

Before the
U.S. COPYRIGHT OFFICE, LIBRARY OF CONGRESS

In the Matter of
Section 1201 Study
Docket No. 2017-10

**Response of the Electronic Frontier Foundation, New Media Rights, and
Organization for Transformative Works to Post-Hearing Questions**

Proposed Class 1 – Audiovisual Works – Criticism and Comment

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In its May 21, 2018 post-hearing letter, the Office sought further input as to whether screen capture is an “alternative” to circumvention in non-film studies or similar courses. As an initial matter, we note that because representatives from the producers of these programs have never participated in these proceedings, the Office lacks a full picture of any particular program, including whether it constitutes circumvention or how usable it might be for a student or professor using a standard computer. Notably, Opponents’ own audiovisual evidence begins with a screen captured clip—literally *in media res*—rather than showing how an ordinary Mac or Windows users could produce such a clip. Proponents, by contrast, have submitted substantial documentary evidence that many providers at different parts of the delivery chain (including Apple and Netflix) use measures that prevent screen capture. And the stark reality is that educators will do what works for them, thus putting them at risk of violating the DMCA while making concededly fair uses.

All these concerns aside, the Office should not endorse a rule that requires the use of degraded footage in the average classroom. For example, the Office should look to the experience of Professor Rebecca Tushnet a professor at Harvard Law School as well as a co-founder of Class 1 Proponent Organization for Transformative Works. She uses audiovisual examples extensively in teaching her courses, which include Advertising Law, Trademark Law, Copyright Law, and Property.

High quality video is incredibly important to today's students, who I have found will be distracted or diverted from the point of the example (the claim made in an ad, the way a trademark was presented in a movie, etc.) if they can't see the details to which they've become accustomed. Pedagogically, students who are laughing at bad quality are likely to be missing the substantive point.¹

There are also numerous occasions in which details are important. The issue of de minimis use, for example, often puzzles copyright students. For a long time, I had only a pixelated, blurry clip from the Roc episode at issue in Ringgold v. BET, the important Second Circuit case on de minimis use. When I finally acquired a better quality version, students expressed far less frustration in distinguishing Ringgold from the cases finding de minimis use in movies; I was able to show them the differences in Se7en, What Women Want, and Coming to America and they were able to perceive the evidence as actual watchers would have seen it.

Similarly, students appreciate the reasoning of cases such as the Hangover II case when they see how the (alleged) Louis Vuitton knockoff suitcase actually appeared in the movie, or how Spa'am the Muppet appeared in Muppet Treasure Island. Because I've been teaching with audiovisual materials for well over a decade,² I have seen changes in student reaction, and I have been particularly sensitized to how student expectations have changed, so that I have to get better copies of older material or stop using it. Without high quality, students focus on the difficulty perceiving the material—which also has important implications for their thinking, since

¹ Students are people; they behave like people outside the classroom. See, e.g., Chris Tribbey, *Verizon: Online Viewers Expect TV-Quality Video*, *Broadcasting & Cable*, Jun. 29, 2016, <http://www.broadcastingcable.com/news/technology/verizon-online-viewers-expect-tv-quality-video/157690> (“[A] new consumer survey from Verizon Digital Media Services (VDMS), . . . found that online video service providers can increase video viewership by 25% by providing a high-quality viewing experience. . . . “It’s clear that poor video quality results in high rates of viewer abandonment,” a summary of the report reads.”).

² See Rebecca Tushnet, *Sight, Sight, Sound and Meaning: Teaching Intellectual Property with Audiovisual Materials*, 52 *St. Louis U. L.J.* 891 (2007).

difficulty in processing can trigger negative emotions about the subject matter.

This experience is consistent with the extensive research, which has not been contested in any particular by the Opponents, indicating that video quality contributes to the salience, understandability, and persuasiveness of the messages contained within the video.³ These qualities are essential to any educator using audio-visual works, as research bears out Professor Tushnet’s observation that difficulty in perceiving material leads to negative reactions to the content of the material.⁴

³ See, e.g., Jordan S. Gruber et al., *Video Technology*, 58 Am. Jur. Trials 481 §50 (2018) (noting that “the quality of the image will greatly affect the persuasive power of the evidence” and recommending obtaining the highest technologically feasible quality); Sanorita Dey et al., *The Art and Science of Persuasion: Not All Crowdfunding Campaign Videos Are The Same*, CSCW 2017 - Proceedings of the 2017 ACM Conference on Computer Supported Cooperative Work and Social Computing (pp. 755-769) (finding that “The perceived quality of audio and video was the most frequently mentioned factor for all three [Kickstarter] project categories [tested] (n = 690). [Survey respondents] strongly criticized lower quality audio and video in their comments,” including low resolution; for all three types of campaigns studied, audio-video quality had the most significant/positive associations with the outcome of the campaigns); Karl F. MacDorman et al., *Gender Differences in the Impact of Presentational Factors in Human Character Animation on Decisions in Ethical Dilemmas*, 19 Presence 213, 214-16 (2010) (finding that motion quality or jerkiness and photorealism or the lack thereof affected the persuasiveness and effectiveness of evidence for male respondents); Robert E Smith et al., *Modeling the determinants and effects of creativity in advertising*, 26 Marketing Science 819–833 (2007) (explaining marketing value of high-quality video); John G Beerends & Frank E De Caluwe, *The influence of video quality on perceived audio quality and vice versa*, 47 Journal of the Audio Engineering Society 355–362 (1999) (noting importance of video quality for effectiveness); Lee et al., *Assessment of Motion Media on Believability and Credibility: An Exploratory Study*, 36 Public Relations Review, pp. 310, 312 (2010) (finding that high production values improve video credibility); Miriam J. Metzger et al., *Social and Heuristic Approaches to Credibility Evaluation Online*, 60 Journal of Communication 413-439 (2010) (finding that technical quality characteristics online are often more important than the quality of arguments).

⁴ See, e.g., Leonie Huddy & Anna. H. Gunnthorsdottir, *The Persuasive Effects of Emotive Visual Imagery: Superficial Manipulation or the Product of Passionate Reason?*, 21 Pol. Psychol. 745, 747-48 (2000) (explaining the process of “affect transfer”); Ellen C. Garbarino & Julie A. Edell, *Cognitive Effort, Affect, and Choice*, 24 J. Consumer Res. 147, 148 (1997) (explaining that increased cognitive effort often leads to negative affect towards the source demanding the effort).