

**Submission on behalf of Joint Creators and Copyright Owners
Class 5: Audiovisual Works – Preservation**



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ITEM A. COMMENTER INFORMATION

The Motion Picture Association, Inc. (“MPA”) is a trade association representing some of the world’s largest producers and distributors of motion pictures and other audiovisual entertainment for viewing in theaters, on prerecorded media, over broadcast TV, cable and satellite services, and on the internet. The MPA’s members are: Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc.

Alliance for Recorded Music (“ARM”) is a nonprofit coalition comprising the many artists and record labels who together perform, create, and/or distribute nearly all of the sound recordings commercially released in the United States. Members include the American Association of Independent Music (“A2IM”), the Music Artists Coalition (“MAC”), the Recording Industry Association of America, Inc. (“RIAA”), hundreds of recording artists, the major record companies, and more than 600 independently owned U.S. music labels.

The Entertainment Software Association (“ESA”) is the United States trade association serving companies that publish computer and video games for video game consoles, handheld video game devices, personal computers, and the internet. It represents nearly all of the major video game publishers and major video game platform providers in the United States.

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ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 5: Audiovisual Works – Preservation

ITEM C. OVERVIEW

MPA, ARM and ESA (“Joint Creators and Copyright Owners”) support and understand the importance of legitimate, lawful preservation efforts. The motion picture, recorded music, and video game industries all participate in preservation efforts and work with non-profit institutions

focused on preservation, including the Library of Congress.¹ Relevant to this proposed exemption, MPA members, in particular, routinely pursue preservation efforts in house and through cooperative agreements with partner institutions.² However, we oppose the exemption requested by the Library Copyright Alliance (“LCA”) to permit libraries, archives, and museums to circumvent access controls on Digital Versatile Discs (“DVDs”) and Blu-ray discs for the purpose of “preserving” motion pictures.

The proposal (1) is based on a false equivalency between motion pictures and old software covered by the existing – and soon to be renewed, without opposition from the Joint Creators and Copyright Owners – computer programs preservation exemption (now pending for potential expansion under proposed class 14(a));³ (2) would enable circumvention for purposes that go beyond the making of replacement copies permissible under Section 108(c) and under the existing preservation exemption for computer programs; and (3) essentially eliminates the reasonable, and necessary eligibility, market check, and access safeguards that are associated with making replacement copies. Importantly, no off-premises access or “preventative preservation” should be allowed.

In sum, the proposed exemption, as crafted, is fatally overbroad and should be denied. If, however, the Copyright Office is inclined to recommend an exemption for the replacement of motion pictures that are no longer commercially available, it should include all the limitations that are present in Section 108 and other Section 1201 exemptions related to preservation. LCA has provided no support for eliminating these common-sense limitations.

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

Petitioner seeks to circumvent access controls that protect content on DVDs and Blu-Ray discs, *i.e.* the Content Scrambling System (“CSS”), and the Advanced Access Content System (“AACSS”), respectively.⁴ Other audiovisual works, such as video games and copies or streams of works not acquired on such discs, as we understand it, are not subjects of this proposed exemption.

¹ See, e.g., [National Film Preservation Board](#), LIBRARY OF CONGRESS (last visited Feb. 8, 2021).

² See, e.g., [Preserving Our Movies](#), DISNEY DIGITAL STUDIO SERVICES (last visited Feb. 8, 2021); Martin Dew, [Talking Film Preservation and Restoration with Disney’s Theo Gluck](#), HOMECINEMACHOICE (Jan. 15, 2019); S.C. Stuart, [At Paramount Pictures, Movies Don’t Preserve Themselves](#), PCMAG (Feb. 14, 2018); [Motion Picture Collection](#), UCLA LIBRARY FILM AND TELEVISION ARCHIVE (last visited Feb. 8, 2021) (highlighting collections and the preservation of films from 20th Century Fox, Sony/Columbia Pictures, Warner Brothers – including 3,000 DVDs, among others); [Universal Pictures and the Film Foundation Announce Film Restoration Partnership](#), THE FILM FOUNDATION (May 1, 2018); [Universal Centennial - Restoring the Classics - A Lifetime of Memories](#), FANDANGO MOVIECLIPS TRAILERS (Jan. 10, 2012) (discussing Universal Studios’ preservation efforts since 1990s).

³ We submit separate comments on classes 14(a) and 14(b), which are hereby incorporated by reference. The Register should not recommend granting either of these proposals.

⁴ LCA, [Class 5 Long Comment](#) at 2 (Dec. 14, 2020) (“LCA 2020 Comment”).

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

1. LCA Has Not Established that the Proposed Class Covers Only Likely Noninfringing Uses

In 2018, the Copyright Office recommended, and the Librarian granted, a new exemption for “preservation” of computer programs by libraries, archives and museums.⁵ The reasoning underlying granting the exemption was primarily based on contentions from proponents concerning a lack of marketplace harm resulting from (i) the commercial unavailability of covered programs and (ii) a prohibition against off-premises access to the programs.⁶ Now, a software-focused petition is pending that seeks to do away with the second limitation, and LCA is seeking to create a new, derivative exemption for a very different category of works – motion pictures – and to piggy-back on the pending request to allow off-premises access to computer programs.⁷ Conflating the rationales for these two proposals would be a mistake, because out-of-date software and motion pictures that may no longer be sold on discs are completely different animals. Relatively few people want to use old software programs outside of research uses, whereas back-catalogue motion pictures are frequently commercially viable, in high demand, and actively made available in a variety of formats by copyright owners through legitimate distribution channels.⁸

(i) Section 108 Should Remain Central to the Analysis

The differences between motion pictures and out-of-date software make the access limitations in Section 108 essential to any consideration of LCA’s proposed exemption. LCA does not limit the covered “preservation” activities to conduct that fits within the scope of existing Section 108 or the changes proposed in the Copyright Office’s 2017 Discussion Document.⁹ Indeed, LCA concedes that they seek to go far beyond what Section 108 – which treats motion pictures

⁵ 37 C.F.R. § 201.40 (b) (13).

⁶ See [SECTION 1201 RULEMAKING: SEVENTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION, RECOMMENDATION OF THE ACTING REGISTER OF COPYRIGHTS](#) 240 (2018) (“2018 Rec.”).

⁷ LCA focuses its discussion on on-premises access, but also asks that if the Register recommends an exemption for off-site access to computer programs that the same be allowed for motion pictures. LCA 2020 Comment at 2. It is understandable that LCA does not want to discuss off-site access to motion pictures, as it is clearly distinct from off-site access to old computer programs.

⁸ See Brian Tallerico, [The 100 Best Movies on HBO Max](#), VULTURE (Feb. 1, 2021) (listing *2001: A Space Odyssey* (1968), *8 1/2* (1963), *Ali: Fear Eats the Soul* (1974), *Alien* (1979), *Battleship Potemkin* (1926), *Bicycle Thieves* (1948), *Blade Runner* (1982), *Blood Simple* (1984), *Casablanca* (1942), and *Chinatown* (1974) among HBO Max’s best 100 movies); Jeva Lange, [Streaming services have rediscovered the value of the back catalog](#), THE WEEK (May 20, 2020); Lucas Shaw, [Apple Buys Older Shows for TV+, Stepping Up Netflix Challenge](#), BLOOMBERG (May 19, 2020). See also [Warner Archive - Thousands of film and TV series direct from the studio vaults](#) (last visited Feb. 4, 2021) (offering back catalog titles for purchase on disc or streaming).

⁹ See generally [SECTION 108 OF TITLE 17: A DISCUSSION DOCUMENT OF THE REGISTER OF COPYRIGHTS](#) (2017) (“Section 108 Discussion Document”).

differently than other works in multiple respects, including for purposes of interlibrary loan – allows them to do.¹⁰

Their use of the term “preservation” to describe their intended use is inaccurate within the meaning of Section 108, because preservation copies can only be made of *unpublished* works, pursuant to Section 108(b). LCA is looking to circumvent for purposes of making *replacement* copies of motion pictures in disc format which are predominantly considered to be *published* works.¹¹ The distinction is an important one, as the making of replacement copies requires eligible libraries and archives to determine “after a reasonable effort” that “an unused replacement cannot be obtained at a fair price,” in addition to the requirement of providing on-site access only.¹² In the Section 108 Discussion Document issued in 2017, the Copyright Office recommended requiring eligible institutions to also consider used replacements from the “vibrant and easily accessible second-hand market.”¹³ LCA’s petition is silent on why this common-sense market-check requirement should not apply to its proposed exemption.

In the Section 108 Discussion Document, the Copyright Office also recommended that preservation copies of works disseminated to the public be allowed but only made accessible on-premises by the institution’s employees.¹⁴ That is consistent with the Section 108 Study Group’s recommendation that was intended to ensure that preservation copies were made for purposes of preservation, not access, except to the extent used as a source for lawfully-made replacement copies.¹⁵ Note that the Section 108 Discussion Document reflects that these issues were debated extensively by the Section 108 Study Group, and there were recommendations that lawful preservation copying be limited to “at risk” works and done only by eligible institutions.¹⁶ All of the concerns that drove these policy considerations should drive the Copyright Office’s analysis of LCA’s proposed exemption, which sets forth a model of replacement copying that is far afield from these earlier, extensively discussed approaches.

¹⁰ LCA 2020 Comment at 3 (“[S]ection 108(c) on its own is insufficient to permit modern digital preservation of motion pictures on deteriorating discs. Moreover, section 108(c) does not reach preemptive preservation of motion pictures on discs that have not yet begun to deteriorate.”); *see also* 17 U.S.C. § 108(i).

¹¹ *See* 17 U.S.C. § 108(c). *See also*, Section 108 Discussion Document at 32 (“Replacement copies are treated differently than preservation copies because they have different purposes. Replacement copies are meant to be substituted into the collection for the original item that is no longer in a suitable state for use or circulation. Preservation copies, on the other hand, are meant to be kept on-hand by the institution in the event that something happens to the original item in the collection.”).

¹² *Compare* 17 U.S.C. § 108 (b) and (c).

¹³ Section 108 Discussion Document at 33-34.

¹⁴ *Id.* at 28.

¹⁵ *See* [SECTION 108 STUDY GROUP REPORT: AN INDEPENDENT REPORT SPONSORED BY THE UNITED STATES COPYRIGHT OFFICE AND THE NATIONAL DIGITAL INFORMATION INFRASTRUCTURE AND PRESERVATION PROGRAM OF THE LIBRARY OF CONGRESS](#) 91 (2008) (“Section 108 Study Group Report”) (“An exception aimed at encouraging preservation and deposit should not be expanded to include distribution privileges in new media formats”). *See also* Section 108 Discussion Document at 28 (“The change in allowing preservation and security copies of works disseminated to the public is not intended to allow perpetual creation of replacement copies for the collection.”).

¹⁶ Section 108 Discussion Document at 26.

Congress amended Section 108 when it passed the DMCA. Accordingly, the Copyright Office has appropriately concluded that any exemptions related to preservation or replacement copies should closely track that provision's parameters.¹⁷ "In its 1998 amendments to § 108, Congress chose to exempt formats that have 'become obsolete,' not to exempt formats that are becoming obsolete. Therefore, the only digital reproduction of published works that would be noninfringing under § 108 relates to copies or phonorecords that are damaged, deteriorating, lost, or stolen, or those works distributed on formats that have already become obsolete."¹⁸ Moreover, "[e]ven in cases where the format is obsolete, § 108(c) imposes two additional requirements before a library or archive is permitted to make copies: (1) the library or archives must have determined that an unused replacement cannot be obtained at a fair price and (2) the digital reproduction of a copy or phonorecord may not be made available to the public 'outside the premises of the library or archives in lawful possession of such copy.'"¹⁹

Although the Copyright Office strayed a bit from Section 108 in 2015 and again in 2018,²⁰ and concluded that some "preservation" activities were likely fair uses under Section 107, it continued to consider Section 108 to be an important part of the fair use analysis.²¹ We urge the Copyright Office to continue to use current Section 108 as a guideline to assess whether the uses at issue are noninfringing. Congress has not acted to amend the statute, and speculating as to what activities should be deemed lawful before Congress acts is premature.

¹⁷ See [RECOMMENDATION OF THE REGISTER OF COPYRIGHTS IN RM 2002-4; RULEMAKING ON EXEMPTIONS FROM PROHIBITION ON CIRCUMVENTION OF COPYRIGHT PROTECTION SYSTEMS FOR ACCESS CONTROL TECHNOLOGIES](#) 51 (2003) ("2003 Rec.") ("Because §108 was enacted specifically to address reproduction by libraries and archives, and was amended by the Digital Millennium Copyright Act to address certain digital issues, analysis of noninfringing archival and preservation activities logically begins with that section.").

¹⁸ *Id.* at 52-53.

¹⁹ *Id.* at 53-54.

²⁰ In 2018, the Joint Creators and Copyright Owners provided in their opposition comments an overview of the Copyright Office's treatment of preservation/obsolescence issues throughout prior rulemaking cycles. Joint Creators and Copyright Owners, [Class 9 Opposition](#) (Feb. 12, 2018) ("Joint Creators 2018 Class 9 Opposition"). We incorporate that overview here by reference. In short, the Copyright Office consistently insisted on a focus upon conduct covered by Section 108, but then in 2015 and 2018 the Copyright Office strayed from this approach to apply a fair use-oriented approach that remains untested in judicial precedents or blessed by legislative action. Predictably, that has led us to the type of broad proposals put forward during this current proceeding. Section 108 should remain central to the analysis.

²¹ See 2018 Rec. at 242 ("Moreover, as the Register previously recognized, section 108 'highlight[s] Congress's recognition of preservation as an important social activity and generally indicates 'the types of uses that are most likely to qualify as fair in this area.' Here, the proposed exemption incorporates most of the key conditions in that provision, namely that the preservation activity must be undertaken by an institution meeting specified public access requirements, that no copies may be made available to the public outside the institution's premises, and that the use may not be for purposes of commercial advantage. The Acting Register accordingly concludes that, even if the proposed uses would not be found transformative, their purpose and character are of a type that favors fair use"). See also [SECTION 1201 RULEMAKING: SIXTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION RECOMMENDATION OF THE REGISTER OF COPYRIGHTS](#) 342 (2015) ("2015 Rec.") ("The Register finds that section 108 provides useful and important guidance as to Congress's intent regarding the nature and scope of legitimate preservation activities, and hence the types of uses that are most likely to qualify as fair in this area.").

(ii) Space-shifting by Libraries that Supplants Commercial Offerings, Especially for Off-Premises Access, Is Likely Infringing

LCA’s petition and comments ostensibly focus on “preservation” of copies of motion pictures, but – reading between the lines – it appears this proposed class is really a space or format-shifting exemption, rather than an exemption focused on preserving or replacing purchased copies of motion pictures for research or archival purposes. Even worse, it is space or format-shifting by large institutions in the name of individual consumers, most of whom just want to watch movies and TV shows. While the Copyright Office has previously concluded that preservation is a legitimate or “favored” activity within certain parameters, this proposal lacks such parameters and enables copying for the sake of obtaining motion pictures in new formats, accessible via different machines, by far more viewers, rather than true preservation. Using the word “preservation” does not *ipso facto* render the desired activities lawful. And LCA’s reliance on the preservation exemption for computer programs is inapposite.²²

If we understand LCA’s proposed class properly, it would allow a library, museum or archive to “preemptively” decrypt all of the discs for titles in a collection that are not at the time being sold on discs (or perhaps even discs “lawfully acquired” from elsewhere through, for example, rentals or loans), create computer/server copies (in an unspecified number) of the motion pictures, and utilize those copies to provide patrons (both in-person, and remotely) with the ability to view the motion pictures for free, regardless whether they do so for entertainment purposes or for academic research. There is no requirement for a market check beyond availability of new discs; that the new copies be stored on discs; or that the purchased discs be used until they degrade. In addition, a patron could be any member of the public. There is no limitation to faculty and students or even to card-carrying members of libraries (which by itself could cover millions of people with no specific research needs or even any research agendas at all). Moreover, the proposed language does not, on its face, limit the covered libraries, museums and archives to nonprofit institutions or to institutions that may technically be nonprofits but which charge fees for access, thereby potentially enabling entities to bill consumers to view motion pictures to which others own the copyrights. Given that the scope of the proposed exemption is so broad, and involves content that is distinct from the obsolete/outdated, functional computer programs covered by the existing preservation exemption, we urge the Register to consider LCA’s proposal using prior analyses that have repeatedly resulted in the denial of proposed space- and format-shifting exemptions.²³

If the proposed exemption is adopted, rights holders would be deprived of revenues and potential revenues derived from the titles that are available on, or may soon be available on, licensed streaming services that cater to public and academic libraries, such as:

- [Swank - Digital Campus](#) provides on and off campus faculty and students in colleges and universities with over 25,000 films, documentaries and TV shows via streaming.

²² See LCA 2020 Comment at 4.

²³ *E.g.*, 2018 Rec. at 121 (“the reported decisions unanimously reject the view that space-shifting is fair use under § 107”) (citing *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 862 (9th Cir. 2017)).

- [Kanopy](#) partners with public libraries and universities to stream content for free to personal devices. Users can log in with a library membership and enjoy a diverse catalog with new titles added every month.
- [Alexander Street](#) enables libraries to increase faculty and student access to learning and scholarly content. It offers purchase, subscription, and demand-driven acquisition options.
- [Passion River](#) distributes a catalogue of award-winning independent and documentary films on topics such as Multicultural Studies, Women’s Studies, Medical Studies and Advances, Religious and Spiritual Studies, Environmentalism, Aging, Drug Addiction, LGBT issues and others. They provide educational DVD and streaming licenses.
- [Roco Films Educational](#) enables students and faculty to instantly stream documentaries at any time, on or off campus through their proxy library server. Roco Films’ catalog consists of highly-acclaimed, festival award-winning films, specifically curated with their academic potential in mind. They offer *à la carte* purchases, entire collection subscriptions and a patron-driven acquisition model, which allows users to pay only for films that are being used.
- [Collective Eye Films](#) offers a license for colleges, universities, and corporations for films to be used by students, staff and faculty in classrooms or at home.

The fair use analysis is the crucial one here as it is clear that the proposal is not targeting conduct allowed by Section 108. It is inaccurate to label the copies contemplated here as “preservation” copies, or even pre-emptive “replacement” or “back-up” copies. First, such copies could be, or could have been, acquired at market prices. Second, LCA wants to create new, additional copies for free, and even use those copies in ways in which the original discs never could have been used. Preservation is not “buy one, get one free.” And the fact that one library bought one copy of a DVD twenty years ago certainly does not entitle the library to copy and make that movie available in the manner and format it sees fit, to its patrons and potentially the entire world, in perpetuity, without permission from or compensation to the copyright owner.

Based on the above, the Section 107 factors do not weigh in favor of a conclusion that the proposed conduct is noninfringing.

- **First factor:** The purpose and character of replacement copies is not transformative: the institutions would simply create new copies of works and provide access to them to patrons who would view them in their entirety, all without payment to copyright owners. Under *Napster* and other cases, this renders the copying commercial, even if consumers do not make any payment for viewing because it supplants marketplace transactions.²⁴

²⁴ See *Wall Data Inc. v. Los Angeles Cty. Sheriff's Dep't*, 447 F.3d 769, 781–82 (9th Cir. 2006) (“We believe that ‘widespread use’ of hard drive imaging in excess of one’s licenses could seriously impact the market for Wall Data’s product.”); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1017 (9th Cir. 2001), *as*

- **Second factor:** The works at issue would include thousands of highly creative motion pictures of the kind at the heart of the Copyright Act’s protective goals. The works are not functional, which renders them distinct from the computer programs considered in prior rulemakings.
- **Third factor:** The reproductions/public performances/distributions would be of entire works. Although LCA would have the Register ignore this fact as unimportant, this factor remains a key part of the fair use analysis, especially when no transformative use is contemplated.²⁵
- **Fourth factor:** Existing and potential markets for the works would be negatively impacted because more than 100,000 institutions²⁶ would be enabled to provide free or reduced-cost access to motion pictures using methods of digital dissemination that copyright owners are already deploying through licenses and digital services, including licenses designed for public and academic libraries, as described above. The limitation of the proposal to titles no longer commercially available *on discs* should not alter this analysis. Many such titles remain available through streaming services, download services, and on-demand cable and satellite services. (We attach hereto an Appendix describing such services.) They are not analogous to old software programs of little interest to typical consumers. For the vast majority of titles, there is little to no risk that researchers will be unable to obtain access for purposes of study, comment or criticism.²⁷ Moreover, the proposed preemptive copying of works, without regard to whether they are specifically at risk, or are or are likely to become available for purchase in the same or other formats in the future, interferes with the potential market for the works. A title previously available on a disc that may not be available today could become available tomorrow, especially taking into account the existence of disc print-on-demand retailers, including studios. Causing such offerings to become economically uninteresting by blessing widespread dissemination by

amended (Apr. 3, 2001) (“Having digital downloads available for free on the Napster system necessarily harms the copyright holders’ attempts to charge for the same downloads.”).

²⁵ See *Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255, 268 (4th Cir. 2019) (“[U]nless the use is transformative, the use of a copyrighted work in its entirety will normally weigh against a finding of fair use.”).

²⁶ LCA states that its members alone constitute 100,000 institutions and that academic libraries have close to 123 million discs. LCA 2020 Comments at 2. The scope of the envisioned copying is staggering.

²⁷ LCA highlights bonus features on discs, but such features are often made available through digital services in addition to discs, and are more likely to be made available in alternative formats going forward. See e.g., [What is included with a digital movie?](#), MOVIES ANYWHERE (last visited Feb. 4, 2021) (“Some movies include bonus features like deleted and extended scenes, commentary and much more.”); Rick Marshall, [Disney+ Might Kill Blu-Rays Forever with Streaming Bonus Features](#), DIGITAL TRENDS (Oct. 11, 2019); Dave Johnson, [What is the X-Ray feature on Amazon Prime Video?: How to find and view bonus material about TV shows and movies](#), BUSINESS INSIDER (Jul. 10, 2020); Joan Solsmen, Samsung, [Netflix Mobile Deal Will Unlock Bonus Content on Galaxy Phones](#), CNET (Feb. 11, 2020). Additionally, an extended panel discussion listed as a bonus feature on one of LCA’s examples, *American Heretics: The Politics of Gospel*, appears to be available on the film’s [website](#).

entities that never acquired the marketplace right to do so would be poor policymaking.

The Copyright Office's prior considerations of space- and format-shifting proposals recognize most of these points, which remain valid today.²⁸ LCA's proposed inclusion of "preventive preservation" and off-premises access makes its proposal more akin to the Internet Archive's National Digital Library, the legality of which is the subject of ongoing litigation before the Southern District of New York.²⁹ LCA's proposal is not focused on preserving old film prints that are about to disappear, or providing access to obscure titles that are of interest to small subsets of researchers. Granting LCA's proposed exemption would facilitate the creation of vast, inevitably aggregated and linkable databases of decrypted motion pictures that may be used to stream or distribute works to the public, thereby undermining the viability and success of a vibrant marketplace replete with licensed options for viewing motion pictures. As the Copyright Office has repeatedly concluded, this proceeding was not created to "break new ground on the scope of fair use."³⁰ LCA's extremely broad exemption is inconsistent with this cautionary instruction.

2. The Section 1201 Factors Weigh Against Granting the Proposed Exemption

As with the fair use factors discussed above, the specific Section 1201(a) (1) (C) rulemaking factors cannot support the proposal.

- **Availability for use of copyrighted works:** Access controls have directly contributed to motion pictures being more widely available than ever before.³¹ The proposal is based on a faulty premise that discs are the only method by which motion pictures should be made available. Worse still, the proposal would apparently allow libraries, archives and museums to decrypt discs to create and disseminate digital copies and streams, thereby erasing the need for these institutions (and their patrons) to acquire motion pictures in other widely available formats (*e.g.*, by subscribing to commercial streaming services). This would only increase the availability for use of works to the degree that infringement does so: increasing access to unauthorized copies always momentarily expands the availability of works. In the long run, however, it decreases incentives to create and to launch new business models thereby undermining the goal of increasing the availability of works.
- **Availability for use of works for nonprofit archival, preservation, and educational purposes:** As discussed above, motion pictures are more available than ever before, including for the enumerated nonprofit purposes. Many titles identified by LCA are

²⁸ See, *e.g.*, 2018 Rec. at 120-123 (discussing prior analyses of Section 107 factors).

²⁹ Complaint in *Hachette Book Group et al. v. Internet Archive et al.*, No. 1:20-CV-04160 (Jun. 1, 2020).

³⁰ 2015 Rec. at 109.

³¹ See Appendix.

available for purchase in disc format³² or via streaming/downloading.³³ The extent of the disc rot problem is unclear from Petitioners' submission.³⁴ Also, there is nothing stopping LCA's members from obtaining copies of motion pictures to archive them or to use them for educational purposes. Instead, the proposed exemption is aimed at turning encrypted copies on discs (some of which already provide digital copies with a purchase) into decrypted digital copies that may be used to enable viewing of motion pictures by the public that are already available for that purpose in other formats.

- **Impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research:** Access controls, by increasing the availability of motion pictures in different formats and at a variety of price points, have only increased their availability for purposes of criticism, comment, reporting, teaching, scholarship and research. Unless a title is completely unavailable in any format, these favored uses are easily achievable.
- **Effect of circumvention of technological measures on the market for or value of copyrighted works:** Allowing libraries, archives and museums to decrypt, reproduce, publicly perform and/or distribute motion pictures originally acquired on discs would undermine the market for, and value of, motion pictures in other formats. These institutions would provide, presumably for free, the same content licensed digital services

³² All five films in the *Joan Crawford Collection Volume 2* (2008) are available for purchase (*A Woman's Face* is available new on DVD from [Warner Brothers](#) (\$17.99); *Sadie McKee* is available new on DVD from [Warner Brothers](#) (\$17.99); *Strange Cargo* is available new on DVD from [Warner Brothers](#) (\$17.99); *Torch Song* is available as a new DVD manufactured on demand from [Warner Brothers](#) (\$17.99); *Flamingo Road* is available as a new DVD manufactured on demand from [Warner Brothers](#) (\$17.99); *Rise of the Planet of the Apes* (20th Century Fox, 2011) is listed as "new" on DVD from 15 vendors on [Amazon](#) (\$8.55-\$26.75); *Freedom: The History of Us* is available new on DVD (4PK) on [PBS](#) (\$250); *Mamma Roma* is available in new and used DVD format (\$29.99) from [Amazon](#); *Quills* (Philip Kaufman 2001) is listed as "new" from at least two vendors (\$17.77 and \$19.97) on [Amazon](#); *Goldstein* (Philip Kaufman 2006) is available, apparently new, on DVD (\$29.95) from [Facets](#); *Legends of Jazz Guitar, vol. 1-2* (2001) is available as a new DVD from [Amazon](#) (\$22.99); *Quilombo* (Carlos Diegues, 1984) is available on DVD (\$395, apparently new), streaming (\$545) or both (\$645) from [ArtMattan Films](#); *The Horse Thief* is available as a new DVD from [Amazon](#) (\$19.99). LCA's assertion that motion picture disc "replacements are often not available," appears to be an overstatement. LCA 2020 Comment at 2.

³³ *Reflections in a Golden Eye* (Warner Bros. 2006) is available for HD streaming from [Amazon Prime](#) (\$1.99 rent; \$7.99 purchase) and [Vudu](#) (\$2.99 rent; \$12.99 purchase); *Rise of the Planet of the Apes* (20th Century Fox, 2011) is available for HD streaming from [Amazon Prime](#) (\$3.99 rent; \$14.99 purchase); *Freedom: The History of Us* – 16 episodes available for streaming from [Kanopy](#); *Stories of Floating Weeds* is available for streaming from the [Criterion Channel](#); *The Flowers of St. Francis* is available for streaming from the [Criterion Channel](#) and [Kanopy](#); *Sólo con tu pareja* is available for streaming from [Amazon Prime](#) (subscription; \$19.99 purchase); *Mamma Roma* is available for streaming from the [Criterion Channel](#) and [Kanopy](#); *Quills* (Philip Kaufman 2001) is available for HD streaming from [Amazon Prime](#) (\$3.99 rent; \$9.99 purchase); *Bamako* (Abderrahmane Sissako) is available for streaming from [Vimeo on Demand](#) (\$4.99 rent; \$11.99 purchase); *Neon Genesis Evangelion* (1995-96) is available for streaming from [Netflix](#); *Armageddon* (1998) is available for HD streaming from [Amazon Prime](#) (\$3.99 rent; \$17.99 purchase); *Red Sorghum* is available for streaming from [Kanopy](#).

³⁴ Petitioners concede that the information they have on disc rot is incomplete because many libraries were unable to provide "comprehensive lists of titles of discs in their collections experiencing disc rot." LCA 2020 Comment at 6 (n. 2). Petitioners also concede that studios have addressed instances of disc rot caused by manufacturing defects. LCA 2020 Comment at 6.

provide for a fee. Such licenses would become less valuable. Fewer legitimate services, especially services offering licenses to educational and nonprofit institutions, would value back-catalogue titles. Less money would be earned by copyright owners. Less money would be available to invest in new titles. And re-releases of motion pictures on discs would be discouraged.³⁵

- **Other factors:** LCA’s comments focus on a variety of reasons that libraries, archives and museums may encounter damaged discs. None of these problems are created by access controls. Instead, the problems involve patrons damaging discs by “mishandling” them, storage issues based on the convenience of librarians, floods, and “disc rot.” Alternatives to circumvention exist. Although their comments focus on the damage caused by “disc rot”, disc use and disc packaging, Petitioners do not request an exemption for the circumvention of deteriorated DVDs or Blu-ray discs protected by TPMs. Instead, LCA proposes a broad “preservation” exemption that would cover circumvention of all DVDs and Blu-ray discs because they *may* deteriorate. In light of the growing availability of motion pictures in the market place, Petitioner’s stated adverse effect is insufficient to justify an exemption.³⁶

3. The Proposal, Which Should Be Rejected, Should At Least Be Narrowed

LCA’s proposal would eliminate all existing limitations in other “preservation” exemptions. For instance, the proposed language omits requirements (1) to circumvent *solely* for purposes of lawful preservation; (2) not to seek commercial advantage; (3) not to allow off-premises access; (4) to meet well-established eligibility criteria for libraries and archives under Section 108(a); and (5) to implement reasonable, specific security measures. As mentioned above, it also cabins the market check requirement in Section 108(c) by limiting it to only copies in disc formats. LCA’s proposal would result in many thousands of decrypted copies of motion pictures being available for viewing by the public. These vulnerable copies could easily end up online and significantly diminish the market value of copyrighted works. Far more tailoring is therefore necessary if any exemption is adopted.

Even setting aside previously granted exemptions, LCA could have included additional narrowing criteria to render the proposal more palatable. For example, LCA focuses on titles or bonus features that are purportedly not available except on previously acquired discs. If this is the problem to address, the exemption should be limited to such content. The exemption should also only enable clearly defined preservation, not harmful space and format-shifting of motion pictures that competes with marketplace offerings. If the objective is to avoid institutions permanently losing access to works, the exemption should only cover works that are legitimately

³⁵ LCA concedes in comments on proposed Class 7 that discs are in higher demand now than in recent years, thereby undermining their contention that discs are becoming obsolete. Authors Alliance, American Association of University Professors, and Library Copyright Alliance, [Class 7 Long Comment](#) at 19, n. 83 (Dec. 14, 2020) (“AA 2020 Comment”) (citing Stephane Prange, [NPD: DVD and Blu-ray Player Sales Jump in Pandemic](#), MEDIA PLAY NEWS (Apr. 30, 2020)).

³⁶ See COPYRIGHT OFFICE, SECTION 1201 OF TITLE 17, 29 (2017) (“Likely adverse impacts must be more than speculative or theoretical harms.”).

at risk of becoming inaccessible and preserved copies should only be available for research and scholarly purposes.

ITEM F. DOCUMENTARY EVIDENCE

We have included hyperlinks to webpages/documents within the body of this document. We also attach an Appendix. We are not submitting any other documentary evidence.

Respectfully submitted:

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Appendix

The digital ecosystem for enjoying motion pictures continues to evolve to the benefit of copyright owners, their licensees and consumers. MPA's members, and other producers and distributors of quality motion pictures, continue to seize opportunities to reach viewers with content they want to watch, in the formats they desire, for prices that are reasonable, and via devices on which audiences prefer to watch movies and TV shows. Copyright owners are embracing digital technologies to expand the reach of creative works and to make them available to audiences more broadly than ever before.

(a) *Digital Copies Available With Disc Purchases*

DVDs, Blu-ray discs, and Ultra HD discs are often sold in “combination packs” that include a “digital code” the consumer can use to access a downloadable digital copy of the motion picture through a variety of channels. For example, each MPA member that distributes titles on discs generally provides an avenue for redeeming digital codes through its website or through the *Movies Anywhere* website and app (discussed further below). For years, discs have been sold with digital codes, or with actual digital copies included on discs in the package at the time of purchase. These offerings are usually sold at a higher price than offerings that include only a disc with no access to a separate digital copy.

(b) *Disc-To-Digital Through Vudu*

If a consumer owns a disc that did not offer access to a digital copy, that consumer may be able to obtain a digital copy through the [Vudu](#) mobile application by scanning the disc's barcode. This [Disc-to-Digital](#) program enables a consumer who owns a DVD to obtain access to a standard-definition digital copy for \$2.00 or a high-definition digital copy for \$5.00. If the consumer owns a Blu-ray disc or Ultra HD disc, the consumer can obtain access to a high-definition digital copy for \$2.00.

(c) *Digital Retailers and Movies Anywhere*

Numerous digital retailers offer consumers the opportunity to obtain downloads of digital copies of movies and TV shows produced, distributed or owned by MPA members and other copyright owners. New releases are frequently available for \$19.99 in HD quality. Older titles are frequently available in HD quality for as little as \$9.99.

[Movies Anywhere](#) (previously known as “*Disney Movies Anywhere*”) continues to provide consumers with the ability, via its “Key Chest” technology, to link their accounts with participating digital retailers in order to bring eligible movies from those accounts into one synched collection and to make them available across all of their connected retailer accounts. In October 2017, *Movies Anywhere* launched its service with titles from Disney, Marvel and Lucasfilm, and almost every other MPA member. Eligible titles obtained through the redemption of digital codes included with Ultra HD, Blu-ray, and DVD discs, as well as through purchase from participating digital retailers are accessible through *Movies Anywhere*. The number of participating retailers has expanded significantly since the 2018 rulemaking proceeding and now includes [Amazon Prime Video](#), [Google Play](#), [YouTube](#), [iTunes](#), [Apple TV+](#),

[Fandango Now](#), [Microsoft Movies](#), [Vudu](#), [Verizon](#), [Xfinity On Demand](#), and [DIRECTV Movies](#).¹ Any eligible title obtained from a connected account with one of those retailers also becomes available via connected accounts with the other participating retailers' platforms (*i.e.*, once you connect multiple retailer accounts to *Movies Anywhere*, you can view movies purchased from, for example, *Vudu*, within your *Amazon*, *Google Play* and *iTunes* accounts). Consumers have used *Movies Anywhere* to store more than 280 million movies in user collections.

Movies Anywhere users may download movies from *Movies Anywhere* to as many as eight permitted devices for viewing via *Movies Anywhere* at any given time. These downloads are in addition to downloads that may be permitted by the participating retailers through linked accounts (*e.g.*, for viewing via iTunes). The number of times a user may download a single movie through a *Movies Anywhere* account to devices associated with the account is unlimited. A user may download movies to a maximum of sixteen different devices within a rolling twelve-month period. Given the large number of devices that may be used to access content using *Movies Anywhere* and linked accounts with participating digital retailers, a user's movie library becomes accessible to her entire family. Through *Movies Anywhere*, viewers can start streaming a movie on one device and finish it on another; two viewers can watch the same title on different devices at one time; and up to four viewers can stream different content on different devices at the same time.

Viewers can also use the [co-viewing](#) feature to invite up to nine other viewers to join a synched viewing of a movie that the viewers have in their libraries. Finally, *Movies Anywhere* now offers a feature called [Screen Pass](#), which allows eligible users to send up to three *Screen Passes* per month to another user to view a movie in their collection for a limited time with no additional cost. By combining the *Screen Pass* and co-viewing features, the number of viewers eligible to join a synched viewing increases to include users who do not have a title in their personal collection.

(d) *Digital Rental*

Digital retailers, including those mentioned above, and others, make motion pictures available for temporary digital rental at low prices. Once rented, the movies may be streamed directly from these services or downloaded temporarily to devices to enable mobile viewing. Some services, like [Amazon Prime Video](#), give the user up to 30 days to begin watching the movie after the rental price is paid. New release titles are often made available for \$5.99, even in high definition quality. Older titles are available for as little as \$2.99. [Vudu](#) offers free, ad-supported viewing options for some titles. These services supplement the availability of on-demand rentals from cable and satellite television providers.

(e) *Online Streaming Services and Over-The-Top Services*

Consumers continue to embrace streaming services that existed in 2018 – like [Hulu](#) (currently owned by MPA member Disney and MPA member Universal's parent company,

¹ In July 2019, the Ultraviolet digital rights locker service discontinued its operations. Many of the studios and digital retailers in Ultraviolet are currently participating in *Movies Anywhere*. Many Ultraviolet users have transferred their movie collections to *Movies Anywhere*.

Comcast), [Netflix](#) (which is also now an MPA member), [Crackle](#), and *Amazon Prime Video*, among many others, for viewing of both movies and TV shows on mobile devices, computers, smart televisions, and (increasingly during the last three years) cable boxes. In addition, MPA members have launched multiple new streaming services in recent years. [Disney+](#), [HBO Max](#), and [Peacock](#) all offer subscription access to long-time favorites and original programming/movies. HBO Max is currently even making Warner Bros. movies available for streaming for a 31-day period at the same time the films premiere in theaters. For sports programming, [ESPN+](#) is available directly to consumers for \$5.99 per month providing access to exclusive live events, original studio shows, and acclaimed series that are not on the ESPN networks, as well as on-demand access to an extensive archive of ESPN content. [Paramount+](#), which will offer movies from Paramount as well as television shows from other Viacom properties such as *CBS*, *BET* and *Comedy Central*, is scheduled to launch in March 2021.² And streaming services offered by non-MPA members are also proliferating, including [Apple TV+](#), [Discovery+](#), and many others. Streaming services offer consumers access to numerous titles for low monthly fees. For instance, basic access to *Hulu* is currently available for \$5.99 per month (or \$1.99 for college students) or \$59.99 for a year; *Disney+* is available for \$6.99 per month, or \$69.99 for a year; basic *Netflix* access is available for \$8.99 per month; and *Amazon Prime Video* is free to Amazon Prime members. Streaming services are also frequently included in cable television provider bundles. Many titles available on streaming services may also be downloaded for offline viewing while the user remains a subscriber.

Several of these services have also increasingly offered add-on subscription access to additional sources of programming. For example, *Hulu* provides subscription access to *HBO Max*, *Cinemax*, *Showtime* and *Starz*, news networks, broadcast networks and sports programming including on ESPN. This includes *Hulu's Live TV* option where consumers can view more than 65 live and on-demand TV channels on Roku, Android devices, iOS devices, Xbox One, Nintendo Switch, Playstation, Apple TV and Chromecast. These types of services allow for the use of multiple devices by a single account, which enables access throughout a household by multiple family members simultaneously.

(f) *Cable, Satellite, IPTV and Fiber-Optic Subscriptions*

Subscription television providers like [Comcast Xfinity](#), [Cox](#), [Spectrum](#), [AT&T TV](#), [Verizon Fios](#), [DISH Network](#), [DIRECTV](#), and [Sling TV](#) continue to offer large numbers of channels for real-time, in-home viewing. In addition, their on-demand and remote access options continue to grow rapidly and to enable access for subscribers to watch live programming. A subscriber to *Comcast Xfinity*, for example, can, on a laptop or mobile device, sign into an account, and watch all of the content stored on an in-home DVR associated with that account. The consumer can also order on-demand movies and TV shows on mobile devices, for limited-time rental or for long-term access. They may also watch linear and on-demand programming from various channels via computers or through apps on mobile devices, smart televisions or other connected devices simply by authenticating their cable or satellite subscription. For example, the same *Comcast Xfinity* subscriber can access the [Disney Now](#) app for free on their mobile device, AppleTV, Roku or other device to watch the live, linear stream of the *Disney*

² Brett Molina, [Streaming service Paramount+, featuring content from CBS, Viacom, to launch March 4](#), USA TODAY (Jan. 19, 2021).

Channel, Disney Junior and Disney XD, as well as to obtain on-demand access to a library of popular shows, shorts, and other content. These “TV Everywhere” services have revolutionized the way consumers enjoy their television and on-demand programming.

(g) *TV Shows and Movies Accessible Directly From Networks and Apps*

Networks continue to make more and more programming available for viewing directly to consumers, including back catalogues of programming and even live viewing of linear content, through websites and mobile applications, often for free (usually in exchange for watching advertising). For example, abc.com and the [ABC mobile app](#) allow free, ad-supported access to recent episodes of popular TV shows and full seasons of many “throwback” favorites. New episodes stream on-demand the day after they air for authenticated subscribers of cable and satellite provider partners. In addition, consumers have increasingly greater options for viewing movies and TV shows on ad-supported free video-on-demand (“AdVOD”) streaming platforms, such as *YouTube*, [IMDb TV](#) and [Tubi](#). These AdVOD platforms allow viewers to stream a variety of content via multiple devices without having to pay a fee to access such content.