely be misunderstood by the user community, increasing copyright confusion. And we pointed out that any restriction on quantity would need to focus on the amount of copyrighted material used, not merely the amount that was circumvented (Post Hearing Response, 2009). I argued that any quantitative restriction should be measured by usage of a DVD per individual class session due to the variety of works that an educator may show throughout the school year. Any proposed regulation must recognize the great variation that exists in the content of copy-protected DVDs. While some DVDs contain only a single audiovisual work, such as a feature film, many others contain compilations of individual works, such as a movie trailer, creator's commentary, and a short film that are all encompassed in one CSS-encryption. The variation among the content of an entire DVD would make it very difficult for educators to apply a consistent quantitative restriction. Should a proportional restriction apply to the entire running time of the DVD, it would be extremely burdensome for the educator to count all of the running minutes of the DVD in order to determine the overall playing time, since many segments do not have a running time indicated. We anxiously waited for the results, hoping that time-based restrictions would not be used as a factor in determining exemptions.

RESULTS OF THE 2009 RULEMAKING

After months of waiting, the Librarian of Congress made a decision on July 27, 2010, continuing to exempt university professors and offering the exemption to students of media and film, as well as college and university faculty from any academic or professional subject discipline. "The record demonstrates that it is sometimes necessary to circumvent access controls on DVDs in order to make these kinds of fair uses of short portions of motion pictures," said the Librarian of Congress, James Billington (Goldberg, 2010, p. 1). The Copyright Office restricted circumvention "to situations where the user aims to include a 'short' portion of an existing work in another, new work - while recognizing that longer excerpts sometimes may qualify as fair use in under ordinary copyright law" (Jaszi, 2010, p. 1). Fortunately, no fixed time limits were established and the user is free to determine how much of a copyrighted work is needed to accomplish their purpose.

No Fair Use for K-12 Teachers

But the Register of Copyright specifically rejected my argument that K-12 teachers and students should receive an exemption. They claimed that I had failed to show that access to high-quality images was absolutely necessary. The Register of Copyright claimed that K-12 teachers and students don't need access to high-quality digital clips and should instead use alternatives to circumvention, stating that screencasting software is superior to using digital clips "because it allows teachers and students to use clips from DVDs for educational purposes when use of the DVD itself would cause teachers to incur excessive classroom time to locate particular scenes," resolving the cost and other problems of camcording the screen. As I saw it, the Library of Congress used the "Let them eat screen capture" position.

While rejecting the needs of K-12 educators to make digital clips for fair use purposes, the Register of Copyright did extend the exemption to "vidders" and other amateur filmmakers, who were allowed to bypass DRM safeguards in order to incorporate an audio or visual excerpt of an artistic work in a new documentary or a noncommercial work of cultural commentary. Media literacy educators are highly sympathetic to those who remix to create engaging and empowering new forms of self-expression and communication because when students discover the power of lifting a sound track from one clip and attaching it to another, they recognize a fundamental principle of media literacy: that all media messages are constructed and that they can be builders themselves. Martine Rife, who attended the oral hearings and testified on behalf of expanding access, noted that the Register of Copyright did not want to define this class of users too narrowly, rejecting the idea that documentary filmmakers need to be members of a special organization or enrolled in a particular class. To Rife, this suggests that "anyone, regardless of whether they are a student, a teacher, or not, can utilize the DMCA exemption as it applies to noncommercial video makers and documentary filmmakers" (Rife, 2010, p. 1).

With sage advice from my colleagues Peter Jaszi and Pat Aufderheide, I decided to inform my community of K-12 and media literacy educators by leading with this relatively positive news, declaring a partial victory and noting, even if our petition was not granted, that at least the Register of Copyright allowed anyone (presumably K-12 teachers and students) to rip videos in order to make a non-commercial video.

But imagine how humiliating and frustrating it was to have the Register of Copyright directly claim that K-12 teachers and students were fundamentally unlike college professors and film students who can presumably exercise discretion carefully to determine when bypassing circumvention of access controls is necessary. What kind of stigma was attached to K-12 educators that made their educational needs seem *so different* from that of those who teach at the college level? It was even more annoying that the Register called out my petition for critique by claiming that the evidence presented by K-12 proponents was lacking because it involved "only assorted hypothetical situations."

Months later, I felt somewhat vindicated when a brief in the *Harvard Law Review* noted some of the weaknesses in reasoning of the Register of Copyright specifically regarding their decision regarding the K-12 exemption. The Register of Copyright "ignored evidence of the benefits of extending the exemption to other university students, to K-12 teachers and students, and to other media beyond motion pictures on DVDs," crafting a rule "that leaves many of the very users whom Congress intended to protect without the ability to exercise their fair use rights" (Note, 2011, p. x). The article pointed that that my petition did make reference to "numerous actual situations in which the DMCA stymied pedagogical goals" and documented how teachers had expressed frustration about the "inability to have students compare particular film scenes or evaluate how portrayals of romance in the media shaped societal expectations." Although I did include some fictionalized scenarios to support my case, the Register failed to mention that most other proponents also offered a mixture of hypothetical and factual illustrations.

In analyzing the 2010 rulemaking, the *Harvard Law Review* article critiqued how the Register of Copyright made a distinction between college level and K-12 educators and their students, writing:

It is possible that non-film students and K-12 teachers and students may still be able to avoid DMCA liability in certain cases by claiming coverage under the documentary filmmaking or noncommercial video prongs of the 2010 rule. Nevertheless, distinguishing between film students and non-film students and between university teachers and other teachers ignores the highly integrated and cross-disciplinary nature of technology usage in the classroom today and serves to make the pure educational exemption underinclusive. Consequently, there seems to be little reason why the Register drew the lines where she did. While the 2010 rule will likely be a boon for university faculty and film students, the same cannot be said for non-film students and K-12 teachers and students. The limited application of the exemption to motion pictures and certain educational actors goes against the spirit of the Section 1201 rulemaking process, which is to protect and preserve fair use in the digital age. (Note, 2011, p. xi)

While for the first six months after the decision I was disappointed, as I see it now, the 2009 rulemaking process maintained the exemption for college faculty, extended the right to college students taking film classes, and overall had a net positive impact for media literacy education. When a professor rips short film clips from Disney movies to comment on historical shifts in gender or racial stereotypes in children's films, this is now legal. A film student can use excerpts from *Scarface* to make a video on the rap and hip hop culture. These are "classic" examples of fair use, which enables people to use copyrighted materials without payment or permission when the social benefit of the use outweighs the cost to the copyright owner (McDermott, 2012). However, because this special exemption has been granted only to college professors (from any discipline or field) and college students in film and media studies who are creating new works for the purpose of comment and criticism, the decision denied elementary and secondary educators and their students their fair use rights.

Because the Register of Copyright believed that only film students needed to use high-quality images in their media productions, college students who major in history, women's studies, literature or physics are not entitled to legally rip excerpts of movies for their creative projects – only those enrolled in film and media programs. Instead, these second-class citizens were invited to use screen capture software to accomplish their educational goals. Screen capture software like the free program Screeencast-o-Matic (www.screencast-o-matic.com) or the more costly program Camtasia (www.techsmith.com) let users highlight any part of a computer screen to create a little movie. It captures the sound from the movie—and it also captures the sound from your computer's keyboard and microphone. Users can embed the file into a Powerpoint presentation or use it to build their own video.

I wondered: how could we persuade the Library of Congress that high school students and literature majors also may need high-quality images for their videos offering critical commentary of Boyz and the Hood, Romeo and Juliet, or Spiderman? Are their creative works inherently less valuable or important than the work of college student film majors? The 2009 rulemaking process was a wake-up call for me as it showed in a concrete way both the tangible benefits of copyright activism and the risks of copyright apathy and ignorance. The experience convinced me that K-12 educators can't sit on the sidelines but must advocate for the right to make fair use of copyrighted content, and in doing so, help expand our rights to use copyrighted materials for teaching and learning.

THE DMCA 1201 RULEMAKING PROCESS, 2012

I looked forward to the opportunity to participate in the 2012 rulemaking process and was determined to use a more effective strategy to address the concerns raised by the Register of Copyright. I needed to show that it was essential, for pedagogical purposes, for teachers to have access to high-quality clips, not just screen capture. I needed to offer examples of actual teachers who were constrained by the limitations of screen capture with both DVD and with online streaming video content. And I needed to be able to put in front of Copyright Office officials an actual K-12 teacher who makes active use of film clips in the classroom so that they understand the importance of these pedagogical practices and hear from an expert that there's no real difference between teaching an 18-year old high school student and teaching an 18-year old college student. However, during the preparation of the brief, I accepted advice offered by student attorneys Erik T. Israni, Elizabeth F. Jackson, Kristin Wall, and Michele-Ann C. Wilson of the Glushko-Samuelson Intellectual Property Law Clinic at Washington College of Law at American University who encouraged me to focus my petition on the needs of elementary and secondary educators and not to request an exemption for students. Take one step at a time, they explained.

In requesting an exemption in 2012, I noted that media is a crucial component of kindergarten through twelfth grade education, making it necessary to exempt audiovisual works for educational uses. The distinction drawn in 2009 between college and pre-college educators, I argued, was illogical and baseless. College professors and K-12 teachers are equally in need of quality media because of the ever-blurring line between high school and college curricula. Teachers are harmed by the law's

restriction of access to high quality media because teachers need high-quality media in order to teach effectively and because non-digital media is often not available. In my petition, I explicitly critiqued the industry's proposed alternatives which had suggested the use of media compilation websites. These sites offer a pre-selected set of movie clips that address thematic topics, including courage, optimism and friendship. Clip compilation websites (with names such as Anyclip.com) present an extremely limited clip inventory, constraining teachers' ability to locate particular clips needed for their lesson plans. In order for media compilation websites to be adequate alternatives to circumvention for clip compilation uses, these websites would need, at a minimum, to offer educationally relevant clips from movies still in commercial distribution. Moreover, those limited clips are also subject to discretionary editing by the website administrators, thereby decreasing their utility in K-12 classrooms. The website administrators also split longer scenes into separate clips, forcing teachers and students to sit through page loading, buffering, and advertisements (Hobbs, 2012).

In many American schools today, there are many challenging issues associated with Internet use, including inconsistent connections, slow bandwidth, website unavailability, and school district-imposed content filters. To illustrate the frustration that K-12 educators experience in their efforts to incorporate media in the classroom, my petition described situations faced by specific teachers, including Eldridge Gilbert, a middle school principal and social studies teacher, who spends five times as much time preparing media for use in class as compared to the time he spends on all other lesson preparations. Edie Lozano, an English Literature teacher at a Texas high school, loses her students' attention each time she must transition between different DVD discs, wasting valuable class time regaining learners' focus. Kindergarten teacher Ellen Moiani once showed her students a YouTube video on shapes, and accidentally exposed them to a movie trailer glorifying gun violence before the intended clip played (Hobbs, 2012). Lawful fair uses of copyrighted materials are impeded by technological protection measures. Many of the uses just described fall within the ambit of the face-to-face teaching exemptions, Sec. 110(1) of the Copyright Act. But other uses of copyrighted material represent a strong transformative use of copyrighted material. Thus, for example, when teachers take a clip, subject it to critical analysis, and frame it with discussion and lecture the use is transformative because the teacher "add[s] something new, with a further purpose or different character, altering the first [work] with new expression meaning, or message" (Campbell v. Acuff-Rose Music, 1994).

In offering workshops and professional development programs on copyright and fair use for digital learning, I was able to develop contacts with thousands of school librarians, technology specialists, college faculty, youth media specialists, and K-12 teachers who were interested in understanding their rights to use digital media under the law of copyright. I had discovered that, while many teachers make active use of film and video for educational purposes, only a very small number of teachers felt moved to actively advocate for their rights under the law. Fortunately, I had met some teachers like Kristin Hokanson, Spiro Bolos, and David Cooper Moore, who were committed to advancing their colleagues understanding of the law; they helped me develop and implement many of these professional development programs.

At the oral testimony, I showed a short video interview with a high school technology teacher who struggled unsuccessfully to make a screencast from legally-acquired content from an online video streaming service. I also brought with me Spiro Bolos, a high school social studies teacher at New Trier High School in Winnetka, Illinois. In oral testimony before the Copyright Office on June 4, 2012, he shared his own experience using film clips in his teaching. To address the claim that K-12 teachers didn't need access to high-quality video clips, he showed a video where he conducted some informal classroom research, playing a short clip from *Citizen Kane* (dir: Orson Welles) and leading a discussion with two groups of high school students. One group viewed a screencast version of the clip while the other group viewed and discussed a digital clip that had been "ripped." We could clearly students' comments were influenced by their ability to see and hear the visual and verbal content of the film (Hobbs, 2012).

When the 2012 Section 1201 rulemaking procedure was completed, the Librarian of Congress granted five exemptions for: (1) literary works for the blind; (2) computer programs on wireless telephone handsets to ensure interoperability and (3) for the purpose of connecting to alternative networking; (4) motion pictures or DVDs or works distributed by online services for purposes of comment or criticism in non-commercial videos, documentary films, nonfiction multimedia ebooks offering film analysis, and for certain educational uses by college and university students *and by kindergarten through twelfth grade educators*; and (5) motion pictures and AV works on DVDs or online services used for research to create DVD players for the blind, deaf, visually impaired or hard of hearing (U.S. Copyright Office, 2012, p. 140).

One of the successes of the 2012 round of rulemaking is that the exemption permits breaking encryption on online content, not just DVDs. Still, the user may take only a "short portion" of the original work for purposes of criticism and commentary and the user must reasonably believe she needs to break the DRM to accomplish that purpose. The exemption does not cover breaking encryption on HD or Blu-Ray disks.

And because the DMCA includes an automatic takedown process for video content that may be copyrighted, as McSherry & Hofmann (2012, p. 1) explain, "[E]ven though the Librarian affirmed yet again that using short portions of a movie for purposes of criticism or comment in a noncommercial video is a fair use, Hollywood can still use tools like YouTube's Content I.D. system to take down such videos with the flip of a switch."

CONCLUSION

The future of digital learning depends upon a robust interpretation of fair use. But we still have a long way to go in eliminating copyright confusion, and this paper is a small effort to help advance people's understanding of the law. In research with more than 1,300 K-12 teachers in 17 states, researchers examined the legal knowledge and educational background of teachers, finding that most educators are uninformed or misinformed about student and teacher rights; have taken no course in school law; get much of their legal information from other teachers; would change their behavior if they knew more about the law; and want to learn more about these issues (Schimmel & Militello, 2007). When it comes to the growth of digital learning, many educators and other creative people depend upon copyright and fair use but few have used the rulemaking process as a means to protect their approach to digital learning as well as new forms of creative self-expression. There is still little awareness among teacher educators in schools of education about the importance of copyright education for pre-service teachers. Indeed, "both fair use and the broader structure of copyright law need to accommodate new forms of art that average citizens make" (Tushnet, 2012, p. 891).

In reflecting on my experience as a copyright activist, these questions about the rulemaking process are still unanswered: What counts as harm for purposes of evaluating whether the DMCA has harmed fair use? If educators are afraid to assert fair use rights for fear of being sued for circumvention, is that a sufficient harm even if the copyright owners have yet to file suit? More generally, who gets to claim fair use? Does a fair user need pre-approval by some outside party such as the Copyright Office, either of her fair use or of the institutional setting in which she wants to make it? To what extent should we expect educators to be aware of technical, counterintuitive features of law that make it better, legally speaking, to download a full unauthorized copy of a TV show or movie that is already "in the clear" than to pay for DVDs and take small clips from them in order to create a remix? (Tushnet, 2012, p. 914).

For K-12 educators and students with interests in digital learning, these questions are highly salient and address some the real-world consequences of the law. One of the challenges I faced, as a non-legal professional, was in simply trying to read and understand the decision of the Librarian of Congress and the Register of Copyright. I wondered: maybe the lawyers and policymakers want copyright law to be an inside game played by experts. The process itself seems to intentionally shut

out ordinary people from participating in the process. Of course, legal language has long been used as a mechanism for discouraging public understanding of the law. When Jodie Griffin describes her first day at YouTube Copyright School, she makes a similar argument. YouTube Copyright School was released in the spring of 2011 as a mandatory program for those YouTubers who were alleged to have violated copyright law. They must watch a video discussing some of the basics on copyright law and pass a quiz, or they risk having their account deleted. Although the video doesn't explicitly say anything that's legally incorrect, "the video implies that fair use protection is a non-starter, and users shouldn't even bother with it," with the narrator imitating the fast-paced verbal fine print that you hear at the end of prescription medicine commercials while the screen fills up with a small-print summary of fair use. "The clear implication here is that fair use is way too complicated to understand, and users should only rely on it if they're willing to pony up for a lawyer to defend them" (Griffin, 2011, p. 1).

Although it is implausible for most elementary or secondary educators to become copyright activists, every educator's work is directly implicated in copyright law today. The fair use doctrine has to be understood in the context of existing patterns and particular group practices of making creative and transformative use of copyrighted work. These patterns will vary for many reasons. Art teachers will make use of copyrighted materials in a different way than science teachers, who, in turn, will use materials differently from those in the humanities. Over time, too, teachers and students will use copyrighted works in new ways (Hobbs, 2010). For example, in 1913, educators used copyrighted materials differently than we do today, where we are exploring digital media, social networking, wikis, podcasts, and videogames to engage and motivate learners. I am confident that the work of media literacy educators is gradually becoming synonymous with the normative practices of literacy; thus, the use of copyrighted materials as a resource for the practices of reading, critical analysis, and composing with digital media will become the rule rather than the exception in education.

There are many admirable qualities to the rulemaking and exemption process that is embedded in Section 1201 of the Digital Millennium Copyright Act. The law allows anyone who is willing and able to testify to speak directly to policymakers. As Tushnet (2010) explains, submitting a petition and participating in oral testimony requires people to speak in the idiom of copyright policy, which requires a certain amount of background knowledge. However, this "process contrasts favorably with other forms of policymaking, in which policymakers themselves--or the lobbyists working on them--decide who will get to speak in favor of and against policy proposals" (p. 889). Furthermore, Copyright Office administrators "are not directly beholden to major campaign contributors, so they are freer than most politicians to listen to individuals testifying to the harms that anticircumvention has inflicted on creativity at the ground level" (p. 889). I'm grateful to have had the opportunity to shape the law directly through a process of advocacy.

It's now legal for K-12 educators and school librarians to "rip" clips from copy-protected DVDs or online streaming media. This fact should greatly expand the creative opportunities for digital learning and teaching. Educators, media artists, librarians and media professionals should not have to live with the uncertainty and fear caused by copyright confusion. This is why educators must learn about their rights under copyright and fair use, and both new and seasoned teachers and librarians must understand on the nature of copyright law and the impact it has on educational practice. This is not a subject that can be glossed over in a single lecture. The exemption could be eliminated at the next rulemaking process in 2015 if educators do not continue to advocate for their rights under the law. Then again, perhaps the law will be expanded to include learners in grades K through 12, and those learning in informal settings like libraries, settlement houses, and non-profit cultural or educational organizations. My modest experience reveals that the law does indeed change (however gradually, slowly and with effort from activists) in response to changes in technology, in society and in educational practice. Educators from all walks of life, including college faculty, researchers, and K-12 educators, must take advantage of their rights under the law in order to preserve and extend them to meet the changing conditions and pedagogies of education today.

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ENDNOTES

[1] However, the DMCA exempts nonprofit libraries, archives, and educational institutions from criminal liability and additional special protection is available if nonprofit libraries, archives, and educational institutions can prove that they were unaware and had no reason to believe the alleged acts were infringing (Pauken, 2010).

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