

# Fair Use, MOOCs, and the Digital Millennium Copyright Act: Frequently Asked Questions

In October 2015 the Librarian of Congress issued new rules permitting certain teachers of Massive Open Online Courses (MOOCs) to break encryption on DVDs, Blu-Ray discs and streaming videos to create short clips for use in their teaching. It's a major step forward for MOOC teachers and their students. This document, prepared by Professors Peter Decherney and Brandon Butler, answers some of the most common questions you might have about the new rule.

## What's a MOOC?

A massive open online course or MOOC is a course available online for free on a mass scale. These courses are often offered by universities and colleges, although they may be offered by museums and other institutions as well.

## What's fair use?

Fair use is a user's right in U.S. copyright law that allows for the reproduction of copyrighted material without permission when an appropriate amount of the work is being used for a new and socially valuable purpose, rather than as a substitute for the original work. Using excerpts of historical documents or works of entertainment for teaching and research, for example, often qualifies as fair use, so long as the portion used is appropriate to the scholarly or pedagogical purpose. Consult community [best practices](#) to learn more.

## What's the DMCA?

The 1998 Digital Millennium Copyright Act made it illegal to bypass the locks (aka copy protection, encryption, and Digital Rights Management) on digital media. DVDs and Blu-ray discs, for example, contain such locks, which must be bypassed to copy clips from the films stored on them. Users may not get around these locks for any reason, even if their purpose would otherwise qualify as fair use.

Every three years, however, the Library of Congress creates exceptions to this rule when fair use is blocked by the DMCA. In the past, exceptions have been created for professors and students using digital media for teaching and course assignments. Other exemptions have allowed cell phone users to connect their phones to different cell carrier networks and noncommercial filmmakers to make clips for use in remix films, such as fan videos.

## **What does the new rule say?**

The 2015 ruling creates a DMCA exemption for MOOC faculty from accredited nonprofit educational institutions who create short clips for use in their courses, allowing them to copy clips from protected DVDs, Blu-Ray discs, and streaming videos so long as the course or lecture requires “close analysis” of the clip. The MOOC, however, must be offered by a nonprofit organization, and access to the clips must be restricted to enrolled students. The MOOC must further prevent dissemination of the clips outside of the course.

## **Coursera and Udacity are for profit companies. Can they take advantage of the exemption?**

Coursera and Udacity are the platforms. Colleges, universities, museums, and other nonprofit organizations offer courses through these platforms. The organization that creates the course must be an accredited nonprofit educational institution, but the provider of the software platform may be for-profit. So a university course offered through Coursera may take advantage of the exemption.

## **How can the material be restricted to students enrolled in the course?**

We believe that use of passwords provided only to enrolled students will sufficiently limit access to the course content to students or learners.

## **How can redistribution be prevented?**

Offering streaming rather than downloadable versions of the course content should reasonably limit unauthorized redistribution of the work. Unfortunately, this unfairly disadvantages learners with slower internet access.

## **What does this mean for still images or audio files?**

Although the exemption only covers motion pictures (including TV and other video), it also brings good news for the use of other media in MOOCs. The Copyright Office would not have recommended that this exemption be created if its staff did not think the use of media in MOOCs often qualified as educational fair use.

Most still images and audio files are not encrypted, they don't have the digital locks that DVDs and Blu-ray discs have. As a result, they are generally not affected by the DMCA's ban on circumventing or unlocking digital media. So these works do not need an exemption. They only need to be subjected to a fair use analysis.

## **Do the clips need to be made by faculty members or can TAs or staff help?**

The exemption does explicitly mention “relevant staff,” so in our reading a faculty member may authorize an assistant to make the clip on his or her behalf.

## What does the exemption actually say, so I can show it to my university general counsel?

(b) Classes of copyrighted works.

Pursuant to the authority set forth in 17 U.S.C. 1201(a)(1)(C) and (D), and upon the recommendation of the Register of Copyrights, the Librarian has determined that the prohibition against circumvention of technological measures that effectively control access to copyrighted works set forth in 17 U.S.C. 1201(a)(1)(A) shall not apply to persons who engage in noninfringing uses of the following classes of copyrighted works:

(1) Motion pictures (including television shows and videos), as defined in 17 U.S.C. 101, where circumvention is undertaken solely in order to make use of short portions of the motion pictures for the purpose of criticism or comment in the following instances:

...

(v) By faculty of massive open online courses (MOOCs) offered by accredited nonprofit educational institutions to officially enrolled students through online platforms (which platforms themselves may be operated for profit), for educational purposes, where the MOOC provider through the online platform limits transmissions to the extent technologically feasible to such officially enrolled students, institutes copyright policies and provides copyright informational materials to faculty, students and relevant staff members, and applies technological measures that reasonably prevent unauthorized further dissemination of a work in accessible form to others or retention of the work for longer than the course session by recipients of a transmission through the platform, as contemplated by 17 U.S.C. 110(2),

A) Where the circumvention is undertaken using screen-capture technology that appears to be offered to the public as enabling the reproduction of motion pictures after content has been lawfully acquired and decrypted, or

(B) In film studies or other courses requiring close analysis of film and media excerpts where the motion picture is lawfully made and acquired on a DVD protected by the Content Scramble System, on a Blu-ray disc protected by the Advanced Access Control System, or via a digital transmission protected by a technological measure, and where the person engaging in circumvention reasonably believes that screen-capture software or other non-circumventing alternatives are unable to produce the required level of high-quality content.

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*See <http://www.copyright.gov/1201> for the complete rules, and more.*

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