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LIBRARY OF CONGRESS

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COPYRIGHT OFFICE
SECTION 1201 ROUNDTABLE

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WEDNESDAY
APRIL 11, 2018

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The Section 1201 Roundtable met in the Mumford Room, James Madison Building, 101 Independence Avenue, S.E., Washington, District of Columbia, at 9:00 a.m., Regan Smith, Deputy General Counsel of the U.S. Copyright Office, presiding.

PRESENT

- REGAN SMITH, Deputy General Counsel of the U.S. Copyright Office
- KEVIN AMER, U.S. Copyright Office
- ANNA CHAUVET, U.S. Copyright Office
- STACY M. CHENEY, National Telecommunications and Information Administration
- EMMA KLEINER, U.S. Copyright Office
- JASON SLOAN, U.S. Copyright Office

ALSO PRESENT

- ANGEL ANTKERS, Samuelson-Glushko Technology Law and Policy Clinic
- SHAIA ARAGHI, UCI Intellectual Property, Arts, and Technology Clinic
- JOVAN C. ARDY, UCI Intellectual Property, Arts, and Technology Clinic
- PATRICIA AUFDERHEIDE, American University

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JONATHAN BAND, Library Copyright Alliance
KEITH CHATFIELD, SolaByte
PETER DECHERNEY, Joint Educators
MICHAEL C. DONALDSON, Film Independent,
International Documentary Association,
Kartemquin Educational Films, Inc.,
Independent Filmmaker Project, University of
Film and Video Association, The Alliance for
Media Arts + Culture ("Joint Filmmakers")
CRISTEN FLETCHER, UCI Intellectual Property,
Arts, and Technology Clinic
RENEE HOBBS, Media Education Lab
JACK LERNER, UCI Intellectual Property, Arts, and
Technology Clinic
PETER MIDGLEY, Brigham Young University
SUSAN MILLER, Samuelson-Glushko Technology Law
and Policy Clinic
JOHN MITCHELL, OmniQ
JIM MORRISSETTE, Kartemquin Educational Films,
Inc.
BLAKE REID, Samuelson-Glushko Technology Law and
Policy Clinic
BRIANNA SCHOFIELD, Authors Alliance
BRIAN TAMSUT, UCI Intellectual Property, Arts,
and Technology Clinic
HEIDI TANDY, Organization for Transformative
Works
DAVID J. TAYLOR, DVD CCA
BRUCE TURNBULL, AACS LA
JOSH WELSH, Film Independent
LAUREN WERTHEIMER, UCI Intellectual Property,
Arts, and Technology Clinic
J. MATTHEW WILLIAMS, Joint Creators II

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1-B Flash drive of video filed by DVD Copy
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P-R-O-C-E-E-D-I-N-G-S

9:02 a.m.

1
2
3 MS. SMITH: All right. So, we are
4 encouraged to start, so Anna is setting up the first
5 presentation. I will get started and just explain
6 what the process is. I see a couple of new faces,
7 although I also see some people who this is not their
8 first time participating in a panel for the section
9 1201 Rulemaking.

10 My name is Regan Smith. I'm Deputy
11 General Counsel of the Copyright Office and I, along
12 with my colleagues here will be asking you some
13 questions. So I think first we'll briefly go around
14 and introduce ourselves.

15 MS. KLEINER: Emma Kleiner, Ringer
16 Fellow at the Copyright Office.

17 MR. AMER: Kevin Amer, Senior Counsel in
18 the Office of Policy and International Affairs at
19 the Copyright Office.

20 MR. SLOAN: Jason Sloan,
21 Attorney-Advisor in the General Counsel's Office
22 at the Copyright Office.

23 MS. CHAUVET: Anna Chauvet, Assistant
24 General Counsel at the Copyright Office.

25 MR. CHENEY: Stacy Cheney, Senior

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1 Attorney-Advisor at NTIA.

2 MS. SMITH: So the purpose, why we are
3 here, is to determine whether the Register of
4 Copyrights and the Librarian should ultimately
5 adopt and NTIA should recommend exemptions to the
6 prohibition on circumvention of technological
7 measures protecting access controls. And so we
8 will look at that with reference to the statute to
9 see whether there has been shown adverse effects
10 on non-infringing uses and also in reference to the
11 statutory factors under 1201(a)(1).

12 Everyone on this side has studied all
13 of your comments. Thank you for submitting them.
14 So our goal in the hearing is really to hone in on
15 the issues of factual or legal dispute. If we have
16 questions about the record or about how technology
17 works, to aid us in understanding that as we go
18 through the record.

19 So if you said it in your written
20 comments, we probably don't need it repeated so much
21 as expanded upon or drilling down with specific
22 questions that people may ask.

23 So a couple notes about the microphones.
24 We can only have I think four on at once and the
25 more on, the more feedback we receive. So after you

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1 are done speaking, if you press the button and turn
2 it off.

3 And we also noticed yesterday when cell
4 phones were too close to the microphones, it created
5 feedback. So if you could just keep your phone away
6 from the microphone.

7 So next I think I'd like briefly the
8 panelists to state their name and any affiliation
9 or interest they have with the category and then
10 we'll start with some presentations.

11 So Mr. Chatfield, if you could,
12 introduce yourself.

13 MR. CHATFIELD: Thank you. It's always
14 great to be back in the District, especially at these
15 times.

16 My name is Keith Chatfield, Founder and
17 CEO of SolaByte Corporation. It's a company that
18 was founded really to help the consumer actually
19 enable their capability to create libraries of
20 content legally. We have technology we've
21 developed and working prototypes of a system that
22 can actually create, and we'll show you that in a
23 little bit --

24 MS. SMITH: Right now, we just need the
25 name and introduction just because we are

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1 time-limited.

2 MR. CHATFIELD: Okay, I'm sorry.

3 MS. SMITH: So you will certainly get
4 the opportunity.

5 MR. CHATFIELD: I need a protocol droid
6 here. So sorry.

7 MS. SMITH: Yes.

8 MR. MITCHELL: So I'm John Mitchell, an
9 attorney representing OmniQ, of which I'm actually
10 a partner. Normally, I represent retailers since
11 1988, of movies, videos, and so forth but now I'm
12 sort of wearing the hat of entrepreneur for the first
13 time.

14 MR. WILLIAMS: Matt Williams from
15 Mitchell Silberberg & Knupp. I'm representing AAP,
16 ESA, MPAA, and RIAA.

17 MR. TURNBULL: Bruce Turnbull, counsel
18 to AACLS LA, LLC.

19 MR. TAYLOR: David Taylor, counsel for
20 the DVD Copy Control Association.

21 MS. SMITH: Okay, great. So we have two
22 brief presentations and we're going to start with
23 SolaByte, which we are calling 3-A and then OmniQ's
24 will be 3-B.

25 And so if you would like to walk up there,

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1 you can walk us through your presentation. This
2 class is Class 3 about space-shifting. And if you
3 could, try to focus on the areas relevant to the
4 exemption -- I don't know if there is additional
5 material in it -- and try to keep it to a few minutes,
6 that would be great. Because the focus will be --
7 yes, thank you.

8 (Whereupon, the above-referred to
9 document was marked as Exhibit No. 3-A for
10 identification.)

11 MR. CHATFIELD: Let me see if I can --
12 all right.

13 Thank you for having me. I'll move
14 through this as quickly as possible and, like you
15 say, I'll try to make it stick to the areas that
16 were under consideration.

17 Just SolaByte, very briefly, we are an
18 electronic new media solution developers and we have
19 actually -- we actually have a method for
20 space-shifting. We're actually moving content
21 based on licensed transactions, not moving the
22 files.

23 We're here to support OmniQ in their
24 proposal because there's a lot of good in that, we
25 believe, for the consumer, the ability to convert

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1 content from weak security to more robust forms of
2 security. We believe that companies that promote
3 interoperability across devices, and appliances,
4 and things like that is forward thinking and
5 actually expected technology or functionality for
6 this digital age. And companies have
7 future-proofed content so that they're less
8 vulnerable to platform app obsolescence is an
9 important interest of the public.

10 We also have -- we mentioned this
11 technology that we've developed. It's available,
12 you can view it on YouTube, a demonstration of it.
13 What it does, actually, is we've developed the only
14 capability, along with partners, for a digital
15 watermark to be inserted into read-only media,
16 optical media. So this is DVD or Blu-Ray. We use
17 this by adjusting --- using firmware within an
18 optical disc drive so the drive that you pop your
19 disc into to establish a digital watermark into it
20 --- this technology uses the laser and special
21 firmware and tracking software to actually locate
22 this digital watermark so it can actually be placed
23 in a specific location. It can also be used to
24 disable the drive or actually disable the disc in
25 the field.

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1 So these create the capability to enable
2 a controlled licensing transaction, where you can
3 trade in discs, disabled discs and register licenses
4 and move licenses without moving content.

5 MS. SMITH: Can I ask you a question?

6 MR. CHATFIELD: Yes.

7 MS. SMITH: Is this something you're
8 currently offering in the market?

9 MR. CHATFIELD: We have this technology
10 now at the -- basically, through patents. And now
11 we're offering it for licensing, yes, in the
12 marketplace.

13 MS. SMITH: Does it involve
14 circumvention of TPMs?

15 MR. CHATFIELD: No.

16 MS. SMITH: Okay. You can move on.

17 MR. CHATFIELD: No, you'll see.

18 So just an example, the use -- case
19 example of how this can be used. So let's say a
20 consumer wants to move their content to a new media.
21 The consumer would scan their disc and authenticate.
22 During this process it authenticates the media and
23 the content as being genuine. So it's not a copied
24 disc.

25 Once that's been confirmed by software,

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1 the content on the disc is identified and a license
2 is registered in the consumer's or actually the
3 owner's account. So they indicate they have this
4 genuine article of content they purchased.

5 The laser then renders the disc
6 inoperable. So basically, they have just destroyed
7 the disc by using the laser. This is the laser in
8 the optical disc drive.

9 MS. SMITH: Sorry. If you've destroyed
10 the disc, where does the content reside now, on the
11 hard disc?

12 MR. CHATFIELD: The content doesn't
13 reside anywhere, just a license record exists.

14 MS. SMITH: A license record, okay.

15 MR. CHATFIELD: So a license record is
16 established in the cloud. Now, if the consumer
17 wants to actually enable content to stream from the
18 cloud or from new media, that license record now
19 acts through a transaction that will allow them
20 access to a master in the cloud.

21 So in this method, there is -- they are
22 already existing -- we know they are already
23 existing masters of this content, electronic
24 digital form available and already produced. This
25 assumes that there's replacement content available

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1 on a server that they can now access because they've
2 registered their ownership and they have forfeited
3 their original content and just replace it with new.

4 MS. SMITH: In your authentication
5 process, there is no way to know if I bought a DVD
6 and then passed it to all of my friends, correct?
7 You're just -- how are you verifying whether it is
8 not copied?

9 MR. CHATFIELD: We authenticate the
10 disc originally to ensure that it's a genuine
11 article through examination of the properties of
12 the media. So we run through a process initially
13 to determine that that content is actually or that
14 disc is a genuine SKU, basically a purchased item.

15 MS. SMITH: It is not tied to a
16 transaction with a consumer or anything like that?

17 MR. CHATFIELD: No.

18 MS. SMITH: Okay.

19 MR. CHATFIELD: No, it hasn't -- we
20 didn't take it to the extent of trying to -- you
21 know it's very cumbersome for a consumer to come
22 up with a receipt so if they bought this disc or
23 whatever --- so basically the disc is owned by an
24 individual. Now what it can do, this process can
25 take a disc that is owned and it's been confirmed

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1 that it's a genuine article in possession of
2 someone, and then actually, then, render it not
3 usable.

4 There is also another use of the use case
5 that for time I didn't talk about, which is basically
6 more like disc to digital, if you're familiar with
7 that.

8 MS. SMITH: Okay. Maybe if you can
9 continue and get to how it relates to the prohibition
10 on circumvention.

11 MR. CHATFIELD: Okay. So what we
12 believe, first we would like to use this technology
13 to enable a recycling and archiving service that
14 takes consumers -- we estimate overall 13 billion
15 of these discs are floating around overall worldwide
16 and we would like -- this whole platform is actually
17 sunsetting. It is getting old in the marketplace
18 and being replaced. So a lot of these discs are
19 going to be aimed at the landfill, eventually.

20 We like to actually pull those off,
21 register their licenses and allow the consumer to
22 archive these discs or their content into a more
23 permanent library. So that's what we ask. We would
24 like to see how this is used.

25 And with respect to, I guess to make this

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1 short, what we are trying to do here is --- is we
2 support OmniQ because basically they are
3 accomplishing very similar means with another type
4 of technology, which we believe there is -- there
5 are ways to use technology here for the benefit of
6 the public and the consumer to keep law-abiding
7 American citizens have the ability to continue to
8 use their content in the future with an archive.

9 MS. SMITH: All right, thank you.

10 MR. CHATFIELD: You're welcome.

11 MS. SMITH: And now I think, Mr.
12 Mitchell, yours should be -- is getting queued up
13 right now. And this will be Exhibit 3-B.

14 (Whereupon, the above-referred to
15 document was marked as Exhibit No. 3-B for
16 identification.)

17 MS. SMITH: Again, if you can stick to
18 a few minutes and then we'll dig in on some
19 questions.

20 MR. MITCHELL: Yes, good morning. It's
21 a pleasure to be able to talk about this. As some
22 of the comments have suggested, we've been talking
23 about it for a very long time and we don't have it
24 at market yet. But we put in a lot of pages, a lot
25 of words but I thought I'd just run through a few

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1 illustrations to try to put a picture behind some
2 of those words.

3 So we've -- the group was working with
4 a number of veterans from the video industry is how
5 the idea started, just realizing that as video
6 stores are disappearing, the benefits of the first
7 sale doctrine were disappearing. A number of
8 efforts have been made to come up with a quote,
9 unquote digital first sale, but they always involve
10 something that is infringing on one of the section
11 106 rights, even as they try to mimic the first sale.

12 So what we came up with was a way to try
13 to restore the benefits of the first sale doctrine,
14 allowing -- one of the critical points, allowing
15 unlicensed redistribution. One of the problems, as
16 we've pointed out, is that whenever you insist that
17 the copyright owner has to give permission for any
18 transaction, it immediately presents those
19 opportunities to price things, according to how --
20 what benefits the copyright owner as opposed to the
21 public, in contrast to the secondary markets that
22 have flourished in the video era.

23 So what we do is -- there are two
24 components or three components I guess to this. One
25 is from a DVD, and the reason we're here is the DVD

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1 portion, is the ingestion process of a DVD. We take
2 a DVD and simultaneous -- as we're moving the content
3 to the hard drive, we're simultaneously destroying
4 the DVD. And we do this in a rapid fashion so that
5 we comply with the terms of the Copyright Act itself
6 and make sure that there are never two copies in
7 existence at the same time.

8 Once it's on the hard drive, then we can
9 transfer that in an encrypted format to a consumer
10 with only one encryption key that we do not get to
11 control. So once the consumer has it, there is no
12 way we can recover that or see it, or it doesn't
13 meet the definition of copy or fixation under the
14 Copyright Act.

15 To restore the data on our server,
16 someone would have to return it. There's no
17 obligation to return it unless it's a contractual
18 one but the consumer could have that on their hard
19 drive until the hard drive dies. But if the
20 consumer returns it under one of the business
21 models, then they no longer have access. They
22 cannot view it, reproduce it, or perceive it.

23 And if the key is never returned, it's
24 just like a broken disc in the mail with Netflix
25 -- somebody stepped on the Netflix envelope before

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1 it --

2 MS. SMITH: Have you developed your own
3 encryption technologies or are you using a
4 commercially-available encryption keying system,
5 or what system are you using?

6 MR. MITCHELL: Using
7 commercially-available. Our engineer has insisted
8 you don't need it anymore.

9 MS. SMITH: But what is it called?

10 MR. MITCHELL: Well, it's -- I don't
11 know what it's called but, from an engineering
12 perspective, it's simply encryption that is hard
13 enough -- we encrypt every packet as it's being --
14 or chunk, as we call it. So each chunk is encrypted
15 and --

16 MS. SMITH: Do you know of other
17 products that use the same encryption technology?

18 MR. MITCHELL: My understanding is that
19 this is essentially off the shelf encryption
20 technology that is widely available. It's sort of
21 a matter of how strong do you want to make it, in
22 terms of the number of bits and so forth.

23 In our case, we have essentially two
24 layers that very much ensure, from an engineering
25 standpoint, that by the time you were able to break

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1 it, the copyright would have expired. So we're
2 locked out. There's no back door, that sort of
3 thing.

4 So this slide simply summarizes that we
5 simultaneously move it from one platform to another.
6 And one key difference here is avoiding infringement
7 of any section 106 rights by non-reproductive
8 space-shifting. Nothing is performed publicly.
9 Nothing is reproduced. And here's where we
10 distinguish ourselves from some of the other efforts
11 that have been tried.

12 Zediva had tried to have the equivalent
13 of you don't have the -- they would keep their disc
14 and they would let you watch your disc from their
15 DVD player and the court said no, no, that's a public
16 performance. So everything was fine in terms of ---
17 it was fine for someone else to have your disc but
18 once they streamed it to you that was a public
19 performance.

20 With ReDigi, their patent, itself, said
21 step one, we make a copy. And step two was we go
22 about deleting all the other copies. So the court
23 basically said no, step one you already infringed.
24 So even if at the end of the process you still have
25 only one copy, to get to that process, you had more

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1 than one.

2 So in our case, we essentially stick
3 within the Copyright Office -- I mean the Copyright
4 Act, the terms of fixation and make sure that
5 essentially there is only one fixation at any
6 particular time.

7 We believe it really fits with a good
8 future proofing of the benefits of the first sale
9 doctrine. It's more secure than a DVD. Once it's
10 in our system, you can't just download one of the
11 thousands of rippers and rip your DVD and make
12 copies, no matter whether it was rented or sold.
13 Those can be done but not with OmniQ.

14 We believe it does reduce piracy by
15 having this more readily accessible. And when we
16 were fighting piracy back in the '80s, video rental
17 was so cheap that piracy was not as big a problem
18 as it was originally with the music industry, for
19 example, at a time when CDs would cost as much as
20 movies.

21 Importantly, we restore that
22 relationship between the copyright owner and the
23 copy owner and protect the benefits that Congress
24 had intended to enact back in 1909 with the first
25 sale doctrine.

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1 And again, the permissions-based system
2 essentially ignores a huge segment of our economy
3 that cannot afford to have the broadband multiple
4 subscriptions to Netflix, Hulu, and everything
5 else, or to pay full price for every copy that they
6 are able to privately perform.

7 So it's not a first sale doctrine issue
8 but we've tried to rest on the same principles of
9 the first sale doctrine, maintaining that right of
10 the owner to be able to redistribute. And I won't
11 go into further detail because it's in our pleadings
12 but essentially, that's the magic.

13 MS. SMITH: Okay, thank you very much.

14 I think, as we did yesterday, we're going
15 to try to divide the questioning into different
16 thematic areas or buckets. And I think the first
17 one maybe --- to keep you on the hot seat, Mr.
18 Mitchell, and ask some questions about the
19 presentation you just gave.

20 MR. SLOAN: Yes, Mr. Mitchell, so from
21 the presentation, from your comments, and from the
22 patent application you provide with your comments,
23 I just want to make sure we understand the
24 technology. And I understand some of these
25 processes may take a very short amount of time. We

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1 could be talking milliseconds, nanoseconds,
2 whatever but I just want to make sure that this is
3 the right chain of events.

4 That basically a small segment of the
5 disc is encrypted and then copied into volatile
6 memory. And I just mean copied generally. I don't
7 want to talk about transitory duration or anything
8 right now.

9 MR. MITCHELL: Okay.

10 MR. SLOAN: But it's encrypted. It's
11 copied into volatile memory. Then, the segment of
12 the disc is destroyed. Then the data in volatile
13 memory is copied into non-volatile memory and the
14 data stored in volatile memory is destroyed. And
15 then you repeat that for the next segment until the
16 process is complete. Is that, essentially, how the
17 technology works?

18 MR. MITCHELL: Yes, that's right.

19 MR. SLOAN: Okay and how does the
20 technology destroy the content on the disc?

21 MR. MITCHELL: We have -- we're
22 exploring two different avenues on that. One is an
23 actual physical scratching, if you will, of the
24 disc, and the other is more of a laser point
25 oriented. So the idea is that right after the laser

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1 is reading that segment of the disc, it's
2 immediately being erased as it passes.

3 MS. SMITH: Can I just back up? Is it
4 only limited -- does it need to start out on a disc
5 or if a film was downloaded or available in a limited
6 download, would that be something that your product
7 could also make use of to convert on your app?

8 MR. MITCHELL: Yes, in fact it could
9 apply to it if this were a copyrighted image, imagine
10 just having essentially a scanner combined with a
11 shredder, so that as it's scanning, it's shredding.
12 It can be anything that can be converted to digital.
13 It could even begin with analog like a printed
14 picture.

15 We didn't go into those since there was
16 no section 1201 issue related to taking books, for
17 example. Imagine Google Books, instead of just
18 scanning and letting people search for them, to
19 actually move the entire book to where libraries
20 can loan them.

21 MS. SMITH: Well, I think we're going to
22 hear in the next panel how some e-books do have TPMs
23 applied to them. So if there is circumvention, it
24 may be relevant if you're trying to circumvent more
25 than audio-visual works. But I think your petition

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1 is limited to circumventing TPMs protecting
2 audio-visual works, correct?

3 MR. MITCHELL: That's correct.

4 MS. SMITH: Okay.

5 MR. MITCHELL: And specifically on
6 disc.

7 MS. SMITH: Okay, so you are not asking
8 the Copyright Office to recommend an exemption for
9 circumventing material obtained via Netflix, or if
10 I download something through Amazon or the Apple
11 Store, and I own it myself but it exists -- it's
12 born digital to me, that would not be within the
13 bounds of what you're looking for?

14 MR. MITCHELL: That's right. We do
15 anticipate that, as this matures, similar to the
16 way the movie studios eventually embraced video
17 rental that they initially tried to kill, we expect
18 if this goes forward, there will be every incentive
19 for a copyright owner on a motion picture to say
20 look, forget the ingestion process. We'll give you
21 the pristine file, understanding that we give you
22 X number of copies, or sell you X number of copies
23 I should say, and you'll only have those X number
24 of copies in circulation.

25 MS. SMITH: Thank you.

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1 MR. MITCHELL: Yes.

2 MR. SLOAN: To come quickly to the actual
3 copies that are in volatile memory. So in your
4 comments and in the presentation, you used words
5 like instantly, and simultaneously, and
6 immediately, but how long exactly do they stay in
7 volatile memory?

8 MR. MITCHELL: We definitely will stay
9 within that window --- that I guess it was
10 Cablevision -- of less than 1.2 seconds but
11 certainly not minutes.

12 We're having to base --- sort of read
13 the tea leaves of case law as to what the courts
14 see as less than transitory duration or not more
15 than transitory, I guess the way -- not more than
16 transitory duration.

17 So if case law were to evolve that allows
18 greater flexibility, perhaps we read larger chunks
19 and if there are some efficiencies to be gained by
20 slowing down that process a bit. But generally
21 speaking, this would be we're talking milliseconds
22 of just reading and destroying data.

23 MR. SLOAN: And along the same lines,
24 when you say that the data is never in two places
25 at once. Is that, again in laymen terms, is that

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1 actually true or is that more that well there's not
2 a more than transitory duration copy in more than
3 two places at once?

4 For example, for however short a period
5 of time, it seems like there would have to be copies
6 both on the disc and volatile memory before the disc
7 gets erased and then again in volatile and
8 non-volatile before the volatile gets erased.

9 And I understand we might be talking
10 milliseconds, but is your statements about that
11 based on the fact that it's only milliseconds or
12 is there some other technological process going on?

13 MR. MITCHELL: It's based on two
14 elements. One is -- and I guess it's the way
15 Cablevision broke out the two elements. One is the
16 transitory duration. So even if it can be
17 perceived, reproduced, if it's for less than
18 transitory duration, it's not a copy.

19 But second, because of the encryption
20 going on as well, the system won't really allow you
21 to watch that movie in that millisecond of moments
22 that it's on there.

23 And because of the encryption, in a way
24 it's -- you mentioned the data being in two places.
25 You know I have data on this piece of paper that

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1 has ink. If that same amount of ink were rearranged
2 into a big Rorschach test blob, it may be the same
3 ink but it can't be -- the work that's on this page
4 cannot be perceived or reproduced from it. So it's
5 not a copy of the other. It's just the ink.

6 MR. SLOAN: Okay. And now kind of going
7 to the thing I'm left with at the end, so without
8 getting into whether the intermediate copies in
9 volatile memory are copies under the Act, the thing
10 I'm left with in the destination hard drive --- why
11 is that not a copy, as defined in section 101?

12 MR. MITCHELL: When you say a
13 destination hard drive, are you talking about the
14 consumer's hard drive?

15 MR. SLOAN: Yes. Yes, so I shifted it.
16 As I understand it, I'm shifting from the disc to
17 the hard disc of my computer, the hard drive of my
18 computer, right?

19 MR. MITCHELL: Yes. So one way of
20 saying it is that if I download it onto my P.C. or
21 my Mac, or whatever, my phone, that tangible medium
22 is the copy but it's not a reproduction of the work
23 I guess is a way of saying it.

24 MR. SLOAN: So you're not -- so you would
25 agree that the destination drive that the media --

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1 that the content is going to from the disc is a
2 material object in which the work has been fixed?

3 MR. MITCHELL: Absolutely.

4 MR. SLOAN: Okay and your argument is
5 that it's not a reproduction under 106(1) because
6 at the end of the process, I'm only left with one
7 thing, as opposed to two things?

8 MR. MITCHELL: And I would say yes, I
9 would say but during the process, you're still left
10 with one thing. So unlike ReDigi, where it was a
11 long process, at no point is there a reproduction,
12 and that re in reproduction I think is very
13 important. It's not a right of production. It's
14 a matter of it's a reproduction.

15 MS. SMITH: So if we abstract to this
16 level, your position essentially is there's always
17 only one thing, but the thing you start out with
18 is a different thing than the thing you end up with.

19 MR. MITCHELL: I don't want to be put on
20 saying it depends on what thing is but --

21 MS. SMITH: Well you started that one.

22 MR. MITCHELL: So when we're -- so it's
23 a different material object. But a blank piece of
24 paper is a material object until you print something
25 on it that may then be a copy of a copyrighted work.

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1 So, it is a different material object
2 but, from the standpoint of the right to reproduce
3 the work into copies, we believe that the proper
4 reading of that is the right of reproducing the work
5 onto any tangible medium now known or later
6 developed, and it's not a right to create tangible
7 media that contain works, I guess is what I mean.

8 MR. SLOAN: And just while we're on this
9 particular dialogue, do any of the opponents want
10 to interject anything into this?

11 MR. CHATFIELD: I have a number of
12 questions but it's probably not my role.

13 MR. WILLIAMS: I'm happy to speak --

14 MR. SLOAN: Mr. Williams.

15 MR. WILLIAMS: -- to a number of these
16 issues. I don't know if you want me to take all of
17 them on at once or just stick to one issue. But if
18 you want to cut me off, just let me know.

19 MR. SLOAN: Why don't we start with the
20 end copy?

21 MR. WILLIAMS: Okay, so yes, I think you
22 can set aside the question of whether the temporary
23 copies that they say will reside in their server
24 for less than 1.2 seconds are actionable copies or
25 not. And they still lose a case under the

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1 reproduction right.

2 It's irrelevant whether the server copy
3 is existing for more than a transitory duration,
4 as long as the new material object in which the work
5 resides at the end user's point is a copy and it
6 is clear that it is. I think he just admitted that
7 it is.

8 And ReDigi, as well as the cases who have
9 cited it in support all say that it doesn't matter
10 whether the original copy was deleted, as long as
11 there's a new copy on the end user's computer.
12 That's a reproduction and that goes back to cases
13 like Marobie that dealt with an internet service
14 provider using temporary copies to deliver a copy
15 to an end user. They made a very similar argument
16 to the court. The Northern District of Illinois
17 said that's a copy.

18 So I think you can set aside the
19 temporary copy issue, if you want to, but I'm happy
20 to talk about that issue as well.

21 MR. SLOAN: I'd like to give Mr.
22 Mitchell an opportunity to respond in terms of
23 ReDigi and the end thing not being a reproduction,
24 what your basis for that position is.

25 MR. MITCHELL: Okay and so with ReDigi,

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1 as I pointed out, it's unfortunate, I think, that
2 the court's language was very broad-sweeping. They
3 didn't have our particular process before them.
4 They were simply looking at ReDigi's own
5 representations that, step one, we make a copy, and
6 step two, we then delete.

7 So ReDigi's argument, which I
8 understand they're still making as far as a fair
9 use argument is concerned, that because at the end
10 of the process there is only one copy this should
11 constitute fair use but the fundamental difference
12 here is that we don't take that interim step of
13 making a copy and then deleting it.

14 So we don't think -- you know at most,
15 the sweeping view of ReDigi, that language is dicta,
16 as applied to a completely different factual
17 scenario.

18 MR. SLOAN: So your distinction is that
19 you see ReDigi more as reproduce and delete, as
20 opposed to yours is reproduce while delete.

21 MR. MITCHELL: Yes, and Congressman,
22 former Congressman Rick Boucher had introduced
23 years ago, he owns a forward and delete exemption
24 to the Copyright Act that didn't go anywhere but
25 it was, even the retailers and the folks I

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1 represented were saying wait a minute, how can you
2 be sure it was deleted. And there was a concern
3 about trust.

4 But the concept was there and
5 essentially that's ReDigi tech. We have simply
6 said look, let's back away from that --- let's read
7 the Copyright Act and let's work through that
8 existing process.

9 MS. SMITH: Mr. Williams?

10 MR. WILLIAMS: Yes, thank you. So I
11 think that's just a basic misunderstanding of the
12 issues that were raised in ReDigi. If you look at
13 the opinion, which I have in front of me, there's
14 a long discussion under the heading reproduction
15 right well before they get to fair use several pages
16 later. And they go through this exact argument that
17 well, not more than one copy existed at any given
18 time and, therefore, we're okay. And the court
19 rejects that outright and says it's incorrect. It
20 says that it's against the laws of physics to say
21 that the copy that was once on a disc or someone
22 else's hard drive is the same copy as the one that's
23 now in someone else's hard drive in a different
24 location.

25 They go through the dictionary

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1 definition of reproduction and they basically say
2 that to reproduce does not require that the initial
3 copy remained. So I just disagree with the
4 characterization of ReDigi. They do go on because
5 they found that a reproduction took place to discuss
6 fair use. But the case was not all about whether
7 the temporary copy or more permanent copy in
8 ReDigi's case was the only actionable copy.

9 The reasoning really turned on whether
10 the copy in the end user's home is a new copy that
11 is resident in a new material object and whether
12 that violates the reproduction right without regard
13 to what you do with the original copy, whether you
14 delete it instantaneously while you're copying it,
15 before or after. That was not the crux of the
16 reasoning there.

17 MR. MITCHELL: If I may briefly respond

18 --

19 MR. SLOAN: Yes, Mr. Mitchell.

20 MR. MITCHELL: -- on that.

21 So we do have that one ReDigi case. I
22 admit I don't like it. I think it was, at best, too
23 overbroad as applied to those very specific facts.

24 But in contrast to that, we do have case
25 law that, such as the C.M. Paula line of cases that

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1 the Supreme Court of Canada relied on to say moving
2 the fixation from one object to another does not
3 involve a reproduction. And our --

4 MS. SMITH: What would you say is the
5 American case that best supports your position? Is
6 this the ink transfer case?

7 MR. MITCHELL: C.M. Paula I think is the
8 most solid one and the Canadian Supreme Court's
9 Théberge case -- however that's pronounced -- goes
10 into a lot more detail in terms of the English
11 language. Let's leave aside the value of the case
12 law itself under Canada's Copyright Act, but they
13 do go into several pages of explaining what a
14 reproduction is, based on the English dictionary.

15 And our Copyright Act recognizes this.
16 In the very definition of fixation, they talk about
17 when you're reproducing this into a copy, they then
18 had to say oh, but oh, wait; under our definition,
19 the original copy -- if you want to talk about the
20 original copy, the original copy that the author
21 wrote out, that's not a copy. So they had to tack
22 on to the end of the definition of fixation oh, by
23 the way, this includes we will call it a copy, even
24 though it is not a reproduction.

25 So the section 101 definition fixes that

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1 little part of saying it's not a copy if it's the
2 only original one because there's no reproduction.
3 There's no exercise of the exclusive right to
4 reproduce the work into copies. It's the first one.
5 There's no reproduction.

6 I see you're puzzled over that.

7 MS. SMITH: I'm going to pull out my book
8 and let Mr. Williams speak to that while I look at
9 it.

10 MR. WILLIAMS: Yes, I'm not sure I'm
11 following but if I am, I think that is incorrect.

12 So the statute has two definitions that
13 are admittedly not that easy to unpack. So the
14 definition of fixed isn't just really a definition
15 of fixed. It's what it takes to be fixed in a
16 tangible medium of expression, so that something
17 becomes a copyrightable work for the constitutional
18 purpose of actually being copyrightable. So it's
19 not really just the definition of fixed.

20 And if you look at that definition, it
21 even refers to that being done with the authority
22 of the copyright owner, which clearly that's not
23 the type of copying he's talking about.

24 So there's some language in there that
25 is a little hard to parse, I think because really

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1 what that definition is trying to do is focus on
2 copyrightability as opposed to reproduction.

3 If you look at the definition of copies,
4 it's distinct and it doesn't refer to the transitory
5 duration language, for one thing. It just refers
6 to perception, or reproduction, or communication
7 through a machine or device.

8 I think the other language that you're
9 referring to is one of two things. In the fixation
10 definition, there's a sentence on the end that
11 basically says for broadcasting, if they're
12 simultaneously recording it as it's being
13 broadcast, you can treat that broadcast as a
14 copyrightable fixed work. That's just not at issue
15 here. It's a separate issue.

16 The other thing is that the definition
17 of copies actually says at the end, the first
18 fixation is a copy. So I think you said the
19 opposite. And I believe that it says the term
20 copies includes the material object in which the
21 work is first fixed.

22 So that is a copy at that time, even
23 though there is only one of it.

24 MR. MITCHELL: And that was essentially
25 the point I'm making, that that language is

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1 superfluous if that was already somehow included
2 in the term copies.

3 The focus here, I think, and it might
4 clarify it a little bit, it's right of reproduction.
5 What is the right of reproduction? The right to
6 reproduce the work into copies. And when we look
7 at the definition of copies, it does use the word,
8 you know that it's embodied that there is a fixation
9 requirement to be a copy. *Cablevision -- Cartoon*
10 *Network*, however you call it, was very clear in that
11 that there are these elements that you make to say
12 is it -- has the work been reproduced into a copy.
13 Maybe that's the bigger mouthful to say, has the
14 work been reproduced into a copy?

15 We cannot simply ignore the
16 reproduction part by saying here's a copy. It's a
17 different tangible medium than the other,
18 therefore, it's a reproduction. The Copyright Act
19 just doesn't work that way. It's a right of
20 reproduction.

21 MR. SLOAN: Mr. Williams, I see your
22 placard up.

23 We would like to move on to adverse
24 effects, unless you have something very brief.

25 MR. WILLIAMS: Yes, I would like to just

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1 -- unless you're going to come back to it, I would
2 like to address --

3 MR. SLOAN: I'm just mindful of the
4 time.

5 MR. WILLIAMS: Sure.

6 MR. SLOAN: If there's time at the end,
7 we can come back.

8 MR. WILLIAMS: -- the transitory
9 duration, though, I haven't really talked about yet.
10 So if you'll come back to that at some point, I'm
11 happy to move on.

12 MS. SMITH: I think now would be good to
13 say what you would like to say about *Cablevision*,
14 and then we'll move on.

15 MR. WILLIAMS: Sure. Sure.

16 So I won't repeat everything in our
17 filing about the differences between the Copyright
18 Office's previous conclusions and *Cablevision* but
19 I do want to point out a couple of things about the
20 statutory text that calls *Cablevision* into
21 question, in addition to all the other cases that
22 have not applied the law the same way.

23 And so one is that if you look at the
24 definition of fixation, the only place where it
25 refers to a period of more than transitory duration

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1 is after the words "otherwise communicated." And
2 there's no comma after "otherwise communicated."
3 So even if you wanted to say that "otherwise
4 communicated" requires something that lasts for
5 more than a transitory duration, there's no reason
6 to read that definition in a way that applies that
7 same qualification to perceptible or reproducible
8 instances of the work.

9 And so I don't think that there are
10 necessarily two prongs to that test. If you look
11 at the definition of copies, for example, there is
12 after the phrase "otherwise communicated" a comma,
13 and then it says "either directly or with the aid
14 of a machine or device." And that then applies back
15 to all of the previous terms that are referenced.

16 So that's one statutory way of reading
17 it that would not require a period of more than
18 transitory duration.

19 Another way of reading it is that it's
20 not just that the temporary copy has to exist for
21 more than a period of transitory duration but that
22 the copy that is enabled downstream from it is
23 capable of existing for that period of time. And
24 that's the way that the plaintiffs in *Cablevision*
25 presented the case. Judge Forrest, who is now on

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1 the Southern District bench, wrote the brief and
2 I would point you to that as another way of reading
3 it. And that all, again, sets aside the case law
4 in your previous conclusions.

5 I think you know why the analog cases
6 are inapplicable but I'm also happy to speak to that,
7 if you want me to.

8 MR. SLOAN: I think we're okay moving
9 on.

10 MR. MITCHELL: Could I respond briefly
11 just to say that this may be a novel interesting
12 argument to -- you know *Cablevision* is pretty well
13 the standard I would go with and the burden would
14 be on the copyright owner in an infringement action
15 to explain to some new court that *Cablevision* was
16 wrong and should not be followed. But I don't think
17 it's the purpose here for the Copyright Office to
18 overrule *Cablevision*. That's all.

19 MR. SLOAN: Thank you. So shift --

20 MS. SMITH: We're not overruling any --

21 MR. MITCHELL: I understand. I'm not
22 suggesting you are.

23 MR. SLOAN: Shifting gears over to
24 adverse effects, so as we understand it and as I
25 think you just said earlier, OmniQ's technology is

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1 not currently available and on the market, correct?

2 MR. MITCHELL: Correct.

3 MR. SLOAN: Do you have any idea when
4 yours or someone else's comparable technology might
5 be available for use?

6 MR. MITCHELL: It's sort of like my wife
7 asking when I'm going to finish the project around
8 the house but we've been going in various -- some
9 elasticity on our projections. We had started out
10 more optimistic. As we have explored opportunities
11 with different funding entities or different
12 partners, such as delivery over wireless, it seems
13 we get caught up quite often and the reason we're
14 here is wait a minute, I want to see how this shakes
15 out in terms of your getting over this one hurdle.

16 So at this point, I don't have any
17 projections as to when. We're still meeting pretty
18 regularly to push that boulder uphill and do have
19 conversations going on with potential partners and
20 funding sources but we don't have a market plan yet
21 to bring it to market.

22 MR. SLOAN: And just to clarify, the
23 reason you're asserting is a fundraising one as
24 opposed to a technological one?

25 MR. MITCHELL: Yes. Yes, from the

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1 technological standpoint, we've actually planned
2 that out on a fairly short period of time, the
3 engineers that would need to be hired. And we're
4 talking just a matter of a few months to pull the
5 technology together because the technology itself
6 is primarily built from existing technologies out
7 there.

8 MS. SMITH: Does it already exist in
9 beta?

10 MR. MITCHELL: No.

11 MS. SMITH: Okay and you don't have a
12 schedule to that because that would be dependent
13 upon the funding?

14 MR. MITCHELL: Right. And again, even
15 that would be dependent on do we need -- how do we
16 need to make the reproduction. So from the engineer
17 standpoint, they would say look, all we need to move
18 is the movie. And if you have a disc that has
19 different language tracks, and bonus material, and
20 so forth, that's not -- those other works are not
21 the ones we want to move. But if we had to do an
22 entire disc image in order to move this without
23 touching the CSS, then it becomes a lot more bloated
24 and inefficient and that sort of thing.

25 So sorting out some of these questions

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1 are fundamental to how exactly we develop the
2 project.

3 MS. SMITH: Okay. And Mr. Chatfield,
4 so your interest is just in -- is not in your company
5 engaging in circumvention because you have
6 protected the whole CSS, as Mr. Mitchell said, or
7 AACS. Is that correct?

8 MR. CHATFIELD: Yes, my company is not
9 involved with any form of circumvention and we don't
10 even touch the original content in CSS or in AACS,
11 basically.

12 MS. SMITH: Okay, thank you. I'm just
13 trying to understand what potential issues are at
14 issue in this class.

15 MR. CHATFIELD: Well, if I may just add
16 that part of this actually is involving the
17 capability to actually render the original --
18 disable it. And we do have technology in that area
19 that automates that process from an optical disc.

20 MS. SMITH: Thank you. Mr. Williams.

21 MR. WILLIAMS: Yes, I'm sorry. I don't
22 mean to keep interrupting but I just don't want to
23 let everything go un-responded to.

24 MS. SMITH: I do think I will say for the
25 two who have not spoken yet, if you want to speak,

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1 just tip your placard up and you know this is getting
2 a little more nitty-gritty than some of the classes
3 but feel free to chime in so we can make sure
4 everyone's heard.

5 MR. WILLIAMS: Sure. I just wanted to
6 respond to what you were saying about what's at issue
7 in this class. From my point of view, the SolaByte
8 technology is not at issue here. It was never
9 submitted into the record. There was a one-page
10 reply comment and then we hear for the first time
11 today about all of this.

12 He says there's no circumvention, so you
13 can't grant an exemption, of course, where there
14 is no circumvention at issue.

15 It sounded like what he was asking for,
16 and I saw one little bullet, but I don't think he
17 mentioned it expressly, is that he wants an
18 exemption to allow him to circumvent all the DVDs
19 he wants to to create master copies that he doesn't
20 have to get licenses for, so that then when he uses
21 his laser to destroy everyone's disc, he can sell
22 these copies to his users. And that would require
23 an exemption and it would be a very, very misguided
24 exemption that I think would run counter to
25 everything the Office has ever had to say about

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1 space-shifting.

2 He referred to licensed transactions
3 but if he needs to circumvent to get the master
4 copies, he must not be coming to my clients for the
5 licenses. So I'm very confused about that service
6 but I don't think you need to get into it because
7 it's really not in the record.

8 MR. CHATFIELD: Can I respond to that?

9 So the -- we have approached your clients
10 and had detailed conversations with respect to --

11 MS. SMITH: If you could just speak into
12 the microphone. Thank you.

13 MR. CHATFIELD: Thank you -- with
14 respect to licensing the replacement content. And
15 the clients actually are requiring a significant
16 amount. So it's basically an impractical request
17 from a funding standpoint.

18 They require a significant amount of
19 payments up-front, guarantees to license the
20 content for this use, plus the vast amount of
21 sources. So there are so many sources of this
22 original content that are owned, that it's very
23 difficult, actually, to license all the content from
24 all these different sources.

25 But if you just set aside -- if you just

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1 say, if you're looking at the studios, for example,
2 the majors, the six majors, we have approached four
3 of them and we continue to hear that they are happy
4 to license the content but they require a
5 significant amount of up-front money, which is
6 basically funding infeasible from a business
7 perspective.

8 We found that the investor perspective
9 on this is there are two huge roadblocks to progress
10 in accomplishing this. One is the amount of money
11 that is required in investing in this library.
12 Basically, you're just investing in getting
13 contracts with the studios you know.

14 So the other part of this is the
15 ambiguity. If there's ambiguity in terms of well,
16 are we going to be able to take the other course,
17 which is should there be an ability for the consumer
18 to actually or to be able to make these master
19 copies, some would suggest that there should be
20 under a fair use. Then, really, there is no money
21 to be made until that's clarified.

22 So we're asking the Librarian, the
23 Copyright Office to grant, yes, grant an exemption
24 that would allow the creation of these copies so
25 that the consumer can exercise their fair use rights

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1 of making their own personal copy.

2 The consequences of this from a fair use
3 perspective is low. I mean in terms of the market
4 and the four tests, it's very low. I mean so
5 basically, we keep the content in a secure form.
6 We actually improve the security of the content that
7 exists today. Therefore, we reduce the consequence
8 or the risk of piracy. We keep the honest people
9 that want to just create a library and archive of
10 their content, we give them the capability to do
11 that.

12 We do not believe --

13 MS. SMITH: Well --

14 MR. CHATFIELD: -- that the DCMA -- can
15 I finish -- should be used to create a toll booth
16 for the consumer's legal right to make a fair use
17 copy. Basically, that's the position that we hold.

18 MS. SMITH: I do agree with Mr. Williams
19 that this wasnot submitted in your written comment
20 and it's difficult to understand the business model
21 you are projecting now. So I will let him respond
22 on this.

23 And if you could perhaps speak to
24 licensing. It sounds as if this is something
25 valuable to the copyright owners, that might be

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1 useful to understand whether they are or are not
2 willing to license and if so, you know.

3 MR. WILLIAMS: Sure. And I'm here
4 representing MPAA, the trade association. And as
5 you know, they're all competitors so I can't get
6 into the specific licensing practices or
7 negotiations of each studio but it would not
8 surprise me, that if they are willing to license,
9 as he says they are, that there would be a
10 significant investment required to get a service
11 up and running. That's only the way it should be,
12 given the value of being licensed to sell some of
13 the most creative, expressive works in the
14 marketplace.

15 That doesn't mean services can't get off
16 the ground. We've got several pages in our
17 opposition comments listing all the various
18 licensees who are already in the marketplace
19 providing the exact same kinds of digital copies
20 that SolaByte claims it wants to provide. It's very
21 similar to Disc to Digital. It's very similar to
22 Movies Anywhere copies. It's very similar to a
23 bonus pack copy that's supplied with a Blu-ray disc.
24 And the Copyright Office has looked at all of that
25 a number of times in the past and said that really

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1 market demands are being met and that these types
2 of unauthorized, unlicensed businesses create
3 market harm under the fourth factor.

4 I'm not going to walk through all four
5 of the factors but you've done so a number of times
6 and all four of them weigh strongly against this
7 type of business model.

8 MR. SLOAN: Mr. Turnbull.

9 MR. TURNBULL: Yes, I would only add,
10 first of all, I think we would echo what Mr. Williams
11 is saying. So our silence isn't misunderstood.

12 But a lot of our focus was on exactly
13 how does this technology work. It doesn't work.
14 And I think the discussions that have gone back and
15 forth here just before demonstrates, number one,
16 that the technology does not actually exist in any
17 kind of demonstrable form. And secondly, the
18 discussion from SolaByte suggests a very different
19 kind of analysis, a fair use analysis, which, again,
20 is something that you all have looked at repeatedly
21 and said no for a library-ing, if you will, of
22 copies, circumventing the technology.

23 The other thing is that it's not at all
24 clear to me where the circumvention actually takes
25 place because is the copy coming off the disc still

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1 encrypted with either CSS and I know Mr. Mitchell
2 has now limited to DVD, although their statement
3 talks about Blu-ray repeatedly and AACCS repeatedly.
4 So, we responded as if it also covered AACCS and
5 Blu-ray but it's not clear whether the circumvention
6 -- whether the copy that's made retains the original
7 encryption and then there is circumvention of the
8 technology from the server copy or whether the copy
9 is decrypted as part of taking it off the disc, which
10 is done not in the drive but separately.

11 So it is very confusing.

12 MS. SMITH: I wonder if they know the
13 answer. Would you like to take Mr. Turnbull's
14 question?

15 MR. MITCHELL: So one point of
16 clarification, if I said DVD to the exclusion of
17 Blu-ray that was simply referring to all Kleenex
18 as a generic. I meant the optical disc.

19 So the only optical discs that we've
20 talked about specifically are DVD and Blu-ray. We
21 haven't talked about 4K technologies or those. But
22 I did not want to suggest that we were abandoning
23 the Blu-ray portion.

24 There are a couple of -- I think we --
25 there's an effort here to have us chase the wrong

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1 rabbit. That is, we've presented a technology of
2 how we would accomplish this but, fundamentally,
3 the question is if someone can, perhaps perfecting,
4 coming up with a different way of doing this, can
5 actually move the fixation from one material object
6 to another, just like was done in C.M. Paula, using
7 chemicals to lift the image and put it on another;
8 if someone can do that, the exemption should apply
9 to the non-reproductive moving of the fixation from
10 one material object to another, not we're granting
11 an exemption to OmniQ.

12 So I mean I don't expect to ever see the
13 regulations saying this is only limited to OmniQ's
14 patented technology as presented. It's the legal
15 concept that if there is no reproduction going on,
16 what is the right that is being infringed.

17 So I think with that being the proper
18 focus -- and then there was an interesting case Grady
19 v. Iacullo, April 18, 2016 case out of the District
20 Court of Colorado, which followed *Cablevision*,
21 noting that its own District Court had not followed
22 *Cablevision's* definition. But they point out that
23 the party with the burden of proof, it's the
24 plaintiff's burden to provide evidence that
25 defendant's conduct constituted copyright

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1 infringement or, more accurately, the defendant's
2 sharing of the thumbnail images resulted in the same
3 being copied to RAM of the defendant's computer for
4 more than transitory duration.

5 So even as we get into issues of
6 transitory duration and that sort of thing, it's
7 still the plaintiff's burden to show that a
8 reproduction actually took place. And I think it
9 would improper for our technology to be held back
10 because we first have to go to court and prove that
11 our technology does not infringe. It doesn't work
12 that way.

13 There's a First Amendment right to get
14 these things out there. And while the Copyright
15 Office -- I mean the Copyright Act is an exemption,
16 to some extent, to the First Amendment, it doesn't
17 obliterate it. So unless, and the Supreme Court's
18 been clear on this, unless the copyright owner can
19 point to a specific 106 right, and there is no 106
20 right of access, it's a reproduction right and
21 that's where the focus should be.

22 If we can accomplish this without
23 reproduction, the exemption would cover us. If we
24 try it and fail and get sued for infringement because
25 we ostensibly use the exemption but it didn't work

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1 the way we had planned or a court rules that we did
2 it in 2 seconds, as opposed to 1.2 and that's too
3 long, so be it. But that's something for the courts
4 to decide as to whether we pulled off. All we're
5 looking for is an exemption to use the Copyright
6 Act in a way that doesn't touch on any of the
7 exclusive rights of the copyright owner.

8 MR. AMER: So to that point, we've said
9 in this proceeding pretty consistently that we are
10 not supposed to break new legal ground. And so
11 we've pretty consistently looked for controlling
12 or at least pretty substantial precedent before
13 we're going to take the step of saying that something
14 is likely a non-infringing use.

15 I know you've addressed this to some
16 extent in responding to Ms. Smith's question about
17 sort of what the strongest case you have, but I mean,
18 can you sort of respond to that concern about whether
19 we would need to sort of be going out on a limb,
20 given the state of the case law? Can you give us
21 anything? I mean is the best case -- I guess you
22 answered this before, but can you give us anything
23 beyond the case about moving the ink, the Canada
24 case you mentioned, that would sort of give us some
25 sort of solid legal basis for reaching the

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1 conclusion that you're asking us to?

2 MR. MITCHELL: Well, the -- and I
3 started to go down the path of looking at all the
4 Canadian cases that have followed the Théberge
5 decision. It's very solid law, not been questioned
6 in Canada. But, again, that's Canadian law, so I've
7 left that aside.

8 But C.M. Paula has stood the test of
9 time, and in cases that assessed whether C.M. Paula
10 applied, the courts have been able to make the
11 distinction, for example, when the image was used
12 as a backdrop to layer on brush strokes and so forth
13 to actually oil paint over the photograph to say
14 well, wait a minute, that's a derivative work.
15 That's something different because you're
16 essentially using the original to trace out or to
17 make the copy.

18 But there's been no -- there have been
19 other cases that have followed C.M. Paula,
20 essentially, or making that distinction are you
21 doing what happened in C.M. Paula or something else.

22 But the fundamental piece here I think
23 is from the Copyright Act itself. In 1976, Congress
24 did try to future-proof it and that language of now
25 known or later developed, the idea is to have these

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1 principles apply. So if something applies to ink
2 on paper or to grooves in a vinyl record, or to
3 magnetic impulses on a cassette tape, or to however
4 it's done with the DVDs, no matter what the
5 technology is, the principles should remain the
6 same, and that seems to be what Congress was trying
7 to establish when they said, oops, we left out piano
8 player rolls. Let's just now say any technology now
9 known or later developed.

10 So when we simply reverse that, if in
11 fact the court is making law based on one technology
12 that was developed at that time, the same principles
13 should apply to any technology now known or later
14 developed. And if Congress, as it did with record
15 rentals to create an exemption to the first sale
16 doctrine on certain computer software and rentals,
17 Congress was the one to come in and say, ah, this
18 new technology changes things; we're going to change
19 the Copyright Act to create an exemption, the public
20 performance right and the digital performance
21 right, and the sound recordings was one, where,
22 again, Congress could have simply said it doesn't
23 apply and they thought well, for digital, we'll make
24 it different. And their distinguishing factor was
25 digital. But that's Congress's decision.

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1 And so right now, I would say you take
2 the precedent and apply it to any technology now
3 known or later developed.

4 MR. AMER: Yes, and I appreciate that,
5 and I don't want to belabor this, but I mean you
6 raised this sort of point about --- I mean this sort
7 of reminds me of sort of the analysis in Aereo. Do
8 we look at sort of the behind the curtain, you know,
9 functionality of what's going on here? But I wonder
10 which way that cuts. I mean if it's sort of
11 well-established that the reproduction right gives
12 the copyright owner the exclusive right to control
13 the making of copies of his or her work, and it's
14 well-established in the case law that we don't care
15 what happens to the original copy, so long as, you
16 know, there are reproductions being made, why should
17 it make a difference that -- whether the destruction
18 of the original happens a few minutes later, or a
19 few seconds later, or, in your case, almost
20 simultaneously?

21 I mean if we are to sort of take your
22 lead and analyze this from sort of, you know, the
23 perspective of not looking at sort of the behind
24 the curtain technology but what is this, what's
25 going on here, I just wonder if that sort of helps

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1 you in the way that you're arguing.

2 MR. MITCHELL: You know I sort of go back
3 to Rick Boucher's forward and delete technology.
4 That was a decision Congress could have rejected
5 a proposal to say look, if you forward it to someone
6 else, that's okay as long as you delete it. You
7 know, that's a call Congress could make.

8 MS. SMITH: Did that also not help you,
9 since that was a bill introduced that was not passed?

10 MR. MITCHELL: Well, I think it's
11 neutral in terms of whether it helps us or not. That
12 is, clearly, that won't involve making a copy. You
13 share the copy, someone makes the copy, and after
14 that's done you delete it. So it fits more the
15 ReDigi type of situation. If you made the copy
16 first --

17 MR. SLOAN: But wouldn't the -- if
18 Congress saw a need for that kind of amendment,
19 wouldn't that imply that the current Act doesn't
20 permit it?

21 MR. MITCHELL: Well the current Act
22 would not permit what Rick Boucher was suggesting
23 of me forwarding you my copy of the movie and then
24 deleting it. I agree. So we needed a change on
25 that.

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1 But when it comes down to the technology
2 being used, if someone says I give you a license
3 to reproduce my haiku poem and that's the license,
4 do I reproduce it on the back of my car, or on a
5 piece of paper, or somewhere else, it's a licensed
6 reproduction of that poem onto something else, but
7 the Copyright Act doesn't cabin the copyright
8 owner's rights to say you can only exercise your
9 rights with certain technologies. Nor does it
10 limit the users on the other end to say well, if
11 that technology didn't exist at the time the Act
12 was passed, all bets are off.

13 MS. SMITH: I'm sorry I interrupted you.
14 I don't know if you had more to say in response to
15 Mr. Amer's question. I just wanted to make sure you
16 felt that you could address his question.

17 MR. MITCHELL: Okay, thank you, and
18 there's been some water under the bridge, so maybe
19 I should turn it back and say did I miss one of the
20 points?

21 MR. AMER: No, I think we can move on.

22 MR. MITCHELL: Okay.

23 MR. AMER: Thank you.

24 MR. MITCHELL: I did want to be
25 responsive. Thank you.

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1 MR. CHATFIELD: I would like to add --
2 so from what I understand, Kevin, your position is
3 that Copyright Office cannot create law. So we
4 started this conversation around the issue of
5 creating law, it appears. Is that -- that's what
6 I heard you say or that was the issue you sort of
7 introduced to start, broadly?

8 MR. AMER: Right. I mean, generally,
9 yes. I mean we've just said that we don't break new
10 ground in this proceeding and sort of go out on a
11 limb beyond -- get ahead of the courts in determining
12 non-infringing uses.

13 MR. CHATFIELD: But you do have the
14 authority to actually grant these exemptions and
15 interpret areas of ambiguity in the law and provide
16 interest -- and provide input and counsel to
17 Congress, correct?

18 MS. SMITH: So the Copyright Office
19 serves a variety of functions related to copyright
20 law. So we do advise Congress, when requested, on
21 ways to change the law.

22 In terms of the section 1201 Rulemaking
23 we need to address under the statute our regulatory
24 authority, which asks us to look at whether the
25 activity at question is likely to be non-infringing.

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1 And so based on that, we have said we are not looking
2 to break new ground on to ways where something may
3 or may not be non-infringing, but we have also said
4 there does not need to be an exact dead-on case on
5 point in order for us to draw an inference as to
6 whether something is likely to be non-infringing
7 or not.

8 So our past Copyright Office
9 recommendations, as well as our 1201 policy study,
10 sort of goes into the standard the Office will apply
11 when we evaluate the exemptions.

12 MR. CHATFIELD: So it just seems very
13 difficult to understand. In some cases, it appears
14 the Copyright Office is quite active in
15 interpreting, in helping to interpret law and in
16 other areas, where it decides that actually it is
17 outside of their scope.

18 So let me reference just in this section
19 104 report that I'm reading right now the Copyright
20 Office provided to Congress. For example, quote,
21 "we believe that Congress intended the copyright
22 owner's exclusive right to extend to all
23 reproductions from which economic value can be
24 derived."

25 So what I'm hearing there is you're

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1 acting as interpreting the law. You're helping to
2 clarify and "deambiguize" the law, if you can use
3 that term, in this case but much of this is very
4 -- it's muddy. It's gray.

5 And I think what we're asking is that
6 there should be some part where we're here really
7 because we believe the Copyright Office should take
8 a stance on certain issues that are somewhat
9 ambiguous. But then I'm hearing that, the same
10 token that oh, maybe that's beyond our scope in this
11 case.

12 You know, so you have got to have it one
13 way or another. Either you have the ability to
14 interpret and make decisions or you don't. And so
15 it appears there is precedent that you have been
16 making interpretations. And then in certain cases
17 you fall back to well, I can't interpret that because
18 that's beyond our scope.

19 So that is inconsistent, in my mind.

20 MS. SMITH: Okay, thank you for your
21 perspective.

22 Mr. Williams?

23 MR. WILLIAMS: Thank you. I've got a
24 few different points I want to address, based on
25 what was said. I'll start with the last one here.

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1 You wouldn't only be creating new law
2 to try to grant one of these exemptions. You would
3 be rejecting existing law. The VidAngel opinion
4 just endorsed all of the Copyright Office's prior
5 hesitancy to say that space-shifting is a fair use.
6 And so certainly with respect to the type of copying
7 that SolaByte is describing and I also believe the
8 type of copying that OmniQ is describing, there is
9 no fair use right there to that type of copying.

10 The C.M. Paula case, Mr. Mitchell said
11 it stood the test of time. I'm not so sure that
12 that's true. The ReDigi court said ignoring the
13 questionable merits of that court's opinion and then
14 went on to explain why it's distinguishable. And
15 it's clearly distinguishable because there, as the
16 ReDigi court said, in a material object, a copy was
17 lifted off of another material object and then put
18 on to a new material object. So the courts have
19 consistently referred to what was transplanted
20 there as a material object in itself.

21 When you're dealing with ReDigi or with
22 what OmniQ is describing, the two material objects
23 at issue are the two computers on either end or the
24 disc on one end and the computer on the other. And
25 the courts are consistently saying that it doesn't

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1 matter what happens on the front end, whether you
2 delete it or when, as long as there is a new copy
3 on a new material object at the end user's point
4 of delivery that is a reproduction.

5 So you can set aside, as I said before,
6 the temporary copies. I do want to try to explain
7 why those temporary copies were so important in
8 *Cablevision* because it's different than what we're
9 dealing with.

10 In *Cablevision*, the court had decided
11 that the end user, who was operating her own DVR,
12 was making the permanent copies that were to later
13 be viewed. And the parties had also set aside the
14 fair use argument over those copies and whether
15 there was some secondary liability for them.

16 So in *Cablevision*, when that court was
17 looking at the buffer copies that supposedly only
18 lasted 1.2 seconds, it wasn't also going downstream
19 to say and they resulted in another new copy, which
20 is clearly actionable. The consumer was being
21 treated as the one who made that copy and, therefore,
22 all they were looking at is, are the ingestion
23 buffers that the Cablevision System creates in order
24 to facilitate those decisions by the consumer, are
25 they actionable. And the court said they weren't.

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1 I disagree with that decision, but they said they
2 weren't.

3 Here, the copy that is delivered is being
4 sold by OmniQ to the end user, and so those copies
5 are not off the table. And so even if you don't want
6 to reach the issue of the temporary copies that are
7 created in-between the disc and the delivery, OmniQ
8 is still on the hook for those copies that it's
9 selling, and they are clearly lasting for more than
10 a transitory duration.

11 The only other thing I wanted to get to
12 is this notion that somehow the Copyright Office
13 is standing in the way of Congress's intent to allow
14 technology to develop over time. And the
15 technology we're dealing with here is not something
16 Congress has ever thought about, it's just
17 incorrect. When the DMCA was passed, Congress
18 foresaw these issues, asked the Copyright Office
19 for the report that was being quoted. The Copyright
20 Office delivered that report to Congress. Congress
21 chose not to create a digital first sale doctrine.

22 The Commerce Department has more
23 recently looked at this. They've also endorsed the
24 notion that there does not need to be a digital first
25 sale doctrine because the marketplace is providing

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1 benefits that go far beyond what these types of
2 digital first sale business models would provide.
3 And that's been endorsed, actually, even in the
4 recent Redbox opinion. The judge extensively
5 quotes from the 104 report and says there's all kinds
6 of policy reasons why you wouldn't want to go there
7 with respect to digital first sale.

8 So I don't think it's true that Congress
9 passed the statute in 1976 and instructed the Office
10 and the courts to just treat every new technology
11 the same. Here, they specifically knew that these
12 types of business models might not be allowed, asked
13 for policy input from the relevant agencies.
14 They've received that input, and they have not
15 created a digital first sale doctrine.

16 Thank you.

17 MR. SLOAN: Mr. Turnbull.

18 MR. TURNBULL: Again, I endorse what Mr.
19 Williams just said. But the point I wanted to come
20 back to again is that the setting for this proceeding
21 is that you have a circumvention prohibition, and
22 there are technologies, such as those developed by
23 Mr. Taylor's and my clients, that rely on that
24 circumvention prohibition. And then the question
25 is whether there are particular identified

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1 non-infringing uses that may be harmed by the
2 imposition of the circumvention protection for our
3 technologies. And where there are, I've forgotten
4 the lineage, the litany, but you know identifiable,
5 demonstrable harms that have been brought forward,
6 then a narrow, specific exemption may be granted.

7 Here what we have is a theory and a
8 questionable legal basis for the non-infringing
9 use. What we have sitting here are representatives
10 of the people who would be harmed if the exemption
11 were granted. And in our view, the way the
12 Copyright Office and the Librarian have evolved over
13 the 20 years of this proceeding is that they take
14 into account what are the effects on the market that
15 the DMCA was intended to create, as well as the
16 alleged adverse effects.

17 And so we think here, if you're looking
18 at the balance, what you have is a theory and a maybe
19 --- and a stretching of the law versus a very clear
20 demonstration of harm to the technologies that would
21 be circumvented.

22 MR. CHENEY: Can I ask a follow-up
23 question there, if I could? And whoever would like
24 to speak to this.

25 One of the things that I think has come

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1 out in a lot of these proceedings is where the harm
2 may lie. In this one we've talked a lot about harms
3 to particular business ideas.

4 Is there an adverse effect for consumers
5 here? And I think that goes to some of what you just
6 talked about, Mr. Turnbull. If there are a lot of
7 alternatives in the marketplace, is there a harm
8 for consumers in this space for being able to make
9 this copy? If they have, for example, when they buy
10 a DVD or a Blu-ray today, there is often -- it often
11 comes with multiple copies on that disc. We didn't
12 talk about what happens with all of those multiple
13 copies on the disc in these technologies.

14 Can you sort of speak to those harms to
15 the consumers, which is one of the things that would
16 be considered in this case?

17 Thank you.

18 MR. TURNBULL: First, what I'd like to
19 say is that the consumers have been incredibly
20 benefitted by the circumvention prohibition in
21 section 1201. The whole DVD market depended on it.
22 The whole Blu-ray market depends on it.

23 And what has then happened is that as
24 other technologies have come on and the possibility
25 of making other copies or having hard drive copies

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1 or having copies in the cloud have evolved, the
2 marketplace has developed. And I think Mr.
3 Williams's submission has many, many examples of
4 how the marketplace is moving to fulfill those
5 desires by consumers.

6 But the first and foremost benefit for
7 consumers is the existence of the DVD and Blu-ray
8 market in the first place, which depend on the
9 circumvention prohibition.

10 MR. WILLIAMS: Yes, thank you. I agree
11 that the harm to consumers would come from granting
12 this exemption because it would, as the Copyright
13 Office has concluded previously, essentially
14 undercut some of the most exciting business models
15 that my clients are putting into the marketplace.

16 Consumers, right now, are getting far
17 more bang for their buck than they would just from
18 the simple right to rip a disc. They're getting
19 access to a lot of offerings at low price points
20 that really wouldn't make sense in the market if
21 every single disc could just be ripped and the copies
22 could be passed around.

23 And so you can get -- if you look at our
24 filing, we try to run through almost all of the
25 options right now, but it's everything from a very

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1 short period digital rental to an on-demand through
2 your cable subscription to a disc, as you say, that
3 comes with access to a bonus copy. Those bonus
4 copies can be stored in cloud services like Movies
5 Anywhere. That can be shared with your family.
6 There's all kinds of benefits that are growing out
7 of the fact that authorized access models and
8 licensing models are able to take root. And if they
9 are undercut and a copyright owner has to consider
10 how to extract full value from that first sale, for
11 fear of losing the pieces of that value along the
12 way from unauthorized copying, it's hard to predict
13 the economics of the marketplace, but it's quite
14 possible that prices would go up in the first
15 instance and a lot of these lower-priced offerings
16 wouldn't be available.

17 MR. SLOAN: Just a quick follow-up
18 question.

19 Would the fact that a copy of a work that
20 is circumvented is then re-encrypted, does that
21 affect anything in terms of any dangers? I mean
22 it's a little different -- it seems a little
23 different than the traditional argument against
24 space-shifting that you now have an in the clear
25 copy. So how would re-encryption affect any of the

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1 analysis if at all?

2 MR. WILLIAMS: I don't think it affects
3 the fair use analysis at all or the reproduction
4 right analysis. Of course, we'd rather have copies
5 that are protected, instead of copies that are in
6 the clear. On the other hand, I don't think my
7 clients are coming to SolaByte and asking for their
8 encryption. And it sounds like OmniQ is using a
9 piece of encryption software that's already
10 available in the marketplace.

11 So to me this idea that somehow they're
12 doing us a favor by giving us a higher level of
13 protection is just a red herring. My clients work
14 with very sophisticated technology companies,
15 including Bruce's clients, to try to provide the
16 protection that they're comfortable with.

17 MR. SLOAN: You don't think it has any
18 bearing on the market harm analysis?

19 MR. WILLIAMS: Well, there would be
20 increased market harm if the copy was in the clear
21 and was further copied on, and on, and on. Although
22 if you look at OmniQ's proposal, they say they want
23 to offer the biggest video store ever. So my
24 understanding of the model isn't only that the
25 individual consumer would get rid of their disc and

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1 have one copy that's now encrypted. What I think
2 OmniQ wants to be able to do is hack the
3 circumvention, get a master copy, essentially, that
4 gets moved back and forth to different consumers
5 in a video store model.

6 So regardless of whether that copy
7 remains encrypted throughout the process, there
8 would have been one sale that would then result in
9 thousands and thousands of views of that one piece
10 of product.

11 MR. SLOAN: Mr. Mitchell.

12 MR. MITCHELL: Thank you. A lot of
13 water went under that bridge, and I'll try to touch
14 on a number of those pieces.

15 But I think that last description is
16 exactly how video stores operated. They could rent
17 the video over and over. A lot of public libraries
18 rent the books until the covers fall off and then
19 rebind them.

20 MR. CHENEY: Excuse me, Mr. Mitchell.
21 If you could add to that, did they have a license
22 to do so?

23 MR. MITCHELL: No. So --- and I've
24 actually dealt with video retailers who are renting
25 and get a demand from a small copyright owner saying

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1 you need a license to rent my videos, just like
2 Blockbuster does and don't realize that Blockbuster
3 doesn't need a license.

4 So you buy the movie, and what we saw
5 with the video industry, was back when the MPAA was
6 trying to persuade Congress to create an exception
7 to the first sale doctrine for rental, they were
8 proposing a one-night rental would be about the
9 price of a movie theater ticket. That sounds fair
10 to us.

11 And what we've seen is that they started
12 selling VHS tapes for \$75 but video stores were
13 renting them for \$3, \$3.50.

14 As time passes, we end up with Redbox
15 renting for 99 cents. All of these were lawfully
16 made copies purchased by the retailer and rented.

17 In terms of the original value, that's
18 up to the studio to decide, but, certainly, they
19 weighed that factor. For a long time we went
20 through what was called sell-through pricing and
21 rental pricing. If the studio thought this is going
22 to be a hot rental item, they would have a high
23 initial purchase price. And then but if it was
24 something that they thought grandparents would want
25 to buy for their children or grandchildren, they

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1 would drop the price so that you sold more copies.

2 But so this comment about capturing that
3 value of the original copy, that's exactly it. What
4 we're seeing right now is the shift is that the
5 consumer is losing that value because you've now
6 got a bookshelf full of DVDs but your DVD player
7 died and you've got two subscription services so
8 you're not going to invest in that. What do you do
9 with the discs?

10 Or, you know, some other situation where
11 you simply, you want to gain access to those copies
12 that were already sold at whatever price but now
13 they are essentially becoming obsolete in terms of
14 the technology to play it back.

15 So I wanted to briefly go back to
16 Matthew's original comments on speaking a lot about
17 temporary copies and buffer copies. That's an
18 oxymoron, and it's one I think it's important to
19 keep clear. A temporary copy is an oxymoron when
20 we're looking at the Copyright Act. And I think
21 here's what OmniQ has been trying to do is be very
22 precise with respect to the Copyright Act.

23 There are a lot of terms in use. Studios
24 will talk about distribution, which isn't
25 distribution in the 106(3) sense but it's

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1 distribution like theatrical license to publicly
2 perform. That's part of distribution.

3 But when it comes to copyright
4 infringement, we need to be careful to know what
5 we're talking about and to say temporary copies begs
6 the question oh, wait a minute. It may be
7 temporary, but the question still remains does it
8 fit the *Cablevision* explanation of what a copy is?

9 And with respect to the DMCA, you know
10 Senator Hatch, in his introduction, was very clear.
11 This was a memoless bill to try to implement WIPO,
12 the WIPO Copyright Treaty. The WIPO Copyright
13 Treaty says we can do this. That is to put it a
14 different way, it says the United States does not
15 have to prevent circumvention in a case like this
16 because the WIPO Treaty says you have to have laws
17 that protect against circumvention that's not
18 authorized by the copyright owner or by law.

19 So the standard there under WIPO is that
20 if it's not infringing, you don't have to have a
21 prohibition on circumvention. You're okay with
22 WIPO.

23 Congress left off the or by law portions,
24 but they did tuck it back in in section 1201(c),
25 saying hey, we don't intend for this to change any

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1 of the balance.

2 And now what we have is a big imbalance,
3 where the Copyright Act says I have this right but
4 the technology has progressed to the point where
5 the copyright owners can favor the methods of
6 dissemination that don't allow that right to be
7 exercised.

8 MS. SMITH: Okay, thank you.

9 We appreciate all of this commentary,
10 but just because we are running short on time, I
11 think my colleague has another specific follow-up
12 question for you on the video store rental and then
13 we may get around to sort of last call to tie up
14 the issues we've been teeing up, unless anyone else
15 on the panel has further questions.

16 MR. MITCHELL: Could I -- there was the
17 question of harm and I just wanted to observe that
18 from Mr. Turnbull's clients' perspective, I don't
19 think the DMCA has anything to do with protecting
20 harm to their industry if it becomes irrelevant.

21 And the work is protected even more so.
22 As we pointed out, any DVD can be ripped and multiple
23 times, and copies shared. With our technology, we
24 lock that down so it's only one. I don't think the
25 copyright owner can necessarily do what we're doing

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1 because it might involve an enlargement of their
2 Copyright Act to say we're going to lock things down
3 in a way that gives us control. There is no right
4 to destroy copies, for example. There is a right
5 to reproduce the work into copies, but there is no
6 right to destroy the copy owned by someone else.

7 We see that happening every day, though,
8 where there are these temporary downloads and, after
9 a certain time, the copyright owner jerks it from
10 you.

11 MR. SLOAN: Thanks.

12 I just had a quick follow-up question
13 about the video store rental model that you
14 mentioned. How do you --- What's your, I guess,
15 plan, in terms of collecting the works to implement
16 something like that? Are you looking to go out and
17 buy lots of DVDs and Blu-rays and shift everything,
18 or are you planning more of a public release of your
19 shifting software through an app and let people
20 shift their own stuff, which then they can sell to
21 you, which then you'll re-shift as you sell down
22 the line? Which kind of model are you
23 contemplating?

24 MR. MITCHELL: Okay. We know we need to
25 launch with a big influx of movies. And one of our

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1 partners, Mark Vrieling from Seattle, just recently
2 closed one of the biggest stores in the country with
3 30,000 titles. I've forgotten now, just an
4 enormous amount of titles. But through both his
5 video store, he still kept those videos. We have
6 already a number of videos to be ingested.

7 But then there are a number of,
8 particularly if a video store has closed, there are
9 a number of warehouses where middlemen are trying
10 to pass off the used, or surplus, or never sold in
11 the first place videos, and the prices are
12 attractive.

13 We do expect though, particularly with
14 new releases as they're coming out, yes, we would
15 buy those. We've talked about elements where we
16 can, sort of the shared economy of Uber and Airbnb,
17 the notion that hey, if you've got these videos
18 sitting on your shelf and you'd like to put them
19 in the economy, send them to us. We'll give you
20 credits for rentals and we'll ingest them into the
21 system with everyone else.

22 And in fact I should say we've even
23 considered having fan-based groups where someone
24 could say hey, rent my video collection and we would
25 be able to track if the customer came through that

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1 recommendation, give additional credit to the
2 person who is drawing more attention to those
3 titles.

4 MR. SLOAN: Just to be clear on that last
5 part of it, so would you be basically asking them
6 to send them -- send you their discs, or would you
7 be providing them the means of using your
8 technology?

9 MR. MITCHELL: We would be asking them
10 to send us the discs. We don't envision, in the near
11 future, a means of having consumers do the ingestion
12 process.

13 We do hope that in a next phase,
14 consumers might be able to, once they've received
15 it from us on their hard drive, might be able to
16 essentially from a consumer perspective, at least,
17 be able to pass it to their neighbor using our
18 technology, but it might mean going back up and then
19 back down.

20 MR. SLOAN: That re-shift would be
21 limited to content that was originally obtained
22 through your store?

23 MR. MITCHELL: Yes. So there are only
24 two ways we could get the movie, the content in our
25 store. One is by purchasing or receiving it as a

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1 gift but becoming owners of the discs ourselves and
2 ingesting and destroying. The other is where the
3 copyright owner says skip that process, you know,
4 we'll charge you a few bucks extra for the value
5 that you can skip that process. And if you will pay
6 us this extra amount, it may be worth the headache
7 to do that.

8 And I should say studios have been ready
9 to do that with various merchants. Netflix, when
10 it was doing the disc rental, and Redbox don't need
11 the jewel box. So here's a different deal if you
12 don't need the jewel box and all the packaging that
13 is based on your model.

14 MR. SLOAN: Thank you.

15 Just because we are long on time, I
16 believe Mr. Turnbull is next.

17 MR. TURNBULL: Very briefly, I just
18 wanted to dispel the notion that either DVD or
19 Blu-ray is going away anytime soon. Both are going
20 strong. Both organizations are very strong and
21 vibrant, and we expect to be in existence for many
22 years, certainly well beyond the next 3 years before
23 the next cycle here.

24 MR. MITCHELL: And OmniQ is thrilled to
25 hear that.

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1 MR. SLOAN: Thank you.

2 I believe Mr. Williams was next.

3 MR. WILLIAMS: Okay, thanks. On this
4 video store question, like Bruce just said, DVDs
5 and Blu-rays are still in the market. If people
6 want to open video stores, they can.

7 What OmniQ is proposing is vastly
8 different from a traditional video store. And the
9 Copyright Office, and the Commerce Department, and
10 numerous judicial opinions have all acknowledged
11 that physical product is different from digital
12 product when you're talking about essentially
13 allowing large numbers of consumers to retransmit
14 the work over, and over, and over again.

15 So it's not that you drive down to a
16 Blockbuster, rent the physical disc, drive home,
17 and watch it. Literally, each time the first user
18 located anywhere in the country or anywhere in the
19 world, depending on how they set this up, each time
20 one person stops watching it, another person can
21 start watching it.

22 And so it's geographically distributed
23 and there's no limitation on how many times that
24 will occur, whereas, with the physical product
25 eventually it's going to run out of steam, and it's

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1 going to break, or it's going to get scratched,
2 there's deterioration. And all of the people who
3 have looked at this carefully have said that this
4 type of offering would cause dramatic harm to the
5 copyright owner in a way that was never anticipated
6 with traditional first sale, which is based on an
7 idea that you shouldn't restrain the alienation of
8 physical products.

9 The only other thing I wanted to address
10 is Mr. Mitchell brought up the WIPO Treaty. On page
11 15 of our opposition comments, we have numerous
12 international and bilateral agreements that we
13 refer to that require our country to protect
14 temporary copies. And so we would just direct you
15 to those on that point.

16 Thank you.

17 MS. SMITH: I will say tomorrow we have
18 a panel that is directed towards issues of
19 obsolescence and degradation in the digital age.
20 Maybe we can save some of that discussion for then.

21 But since we're one minute, Mr.
22 Chatfield, then Mr. Mitchell and we will wrap this
23 up. Okay, thank you.

24 MR. CHATFIELD: Okay, I feel like just
25 to provide a balance here and a reality check on

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1 some of the comments that were made with respect
2 to consumer harm. So in my presentation, there's
3 significant information in there about, that
4 counters some of the information actually has been
5 provided here by Matt and the MPAA.

6 So one is is that there's an abundance
7 of sources for this content in digital form on the
8 web or through other outlets. We're talking from
9 while there are many sources out there, it is
10 absolutely impossible for the consumer to actually
11 get all the content that's on home video available
12 online from web sources, especially in an affordable
13 manner. What would require that, the consumer
14 would have to subscribe to multiple services and
15 many of them, and that would be very cost
16 prohibitive.

17 Okay so another was mentioned, and this
18 is also in my presentation that I wasn't able to
19 actually give, is that if you can refer to basically
20 Disc to Digital, which we pioneered as a company
21 before it was picked up by Walmart and Vudu and used
22 in a different way, actually is still not a real
23 solution because there are so many titles that are
24 not available on Disc to Digital.

25 Furthermore, it doesn't -- there has

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1 been mentioned redemption tags and things like that
2 are available in the MPAA article or submittal.
3 These redemption tags are only available for new
4 releases in UV or now in the UV System. What about
5 the billions of discs that already exist that never
6 had a redemption tag? The consumer is left with no
7 outlet for that.

8 So when we are talking about widespread
9 harm to the consumer, it is dubious for me to think
10 that there -- you know, is this about the comments
11 about the DVD CCA, and the MPAA, and the industry
12 being harmed, when we're talking about the exercise
13 of law here that is preventing the consumer from
14 making their own. They're right. They actually
15 make their private copy, and the only way they can
16 actually get anything close to that is actually in
17 a Disc to Digital transaction, where now the few
18 outlets that offer that are charging people \$2 just
19 for the right to make a copy. If you go to Vudu and
20 you have a disc, if you can find it available on
21 Disc to Digital, they're charging you \$2 to get an
22 equivalent copy in digital format.

23 That's basically taking hostage the
24 consumer's right to make fair use copies, and we
25 don't believe that's really -- we call that,

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1 basically, you shouldn't be holding media ransom
2 basically in the industry for the consumer to
3 exercise that right.

4 The right they need so they can
5 future-proof their content when platforms are in
6 decline, which is undeniable, and there is data that
7 the optical platform is in decline, it's in my
8 presentation. Nielsen data. There's less
9 penetration of optical disc players in the home.
10 The optical disc is actually no longer in a majority
11 of computers anymore. So they do not play.
12 Microsoft abandoned DVD playback back in Windows
13 8. So I'm just trying to provide a little bit of
14 balance here to a lot of information that's come
15 out that basically, let's get back. Are we in the
16 same planet?

17 MS. SMITH: All right, I think we need
18 to move on because we're out of time, but we
19 appreciate that. Thank you.

20 MR. MITCHELL: So thank you. And just
21 briefly, Mr. Williams pretty much -- a few of his
22 comments on the notion that physical product is
23 different from digital product. I think that's a
24 direct quote.

25 Every DVD I know is a digital product.

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1 So it's sort of -- and conversely, there is no
2 digital product that doesn't have a tangible medium
3 of expression. There are no files floating in the
4 ether that one can pull out of thin air and put on
5 something.

6 So it's a distinction without a
7 difference to say that one thing is delivered on
8 a disc and the other happens to be on a USB, or a
9 hard drive, or some server farm. There's always a
10 material object somewhere.

11 I did want to correct the statement that
12 each time one stops, the other starts. That's not
13 the way our technology would work. Only the person
14 who owns that copy can watch it, and no one else
15 can watch it until someone else becomes the owner
16 of that copy.

17 So there is no ability for me to end the
18 movie and someone else instantly starts watching
19 it. There has to be a volitional act of returning
20 that copy back so that OmniQ would become the owner,
21 for example, and then passes that on to another
22 customer.

23 Deterioration, I think it was in the '60s
24 book publishers were talking about deterioration
25 and the Register rejected the notion that you should

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1 have extra rights because your book is more durable
2 and it's now going to be loaned out more often and
3 passed around in secondary markets. That's what
4 section 109 was all about and where Congress said
5 we don't want the copyright owner to have any control
6 whatever over the article once you put it out there.

7 There have been efforts by copyright
8 owners in the motion picture studio area that were
9 trying to, at one time, put in counters on VHS tapes
10 so that after a certain number of plays, it would
11 not play anymore. That didn't quite fly, the EZ-D
12 DVD was a self-destructing DVD. There have been
13 efforts to make the product less durable, but the
14 Copyright Act doesn't recognize any legitimate role
15 to say I should have greater rights because my copy
16 is more durable.

17 MS. SMITH: Okay, thank you very much.
18 I appreciate this robust discussion. I think some
19 of this is also reflected in the written comments
20 or at least would have had the opportunity to have
21 been raised during those.

22 So since we need to set up for the next
23 panel, I think we're going to draw it to a close.

24 So thanks very much. We will come back
25 at eleven o'clock to discuss Class 1, which is

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1 Audio-Visual Works - Criticism and Comment - E-Books
2 and Filmmaking.

3 Thank you.

4 (Whereupon, the above-entitled matter
5 went off the record at 10:44 a.m. and resumed at
6 11:03 a.m.)

7 MS. SMITH: All right. We're going to
8 get started in a minute. I think we're already a
9 couple of minutes late.

10 All right. I think we are going to get
11 started. This is our next panel for the session
12 1201 rule makings. This is Class 1, audiovisual
13 works, criticism and comment, e-books and
14 filmmaking.

15 My name is Regan Smith. I'm Deputy
16 General Counsel of the Copyright Office. And I
17 think first, if the panelists will introduce
18 themselves, we'll go over the rules of the road.
19 And then we'll get started.

20 MS. KLEINER: Emma Kleiner, Ringer
21 Fellow at the Copyright Office.

22 MR. AMER: Kevin Amer, Senior Counsel in
23 the Office of Policy and International Affairs at
24 the Copyright Office.

25 MS. CHAUVET: Anna Chauvet, Assistant

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1 General Counsel at the Copyright Office.

2 MR. SLOAN: Jason Sloan,
3 Attorney-Advisor in the General Counsel's Office
4 at the Copyright Office.

5 MR. CHENEY: Stacy Cheney, Senior
6 Attorney-Advisor at NTIA, National
7 Telecommunications and Information
8 Administration.

9 MS. SMITH: Okay. And so in terms of the
10 panelists, some of you have participated, some of
11 you have not before. We're glad to see everyone
12 here.

13 This is being recorded. And it's also
14 being transcribed. So, make sure to speak clearly
15 into the microphone and turn it on if you are going
16 to speak.

17 If you wish to opine on an issue, just
18 tip your placard up and we'll call on you. We
19 endeavor to let everyone get a chance to speak as
20 to a particular question.

21 But the goal of these hearings is really
22 to refine the written record that many of you have
23 already submitted that we're already looking at.
24 And hone in on areas where the evidence may be
25 patchy, or where an issue may be in great dispute.

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1 Because of our technology, if you could
2 turn your microphone off after you speak in, that
3 will reduce feedback. And also, please remove your
4 phone from being close to the microphone.

5 There is a very large number of panelists
6 on this panel, which we think is great. But in order
7 to aid our court reporter, we have to request that
8 each time you speak, you repeat your name so that
9 he can understand who is speaking.

10 So, Class 1 is audiovisual works,
11 criticism and comment. The Register of Copyrights
12 has already determined that it may be appropriate
13 to renew the existing temporary exemption to the
14 prohibition on the circumvention of access
15 controls.

16 And that is the last rule making cycle,
17 with seven classes. We've condensed it into one due
18 to, to examine whether there maybe sort of shared
19 efficiencies.

20 And given the large demand, we then sort
21 of collapsed it back out into three hearings to
22 accommodate all the participation.

23 So the focus on this, although it is
24 Class 1 in general, is on issues really affecting
25 modifications to e-books or filmmaking exemptions

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1 that have -- are currently adopted by regulation.

2 And I think to start out, we will have
3 a short presentation from Michael Donaldson, which
4 we are going to label Exhibit 1-A. There's another
5 presentation.

6 And then I also have a -- in terms of
7 housekeeping, I have a request to submit a book
8 called Documentary Film by Ms. Aufderheide. Did I
9 say that close to right?

10 Okay, I'm getting a nod that maybe if
11 no one has any objection will be 1-C. So, before
12 Mr. Donaldson's presentation, if we can go around
13 and the participants just very briefly state your
14 name and your affiliation.

15 But any substantive comments, we would
16 hope you would reserve for later when we get to the
17 questioning. Mr. Midgley?

18 MR. MIDGLEY: I'm Peter Midgley from
19 Brigham Young University.

20 MS. SCHOFIELD: Brianna Schofield.
21 I'm the Executive Director of Authors Alliance.

22 MS. TANDY: Heidi Tandy. I'm of
23 counsel of the firm of Price Benowitz, and here on
24 behalf of the Organization for Transformative
25 Works.

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1 MS. MILLER: Hi, I'm Susan Miller. I'm
2 a student attorney with the TLPC and representing
3 Authors Alliance.

4 MR. REID: Blake Reid with the TLPC.

5 MR. LERNER: Jack Lerner, U.C. Irvine
6 Intellectual Property, Arts, and Technology Clinic
7 here on behalf of both the e-book proponents and
8 the film proponents.

9 MS. WERTHEIMER: Lauren Wertheimer,
10 certified law student of the University of
11 California Irvine Law School.

12 MR. DONALDSON: Michael Donaldson,
13 private practitioner with Donaldson and Callif,
14 representing Film Independent, the International
15 Documentary Association, Kartemquin, and UFVA.

16 MR. WELSH: Josh Welsh, President of
17 Film Independent.

18 MR. MORRISSETTE: I'm Jim Morrissette,
19 the Technical Director of Kartemquin Films, which
20 is a 501(c)(3) not-for-profit documentary film
21 production company in Chicago, Illinois.

22 MS. AUFDERHEIDE: Patricia Aufderheide,
23 Film Professor, American University.

24 MR. WILLIAMS: I'm Matt Williams from
25 Mitchell Silberberg & Knupp. I'm representing AAP,

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1 ESA, MPAA, and RIAA.

2 MR. TURNBULL: Bruce Turnbull, counsel
3 for AACCS LA.

4 MR. TAYLOR: David Taylor, counsel for
5 DVD Copy Control Association.

6 MS. SMITH: All right. Great. I think
7 we'll start with Mr. Donaldson.

8 If you can hopefully keep it to a few
9 minutes, simply because we've got a lot of people
10 who I'm sure have much to say. And we've got two
11 hours to do it. Thank you.

12 MR. DONALDSON: Well, thank you very
13 much. And I just take a few minutes to respond to
14 specific points that were made by opposing counsel.

15 And the first one, since they made so
16 much of the past use of the phrase, documentary films
17 at a time when we're seeking to cover all filmmakers.
18 I need to plead guilty that back in 2009 when we
19 first appeared before you, we only talked about
20 documentary films.

21 And at that point it didn't make any
22 difference. Because frankly, films that were not
23 categorized as documentary films were not using
24 archival material.

25 So, you see in the three years previous,

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1 zero in our office. Zero non-documentary projects.

2 I first brought it up when we had various
3 filmmakers and three projects in our office that
4 we worked on. And I -- for those that were at that
5 hearing, I ended by saying, I'll be back, because
6 they didn't really expect an exception.

7 When it grew to seven, double the number,
8 we made a serious try. And I think the Copyright
9 Office thought seriously about it. And tried to
10 figure out some way to describe something less than
11 all film.

12 This past year, the last past three
13 years, we've worked on 65 films in the Office that
14 were not classified as documentary films. And
15 nevertheless, used fair use, were insured, went out
16 into the world.

17 And if you project that during the next
18 three years, the bar will go all the way up to the
19 writing. We stopped it at 109. But that's so
20 conservative.

21 MS. SMITH: Can I just ask one question?

22 MR. DONALDSON: Sure.

23 MS. SMITH: Are those 65 films ones that
24 were released? Or that you -- your firm looked at
25 for clearance issues?

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1 MR. DONALDSON: We looked at for fair
2 use. They were insured and released into the world.

3 MS. SMITH: Okay. And is that in the
4 record, what films they were? Or do you know?

5 MR. DONALDSON: I can provide. I can't
6 give you a list off the top of my head.

7 MS. SMITH: Okay.

8 MR. DONALDSON: But I can supplement.

9 MS. SMITH: Okay. Thanks.

10 MS. CHAUVET: One other follow up
11 question. Because when we're talking about, you
12 say that there's 65 films that were shown to be using
13 fair use.

14 The existing exemption for filmmaking
15 that you're looking to expand, talks about for
16 purposes of comment and criticism. So, are those
17 films specifically constituting fair -- like their
18 use of motion picture clips?

19 If it's constituting fair use, is it
20 because they were for the purposes of comment and
21 criticism?

22 MR. DONALDSON: Great question. I
23 suspect the answer is not all of them.

24 The exemption is much narrower than the
25 fair use exemption as described by the courts. And

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1 that is the exemption we have to live with.

2 And we're not asking for that to be
3 expanded. We're willing to live with that over the
4 next three years and see how it works, just as we
5 have in the past.

6 But it is narrower than the fair use
7 exemption.

8 But I wanted to also address the wildly
9 inaccurate statement that has been injected into
10 the record. And it was injected into the record
11 last time by the MPAA.

12 That oh, if it's an entertaining film,
13 it can't have fair use. Ridiculous and inaccurate
14 reading of the case law.

15 Fair use is for any kind of a film. And
16 I start off with Jersey Boys, which was a wildly
17 successful Broadway musical.

18 A use of a clip in that show was found
19 to be fair use. And when Warner Brothers made a film
20 directed by Clint Eastwood that was actually more
21 accurate than the musical because it showed the
22 mafia, it's the guy with the glasses there.

23 They used that same clip. And they used
24 it pursuant to fair use. There it is, it's Ed
25 Sullivan introducing the Four Seasons to the set.

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1 MS. CHAUVET: Mr. Donaldson, just real
2 quick. So in that case though, the court did not
3 look at that use for purposes of comment and
4 criticism.

5 It was specifically used to identify a
6 significant part of the band's career. So you had
7 like the British invasion at the time.

8 And so, again, how is that example going
9 to what the exemption is for? Which is for purposes
10 of comment and criticism.

11 MR. DONALDSON: What you're seeing, and
12 what I'm demonstrating is that more and more
13 filmmakers, major filmmakers, independent
14 filmmakers, are using archival footage. Some
15 pursuant to fair use, some that does not fall within
16 the fair use exception license.

17 This is a growing trend. We're in an era
18 that people are starved for accurate information.
19 It's everywhere. People are doubting what they're
20 seeing and what they're hearing on the media.

21 So, filmmakers want to make sure their
22 audiences understand when they're doing something
23 this accurate, that it is accurate. And they're
24 using archival footage to do it.

25 So, the important point here is that this

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1 is a trend that nobody in this room will stop.
2 Nobody can stop.

3 It is filmmakers who want to use archival
4 footage. And yes, the exemption is more narrow and
5 therefore you're going to see examples where because
6 the exemption wasn't available, there was no use
7 trying to comply with the narrower view.

8 It certainly could have been used as a
9 -- with commentary if they had -- if it gets expanded
10 and they're working with our office, we'll work with
11 them as we work with them to bring it within fair
12 use, we'll work with them to bring it within the
13 exemption.

14 And this is one that doesn't imply the
15 DMCA at all. But it's an example. This was found
16 to be fair use where Miramax Film copied the costume,
17 the dialog and everything from a protected motion
18 picture called Deep Throat.

19 And they had to replicate the scenes with
20 actors instead of using clips. And of course, way
21 out in the entertainment spectrum, is Midnight in
22 Paris, where the Faulkner estate was sued.

23 And the dialog from Faulkner was found
24 to be a fair use. And Midnight in Paris, a Woody
25 Allen film, is clearly only entertainment.

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1 So, this notion that has been injected
2 into the record that entertaining films cannot have
3 fair use, is just ridiculous.

4 I have -- sometimes these clips are used
5 just because of money. This was a four million
6 dollar film. Wonderful film.

7 I'll provide you with a copy of the whole
8 film, because so much archival footage was used.
9 It was about the overthrow of Pinochet.

10 And a wonderful way they used -- it was
11 a four million dollar film. They could not have
12 replicated a ten thousand person scene.

13 But they kept archival footage and
14 actors, like in this scene, going back and forth.
15 Marvelous film.

16 Same with the Chavez film. Which is
17 another film we worked on. We worked on Che. It
18 was nominated for an Oscar.

19 Chavez is a wonderful film that used
20 actors. But Cesar Chavez' life was so amazing that
21 they kept wanting to drop in archival footage to
22 show that these events actually happened.

23 And then another film we worked on, LBJ,
24 Rob Reiner was the director. Woody Harrelson here
25 playing the president.

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1 Wanting to show exactly what happened
2 in Air Force One. This is the exact broadcast they
3 watched as soon as President Johnson boarded the
4 plane and before he was sworn in.

5 Snowden, a film we talked about last
6 time, because we were working on it in the Office.
7 Oliver Stone worked so hard to make it accurate.

8 You can see on the right the documentary
9 that was shot of Snowden with his head under the
10 blanket. And this is, on the left, the way Oliver
11 Stone set it up with an actor.

12 Replicated the room. Replicated the
13 cloth over his head. Very accurate. And the --
14 they had to use a lot of archival footage.

15 And this is the exact footage that was
16 being watched at the time. These are actors
17 watching it because it's Snowden by Oliver Stone.

18 MS. SMITH: Can I ask in these last few
19 examples where there is archival footage, was that
20 footage that was obtained on fair use, but
21 circumvention was not required?

22 Or that was obtained via a licensing
23 arrangement?

24 MR. DONALDSON: That is a fair question
25 to ask on all the films we worked on.

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1 MS. SMITH: Okay.

2 MR. DONALDSON: And as to the films we
3 worked on, I can tell you that it's my strong hunch
4 that several of them just ripped a DVD to get the
5 footage.

6 And the reason I have to answer it that
7 way is because when they're in the Office, we give
8 them a strong run down. This is the exemption.

9 This is the only way you can use it. And
10 you can't use it except if you're going to label
11 your film a documentary.

12 So we get it back and I'll ask the client,
13 well that's great. Where did this come from?

14 And the answer I get is like, we're not
15 telling you. We're not done.

16 And so I -- I don't know. But that
17 answer suggests to me that I probably should know.

18 MS. SMITH: Well, it sounds like it's
19 clear to you that they would not -- they obtained
20 an opinion of counsel, I guess, that it was likely
21 to be fair use.

22 And perhaps in turn some chose to proceed
23 on a fair use basis as opposed to a licensing basis.

24 MR. DONALDSON: That is correct.

25 MS. SMITH: Okay. Thank you.

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1 MR. DONALDSON: Yeah.

2 MS. SMITH: All right. Well, I don't
3 want to interrupt you too much more. Just because
4 --

5 MR. DONALDSON: No, no. That's -- I
6 don't mind being interrupted.

7 MS. SMITH: Well --

8 MR. DONALDSON: I'm married. You know,
9 I know about being interrupted.

10 MS. SMITH: All right. Well, if you
11 could take a couple more minutes. And then we'll
12 start taking questions.

13 MR. DONALDSON: Yeah. It also applies
14 to music. Family Guy could not be anything but
15 entertaining.

16 And this was found to be fair use when
17 he sings, instead of I Wish Upon a Star, I Wish for
18 a Jew. He was looking for an accountant to clean
19 his business up.

20 The Crown, this is interesting because
21 in this very successful series, they're telling the
22 queen that her uncle, King Edward, actually went
23 and cut a deal with Hitler.

24 And people like me said what? That's --
25 I thought it was like a little much of literary

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1 license. And they showed this -- these actors. And
2 I thought it was a little much.

3 And then probably anticipating that a
4 lot of people felt that way, at the end, they showed
5 a lot of archival footage of King Edward making nice
6 in Russia. Reviewing troops in -- or not in Russia,
7 I'm sorry.

8 In Germany with Hitler. And it gave
9 confirmation to the point they were making earlier.

10 Immediate Family, another entertaining
11 film. Found to be fair use. This appeared in the
12 film quite a bit, this -- and was found to be a fair
13 use of this mobile, actually the animals on the
14 mobile.

15 Made in America, a film with Whoopie
16 Goldberg. Again, all entertainment. This was a
17 picture, didn't implicate the DMCA. But that
18 picture on the wall was found to be fair use.

19 The exception is Roc. It's the only
20 case I was able to find of a film not categorized
21 as a documentary where something was found not to
22 be fair use.

23 And lo and behold, it was really a de
24 minimis case. It was argued as a de minimis case.
25 And they just kind of threw in fair use at the end.

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1 And of course, Universal made Steve
2 Jobs. And used fair use because he couldn't -- they
3 couldn't get this iconic advertisement.

4 The family didn't like the content of
5 the film. They didn't like the way Steve Jobs was
6 represented.

7 So they denied a license. And what you
8 do by not expanding the exemption is that you turn
9 copyright owners into censors.

10 If they don't like a film, even though
11 what they own can be licensed to many people, they're
12 not going to license to you. Because they don't
13 like the content of your film.

14 This was the way Steve Jobs was pictured.
15 They didn't like it. And the same goes by the way
16 for --

17 MS. SMITH: All right. We appreciate
18 that. I think we will have questions especially on
19 Steve Jobs eventually.

20 MR. DONALDSON: Yeah.

21 MS. SMITH: But if you could wrap up just
22 so we can start with some of the panelists.

23 MR. DONALDSON: Great. Okay, so I will
24 let you know that I will be leaving behind three
25 videos of some of those films.

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1 So that if you want to see the whole film
2 the way it's worked, you'll be able to do that.

3 MS. SMITH: Okay.

4 MR. DONALDSON: Do you want me to take
5 this out now?

6 UNKNOWN: I'll take care of it.

7 MR. DONALDSON: Okay. Great. Thanks.

8 MR. SMITH: Okay. All right. Thank
9 you.

10 MR. DONALDSON: You can keep it too.

11 MS. CHAUVET: Great. Well, thank you,
12 Mr. Donaldson.

13 So, this actually dovetails into -- so
14 how we're going to do it today for this panel is
15 how we've done it this morning and then yesterday
16 is we're going to have like buckets of questions.

17 So, I know everybody has a lot to say.
18 We will try to get to you. Just put up your placard
19 like this is you want to be called on. And then we'll
20 try and take everyone in turn.

21 So, as I alluded to, we're really talking
22 about purposes for comment and criticism today in
23 terms of expanding the existing exemptions for
24 e-books and for filmmaking.

25 The Register noted in her 2012

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1 recommendation that the use of an earlier work to
2 flesh out characters or motivations in a new work,
3 or to develop a storyline does not inherently serve
4 the purpose of comment and criticism.

5 And the opponents and I think several
6 of them noted this. And they cited that the
7 examples that were cited by the proponents of both
8 the e-books and filmmaking exemption expansions did
9 not constitute for purposes of comment and
10 criticism.

11 So, my first question would be to like
12 the e-books people and to the filmmakers, what is
13 your best example of a -- in the case of e-books,
14 like a fiction, multimedia e-book that is used for
15 purposes of comment and criticism?

16 All right, Ms. Tandy?

17 MS. TANDY: Rather than go into
18 something that actually already exists, I'd like
19 to talk about this in the context of something that
20 would like to exist but doesn't.

21 Right now it's possible for people to
22 take content from a DVD or a Blu-Ray, or from an
23 online download, and rip it and turn it into a fan
24 vid. Because we've already gone through that
25 exemption purpose.

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1 However, the minute somebody wants to
2 take that content and turn it into, say, not a
3 multiplayer game, but some sort of a linear, like
4 a choose your own adventure style story in the format
5 of the game using twine.

6 Or if they want to turn it into an e-book
7 that is either non-downloadable or downloadable
8 that includes different kinds of content, i.e.,
9 video content, but also screenshot stills, things
10 that are created, something they may have filmed
11 for themselves either locally or at a fan convention
12 or something like that. The minute they want to
13 weave all of that together into one unitary work
14 that is not a video that you can upload to YouTube
15 or upload to Vimeo, that's where the exemption ends.

16 So, if you want to do this in a video
17 form so that you have say, for example, one screen.
18 And there's a video and the video plays and then
19 some text flashes up on the screen and someone can
20 either pause to read it, or you've got enough, you
21 know, time so that somebody can read it. And then
22 it goes, sorry, then it goes to another video.

23 MS. SMITH: And just to understand, is
24 your concern that the remix video exemption language
25 would sort of bleed over into being an e-book if

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1 it's a video and then text?

2 Or maybe I'm not understanding.

3 MS. TANDY: If it's entirely in one
4 video file, then it would constitute. But if you
5 wanted it to be something that's available in a
6 different kind of media format, then the exemption
7 wouldn't go that far.

8 Say for example, I wanted text. And I
9 click on this part of the text, it goes to this video.

10 And if I click on this part of the text,
11 it goes to a different kind of a video. Sort of in
12 an e-book format.

13 The exemption as it currently exists,
14 doesn't cover that. Unless it's something that I
15 can see as a single, you know, AVI file.

16 MS. SMITH: All right. And are you
17 speaking purely in the realm of the -- the remix
18 video exemption is currently enacted, requires it
19 to be noncommercial.

20 And I understand that, you know, the
21 e-books exemption does not have a similar
22 limitation. Are you talking about in the realm of
23 noncommercial videos or noncommercial e-books?

24 MS. TANDY: Well, the question about
25 commercial versus noncommercial is very weird.

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1 Because there isn't any sort of a stable and perfect
2 definition of what is or isn't commercial.

3 Earlier this week, Hasbro introduced
4 like a -- basically terms of use for people who want
5 to create content inspired by or based on Hasbro
6 properties.

7 And they say very specifically in it that
8 if you have a Patreon, or if you have, you know,
9 people can buy you a coffee online or give you PayPal
10 money for doing your content in general.

11 They don't consider that commercial.
12 But obviously some other entity might not have that
13 exact same definition of commercial.

14 So for the definition of commerciality,
15 I really need to -- I'm trying to leave that out
16 of the conversation here. Because we don't have a
17 perfect definition of it.

18 MS. SMITH: Okay. I think it would be
19 hard from the Copyright Office perspective to say
20 commerciality is irrelevant to fair use items.

21 MR. TANDY: But what's the definition of
22 commerciality? If you have something on a website
23 like LiveJournal, that has advertisements on it for
24 people who do not have paid accounts.

25 Or if you have something that is

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1 available via GooglePlay, where there are ads on
2 the side column that Google puts there. And you're
3 not getting any revenue from it, is that commercial?
4 Or is that noncommercial?

5 MS. SMITH: I don't want to get away from
6 the fiction/nonfiction elements. I think maybe
7 some of that might be relevant to the next panel.

8 But, I would invite others to speak to
9 the question you've raised as to how to figure out
10 if something is commercial or not. Because I think
11 that the case law might be helpful there.

12 MS. TANDY: Agreed. Thank you.

13 MS. CHAUVET: But so specifically, are
14 there examples of e-books that want to be created
15 but cannot be created because of TPMs that are
16 specifically for the purpose of comment and
17 criticism?

18 MS. TANDY: Just having watched
19 discussions by people at the Organization for
20 Transformative Works and other entities that I'm
21 involved with that are on the interactive games and
22 interactive e-book side of things, I think that
23 there are things that people want to create that
24 include either mise-en-scene, or just to flesh out
25 a narrative, or to give an example, or to show

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1 something that happened in the past, who would like
2 to be able to incorporate those kinds of clips.

3 And in part right now, the technology
4 is not necessarily available for it to happen
5 particularly easily. But it is getting there.

6 And to be able to do that sort of thing
7 both on a tablet or on a computer and within the
8 next couple of years in virtual reality, I think
9 is something that people want to be able to do.

10 MS. CHAUVET: Sure. I think the
11 Copyright Office, like what we really need to see
12 are like concrete examples. Because we can't
13 really evaluate fair use in a vacuum.

14 Or if -- so if -- and there were a few
15 examples that were given in the record. But, like
16 if you could, maybe talk about, or someone else,
17 or if filmmaking wants to jump in.

18 But like what is your best example that
19 the Copyright Office can look at to see that there
20 are in fact people who want to create fiction,
21 multimedia e-books for the purposes of comment and
22 criticism?

23 MS. TANDY: I put one into, as I think
24 you all have seen, into my prepared remarks, or my
25 submission statement. And it basically focuses on

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1 the idea using the TV show Supernatural.

2 Which has -- is about to go into its 14th
3 season. So it's basically the longest running U.S.
4 show so far.

5 In that show, in the fictional world
6 created in that show, there is a series of novels
7 called the Supernatural series. My proposal was
8 for a group of fans in that world, creating a YouTube
9 series.

10 And within that YouTube series the
11 process that they go to in creating this particular
12 fan work. And going through discussions of oh, can
13 I do this in fan fiction?

14 Can I do this in my fan art? And whether
15 or not I'm able to get into this kind of creative
16 genre.

17 So, it would use clips from the show to
18 illustrate things that fans themselves were
19 creating. And the only way to do that as an e-book
20 would be -- basically the only way to do it now
21 legitimately would be to do it as a video.

22 And it wouldn't have the same presence
23 of being able to sort of scroll through the
24 experience of being within that fandom.

25 Whereas creating it as an e-book,

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1 something that people can download as a Kindle file
2 or download as a specific pdf file, or a different
3 kind of a format would give them the ability to have
4 it as an e-book.

5 And it would have a different visual and
6 personalizable experience to be able to go through
7 it.

8 MS. CHAUVET: Thank you for that. It's
9 helpful to us.

10 So, why a circumvention of TPM is
11 necessary to create such a book?

12 MS. TANDY: Because in order to create
13 the fan content that would be created within this
14 kind of a project, I would need to be able to go
15 to the show itself and to some of the behind the
16 scenes images that are in the DVDs that have been
17 released by Warner Brothers in connection with the
18 show.

19 And pull those different elements out
20 to put into the e-book that I'd like to create for
21 this.

22 MS. CHAUVET: And so why wouldn't screen
23 capture be a feasible alternative?

24 MS. TANDY: Because a screen capture
25 would be a static element. And to be able to have

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1 multiple static elements would look weird compared
2 to the other content that I'd be creating within
3 this.

4 Whereas having something with the
5 proper flow, especially if I was able to do this
6 in a virtual reality mode in the next year or two,
7 you wouldn't be able to see it properly on the
8 screen.

9 Have you ever been to like a wedding or
10 something like that where there's a video on the
11 screen and the pictures are floating across the
12 screen, you know, like in the slide shows that you
13 have like at engagement parties and weddings.

14 And then all of a sudden there's a clip.
15 And it's completely static. And your brain wants
16 that image to move.

17 Your brain expects that image to be
18 floating across the screen. Or some sort of a frame
19 to manifest around it.

20 And it stutters your brain to be able
21 to see it as something that's completely static on
22 the screen in the middle of all this video.

23 That's why when we're watching
24 newscasts they usually have some sort of a motion
25 on the screen. Because that's what your brain is

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1 used to seeing.

2 MS. CHAUVET: And then -- and why
3 wouldn't it be possible to license if the screen
4 capture is not a feasible alternative?

5 MS. TANDY: Well, for larger scale shows
6 like this, the powers that be, i.e., the owners of
7 the copyright, don't necessarily have the time or
8 the energy to devote for somebody to be able to
9 communicate with the millions of fans who want to
10 create fan works.

11 Sometimes you have a situation like
12 Hasbro where they finally say, okay, you can do all
13 of these different things. And in that kind of a
14 situation, you have a blanket license to be able
15 to do it.

16 Even going back to like 2002 when America
17 Online worked out a deal with Warner Brothers. And
18 you could finally use Harry Potter for example,
19 house crests as your user picture on America Online.

20 But, to be able to get to that point,
21 even for something that's a large scale show, is
22 something that takes many, many years and a lot of
23 dollars and a lot of time and a lot of effort from
24 within the company itself.

25 Some companies don't want to do it.

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1 Some companies don't have the time to do it. But
2 also, some companies can't make that kind of a
3 turnaround very, very quickly.

4 So if I want to do something that's
5 commenting on a show that's recent, like with the
6 Simpsons last week. Because there had been an
7 extensive discussion of the problem with Apu, one
8 of the characters on the show.

9 And then the Simpsons finally addressed
10 it. And if I wanted to be able to create an e-book
11 that responded to that quickly, then I would want
12 to be able to get it out immediately.

13 And even if I was only able -- even if
14 I only had to wait one full business day, then I
15 wouldn't be able to get it up Sunday night, I'd have
16 to wait until Tuesday.

17 MS. SMITH: Thank you. I wonder if
18 anyone, perhaps Mr. Williams, not to put you on the
19 spot, wants to speak, but I guess I just did, as
20 to whether your clients are licensed for fan works?

21 Whether they would do stuff for
22 commercial purposes? Whether they would offer
23 licenses to use archival footage for a mise-en-scene
24 as Ms. Tandy said.

25 And then we'll go to Ms. Schofield.

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1 MR. WILLIAMS: Thank you. I missed one
2 thing that you were saying, licensed archival
3 footage. And then I missed.

4 MS. SMITH: I think Ms. Tandy suggested
5 one of the reasons why I think fan work creators
6 and others wish to use material is to set the
7 mise-en-scene for a larger creative work that
8 they're making.

9 MR. WILLIAMS: Okay. So, I think you
10 were asking a couple of times for examples that
11 involved criticism and commentary.

12 And I haven't really heard that yet.
13 And I'm not sure what the criticism or commentary
14 is.

15 I did review the comments. And I did go
16 onto a number of the platforms and try to watch some
17 of the remix videos, for lack of a better word.

18 Some of them have decent, fair use
19 arguments that I can actually perceive from watching
20 them without an explanation. Others to me do not
21 appear to be non-infringing uses.

22 I do think my clients are open to
23 licensing, if that was your question. And some of
24 my clients have made public statements about the
25 types of uses that even though they might be

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1 infringing, they're not going to object to, or
2 they're not going to take action on.

3 But when it comes to, is there a market
4 for licensing the clips, then yes, there is. If
5 what she's saying is, it's not good enough if she
6 can't get it within one business day, that would
7 be a difficult standard to meet.

8 MS. SMITH: We think she's laid out a
9 couple of obstacles. And one obstacle is that the
10 studios or other copyright holders just might not
11 be wanting to deal with, I guess, an individual
12 remixer or someone small who may not have a lot of
13 money to pay for it.

14 I don't know if that is paraphrasing.
15 But, for the, I guess, the fan works community in
16 general is, are there licenses available to them
17 if they need it?

18 Or is there a sort of agreement that it's
19 fair or not going to be actionable?

20 MR. WILLIAMS: I don't think there's any
21 general agreement that all works that would be
22 described as fan fiction are non-infringing.

23 We've got some cases in our opposition
24 at page 15 involving things like kind of
25 unauthorized prequels or sequels to different

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1 works. And those have been held to be infringing.

2 I don't think there's any cases in the
3 record on fan works being non-infringing. So, I'm
4 not saying that they are always infringing.

5 And as I said, I think there probably
6 are some out there that are not that I've seen. But
7 --

8 MS. SMITH: But do you know if there's
9 licensing -- it sounds like you're not necessarily
10 disagreeing with how Ms. Tandy has characterized
11 the availability of licenses.

12 MR. WILLIAMS: I don't think there's any
13 record showing that my clients are unwilling to
14 issue licenses to individuals. And I'm pretty sure
15 in the last record that there was testimony from
16 Fox that they would issue such licenses.

17 What the cost of those licenses would
18 be, and whether someone could afford it, is a
19 different question. I don't know exactly what the
20 price would be. And it would differ from studio to
21 studio.

22 Sometimes they might issue no-cost
23 licenses. They do that frequently in the education
24 space.

25 And it might be possible they do that

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1 in this space. But, I haven't seen anything in the
2 record to indicate that someone came to one of my
3 clients and was denied a license.

4 MS. SMITH: Okay. Ms. Schofield?

5 MS. SCHOFIELD: Thanks. This is
6 Brianna Schofield.

7 So, I would like to offer a couple more
8 examples about where criticism and commentary may
9 be offered, but in the nonfiction space in ways that
10 is questionable as to whether the limitation that
11 the use must be for offering film analysis.

12 MS. CHAUVET: I'm sorry, you're going to
13 give nonfiction examples? Or fiction examples?

14 MS. SCHOFIELD: Nonfiction examples,
15 that go beyond using the material potentially for
16 film analysis.

17 So speaking to that side of the
18 modification that we're requesting.

19 MS. CHAUVET: Got it. Absolutely.

20 MS. SCHOFIELD: So, the first is an
21 example of a book called *Show Sold Separately*, which
22 is by Jonathan Gray.

23 This book is a book that critiques the
24 phenomenon of how audiences are interacting with
25 movies and TV shows based on preconceived notions

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1 before that material is released.

2 So, by looking at promotional material,
3 media coverage, trailers, and what not, to really
4 comment upon how the audiences are interacting with
5 that work prior to the release of that work.

6 This book is available online. It uses
7 video clips and other images embedded in the e-book
8 that really help the audience for that book
9 understand the author's argument.

10 The other example is actually in our
11 comment, which is Digital Dubliners. This is
12 another multimedia e-book, which is a guide to James
13 Joyce's book, the Dubliners.

14 And it uses film clips and other still
15 images to provide historical and cultural context.
16 And again, it aids the reader's understanding by
17 using that material, commenting on it, in order to
18 fully flesh out Joyce's book, the Dubliners.

19 So, in my opinion, these examples show
20 that the limitation to offering -- books offering
21 film analysis is potentially too stifling.

22 At best, authors have uncertainty that
23 surrounds their project as to whether the film --
24 the limitation to film analysis would actually apply
25 to their works.

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1 And at worst they may abandon their
2 projects because of that uncertainty.

3 MS. CHAUVET: So, in the examples that
4 you just gave where the motion picture clips ---
5 were they licensed? It was -- like how, you know,
6 how were they used in the e-books?

7 MS. SCHOFIELD: I don't have firsthand
8 knowledge about how that worked.

9 MS. CHAUVET: Thank you. I think Mr.
10 Reid was next.

11 MR. REID: Thank you. This is Blake
12 Reid. And I wanted to add to Ms. Miller to speak
13 to some of the fair issue -- fair use issues that
14 Mr. Williams just raised.

15 But very quickly, I wanted to raise a
16 legal point. Which is that the Office has already
17 made determinations or presumptive determinations
18 in this proceeding to renew both the noncommercial
19 video exemption and the multimedia e-book exemption
20 offering film analysis.

21 And I'm a little concerned that some of
22 this discussion feels like an effort to relitigate
23 some of the record that has already been accepted
24 by the Office and has not been opposed by opponents.

25 So, in particular the notion of seeking

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1 out licenses as a viable non-circumventing
2 alternative in both the noncommercial video
3 exemption and in the nonfiction multimedia e-books
4 exemption.

5 The only requirement is, I think it's
6 in sort of a Subparagraph B of both exemptions, is
7 that the person who's engaging in the circumvention
8 reasonably believes that there's not a
9 non-circumventing alternative available.

10 So, I think the burden that Mr. Williams
11 is attempting to impose here, the idea that we need
12 to have a lengthy record of folks reaching out,
13 seeking out a license for every single clip, I think
14 that goes beyond the requirement that's already in
15 these exemptions.

16 And as I recall Mr. Williams and his
17 clients did not object to the renewal of those
18 exemptions nor the acceptance of the record that
19 led to them.

20 So, I just wanted to make sure that we
21 don't relitigate that point. I also wanted to just
22 very briefly put a finer point on what Ms. Tandy
23 said.

24 Which is she's describing a
25 noncommercial video in her Supernatural project

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1 that would pretty clearly fall under the ambit of
2 the noncommercial video exemption.

3 And the idea is there are a number of
4 projects in that vein where it would make sense
5 rather than to sort of trying those on a YouTube
6 channel or something like that, and distribute them
7 as videos, it would actually make more sense from
8 a creative perspective to embed them in an e-book.

9 So I think what we're talking about just
10 to sort of clarify and maybe this gets to the broader
11 questions about whether a unitary Class 1 that
12 encompasses all of these sorts of uses might make
13 sense, is taking a video that would be within the
14 ambit of the noncommercial video exemption and
15 distributing it in the form of an e-book.

16 So, I just wanted to offer that as a
17 clarification.

18 MS. CHAUVET: Well, I guess my follow-up
19 question is like so say the Register were to
20 recommend an expansion. We'll talk about e-books,
21 I mean, similarly for -- but so say what if there
22 were to be a limitation for noncommercial use? But
23 we allow -- it was extended to fiction, but it was
24 for noncommercial purposes.

25 Would that be reasonable?

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1 MR. REID: Well, let me just point out,
2 again, the Office has already recommended accepting
3 the e-book, the multimedia e-book exemption. Which
4 doesn't have a noncommercial --

5 MS. CHAUVET: That's right. But what
6 I'm specifically asking though, like if we were to
7 extend it fiction, which it does not currently
8 cover, would it be reasonable at the same time to
9 add a limitation limiting it to noncommercial use?

10 MR. REID: So, just to make sure I
11 understand the question. The idea would be
12 expanding the exemption in a way that would cover
13 fictional e-books, perhaps offering non-film
14 analysis or some combination of fictional and
15 non-film analysis, but only in a commercial context?

16 MS. CHAUVET: In the noncommercial
17 context.

18 MR. REID: Excuse me. Only in a
19 noncommercial context?

20 MS. CHAUVET: Yes. But yes, otherwise
21 yes.

22 MR. REID: So, you know, I think and I'll
23 defer to some of my colleagues here to speak to
24 commerciality. I think, you know, obviously that's
25 better than what we have now.

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1 And that would expand the abilities for
2 authors and venders to make use of the platform.
3 I think the question that the Office ought to be
4 grappling with is, to the point that Ms. Smith
5 raised, how that impacts the fair use analysis.

6 And I think there's a good case to be
7 made that there's still some legitimate fair uses
8 out there that might fall within the ambit of
9 commerciality. But I might defer to my colleague,
10 Professor Lerner to address that in more depth.

11 MR. LERNER: Well, I would -- thank you.
12 Jack Lerner. I would also add to what Mr. Reid is
13 saying.

14 You know the problem is that what you're
15 saying is, you're welcome to make fair use. You're
16 welcome to exercise your speech. You're welcome to
17 make criticism and commentary.

18 But, if you want to do this as a living,
19 or to supplement your living, or if you want to use
20 that incentive to actually go out and create, you
21 wouldn't be able to do that.

22 That prospect would not be permitted.
23 And as we've, you know, we've seen and many courts
24 have held, commercial use is not in itself a bar
25 to fair use.

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1 In fact the vast majority of fair use
2 is commercial use in a sense that it's -- and I'm
3 not talking about being placed up on YouTube where
4 there are ads being displayed.

5 But actually, you know, taking your film
6 to market or whatever it maybe. Many e-books that
7 make fair use are sold in marketplaces, digital
8 marketplaces and so on.

9 So, I would say what you'd be doing there
10 would really be taking the incentive away from a
11 large group of creators.

12 MS. SMITH: I think Mr. Williams and
13 then Ms. Miller.

14 MR. WILLIAMS: Thank you. So there's
15 just been a number of mischaracterizations of our
16 position. And I'm going to try to clean some of them
17 up.

18 What Blake was just saying that I was
19 arguing that every single thing in the record has
20 to involve someone going and seeking a license and
21 being denied, that's not at all what I was saying.

22 What I was saying was that if you're
23 going to use as part of your reasoning the notion
24 that my clients are unwilling to license in order
25 to justify the exemption, there should be some

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1 evidence of that fact.

2 And there simply isn't as far as I'm
3 aware. So, that's number one.

4 We do believe licensing is important as
5 an option. But, that wasn't what I was saying that
6 every single example in the record that needs to
7 be part of what transpired.

8 Going back to what Mr. Donaldson said
9 in his presentation, his whole premise was that our
10 position is that you can never make fair use in an
11 entertaining motion picture. And that's
12 absolutely not the case.

13 And we say that expressly in our
14 comments. So, I'm not sure if he didn't read them.
15 Or if that was a rhetorical device.

16 But, the MPAA often asserts fair use.
17 The MPAA makes entertaining films. We say
18 expressly in our filing that we are not claiming
19 you can never make fair use in an entertaining film.

20 However, it's a murky area. Much
21 murkier than the issues we're dealing with --- with
22 film analysis or with a documentary film.

23 And the record has always been that there
24 are no good examples or maybe one or two here and
25 there, of fictional works that involve the need to

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1 make clips included. And that are clear, fair uses.
2 Especially in the commercial context.

3 And so to get to an exemption, that is
4 the standard that needs to be met. That there's a
5 large amount of fair use out there that's being
6 suppressed.

7 And that standard has never been met.
8 And I don't think it's been met here today.

9 So, I just wanted to clarify that. A
10 number of the cases that are cited by the other side,
11 my clients are the defendants.

12 So, we are not here to take an anti-fair
13 use position. But this is about when you can get
14 an exemption in this proceeding, and when you
15 cannot.

16 Another thing that's raised a number of
17 times is, well, we have a low budget here. I don't
18 think that gets you to a fair use conclusion.

19 Under the fourth factor, if there's a
20 market that's established, or a potential market.
21 And if the copyright owner is out there exploiting
22 it or on the verge of exploiting it, or likely to
23 exploit it, then there is harm.

24 Regardless of whether an individual
25 user says they can't afford within the budget for

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1 their work to get a license. And so I don't think
2 that that is a justification for an exemption.

3 There are a large number of films
4 discussed by Mr. Donaldson. And I'd be happy to go
5 through them one by one, but I know you're short
6 on time.

7 So I'll take questions on that.

8 MS. CHAUVET: Ms. Miller?

9 MS. MILLER: Hi. I just wanted to kind
10 of go back to the criticism and commentary aspect
11 of the fictional works that we kind of began this
12 discussion with. And talking about Heidi Tandy's
13 example again.

14 And when we're talking about a fictional
15 work and how it can be a fair use and how it crit
16 -- how her work is a critique.

17 It's a critique of the characters which
18 involves also critiquing society as a whole
19 oftentimes. And the story that she proposes, is
20 commenting on specific characters and specific
21 elements that has a broader scope.

22 So, and that is just one of her examples.
23 Obviously there are other works out there that have
24 a similar aspect.

25 And that is one of the trends of fan

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1 fiction, is that they often critique and comment
2 on society as a whole. Even though they're using
3 characters from a well-known work, or they're using
4 a minor character in a certain way, they are often
5 critiquing in a grander scale.

6 MS. SMITH: And I think that's the issue
7 whether it leads to critique and comment upon the
8 work itself in order to -- under the first factor.
9 And then also how the fourth factor might be impacted
10 the market for derivatives versus making a broader
11 commentary about society.

12 I don't think we question that, you know,
13 almost any creative work is going to do the latter.

14 MS. MILLER: Right.

15 MS. SMITH: But, we're looking for
16 specific examples of criticism and commentary of
17 the copyrighted work. That the circumvention is,
18 you know, taking place in order to use.

19 MS. MILLER: All right. I'll let Heidi
20 speak. I think she may have more to say on her work
21 specifically.

22 But I'll also just throw in the
23 non-commerciality aspect of fictional works, and
24 specifically fan fiction.

25 It is a trend. And it's very common

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1 amongst fan fiction authors not to sell their works.
2 It is a noncommercial work of art.

3 And so that is something that is very
4 common amongst the fandom.

5 MS. CHAUVET: It is, though Mr. Reid
6 said that that would not be a reasonable limitation
7 to impose.

8 MS. MILLER: Um-hum.

9 MS. CHAUVET: So, how do we reconcile
10 that?

11 MS. MILLER: Well?

12 MR. REID: I'll be happy to jump in. I
13 think the question, and Professor Lerner raised
14 this, there are different communities that are
15 affected by the ambit of this exemption.

16 So the fan fiction community broadly
17 construed, and Ms. Tandy can speak to that and add
18 more directly, is one of them.

19 But, we're talking about an exemption
20 that affects lots of different communities on the
21 internet that are interested or may be interested
22 in taking advantage of this.

23 And some of those communities to the
24 point that Mr. Lerner raised, might look at their
25 ability to recoup the expenses of developing what

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1 is likely to be fairly intensive in terms of times
2 and resources project, and being able to recoup some
3 of those.

4 And again, we -- our perspective is, the
5 Office should be looking at these questions under
6 the traditional four factor fair use analysis.

7 And I think we had described in our
8 briefing, and we don't need to get into -- too deep
9 in the weeds unless you'd like. That commerciality
10 is not necessarily a barrier to fair use.

11 Having said all of that again, we would
12 -- if the Office were to draw this exemption in a
13 way that it swept in noncommercial e-book use for
14 non-film analysis or non -- or fictional works, that
15 would be an improvement over what we have now.

16 MS. CHAUVET: Okay. Thank you. Just
17 Ms. Miller and Ms. Tandy, very briefly. Because I
18 would like to get to the filmmakers also.

19 So, please, go ahead.

20 MS. TANDY: So, I just wanted to speak
21 very briefly on the issue of fan fiction and fan
22 works and fan videos, basically any form of fan
23 creativity as commentary and criticism.

24 Fan fiction and fan art derived
25 basically not just in the 1960s when Star Trek fandom

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1 started to explode, but even going further back to
2 say people doing Sherlock Holmes fan fiction, or
3 Alice in Wonderland fan fiction in the 1900s and
4 the 1910s.

5 People like Frances Hodgson Burnett
6 were creating fan works for -- and she went on to
7 write Secret Garden and the Little Princess, were
8 writing fan fiction in those universes and sharing
9 it amongst their friends.

10 And that was really how they started
11 writing and commenting on the Sherlock Holmes
12 stories. So it was a way to talk about the stories
13 and the characters themselves.

14 And yes, there was, you know, different
15 parameters that they were putting in with regard
16 to society. But, it's inherently commenting on the
17 story itself.

18 Because if what you wanted in fan fiction
19 was already in the story, then you wouldn't need
20 to write it separately.

21 However, there is something missing.
22 Or there's something you're not seeing. Or there's
23 something that you want to give different kind of
24 illumination to.

25 And if that's the -- if that's what

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1 you're seeing in the story that is missing, then
2 that's what you want to create.

3 And that doesn't necessarily mean only
4 illuminating a minor character. Or only writing a
5 missing scene. Because it's just a different
6 perspective.

7 MS. SMITH: I have to say I appreciate
8 that. And again, we've found that many instances
9 of fan works are likely to be fair use.

10 But the way you're describing it now
11 seems to also encompass a lot of derivative work
12 examples. Where would you draw the line? Or how do
13 you see the derivative writing --

14 MS. TANDY: Well, I can see situations
15 where cosplay for example, is not necessarily making
16 a comment on the characters themselves, or on the
17 story itself. But it can be.

18 Let's say for example you want to
19 recategorize the entire Justice League if it was
20 in a steampunk universe. Or if it was, you know,
21 in a solarpunk universe.

22 Then the costumes and the content and
23 the structure that you're creating there as cosplay
24 would be different. But that's not what we're
25 specifically speaking about here in terms of this

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1 exemption.

2 So, focusing specifically on what you'd
3 want to be creating in an e-book or in a game that
4 can be presented as an e-book, in those kinds of
5 situations, it's inherently a commentary on the work
6 itself.

7 Especially if it's an e-book where
8 people are being given choices where they can decide
9 which direction the story is going to go.

10 Or how they're going to read the story.
11 What part they're going to click on first. What
12 part they're going to view and enjoy first.

13 And that's how it differs, especially
14 in a multimedia e-book, from just something that's
15 a standard text only story that you're reading on
16 the screen.

17 But those kinds of things, say for
18 example creating in-universe content, like I
19 remember back in 2003, 2004, people were creating
20 wizarding magazine pages. Like what you would see
21 in a magazine in the Harry Potter universe.

22 And you know, with ads for brooms, and
23 with different kinds of, you know, household spells.
24 But also articles about, you know, five different
25 uses for Floo powder and stuff like that.

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1 And they were creating it in a way that
2 would look like a magazine page if it were in the
3 wizarding world. And that kind of thing is a
4 commentary on the story without even getting into
5 any of the individual characters.

6 Without taking quotes from the story.
7 That mashes up the text and also the photographs
8 of it.

9 Now in 2003 we didn't really have the
10 technology to be able to create and share moving
11 images online the same way that we do now.

12 So, somebody who wanted to do something
13 similar to that now, would want to be able to create
14 it as an e-book, multimedia format.

15 MS. CHAUVET: Thank you. And okay, so
16 I know the filmmakers have been patiently waiting.

17 Ms. Aufderheide? I'm so sorry if I
18 butchered your name.

19 MS. AUFDERHEIDE: It's all good. So, I
20 just want to make a really simple point. That it
21 doesn't seem to me to -- I think you can make a
22 distinction between documentary and fiction.

23 I hope you can, because I wrote a whole
24 book about documentary film. But that's one of many
25 ways to slice that unitary form.

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1 So, it seems to me this is a form that
2 shares virtually everything between those two
3 categories. You're talking about using audio and
4 video together.

5 You're talking about long form and short
6 form. You're talking about three act structure.
7 You're talking about using reenactments in both
8 cases.

9 So, these aesthetic forms are all very
10 similar. And many kinds of documentary, and many
11 kinds of fiction don't make commentary and criticism
12 about anything else.

13 And then sometimes they do. So and then
14 you have these hybrids like the Act of Killing is
15 a major award-winning film in which the characters,
16 the documentary characters are reenacting -- they
17 are real-life people in Indonesia who see themselves
18 as gangsters, and dream of being gangsters in a
19 gangster movie. And then stage a gangster movie.

20 Now this is something where there are
21 no gangster movies referenced in there. And I'm
22 sure, I think it is very hard to say, here's a great
23 example of how this is done when people know, know
24 that they can't do it.

25 That they can't add this stuff without

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1 enormous complications. And although Mr. Williams
2 says that it's not difficult to license, I assure
3 you as somebody who has worked with documentary
4 filmmakers for 40 years, the complaints never stop
5 about not getting answers back from license holders
6 about the request for licensing.

7 So, I do think that there are examples
8 of hybrid films like The Act of Killing where you
9 could imagine a perfectly plausible use of -- like
10 a gangster movie to comment on.

11 There is -- it isn't hard to take a
12 category like music video and think of Beyonce's
13 Lemonade as referring to many things in the real
14 world critically.

15 And being a criticism about the role of
16 African-Americans in society. And the slighting of
17 African-American culture.

18 I don't think it's hard to see a parody
19 and satire in those fiction skits that are on
20 Saturday Night Live every weekend as examples where
21 incorporating and referring to, and criticizing and
22 commentating -- creating commentary on real
23 copyrighted things, is something that there's no
24 reason not to encourage.

25 Good Night and Good Luck, a film that

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1 many -- like many biopics and historical films, has,
2 I think, every -- there's just no reason to say,
3 we want to discourage somebody from showing what
4 we mean by a vast wasteland and so on.

5 But my argument is basically this is a
6 form in which you can -- there's no reason to say
7 it's just crazy to think of criticism and commentary
8 happening in a fiction universe.

9 This is a unitary form. Thank you.

10 MS. SMITH: I appreciate that. I will
11 say in the last rulemaking we tried to look at --
12 so we're not trying to make any aesthetic judgments
13 as to whether criticism and commentary can or cannot
14 happen in a nonfictional work or in a fictional work.

15 We're trying to look at when there is
16 a use of copyrighted work, whether it is likely to
17 be non-infringing. And in the filmmaking context
18 there have been enough records to say that for
19 documentary films, it was likely to be
20 non-infringing.

21 And we were asked to sort of push that
22 boundary further and add it to all filmmaking. In
23 the last rulemaking we said well, you know, because
24 we understand there's also many other uses of
25 copyrighted works that may implicate the derivative

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1 right.

2 Or maybe validly licensed but may not
3 be the examples you're talking about. But in terms
4 of a line drawing exercise, we floated whether
5 biopic would sort of make sense to push out too.

6 And I think everyone thought that was
7 unsatisfactory. So, if you had any thoughts as to
8 how we might describe it.

9 Or whether that is just a fruitless
10 project to draw any division between types of films,
11 to separate out ones where use of a copyrighted work
12 is likely to be non-infringing, or those where it
13 is likely to be infringing.

14 MS. CHAUVET: And maybe just jumping on
15 that. One way to think about it might be to say
16 rather than extending the exemption to cover
17 specific films, maybe there's a way to exclude
18 certain types of films which might be less likely
19 to be fair use.

20 MS. AUFDERHEIDE: So, this is something
21 that I don't -- I don't quite understand. I mean,
22 I perhaps don't understand what your task is.

23 Because it really seems to me like it's
24 pretty -- you're being pretty clear, commentary and
25 criticism of the thing itself.

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1 So wouldn't it be up to the person to
2 make sure that they color within the lines? And if
3 they don't, they pay the penalty?

4 And obviously there are going to be many
5 circumstances in which that's not going to fit. And
6 they are going to have to go license.

7 But, I don't understand what's the bad
8 part about letting people have that option of using
9 that in a form in which you've already said well,
10 one part of the form it's fine.

11 But to me there's a -- there's both
12 fuzziness at the edges between these forms, and also
13 it seems to me no reason to not extend it to the
14 whole form.

15 It seems almost arbitrary to me.
16 Because if the document -- there are also lots of
17 situations in a documentary film where it would be
18 infringing to use copyrighted material in.

19 And that's why filmmakers like Jim
20 Morrissette's outfit, they have something on our
21 website where they show all the clips they licensed
22 and all the clips they didn't license, and the
23 reasons why in that film Refrigerator Mothers.

24 Because there's lots of reasons why --
25 anyway, never mind.

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1 MS. CHAUVET: I was going to ask, if that
2 evidence is in the record anywhere. I think that
3 would actually be a useful document.

4 MS. AUFDERHEIDE: Which evidence?

5 MR. CHAUVET: Just how you referenced
6 Mr. Morrissette's film or like how --

7 MS. AUFDERHEIDE: Yeah. We can give
8 you that link.

9 MS. CHAUVET: Some uses were fair use,
10 some were licensed, some were not. I think that
11 would be a helpful submission.

12 I know Mr. Lerner's had his placard up
13 for a while. But I do want to kind of go to Mr.
14 Williams.

15 And Mr. Taylor, just to hear kind of what
16 your position is relative, like if we were to go
17 ahead and extend the filmmaking exemption to include
18 films, but for the purposes of comment and
19 criticism.

20 Like why is that not sufficient to ensure
21 that you're more on the fair use side of things?

22 MR. WILLIAMS: And I'm going to speak to
23 e-books, as well, if that's okay because that's --

24 MS. CHAUVET: Absolutely.

25 MR. WILLIAMS: -- why I had my placard

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1 up. Of course, comment or criticism is an important
2 aspect of the analysis when you're dealing with fair
3 use. It's a lot harder to see how that plays out
4 in the fictional context than it does in the
5 documentary context because the examples that we've
6 been hearing about are things like, you know,
7 needing to use archival footage to show what it was
8 like to be in the moment at a certain point in
9 history. That's not commenting on that footage,
10 it's using it to further a different purpose.

11 So, yes, that would need to be a
12 necessary piece of any exemption if there was an
13 expansion, but I don't think it gets you to a point
14 where you can be comfortable enough that it's always
15 going to be fair use and that an exemption is
16 justified without some specific examples that you
17 can wrap your hands around, that you can apply the
18 four factors to, and that you can determine whether
19 what's at issue is really criticism and commentary,
20 number one, and, number two, whether even if it is,
21 there would be some market harm.

22 The example in the e-book context that
23 I heard earlier was I want to write a fan fiction
24 e-book that is a choose-your-own adventure style
25 approach. And so if I understand that correctly,

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1 that would be taking, say, a movie character,
2 writing your own novel about that character, and
3 then taking clips from some of the movies that have
4 been made and inserting them along the way so that
5 the reader can say, oh, well, I'm going to make this
6 choice and, therefore, I now watch this piece of
7 the movie and then the novel moves on. I haven't
8 heard anything about how that involves criticism
9 or commentary of the movie itself. It may involve
10 some type of additional expression that's in the
11 new novel, but the Axanar case and the Salinger case,
12 I mean, the courts have not held that such uses are
13 fair.

14 The other thing that was raised is, is
15 it enough to just say, well, it's all non-commercial
16 e-books or non-commercial fictional films, and I
17 don't think that is enough. Just the fact that
18 something isn't for sale doesn't mean that it's,
19 number one, non-commercial for fair use purposes
20 because paying the customary price is what is
21 involved in that analysis, not just whether you sell
22 it for a profit. So there could be all kinds of uses
23 that are non-commercial that would still harm my
24 clients and that would still be infringing uses.
25 So without the specific examples, I'm not seeing

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1 it.

2 The examples I did see, and I won't
3 rehash all of the examples that Mr. Donaldson went
4 through, but there were a very small number where
5 he said, okay, in this scene, in this fictional film,
6 because we were trying to show what happened on Air
7 Force One right after Kennedy was shot, we had to
8 show the actual footage those people watched.
9 Maybe that's a justification that you really have
10 to have that specific piece of footage to accurately
11 recreate the fictional scene. That's not criticism
12 and commentary on that footage and, in most of the
13 cases that he referenced, for example the Cesar
14 Chavez film which I watched recently, I think there
15 were a wide variety of archival clips that they could
16 have chosen from and they selected the ones that
17 they wanted the most and there was a list of credits
18 at the end where either they had licensed or they
19 had been given gratis licenses from a number of
20 entities, I think that, if I recall, included NBC
21 Universal. And there may have been some where they
22 decided to try to make fair use, but if it was
23 actually fair use I don't know because if you've
24 got 60 clips of Cesar Chavez to choose from and you
25 pick the one that's the most engaging because the

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1 people who created it did a great job, the fact that
2 you don't want to pay to license that one, I'm not
3 sure that that's fair use.

4 MS. CHAUVET: I have a lot of thought,
5 but I know lots of people have their placards up,
6 so Mr. Taylor.

7 MR. TAYLOR: David Taylor. I think the
8 problem is that there are no real concrete examples
9 throughout this. What we've heard is, particularly
10 in the e-book situation, is stuff that sounds more
11 like interactive games, and it's not clear to me
12 that, you know, that is an e-book. And so I'm not
13 exactly sure what the examples are.

14 And the examples that we've seen in the
15 film-making examples are the archival clips. Well,
16 the archival clips, as far as I know, aren't
17 distributed on protected DVDs. Those are news
18 clips that you have to get from some other source.
19 So, again, we don't see examples of use that we can
20 actually evaluate to say this is clearly a
21 non-infringing use or not. So I think that's all
22 I have.

23 MS. CHAUVET: Okay. I know Mr. Lerner
24 and Mr. Reid have had their placards up, but I am
25 interested into hearing more specific examples, if

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1 there are any, from the filmmakers that go to,
2 basically, what they have said, like they don't see,
3 like, there are sufficient examples in the record
4 showing for the purposes of comment and criticism,
5 so I would be particularly interested to hear about
6 that and then what other points you have. Mr.
7 Lerner, or ---

8 MR. DONALDSON: Thank you. I'll
9 probably have to supply a supplemental. I wasn't
10 the point person on a couple of films that did come
11 to my mind that were worked on since the last hearing
12 in our office. One was a wonderful film called In
13 Search of Fellini where there was a young woman very
14 taken with Fellini's work and the actual clips were
15 shown for the purpose of commenting on them that
16 this is the power of a Fellini film, which is very
17 unusual. And I see one of the panelists nodding her
18 head, which, if you haven't seen the Fellini films,
19 you wouldn't particularly relate to how impactful
20 they are. And recreating them as they did in
21 Lovelace doesn't work. You really have to see what
22 Fellini did.

23 The other one was a film, a scripted
24 film, about Christine, who is a news anchor in
25 Florida who one night on the news leaned down, pulled

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1 out a gun and shot herself. Using anything but that
2 doesn't -- so the commentary is this is how it looked
3 to the television audience that day, not something
4 cooked up as a re-do as they did in Lovelace, but
5 this is what the audience actually saw. In that
6 case, I'm not sure if they decided they couldn't
7 because it was not within the exemption and they
8 couldn't get it otherwise. It's certainly not
9 footage that the television station is licensing.

10 I did want to comment before I pass it
11 on to Jack that you implied that I was suggesting
12 low budget was somehow part of the consideration
13 when you're making a fair use analysis, and of
14 course, of course it is not. But what it is, it tells
15 you that there's this group of people based on budget
16 who simply can't afford \$10,000 a clip for a number
17 of clips in a film where they're used for criticism
18 and comment, which, again, is much narrower than
19 just fair use. When I hear the words, well, I'm not
20 personally satisfied, to me that's not particularly
21 relevant, nor is it particularly relevant that I
22 am personally satisfied. It's the fact that you
23 have insurance companies who put real skin in the
24 game, take a real risk of hundreds of thousands of
25 dollars, they'll say we'll defend that. And that

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1 is not lightly taken. We all know insurance
2 companies don't like to pay claims. Most of us had
3 experience with that. Insurance companies are
4 taking on a major risk every time they insure one
5 of these films that contains fair use.

6 MS. CHAUVET: So do you have any
7 examples of insurance companies refusing to insure
8 a movie because they are fearful of, like, a motion
9 picture clip being incorporated? Like, basically,
10 we're looking for adverse effects here, so like,
11 do you have any specific examples where a movie is
12 not made because the insurer said, no, you cannot
13 use that movie clip?

14 MR. DONALDSON: I have several examples
15 -- again, I think I need to do it in writing so I
16 can check with the point person on the film -- where
17 adjustments have been made. Every film we've
18 worked on we've eventually gotten insurance, but
19 quite often there's pushback from the underwriter
20 and not so much disagreeing with our analysis but,
21 rather, that person is very litigious. We have a
22 number of films dealing with the current President,
23 and the insurance companies are very strict about
24 that because they are concerned about a litigious
25 person being at the center of the film.

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1 So we've had a lot of pushback, more on
2 the risk factor than the fair use factor, but I can
3 get some examples to you. But I want to be accurate
4 about it, not just like, well, this is the way things
5 are.

6 MS. CHAUVET: Great. Thank you. Mr.
7 Lerner.

8 MR. LERNER: Thank you. Jack Lerner.
9 I just wanted to talk a little bit about the
10 definition of criticism and commentary. I think
11 it's been dealt with by some of my fellow proponents
12 here, but, you know, the definition of criticism
13 and commentary does not, when you make criticism
14 and commentary, it's not necessary to say explicitly
15 I am commenting on this work, I am criticizing this
16 work, and here is exactly what I'm saying. It can
17 be, as Mr. Donaldson said, simply showing how
18 someone felt about a work at the time, and that's
19 absolutely a commentary and criticism of the work
20 but also why is criticism and commentary limited
21 to criticism and commentary of a specific work that
22 has not been in the definition before?

23 I also want to just counter something.
24 There are a number of cases that support the
25 contention that many fan fictions are fair use. I

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1 would just point the Register to *SunTrust v.*
2 *Houghton Mifflin* which was about an unauthorized
3 parody/sequel of *Gone with the Wind*. There are a
4 number of other cases which we're happy to submit
5 in the record.

6 I want to make the point that you've
7 already endorsed in the non-commercial video rips
8 exemption which you've suggested or said that you
9 will be suggesting for renewal, an exemption that
10 includes fictional use.

11 A couple of other quick points on this
12 question about the sufficiency of the use and
13 criticism and commentary and the question of whether
14 fiction or non-documentary films should be
15 included. Let's be clear: I don't think there's any
16 question at this point, after I think we've had
17 exemptions in place in a documentary context for
18 eight years, I don't think there's any question
19 after all these years that there's a real risk of
20 any kind of infringement or of any kind of,
21 quote-unquote, piracy that would arise if you simply
22 remove the term documentary from the existing
23 exemption. The effect would be lifting a veil of
24 fear and a chilling effect, and there would be
25 absolutely no effect on the market that our friends

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1 at the end of the table were concerned about.

2 MS. SMITH: Do you contend that the
3 licensing market would not be affected? Do you
4 think that if someone -- do you want to speak to
5 that?

6 MR. LERNER: Absolutely, yes. The
7 licensing market would not be affected because what
8 we're talking about is the market for works which
9 a rights holder has the right to demand a license
10 for. If I make fair use and I do it appropriately,
11 as our clients do, a rights holder does not have
12 the right to say you need a license to that.

13 What we have now is that we have a number
14 of filmmakers who are either not doing the fair use
15 that they want to do or they're getting licenses
16 simply because they can't access the material they
17 want to access. And I don't think there's really
18 any dispute that there is a large amount of fair
19 use in the non-documentary context. The question
20 is how much of that is being licensed when it
21 actually doesn't need to be licensed?

22 MS. SMITH: Are there any examples you
23 can point us to, especially in the written comments,
24 of something where a license was taken because of
25 section 1201 but, otherwise, you believe would not

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1 have been taken because it would have been
2 non-infringing under 107?

3 MR. LERNER: Could you repeat the
4 question? Whether a license has been taken --

5 MS. SMITH: Examples where a work is
6 licensed for use because of section 1201 but, you
7 know, in a world where section 1201 is not
8 applicable, it would not be necessary to obtain a
9 license because fair use would permit the unlicensed
10 use.

11 MR. LERNER: There are numerous
12 examples in the record. We brought forth over,
13 we've brought forth in the last two rulemakings,
14 I think, nearly 70 different films where people said
15 I want to make fair use but I can't because of the
16 DMCA's restrictions. A number of these did include
17 licenses. We could supplement the record with some
18 specific examples.

19 And, finally, I just want to point the
20 Office to something that the Register said in 2015
21 at page 78 of her recommendation. She explicitly
22 noted that she did not need to opine on the fairness
23 of any particular proposed use and that the standard
24 is simply many of the contemplated uses are likely
25 to be non-infringing under section 107. And we

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1 have, we think that we have shown that with a lot
2 of documentary evidence and this evidence is
3 undisputed in the sense that, well, they're saying
4 that it is not fair use and we're saying that it
5 is. But at the same time, there's no real dispute
6 that a broad, robust, burgeoning fair use practice
7 is existing in the non-documentary context, and the
8 question is whether a lot of this will be either
9 chilled or whether a lot of this will be allowed
10 to go forward without section 1201 being an
11 impediment.

MS. CHAUVET: There's so
12 many questions I want to ask. Mr. Reid.

MR. REID: And I just want to -- Blake
13 Reid. I just want to tack on to what Professor
14 Lerner said and respond to some comments that Mr.
15 Williams made. We understand that this job would
16 be a lot easier for the Office if we could arrive
17 with a binder full of business plans and scripts
18 and ideas that folks had gotten all lined up and
19 ready to go but for the existence of section 1201
20 and had asked permission and had satisfied to all
21 of the questions that you've asked today that they
22 would go forward were this exemption not granted.
23 But we want to remind the Office of the context in
24 which this rulemaking is taking place. First of
25

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1 all, this rulemaking takes place every three years,
2 and it currently is against the backdrop of section
3 1201 which makes the creation of these films where
4 licensing and screen capture are not reasonable
5 alternatives, which, as we've argued at length,
6 they're not. It basically makes making these films
7 illegal, and it makes them punishable by statutory
8 damages. It makes them punishable where it's
9 willful and commercial by criminal prosecution. So
10 you have to understand that folks are maybe not
11 willing to come out of the woodwork with very
12 detailed plans and say when we get our shot in three
13 years we are willing to provide this incredibly
14 detailed record --

15 MS. SMITH: But I just have to interrupt
16 for a second. We appreciate that, but, because we
17 are tasked with every three years looking at whether
18 the market has changed, the proposed uses have
19 changed, we do need to tie it to some real world
20 examples of what people like to do. And in the past,
21 we have been able to do that for a variety of
22 audio-visual uses, and that's what we're looking
23 to do. It's difficult for the Office to say without
24 looking at some tangible examples to draw on, so
25 that's sort of our purpose.

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1 So we appreciate the backdrop upon which
2 all of this happens, but since it's been feasible
3 for prior Class 1 categories, that's what we're
4 trying to focus on now when we look at whether we
5 can expand it.

6 MR. REID: I guess I can just respond and
7 say we have attempted, notwithstanding that very
8 dangerous backdrop for folks, to assemble a large
9 variety of examples that we think are very probative
10 in the same way that the record has been in past
11 proceedings that establish the need to expand this
12 exemption. And I want to tee in to Mr. Williams'
13 comments here, we are now engaged in this
14 line-drawing exercise where we have to take every
15 one of those examples and we want to divide among
16 genres, we want to divide among specific films, we
17 need to have a specific analysis of each example
18 that's on the record. So it's not just good enough
19 for us to provide examples, we have to prove that
20 they are non-infringing and we have to do some sort
21 of fair use analysis.

22 And we're really troubled by that, and
23 we want to underscore that this is the only
24 opportunity that folks have to be able to make these
25 sort of films and to sketch what all of that looks

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1 like out in advance for three years is not the burden
2 that the statute demands. It demands a showing of
3 likely adverse effects, and I think what you've seen
4 in the comments and I think what you've heard here
5 today and what Ms. Tandy will speak to in a moment,
6 go far beyond satisfying what section 1201 requires.
7 So we really urge the Office to view these examples
8 in light of the backdrop of this proceeding.

9 MR. CHENEY: If I could ask a question
10 or two, if I might. There's this sort of
11 undercurrent and Mr. Taylor sort of teed this up
12 a little bit in one of the comments that he made,
13 and I just wanted to ask this: why in the e-book
14 sense, and I'm going to leave film aside for a
15 second, why in the e-book sense that you guys are
16 asking for here didn't you go for the sort of broader
17 category of the mixed video or for your fan fiction
18 and the cosplay things you're talking about? Is it
19 because the clip that you're using is a lengthier
20 clip and you're not really messing with that clip,
21 you're just inserting it into -- and I went to some
22 of the things you're talking about, the Dubliner,
23 it looked to me like it was a sophisticated blog
24 and a series of articles that people wrote that were
25 posted. It seemed to me that that's more akin to

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1 the other things that you're talking about. Is it
2 because you're not messing with the film itself,
3 you're not changing the actual content that's talked
4 about in the remix type of category? Because we've
5 talked about that there's fiction allowed in that
6 section, but it's not allowed here as the current
7 exemption is written. So can you address that a
8 little bit, why you went to this, looking at the
9 e-book rather than at the remix style for your
10 exemption for this part?

11 MR. REID: Mr. Cheney, I may
12 misunderstand your question, but if the question
13 is whether we are in support of a broader exemption
14 that might wrap all of these together, I believe
15 everybody involved in the e-books exemption
16 endorses the broader approach, as well.

17 MR. CHENEY: Let me tease that out just
18 a little bit longer. The e-book that we talked
19 about in the past is a very sophisticated e-book
20 intended for publication, right? So it wasn't
21 something that was just going to be posted on the
22 web. It was something intended more for
23 publication, and that's why you needed the
24 higher-quality film and some of those kind of things
25 that were built into that exemption.

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1 So in this case, you're not talking
2 about, from what I can tell, higher-quality type
3 film that you need to get clips for and those kinds
4 of things. That hasn't been brought home to me in
5 this, and that was sort of brought out by what Mr.
6 Taylor said and some of the things you've indicated
7 here. So can you help with that a little bit?

8 MS. TANDY: If it's okay for me to take
9 the answer to that one. These days, what you're
10 putting on the web can be incredibly high quality.
11 I mean, right now, on our phones, we're able to shoot
12 high-quality video and we're able to distribute it.
13 So being able to incorporate something that is what
14 people are used to seeing and what the kind of visual
15 quality they're used to seeing basically goes along
16 with that.

17 One of the reasons we haven't really
18 talked about needing exemptions for fan fiction and
19 fan art is because, of course, that doesn't involve
20 pulling anything off of visual content. It's all
21 textual or it's all hand drawn or it's all
22 sculptural, painted, et cetera, et cetera. So what
23 we're talking about here is the other different
24 kinds of fan works, and, of course, people have been
25 doing fan films going all the way back to the 1960s.

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1 I myself was editing on a three-deck VHS then
2 connected to an Amiga back when I was in college.
3 And now we have sophistication. The quality of the
4 video that I was working with, things that I was
5 videotaping off of the regular television back in
6 1990 is, you know, like, one-tenth or one-fiftieth
7 of the kind of quality that we're shooting on a daily
8 basis, like I said, just from our phones.

9 So we have a situation here where we want
10 things, where people want to create things that
11 match up visually with what people are used to seeing
12 in terms of visual sophistication, and, yes, that
13 can be published right to the web. So I'm having
14 a bit of a hard time seeing a differentiation between
15 published and, by that, do you mean downloadable,
16 you know, via Amazon or via Kindle Books or something
17 like that, or something that somebody is just
18 uploading themselves. Even, you know, right before
19 YouTube launched in, like, 2005/2006, people were
20 putting up fan vids in AVI format on their own
21 personal websites, and people were downloading it.
22 And people who still don't trust YouTube or Vimeo
23 are continuing to do that to this day.

24 Just because we have another format that
25 automatically compresses things into different

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1 file levels and different speed levels and different
2 download times doesn't mean that people aren't still
3 taking other approaches. So I could create
4 something that is an e-book that's a PDF or something
5 that is an e-book and multimedia e-book as a
6 PowerPoint, you know, that moves through at specific
7 speeds that I program into it, and it doesn't require
8 anything other than access to Google Drive.

9 MR. CHENEY: So in a sense, you're
10 expanding what we thought about as an e-book in the
11 past and it really could be included in all of these
12 sorts of forms of including both text and film clips,
13 and that's sort of the direction that this is going,
14 if I'm understanding what you're saying here.

15 MS. TANDY: Yes, although it doesn't
16 necessarily include text in the sense of, you know,
17 the way that we think about it where, you know, you
18 can copy and paste it because sometimes people are
19 creating an e-book where all the text in it is
20 included in JPEGs, so it's JPEGs and video clips
21 mixed together with little, if anything, that's
22 copyright, you know, that's copyrightable textual
23 content in the sort of way that you would think of
24 something coming off of a computer or off the
25 typewriter because you want a specific visual

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1 impression that you're creating here so you want
2 to create the font in the way that people will see
3 it exactly, rather than having it come up with
4 whatever their computer or their phone allows.

5 MS. CHAUVET: Great. Thanks. That's
6 very helpful. We are kind of running out of time,
7 so I do want to make sure to get to other topics.
8 So, Mr. Williams, specifically, there are a couple
9 of follow-up questions from previous discussions
10 I wanted to ask you about, so the filmmakers and
11 e-book people might also feel the same way is, if
12 someone oversteps the line, then why can't creators
13 or the content owners just sue? Why is it necessary
14 to have the current limitations and it's not
15 sufficient just to be bounded by the comment and
16 criticism and the short portions limitations?

17 MR. WILLIAMS: Sure. And I think this
18 relates to why I had my placard up, so I'll try to
19 combine the answer with what I was planning to say.
20 Jack had referenced previously that, you know, it's
21 clear that no infringement has ever resulted from
22 any of these exemptions and, therefore, it will not
23 result from any of the expansions. And our position
24 has been throughout these proceedings before the
25 non-commercial video exemption is granted, that

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1 there's already a lot of infringement happening that
2 a large portion of those videos are infringing and
3 that has continued throughout each cycle. We've
4 identified examples that we feel are infringing.
5 And so we have chosen not to continue to oppose those
6 exemptions because, once the Office a couple of
7 times reaches a conclusion, you know, we don't beat
8 our head against the wall; we respect the Office's
9 conclusions. But that's not a concession on our
10 part that there's been no harm caused and no
11 infringement taking place.

12 That said, I think it's important to
13 remember that section 106 already existed before
14 section 1201 and Congress chose to grant a new right
15 related to unauthorized access, and that's why we're
16 all here. And so to say that, well, you know, let's
17 just let everyone have at it and let the litigation
18 sort it out, it's not a very comforting proposition
19 because, you know, litigation is a very burdensome
20 process --

21 MS. SMITH: I don't think Ms. Chauvet is
22 suggesting that. I think she's saying if there's
23 a quantum of, you know, films that are likely
24 non-infringing, if you allow these limitations of
25 criticism and short portions, and if one or two gets

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1 through don't you still have 106 actionable and why
2 wouldn't that be a reasonable way for the Office
3 to look at this rulemaking?

4 MR. WILLIAMS: I don't think it would be
5 one or two, I guess is my primary answer. As I've
6 been saying, I've seen very few examples actually
7 in the record of non-infringing uses in the
8 fictional space especially, but, even in the
9 non-fiction e-book space, there's really only a
10 couple of examples that I can think of. This
11 Digital Dubliners, I did look at that, as well. I
12 didn't read through the whole thing, but it uses
13 some audio-visual clips and didn't appear to be a
14 fictional work. And from what I saw, it had some
15 good arguments as to making fair use, but then,
16 again, I don't know all the circumstances involved
17 with selection of those clips.

18 So I don't think it would be one or two.
19 I think it would be seen as the Office endorsing
20 a broad swath of content and would lead to misuse.
21 And even in the initial recommendation and
22 subsequent recommendations related to
23 non-commercial videos, the Office has said there's
24 a lot of stuff in the record that we think is probably
25 infringing and, yet, what we hear time and again

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1 when we come back from proponents is the Office has
2 already decided that all of this is non-infringing
3 and that there's no harm. And so I do think it would
4 be seen as an endorsement of a broad swath of conduct
5 that the Office doesn't actually, one, have a chance
6 to analyze carefully and, two, doesn't intend to
7 endorse.

8 MS. CHAUVET: So then, just to clarify,
9 to say we were to extend it but we still had the
10 comment and criticism, short portion, but then we
11 added for non-commercial purpose, in your view
12 that's still not sufficient?

13 MR. WILLIAMS: Yes, as I was trying to
14 say, and I'll say for the record this is Matt
15 Williams, as I tried to say earlier, non-commercial
16 in and of itself is not enough. It is a factor to
17 consider, and then it has layers to it. So one type
18 of commercial use is going out in the market and
19 trying to make a profit off of your work. Another
20 type of commercial use under the case law is just
21 avoiding paying the customary licensing fee to make
22 use of a work, and so that is a form of commercial
23 use, at least under fair use. So I'm not sure which
24 way the Office is using the term, whether it's kind
25 of more in the plain language meaning or what the

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1 case law has said, but that by itself is not enough.
2 You still have to look at the other factors and,
3 yes, short portions is very important, as we've said
4 before. Criticism and commentary is very
5 important. But none of those things add up to a slam
6 dunk in every case.

7 Even in the *Campbell* case where they
8 found that it was transformative, that it was
9 criticism and commentary, they remanded to the lower
10 court to take a look at the fourth factor more
11 carefully and make sure that that type of use in
12 that specific instance wasn't going to interfere
13 with the market and cause harm. And so it's a very
14 careful analysis that's required, and I appreciate
15 the spot you're in because you're trying to make
16 sure that you're doing your job and addressing fair
17 uses when you see them, but I just think that this
18 space is a very hard one to draw lines where we can
19 feel comfortable that almost all of the activity
20 is going to be fair.

21 And in the documentary space, we've come
22 to live with it, in the short videos with short
23 portion space we've come to live with it, but, as
24 you've concluded in the last two rounds, there's
25 just not enough clarity in the fictional space to

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1 get there.

2 And so I think this record is very
3 similar to the record we had last time, and I don't
4 see a reason to expand this under what we've been
5 shown so far.

6 MS. CHAUVET: So I do want to turn to
7 licensing and kind of keep the conversation going.
8 So, Mr. Williams, the joint creator stated in the
9 comments that motion pictures are even more broadly
10 available for licensing today. Is there any
11 evidence that you can point us to to suggest that
12 this is true?

13 MR. WILLIAMS: Yes. So we have a large
14 number of links in our comments to websites that
15 provide easy access to the contact points that you
16 need to reach in order to engage in licensing. I
17 think we've almost always been able to point to some
18 websites that have contact information posted, but
19 some of the ones that we've provided this time are
20 much more interactive. For example, the CNN site
21 is one I can think of where you can actually go on
22 and say, you know, I'm looking for a clip from this
23 period of time of this specific person and a bunch
24 of different clips will pop up and you can say I
25 want to use this in a fictional film, in a

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1 documentary film, I want to use this in an
2 educational setting, and they give you different
3 pricing. It pops up almost immediately on the site,
4 and so that makes the licensing more available in
5 my view.

6 MS. CHAUVET: Thank you. That's very
7 helpful. Ms. Aufderheide, I think it would be good
8 to respond specifically to Mr. Williams' statement
9 because if there are, you know, he did indicate in
10 the comments that there are, even for, like, news
11 reporting, which has been desired to be news, like
12 CNN has its own licensing side or some of these
13 motion studios. And at least in the last rulemaking
14 it was noted that one of the difficulties with
15 licensing was it's difficult to identify the content
16 providers or to have a very lengthy kind of
17 negotiation. So it would seem with those types of
18 organizations or websites that it would make it more
19 available or at least easier or at least address
20 some of the concerns that were previously in
21 existence before.

22 MS. AUFDERHEIDE: Because I'm a critic
23 and a historian, I want to cede to my filmmaker
24 colleagues here to give you specifics.

25 MR. DONALDSON: I'd be happy to tell you

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1 how darn hard it is to license certain things that
2 they're saying are so easy.

3 MS. CHAUVET: Well, I guess my specific
4 question is, if the identification of having some
5 movie studios with websites saying, you know, by
6 genre, you have these different clips available,
7 you know who the actual content owner is in that
8 sense, it doesn't seem like there would be a lengthy
9 negotiation, so does that alleviate some of the
10 concerns that were expressed in the previous
11 rulemaking? That is my specific question.

12 MR. DONALDSON: The answer is no, but it
13 is easier to find out that they have the thing you
14 want. Two things: number one, it doesn't say on
15 those sites that, by the way, if what you're looking
16 for has an anchor and you're going to put it into
17 a film that has a point of view, like most
18 documentaries do, we won't license it at all.
19 Oliver Stone found that out on Snowden where he
20 couldn't get the -- and the other thing is it used
21 to be that you'd call and a human would answer, and
22 now it's very hard if the posted price is, like,
23 beyond what the filmmaker could possibly afford
24 because the film is small or the market for the film
25 is quite niche, getting a call back is really, I

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1 can't tell you the number of complaints I get from
2 filmmakers that, sorry, nothing I can do about it
3 because I can't get through either.

4 MS. CHAUVET: Ms. Wertheimer?

5 MS. WERTHEIMER: Lauren Wertheimer.
6 One additional issue with licensing is that we've
7 provided evidence for the record that a lot of
8 licensing agreements include clauses, like
9 non-disparagement clauses that state that the
10 licensee can't make critical, like, use of the
11 licensed clip, not critical or disparaging, and they
12 actually use the word critical. So even with a
13 license, if they can't make criticism, they can't
14 make fair use.

15 MS. CHAUVET: Mr. Williams, I'm going to
16 put you on the spot. What is your response to that?
17 So the fact that there are these disparagement
18 clauses in licenses, if that's going to prevent
19 people from entering into a license to get it, how
20 is there a licensing market to be had?

21 MR. WILLIAMS: Sure. So this is
22 something that's come up at least the last two cycles
23 and has not ultimately justified granting an
24 exemption. A number of the copyright owners do
25 include non-disparagement clauses. I think the

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1 record has shown not all of them do. I'm pretty sure
2 that previous records show that Warner Bros. did
3 not have non-disparagement clauses in its licenses,
4 and so I'm not sure that Mr. Donaldson's reference
5 to CNN telling you you won't be able to use it in
6 certain ways is accurate. But there are --

7 MS. CHAUVET: Well, there was the
8 example of the Miramax licensing agreement that did
9 actually contain it.

10 MR. WILLIAMS: Yes, so I'm not denying
11 that there are non-disparagement agreements in a
12 lot of licensing agreements. There's a few things.
13 I don't actually think there's any examples that
14 anyone has offered that involved actual criticism
15 of the studio or of any of the actors or really,
16 in this record, of the films themselves, and so I
17 don't think that those provisions would prevent
18 licensing of the works that are actually in the
19 record.

20 The other thing is that some of those
21 relate more to, you know, issues about disparagement
22 of the talent that provides services to the studios,
23 and I haven't heard anything relevant to that in
24 the record either, so.

25 MS. CHAUVET: Though they do give the

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1 example of the movie 1984 with Steve Jobs that the
2 Jobs family didn't like how it was going to be used
3 and so they refused to enter that license. I mean,
4 isn't that an example of --

5 MR. WILLIAMS: Well, so Universal, in
6 that example, exercised fair use. They didn't get
7 a license because it was denied them, which is a
8 bit of a different question than this issue because
9 --

10 MS. CHAUVET: But it is an example of a
11 license being refused because they didn't like how
12 it was going to be used in the film.

13 MR. WILLIAMS: Sure. I mean, I'm not
14 going to say that there are no copyright owners who
15 would like to avoid being criticized. That's an
16 undeniable fact. In that film, and you saw a brief
17 clip of it there and that's been in the record in
18 prior cycles, as well, the Jobs family apparently
19 did not like the film and didn't want to license
20 it. Universal moved forward. I think if you saw
21 the way they used it, they didn't just show the
22 entire thing. They had a mixture of the audience
23 worked into the scenery watching it on a big screen,
24 and so they made certain creative choices about the
25 way to use it. I don't think that one example

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1 standing alone would justify an exemption.

2 MS. CHAUVET: But if it affects how
3 they're going to make the film, like if it limits
4 how they can use a motion clip for fair use, how
5 is licensing a feasible alternative in that
6 scenario?

7 MR. WILLIAMS: Well, I'm not saying that
8 licensing is always a feasible alternative.
9 Clearly, in that case where the license was denied,
10 you can't say that a license was available to be
11 had. What I am saying is that the examples of that
12 in this record and in all the prior records are very,
13 very few and far between, and I've also heard
14 frequently that it's unacceptable to condition the
15 exemption on asking for the license and being denied
16 in the first instance. And so if you only want to
17 target those examples, I think you would end up with
18 an exemption that the proponents would be unhappy
19 with because they don't even want to go ask in the
20 first place.

21 MS. CHAUVET: I have a quick question
22 for Mr. Taylor. So regarding the market for
23 multimedia e-books, so, actually, both you and Mr.
24 Turnbull, you guys, in your joint submission, stated
25 that there actually is no such market for the

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1 e-books. So if there is no market for multimedia
2 e-books or it's very small, how can there be an
3 adverse effect on the clip licensing market?

4 MR. TAYLOR: I don't think that we said
5 that there would be an adverse effect on a clip
6 licensing market.

7 MS. CHAUVET: No, you didn't, but you
8 said that there is no market. So my question is if
9 there's no market for multimedia e-books, then how
10 can there be a clip licensing market for multimedia
11 e-books?

12 MR. TAYLOR: Well, if you believe that
13 there is a robust multimedia e-book market, our
14 argument is that, if that market were to develop,
15 then we think that those authors should have to
16 license work just like they would if they were doing
17 it in a documentary. And we noted that there were
18 a lot of potential -- or works that were proffered
19 by people who are also documentary filmmakers. And
20 so if you expect the documentary filmmaker to
21 license or the non-documentary filmmaker to license
22 works, then you can just as equally expect them to
23 license works for the multimedia e-books.

24 MS. SMITH: So to follow up and maybe to

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1 get Mr. Williams's answer, is it the motion picture
2 studio's view that the e-books multimedia market
3 is a traditional, reasonable, or likely to be
4 developed market, and, if so, is there anything in
5 the written comments you can point us to to back
6 that up?

7 MR. TURNBULL: I think it is, at the very
8 least, a potential or likely to be developed market.
9 Last cycle, Simon Swart from Fox testified that they
10 would be willing to license multimedia e-books from
11 what I recall, and we do have Ben Sheffner from MPAA
12 who is going to testify in Los Angeles on issues
13 related to licensing, as well as the importance of
14 access controls.

15 MS. SMITH: I think it will be helpful
16 to hear from Mr. Sheffner with specifics in Los
17 Angeles so that we can understand more about the
18 licensing --

19 MR. TURNBULL: Sure.

20 MS. SMITH: -- from the proponents.
21 Mr. Welsh?

22 MR. WELSH: Yes, if I could. Thank you.
23 Josh Welsh, Film Independent. I wanted to go back
24 just briefly to the basic distinction between

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1 documentary and fiction film because it's obviously
2 running throughout this. And in terms of filmmaker
3 practices today, and this is picking up on what
4 Professor Aufderheide said, there really is a
5 growing trend towards blurring the line between
6 documentary and fiction film. And these aren't
7 just one-off films that are kind of odd cases. It's
8 a growing genre of hybrid films that employ
9 documentary and fiction elements. And in 2011, one
10 of the major documentary awardshows in the United
11 States, the Cinema Eye Honors, introduced a new
12 award. It's the Heterodox Award specifically to
13 recognize films that are kind of unclassifiable.
14 They're both fiction and documentary.

15 And I think you see, to name a couple
16 of examples, in 2018, Alex Gibney's series, "The
17 Looming Tower," which is -- it's a ten-part series
18 about al-Qaeda. It's a fiction scripted series
19 that has substantial documentary components in it,
20 and the whole point of this approach to filmmaking
21 is to have the fiction and the traditional
22 documentary segments play off each other.

23 Another one is Errol Morris's
24 "Wormwood" also on Netflix where it's the same

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1 thing. He had actors doing scripted scenes
2 intercut with archival footage and documentary
3 interviews. And they comment on each other. You
4 don't have that genre of filmmaking without both
5 elements.

6 MS. CHAUVET: And how are those examples
7 of films for the purposes of comment and criticism?

8 MR. WELSH: So I'm not citing them as
9 examples of that. I'm citing them as examples of
10 why I think granting or denying an exemption based
11 on a film genre is problematic when the genre itself
12 is so porous. I mean, that would be my argument.

13 And the other thing I want to emphasize
14 is this is really a growing segment of the filmmaking
15 world today. I think this is a very exciting
16 development and growth area for film. And so if,
17 again, it just doesn't make sense to me that you
18 would grant or deny an exemption based on what genre
19 a film falls in.

20 MS. CHAUVET: Great. Thank you. I
21 want to ask a few other questions more towards the
22 adverse effect. And I know people have been
23 waiting.

24 MS. SMITH: Do you think we could let

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1 Professor Aufderheide, just since she wrote the book
2 on documentary filmmaking, just speak to that one
3 point first?

4 MS. AUFDERHEIDE: Well, when I'm not
5 writing books on documentary film, what I've been
6 doing since 2004 is to work with different creative
7 communities to figure out what happens to them if
8 they don't understand what their fair use rights
9 are. And we've developed, and I've worked with a
10 colleague, Peter Jaszi, we've developed a category
11 of thinking about this called Imagination Foregone,
12 which is what happens, what do you not do if you
13 think this is probably something that's prohibited?

14 And there are large -- I can share this
15 data with you, but there's instance after instance
16 of people excluding entire categories of behavior.
17 And this is what worries me about looking for
18 specific ways in which people are now using this
19 stuff that justify your logic that this will be
20 probably not infringing, or that there are
21 imaginable non-infringing uses because a lot of
22 people are not imagining it. And this heterodox
23 category is labeled heterodox precisely because
24 it's unusual.

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1 So I don't think we want to restrict
2 that. I'm just going to name some classes of filmic
3 behaviors that it's not hard at all to see how you
4 could incorporate commentary and criticism. You
5 have topical dramas on television, like Roseanne,
6 Black-ish, Insecure, and you can imagine each one
7 -- and South Park, each one -- that's not a drama.
8 Each one of these is an example of where copyrighted
9 material has been incorporated, could be
10 incorporated, in order to facilitate the topical
11 criticism or commentary of particular things, like
12 how anchors behave or what a president said.

13 You have parodies and satire which are
14 naturals for incorporating material for criticism
15 or commentary. I'm sorry. Spaceballs, there you
16 go. And music videos.

17 So if you have entire classes of and
18 subgenres where they're all fiction where it's easy
19 to see a defensible use of uncleared material, is
20 that of any help in your thinking? Thank you.

21 MS. CHAUVET: Thank you. That's really
22 helpful. I have two questions about the adverse
23 effects, and then I know that Mr. Taylor and Mr.
24 Turnbull have a video that they want to -- can you

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1 get that ready? It's queued up? Okay.

2 So very quickly, before we turn to the
3 video, so AACIS LA and DVD CCA, they assert that
4 technological limitations, such as memory storage,
5 is actually what is holding back the multimedia
6 e-book market and not TPMs. Can I have a response,
7 please, from the e-book proponents?

8 MS. TANDY: I can try and speak to that.
9 I don't think that that's really an issue because
10 it depends on what you're thinking of as a multimedia
11 e-book. As I said before, you can create something
12 that's a multimedia e-book in PowerPoint. And
13 while it's very important to be able to have
14 high-quality and high-resolution content within
15 that, it's not the kind of thing that someone is
16 necessarily precluded from doing on a home machine.

17 So it sounds like Dr. Lerner wants to
18 go along with that.

19 MS. CHAUVET: All right. Mr. Lerner?

20 MR. LERNER: Thank you. Jack Lerner.
21 I just wanted to add to what Ms. Tandy was saying.
22 So audiobooks, for example, can be anywhere from
23 250 megabytes to up to a gigabyte or more, and people
24 download audiobooks to their phones all the time.

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1 So any technological limitations on data have mostly
2 gone by the wayside, you know. You could fit one
3 or two gigs onto your phone, not to mention your
4 PC or your Kindle reader, pretty easily.

5 I also want to just take this
6 opportunity, as long as we're talking about e-books
7 and how they're made and so on, we're talking, when
8 we talk about e-books, we're talking about the
9 ability to take a package of materials and be able
10 to access those materials offline and those
11 materials are sort of packaged in one file, right?
12 And so we're not talking about games, period. What
13 we are talking about is some interactivity that
14 might be enabled within that e-book. So, for
15 example, maybe you click on something to enable a
16 video component and maybe you don't.

17 But what I also want to point out is the
18 bigger trend here and the bigger point here which
19 is that this is about a promising new technology
20 where you have legions, hundreds of thousands or
21 tens of thousands of people out there, wanting to
22 create e-books, whether it's thousands of
23 professors, whether it's fan fiction creators,
24 whether it's film scholars, that want to go out and

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1 say, okay, well, I want to conduct criticism and
2 commentary through all of these different quite
3 heterogeneous ways, and I want to do so using the
4 new technology that's available. And so what we
5 have is this fancy new technology, and we have people
6 out there actually innovating around that based on
7 their desire to create on the e-book form.

8 And so I just wanted to give you that
9 context and thank you for indulging me on that.

10 MS. CHAUVET: No, and I wanted to ask a
11 specific question because the proponents of the
12 e-book expansion, they do reference technologies
13 like Ren'Py, KiriKiri, Fulcrum to create multimedia
14 e-books. So I guess is circumvention necessary to
15 use those technologies?

16 MR. LERNER: Jack Lerner. I don't
17 think circumvention is necessary to use the
18 technologies. What's necessary is --

19 MS. CHAUVET: Or I guess to use them to
20 create the multimedia books that you seek under this
21 exemption. Is circumvention of TPMs necessary?

22 MR. LERNER: Well, we absolutely think
23 so. You can make an e-book. You can make a
24 multimedia e-book, and maybe that multimedia e-book

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1 is something that you give to your students and it's
2 really very, maybe it's not something where you
3 would require the high fidelity. But we've
4 suggested in the record and in the previous record
5 that there are a lot of situations where having
6 high-definition, high-fidelity content is
7 extremely important, and Ms. Tandy's example is an
8 important one. We have others, Kirby Ferguson and
9 others, in the record who would like to do this.

10 And so it's not a question of do you have
11 to circumvent to use the technologies. It's a
12 question of how many people aren't going to be able
13 to use those technologies in the way that the law
14 says they can except for section 1201 and are cut
15 off from doing that.

16 MS. TANDY: And I'll try and keep just
17 an addendum to that to one sentence. If we put in
18 a restriction on people's ability to use their
19 creativity, just as the documentary filmmaking
20 people were saying before, it's the same kind of
21 thing for e-books because, by giving people the
22 knowledge that they can do these kinds of things
23 creatively, then they're going to start being able
24 to put a different kind of creativity in a different

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1 kind of form. And by taking away these restrictions
2 of fear that, I mean, I spent years working with,
3 especially, teenagers who are afraid that somebody
4 is going to come to their house and arrest them for
5 writing fan fiction.

6 We all know that that's not the case.
7 But it's still a fear and it's still a rumor and
8 it's still a hypothetical that people talk about.
9 And being able to have these kinds of conversations
10 here and being able to say, no, this sort of thing
11 is not barred, gives people the ability to let their
12 imagination take wing, and it's a fantastic thing
13 to be able to see teenagers, young adults, people
14 of any age going forward with that sort of creative
15 content process in a new kind of format.

16 MS. CHAUVET: Great. Thank you. For
17 Mr. Taylor and Mr. Turnbull, DVD CCA and AACCS LA
18 suggest that the rulemaking should not focus on
19 prospective uses. Your opposition comments are at
20 page 21 --- but the statute is prospective in that
21 it asks us to look at adverse effects that are likely
22 to occur within the next few periods. So how is it
23 not appropriate to examine prospective adverse uses
24 or adverse effects or prospective uses?

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1 MR. TAYLOR: Well, I think that what we
2 said was that the prospective uses, as far as the
3 fair use analysis, it's almost impossible to tell.
4 And so if you conflate the two points, then, yes,
5 you could argue exactly what the proponents have.
6 But there is a distinction that if you are going
7 to argue that something should be allowed for an
8 exemption, you have to demonstrate sufficiently on
9 the record that that exemption is indeed more likely
10 than not non-infringing, and what we complained
11 about here is that they have not done that.

12 And you had asked earlier what's the
13 problem with going ahead and approving a larger
14 exemption and just following up with a copyright
15 suit after there's been a violation, and the problem
16 is --- is that the rulemaking is tasked by creating
17 an exemption based on the evidence that's produced
18 in this rulemaking. And so the fact that they
19 haven't proffered enough evidence really is fatal
20 to their case. And the fact is --- is that it's not,
21 these arguments are the same arguments that we had
22 the last time around. And so if they wanted to
23 prepare, if they wanted these exemptions or needed
24 these exemptions, they could have come in with

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1 better evidence that demonstrates their actual need
2 for it. And you'll see in the clip it's not hard
3 to make an iBook, and they could have done that.
4 I'm not saying that the filmmakers necessarily would
5 have to go out and make a film to demonstrate the
6 evidence, but, you know, there are ways that they
7 could have introduced evidence.

8 MS. CHAUVET: Mr. Turnbull, do you have
9 anything to add and then perhaps we can see the
10 video.

11 MR. TURNBULL: Very quickly. It seems
12 to me that the -- sorry, I lost my point. Give me
13 one second.

14 MS. CHAUVET: Do you have any comment on
15 prospective uses or what Mr. Taylor just commented
16 on?

17 MR. TURNBULL: Yes, the issue isn't that
18 you can't, it's that there still needs to be evidence
19 that there is something that's actually being
20 prevented. And the point that, sorry, the point
21 that I had wanted to make was, and, Mr. Cheney, I'll
22 hit on something that had been occurring to me
23 throughout the course of the discussion today which
24 is that certainly in the last round and in much of

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1 the comment that was filed the focus was on the much
2 more elaborate platform of the e-book. We had
3 somebody who's prominent in Hollywood who wanted
4 to make a multimedia e-book, and our point was, first
5 of all, none of what was proffered three years ago
6 has actually come forward and, secondly, that the
7 platforms that they were talking about are, in fact,
8 limitations. Now, other platforms may not be, but
9 the ones that were talked about in the sort of
10 classical, in the more formalized e-book context
11 do have the limitations, and that's what our
12 comments go into in some detail.

13 MR. CHENEY: Can I ask just a follow up?
14 In what's presented, if you start to see trends,
15 we saw at the very beginning presentation where you
16 have sort of a zero at the beginning and then you
17 end up with 109. Is that trend analysis, does that
18 give enough to give perspective that something is
19 more than likely going to occur? That sort of
20 analysis, is that helpful in this sort of looking
21 at prospective? Because we may not have, we may
22 have some creative things being thought about, but
23 then we start to just see this inkling of a trend.
24 Does that give enough for the prospective for the

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1 Copyright Office to recommend that there needs to
2 be an exemption?

3 MR. TURNBULL: I mean, you need to have
4 the evidence of that, I think, is really our
5 perspective. And for the e-book, again, what we
6 were pointing out was that we had a number of things
7 that were brought forward three years ago that
8 didn't happen. There was discussion of the
9 platforms that, in fact, have the inhibitions.
10 Now, again, other non-formalized, you know, maybe
11 in a broader sense e-book, you know, may present
12 a little different question. And if the issue is
13 that the formulation of non-commercial videos, if
14 somehow people feel inhibited because they don't
15 view what they've done as a video, I don't want to
16 go out too far on a limb here, but it may be that
17 that is the place to look at what has been the focus
18 of the discussion here today, whether something
19 could be crafted around whether video, whether
20 presented in, you know, whatever format or however,
21 if that would facilitate some of the fan fiction
22 kinds of things, rather than tackling a much broader
23 category of e-book. You know, that may be a way to
24 look at it that would facilitate some of the sort

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1 of non-commercial uses.

2 MS. CHAUVET: Okay. I think we're
3 going to go ahead and let's show your video.

4 MR. LERNER: Could I just quickly speak
5 to the trend question?

6 MS. CHAUVET: Sure. Very briefly
7 because we are very short on time.

8 MR. LERNER: I think it was a good
9 question. If I understood the presentation
10 correctly, it was kind of a trend within Mr.
11 Donaldson's practice that he has seen in terms of
12 how many people are coming in to him wanting to
13 exercise fair use in fictional films.

14 But I think his starting premise was that
15 that, that people were not using film clips in
16 fictional films before that trend started to go up
17 in his own practice, and I don't think that's
18 accurate. I mean, if you look back at Oliver Stone
19 movies going a long way back, Natural Born Killers
20 is one that comes to mind, I think it's a practice
21 that's been referred to as vertical editing, he'll
22 use a lot of different types of clips at times to
23 show what's going on in a character's head instead
24 of trying to just have you read that on the screen

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1 through the actor's performance. And I think that,
2 because most of those were released by major
3 studios, that those were probably licensed clips,
4 and there's been licensing of those types of clips
5 for a long, long time.

6 So while I credit the testimony that,
7 in his practice, he's seen an increase maybe in the
8 number of people coming to him with questions, I
9 would dispute that there's not always been, not
10 always but for a long time there's been use of clips
11 in fictional films, and I think almost always
12 they've been licensed.

13 MS. CHAUVET: Great. Thank you. Let's
14 have the video, please.

15 MR. LERNER: Would it be possible to
16 make a point while they're setting up? I wanted to
17 respond to what --

18 MS. CHAUVET: Let's have the video, and
19 then I will let you have your --

20 (Video played.)

21 MS. SMITH: Can I ask a question about
22 that specifically? Does anyone here about e-books
23 want to speak as to why that's not a reasonable and
24 available alternative to circumvention?

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1 MS. TANDY: Heidi Tandy. I just don't
2 understand why we're being conceptually limited to
3 the idea of what Apple permits via iBooks when this
4 is something that someone can create as a standalone
5 download or have available via, you know, without
6 using a commercial mechanism.

7 MS. SMITH: I don't know that that's
8 responsive to is that a reasonable alternative to
9 circumvention to create the work, whether it's on
10 the Apple Store or anywhere else.

11 MS. TANDY: But that's what I'm not
12 understanding, why we necessarily need to find an
13 alternative just because it happens to comport with
14 something that Apple has put up as a restriction.

15 MS. SMITH: I don't think it has to do
16 with an Apple restriction. We're evaluating
17 whether there's alternative to circumvention for
18 the availability of the use of copyrighted works
19 and is that widget a sufficient alternative?

20 MS. TANDY: I don't think I'm able to
21 really understand from this video clip how this
22 widget works as some sort of a workaround. Maybe
23 there's something in this that I'm missing.

24 MS. SMITH: Well, I think we're looking

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1 at -- this was -- he was able to create this without
2 circumventing a TPM and he's saying, you know,
3 essentially, it looks pretty good, which is --
4 there's been concern that without circumventing the
5 access controls on Blu-Ray or on DVD you will not
6 be able to create a high-quality work using clips
7 so just specifically to that.

8 MS. TANDY: I'm primarily going to defer
9 to Angel on the technological aspect of that, but
10 the widget, it doesn't have the same sort of a visual
11 import as what you might necessarily want to be able
12 to put into this.

13 MS. SMITH: In what way? I mean, it
14 wasn't dropping frames, it wasn't skittering, it
15 wasn't creating the stutter effect you were talking
16 about earlier.

17 MS. TANDY: But it doesn't have the same
18 sort of visual narrative and context that you would
19 necessarily be looking for.

20 MS. SMITH: Like what specifically in
21 the image would you have seen if you had circumvented
22 a DVD or a Blu-Ray that you are not seeing here?

23 MS. TANDY: Well, I'm not sure how they
24 even were able to get these kinds of high-resolution

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1 clips. The minute you start trying to do those
2 high-resolution clips, you're automatically losing
3 some of the content and some of the context.

4 MS. SMITH: I'm not contending, like as
5 a technological matter it wasn't lossless or
6 anything, but in terms of what the eye sees I think
7 is what we're trying to understand. I mean, I don't
8 know if --

9 MS. TANDY: Then the whole issue of
10 linking that content together to be able to try and
11 create something is incredibly, incredibly
12 complicated. To be able to do all of that, you need
13 a desktop computer, you need to be able to work with
14 something that has that degree of, basically,
15 knitting-together capability. And you have to be
16 able to, my understanding is that you have to be
17 able to obtain additional software in order to do
18 it on, and that's not necessarily the kind of thing
19 that everybody is able to have access to.

20 MS. SMITH: So are you saying it's
21 different using this clip than if you had ripped
22 it for the software you can use for editing? What
23 program would you use, and how would it be different?

24 MS. TANDY: Well, if I was, for example,

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1 if I was using Windows Movie Maker, I wouldn't be
2 able to create those kinds of clips. Maybe you can
3 do it in certain kinds of professional level Adobe
4 kinds of things, but I primarily use Windows Movie
5 Maker. So to be able to get those kinds of clips
6 in Windows Movie Maker, I can do it just by ripping
7 and then by editing it out. But if I'm trying to
8 do it by knitting together individual stills, it
9 doesn't have the same sort of frame speed to be able
10 to do it in that kind of a process.

11 MS. SMITH: Okay. I wonder if Mr.
12 Taylor or Mr. Turnbull can speak as to whether you
13 can get this into Windows Movie Maker or editing.
14 Go ahead.

15 MR. TURNBULL: What I think the
16 disconnect here is, this is not knitting together
17 individual stills. This is a form of screen capture
18 that is capturing the entire video. So it's not
19 screen capture in a snapshot, it's a screen capture
20 program that captures the video. And we were
21 making, I think, two points with this presentation.

22 Number one, as Ms. Smith indicated, that
23 the quality is quite good and doesn't have the sort
24 of jittery and that sort of thing and, in fact,

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1 technology has developed over the course of the 12
2 years or so that we've been looking at screen capture
3 in this proceeding. The second thing is other
4 proponents, not people here today, had made the case
5 that iBook, some of the multimedia formats would
6 not accept video if it was at the quality of screen
7 capture, and the point here was simply that they
8 do. And that may not be the format that the
9 proponents who are present today are talking about,
10 but it is a format that has been brought up in the
11 course of the proceeding, and so that point was being
12 made by the video.

13 MS. SMITH: Thank you. Mr.
14 Morrissette, do you have a view as to whether this
15 technique or any other techniques would or would
16 not be sufficient for a film festival or a filmic
17 distribution?

18 MR. MORRISSETTE: They would not.
19 Filmmakers today have even more gatekeepers and high
20 technical requirements from distributors than ever
21 before. And I want to say that the exemption, in
22 its current state, is working beautifully for us
23 because the availability of pulling clips from
24 Blu-ray disks has meant the difference whether we

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1 can even use fair use clips anymore.

2 Case in point, last year we released a
3 movie called Abacus which is about a small bank in
4 New York that was the only bank that had jailed
5 owners during the financial crisis, and we wanted
6 to use a clip from It's a Wonderful Life, the Jimmy
7 Stewart movie we see every year at Christmas. And
8 lo and behold, Blu-ray was out with that movie, so
9 we immediately bought it on Amazon, used the
10 provisions in the current exemption to pull just
11 the clip that we needed, cut it into our show, and
12 it passed through with flying colors to every QC
13 portal that we had to go through. The movie was on
14 public television, which has draconian technical
15 standards of microseconds of jitter or repeated
16 frames or whatever. It was also shown
17 theatrically, which meant that the file had to be
18 reconverted to XYZ color space in order to get onto
19 a DCP file-based for theatrical projection. And
20 almost every documentary filmmaker that I know of
21 sends their films to film festivals first, then it
22 gets a contract, and then it ends up on Netflix,
23 which, because Netflix is creating their own content
24 now, they're even more strict than ever about the

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1 file that you send it.

2 So screen capture is, from my viewpoint
3 and my tests, pretty much where it was three years
4 ago. To have to play a high-definition file on a
5 computer and capture it in real time with perfect
6 framing, it just can't be done.

7 And this year Abacus went to the Oscars.
8 Yet again, another QC. We were nominated for an
9 Academy Award for two of our films. Abacus was
10 nominated, and we didn't win unfortunately, but it
11 wasn't because of technical problems. It was that
12 we had a lot of artistic competition.

13 MS. CHAUVET: So, Mr. Turnbull, is there
14 any harm in retaining the screen capture
15 limitations?

16 MR. TURNBULL: No. I mean, our view is
17 that we ought to retain the screen capture
18 limitation. I think Mr. Morrissette has indicated
19 that the current exemption is working fine from his
20 perspective because, in the cases where, in fact,
21 it is not and you can, you know, say, you know, you're
22 allowed to make the determination that screen
23 capture is not sufficient for the particular use,
24 then, you know, I mean, the current --- we have not

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1 objected to retaining the current exemption.

2 But we think that the screen capture is
3 important because, in many instances, you don't,
4 you know, you're not in those kinds of circumstances
5 and for many kinds of purposes, particularly where
6 you're dealing with, you know, large numbers of
7 people who are doing amateur things where I think
8 the risk of that bleeding over into the removal of
9 the TPM altogether, I think screen capture is a good
10 alternative and ought to be retained.

11 MS. SMITH: Okay. Thank you for your
12 perspective. There's a lot of placards up, but I
13 do have one specific question, so maybe we can do,
14 like, a show of hands if someone can speak to this
15 specifically. Has anyone, does anyone think that
16 there is a need for an exemption for screen capture?
17 I would just like to see first a show of hands if
18 you think yes because it has been contested that
19 maybe it's not necessary, you don't need an
20 exemption for screen capture, and that the exemption
21 is confusing. Okay.

22 MR. REID: Can I ask for clarification?
23 When you say an exemption for screen capture, what
24 exactly do you mean?

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1 MS. SMITH: I think that's in the
2 current --

3 MS. CHAUVET: Yes, it's in both ---

4 MS. SMITH: --- language.

5 MS. CHAUVET: --- the e-books and the
6 filmmaking exemptions.

7 MR. REID: You're referring to the
8 language that --

9 MS. CHAUVET: Yes, yes.

10 MR. REID: -- requires the author to
11 engage in some sort of investigation as to whether
12 screen capture --

13 MS. SMITH: No, that's not what I'm
14 talking about. I'm talking about in 201.40 it says
15 when circumvention is undertaken using screen
16 capture technology that appears to be offered to
17 the public as enabling the reproduction of motion
18 pictures after content has been lawfully acquired
19 and decrypted. So I'm not talking about
20 considering whether screen capture might work for
21 you but whether there needs to be a specific
22 regulatory exemption to engage in screen capture,
23 because if that is not involving circumvention
24 anyways, it seems like it's not serving any purpose

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1 for the Office or the Librarian to implement a rule
2 allowing you to do it.

3 MR. REID: I think I can respond to this.
4 So this is the A prong of both of the exemptions.
5 I think the answer to that question is entirely
6 contingent on what you do with the B prong. In other
7 words, the existence of that exemption is tied into
8 the prospect that you might need to use screen
9 capture. We think if you blow away B, as we've asked
10 you to do, the likelihood that we need A, folks are
11 not going to be using --

12 MS. SMITH: That's not making sense to
13 me. Do you violate 1201(a) if you engage in screen
14 capture sans an exemption or do you not?

15 MR. REID: I'm not sure that we know the
16 answer to that question.

17 MS. SMITH: Does anyone think it is a
18 violation from a technological reason or have a
19 reason? Mr. Williams?

20 MR. WILLIAMS: So I'm not going to
21 answer that question as yes, but I'm going to try
22 to provide some nuance. I think the reason that the
23 exemptions are drafted the way they are now is that
24 there do appear to be a number of screen capture

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1 programs that do not constitute circumvention
2 devices. We haven't analyzed all of them, but it
3 appears that sometimes screen capture captures the
4 image after it has been lawfully decrypted and, at
5 that point, nothing has to be circumvented.

6 However, over the years, proponents had
7 expressed some concern that they might accidentally
8 engage in circumvention because they don't know
9 which devices are legitimate screen capture and
10 which are not. So I think what the Office tried to
11 do is say we want to encourage you to, when it makes
12 sense for your project, when you can get the level
13 of quality you need, to use lawful screen capture.
14 And so if it's marketed as lawful screen capture
15 and you use it but it happens to end up being that
16 it's a circumvention device and you weren't aware
17 of that, you're still protected.

18 And so I see that as a good idea. It's
19 not something we came up with, but I think it was
20 a good idea because it basically gives proponents
21 comfort that if they think they're engaging in
22 something that is not circumvention using something
23 that's marketed as a screen capture tool, then they
24 can do that without fear of violating the statute.

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1 But then there's also built into that, as Bruce was
2 saying, that if there's a project that requires
3 higher quality and they have a good faith belief
4 that they need that higher quality, they can
5 exercise the other piece.

6 MS. SMITH: Sure. But, I mean, I guess
7 I'm wondering, this illegitimate screen capture,
8 I'm not aware of any specific technology that people
9 say I'm not sure about that or I'm scared about that.
10 I think the Apple phone has a button which can enable
11 you to do screen capture, so I assume maybe at least
12 Apple is pretty confident that it doesn't engage
13 in circumvention. So I'm just wondering if it's
14 serving any real, like, purpose for anyone and if
15 anyone is making use of that.

16 MR. MIDGLEY: To the extent --

17 MS. CHAUVET: Mr. Midgley.

18 MR. MIDGLEY: Yes, Peter Midgley. To
19 the extent that, I believe what I just heard was
20 that the current structure of the rule could provide
21 some comfort to proponents. I can just report that
22 it's providing zero comfort. It's only providing
23 confusion. To conflate the issue of, you know, the
24 way that the rule is currently worded makes it sound

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1 like screen capture is a form of circumvention when
2 it seems like the overwhelming majority of the
3 evidence that we see, including the demonstration
4 that was just made, suggests the exact opposite.
5 So it's far from providing comfort to proponents,
6 it's providing confusion.

7 MS. CHAUVET: Ms. Kleiner, did you want
8 to go ahead and ask your distribution limitation
9 question?

10 MS. KLEINER: If the Register were to
11 recommend expanding the multimedia e-books
12 exemption to include fiction, would it be reasonable
13 to place distribution limitations or require
14 certain protections to be added to the e-book to
15 prevent readers from taking and using the motion
16 picture clips?

17 MS. CHAUVET: So in a nutshell, would it
18 --- is it reasonable to ask for e-book authors to
19 essentially add TPMs back on after the e-book has
20 been created to prevent piracy or for people to,
21 like, rip it and go and use the motion pictures in
22 a non-infringing -- sorry, in an infringing way?

23 MR. LERNER: So the question is, if I
24 understand correctly, that if people were allowed

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1 to use the DMCA exemption, then they would also be
2 required to put some kind of DRM on that, correct?

3 MS. CHAUVET: I'm asking if that would
4 be reasonable, if we were to expand the existing
5 exemption to include fiction.

6 MR. LERNER: We were surprised to see
7 this because it seems so off the wall. But to us,
8 that seems problematic. First of all, how do you
9 define DRM? Do you mean encryption? Do you mean
10 TPMs? That's the first question.

11 But a more fundamental question is what
12 you'd really be doing would be saying, okay, if you
13 want to make fair use, which the law says you can
14 do, you can do it appropriately, it's
15 straightforward to do it appropriately. But
16 leaving that aside, now you have an additional
17 restriction which is that you have to make it
18 difficult for someone else to access that.

19 When I take something and make fair use
20 of it, that's my speech. That's my message that I
21 want to get out there and --

22 MS. CHAUVET: Sure. And I appreciate
23 that, but, like, the technologies that are being
24 used to create these multimedia e-books, do they

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1 have the capability to add, whether it be encryption
2 or some other form of protection? Is that --- I
3 don't know how easy or difficult that would be.

4 MR. LERNER: I'm going to defer to
5 Professor Reid.

6 MR. REID: I mean, there's no doubt
7 digital rights management technologies, and we
8 might defer that question to our colleagues that
9 sell such products down at the other end of the
10 table, but in general I think we object to the
11 distribution scheme, in addition to the reasons that
12 Professor Lerner mentioned, because it's
13 transforming an exemption that's supposed to be
14 looking at the moment of circumvention, what's ---
15 you know, and to the extent there's
16 post-circumvention behavior that's probative of
17 intent to create a multimedia e-book, that makes
18 sense.

19 But we're now transforming that
20 exemption into what's basically a regulatory regime
21 for the downstream distribution of a product. We
22 think that's pretty far beyond the ambit of what
23 Congress had in mind in delegating authority to the
24 Office to engage in this rulemaking. I think that

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1 also raises pretty significant First Amendment
2 concerns because you're conditioning the further
3 distribution of speech contingent on the
4 application of some technological protection
5 measure that we basically have no evidence in the
6 record of, so.

7 MS. CHAUVET: But for section 110, for
8 example, a different context, granted, but in like
9 distance education Congress has basically said that
10 it is appropriate if you are having distance
11 learning where you're using motion picture clips,
12 short portions, granted, but that a requirement is
13 to add on protections so that you don't have
14 infringement by third parties who might get a copy
15 of that. So Congress has already evidenced a
16 willingness to go that far.

17 MR. REID: And I'll defer to my
18 colleague, Mr. Midgley, on the contours of section
19 110, but I think, suffice it to say, there's no
20 reference that I'm familiar with in section 1201
21 itself or in the legislative history to --- an idea
22 along these lines. We'd ask, if the Office is
23 considering going down that road, this is obviously
24 raising a lot of complexities, that we would be given

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1 an opportunity to issue some post-hearing comment.

2 MS. CHAUVET: Mr. Midgley, I know we're
3 going to talk so much about this on the next panel,
4 but briefly, if you have a comment about section
5 110.

6 MR. MIDGLEY: I would just say that the
7 language of section 110 refers to reasonable and
8 limited portions, not short portions which the
9 current rules provide. That, among other issues,
10 is why we're suggesting just tying it to the actual
11 statutory requirements of section 110 instead of
12 trying to do a mini version of those requirements
13 in the context of this rulemaking.

14 But I haven't -- I'll be better prepared
15 to answer the question about the limitations imposed
16 by Congress in section 110 once I've had a chance
17 to think about it a little bit longer. Thank you.

18 MS. SMITH: I guess we're going to wrap
19 up, so this will be the last one. One question I
20 have specific for filmmaking, so we'll start with
21 Mr. Donaldson, is in 2015 the Register's
22 recommendation concluded that, based on the record
23 provided, the Register concluded that the suggested
24 non-documentary uses were not noninfringing. And

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1 so what in your view has really changed, you know,
2 a high-level summary now that we're here in 2018
3 that would enable us to look upon the record fresh?

4 MR. DONALDSON: Just the sheer number of
5 filmmakers who are making films that are not labeled
6 or marketed as documentaries but they want to use,
7 especially archival clips but also photographs and
8 other material, pursuant to fair use. Granted, you
9 define the availability of ripping more narrowly
10 than just all fair use, but what happens, and it's
11 a heartbreaker, I see it frequently by the way, a
12 couple of times every month, where somebody who has
13 worked on a documentary for one month or two months
14 is next working on a feature film and this,
15 particularly editors and directors who are hands-on
16 in terms of making these decisions, they are wanting
17 to do what they did last month, maybe even using
18 the same material in a similar way, and all of a
19 sudden it's a criminal act.

20 So it's one thing to have a definition
21 which works at a cocktail party, which works in many,
22 many ways. It certainly works in marketing. But
23 we're talking about making activity which is totally
24 legal in May illegal in June because the film they're

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1 working on has not been labeled the same way.

2 And as Josh pointed out, this is mainly
3 a marketing term, a self-description. There are a
4 lot of films not labeled documentaries who could
5 have been labeled documentaries, and there are
6 documentaries, and I can think of a number of them,
7 that are not marketed with a documentary label
8 stamped all over them. And yet, that label causes
9 a well-intentioned human being who's working hard
10 and trying to do the right thing, it turns him into
11 a criminal just because of the way the film he's
12 working on being labeled, and I don't think that's
13 the kind of society we want to live in.

14 MS. SMITH: Okay. Thank you for your
15 perspective. I don't know if Ms. Antkers still
16 wanted to speak but --- maybe you didn't, if not,
17 we'll go to Professor Lerner.

18 MS. ANTKERS: Yes, Angel Antkers. We
19 just wanted to respond just really quickly to the
20 demonstration. We haven't had the chance to review
21 that software in particular that was demonstrated,
22 and we'd like to have our own demonstration
23 presented at the Los Angeles hearing, so we'll have
24 that prepared then. Thank you.

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1 MR. REID: And I believe Ms. Rosenblatt
2 from OTW who's scheduled to present at the Los
3 Angeles hearing will have that on tap.

4 MR. LERNER: Thank you. Jack Lerner.
5 I just wanted to make one quick response and one
6 quick point because I know we're low on time.
7 Regarding Bobette Buster, Bobette Buster is a client
8 of the UCI Intellectual Property Arts and Technology
9 Clinic, and I can confirm that she is still working
10 on her book and you have that testimony in the
11 record. And I can talk about other proponents whose
12 wives -- one whose wife passed away and so on.

13 But this brings up an important point
14 that I want to get into the record, and that is that
15 evidence does not have to include exact specific
16 examples for every hypothetical or every
17 permutation of possible adverse effects or
18 infringing effects. Evidence can also include
19 testimonial evidence submitted by experts on the
20 creative practice of communities, and we have
21 submitted substantial testimonial evidence to that
22 effect.

23 We have a number of experts here who have
24 done that, and I would submit that that is more than

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1 sufficient, particularly given the utter absence
2 of any concern about piracy, counterfeiting, or
3 increased unauthorized sharing as a result of these
4 exemptions. And thank you for having us today.

5 MS. SMITH: Thank you. We appreciate
6 it. We appreciate all of your time and also for
7 going over well into the lunch hour. So I think we
8 will conclude, and we will start again at 2:30.
9 Thank you.

10 (Whereupon, the above-entitled matter
11 went off the record at 1:36 p.m. and resumed at 2:30
12 p.m.)

13 MS. SMITH: Okay, I think if everyone
14 can be seated, we would like to start.

15 All right. Hello, everyone. Welcome
16 back. This is the section 1201 Rulemaking. This
17 is the second panel we are holding for Class 1, which
18 concerns the circumvention of audiovisual works for
19 criticism and comment, and this is a category which
20 was combining seven previous exemptions, which the
21 Register has tentatively determined she can
22 recommend renewal of and discussing proposed
23 modifications or expansions.

24 The panel immediately prior to the lunch

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1 hour focused specifically on issues affecting
2 e-books and filmmaking current exemptions, and this
3 one is a little bit --- focusing first on a broader
4 category of how this might be expanded, and also
5 specific issues affecting educational uses of short
6 portions of audiovisuals.

7 So my name is Regan Smith, I'm Deputy
8 General Counsel of the Copyright Office. I see a
9 lot of familiar faces. So we on this side will
10 introduce ourselves, go over briefly the rules of
11 the road, and then have you introduce yourselves.
12 Then, we'll get started.

13 MS. KLEINER: Emma Kleiner, Ringer
14 Fellow at the Copyright Office.

15 MR. AMER: Kevin Amer, Senior Counsel in
16 the Office of Policy and International Affairs.

17 MS. CHAUVET: Anna Chauvet, Assistant
18 General Counsel at the Copyright Office.

19 MR. SLOAN: Jason Sloan,
20 Attorney-Advisor in the General Counsel's Office
21 at the Copyright Office.

22 MR. CHENEY: Stacy Cheney, Senior
23 Attorney-Advisor, National Telecommunications and
24 Information Administration, NTIA.

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1 MS. SMITH: Okay. So again, thank you
2 all for coming. We're going to try to focus on areas
3 where we can build out or foment discussion where
4 there may be discrepancies or disagreements in the
5 record. Put your placard up if you would like to
6 speak. We will have brief introductions, a little
7 bit of questioning, and then go into some multimedia
8 presentations. So, Mr. Band?

9 MR. BAND: I'm Jonathan Band,
10 representing the Library Copyright Alliance.

11 MR. DECHERNEY: I'm Peter Decherney, a
12 professor at the University of Pennsylvania,
13 representing the Joint Educators.

14 MR. MIDGLEY: Peter Midgley,
15 representing Brigham Young University.

16 MS. HOBBS: My name is Renee Hobbs. I'm
17 a professor of communication at the University of
18 Rhode Island, representing the Media Education Lab.

19 MR. WILLIAMS: Matt Williams from
20 Mitchell Silberberg & Knupp, representing ESA, AAP,
21 MPAA, and RIAA.

22 MR. TURNBULL: Bruce Turnbull,
23 representing AACS LA.

24 MR. TAYLOR: David Taylor, Counsel to

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1 the DVD Copy Control Association.

2 MS. CHAUVET: So as we've done with
3 previous panels, for this rulemaking is that we are
4 going to focus on different buckets of questions,
5 so everyone is going to have a chance to kind of
6 have their say. But we're going to try to kind of
7 go through these different buckets.

8 We do have two presentations that are
9 going to be given at various times. And we have them
10 set up, but I will kind of cue for when that should
11 take place.

12 Okay, so the first bucket of questions,
13 we are going to focus on the elimination of
14 distinctions between users, because you have both
15 BYU's proposed exemption, eliminating distinctions
16 between educational users, and then you also have
17 the broader -- no one is here from EFF or NMR today,
18 but we also have this broader category of
19 eliminating distinctions.

20 So on that issue, so DVD CCA and AACSS
21 LA state that expanding the -- having BYU's proposed
22 exemption and expanding the current university
23 exemption to cover non-profit educational purposes
24 would be too broad. So, opponents, is there a way

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1 to eliminate the distinctions between educational
2 users without an exemption being too broad?

3 Opponents, you guys said that it was too
4 broad. So is there a way to eliminate distinctions
5 between educational users, perhaps using a
6 different phrase? And if so, how would you do that?

7 Mr. Williams, if you'd like to speak to
8 that --

9 MR. WILLIAMS: We did try to offer new
10 potential language, but what we tried to do was to
11 preserve all of the existing boundaries that have
12 been built into the exemptions, because we think
13 they're all based on the record evidence and that
14 they've been carefully thought out and drawn out.
15 And there's not really anything new in the record
16 that would lead us to conclude they should be changed
17 at all.

18 So we do think it could be re-drafted,
19 but the actual contours should be preserved.

20 MS. SMITH: So there is currently sort
21 of a tiered approach to varied educational uses,
22 depending upon whether one is at a university or
23 collegiate level, K-12, or educational use outside
24 of those.

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1 And I wonder -- maybe you can speak to
2 why you think it's appropriate to maintain all those
3 divisions, and then if proponents want to discuss
4 whether it might make sense to bring it up to a larger
5 non-profit educational purpose that is perhaps
6 affiliated or not affiliated with an institution,
7 and if so, what evidence in the record, including
8 this current record, would justify altering the
9 current regulatory language.

10 MR. WILLIAMS: Sure. So as I was
11 saying, I think the distinctions have been drawn
12 based on the record, for example, with K-12, they
13 have the screen-capture exemption. I think Ms.
14 Hobbs submitted an opening comment saying basically
15 thank you for granting us that. It's helpful, and
16 it's working well for us.

17 So I haven't seen any new examples of
18 things that are preventing them from engaging in
19 the kinds of educational activities that they want
20 to engage in. And similarly, when you move up
21 through the university level and then on to MOOCs,
22 the contours that are there were drawn based on what
23 people said they needed to do, what the Office
24 concluded about whether those things were lawful

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1 or not.

2 And when you get all the way onto the
3 online environment, the Office wisely brought in
4 portions of section 110, because Congress had
5 already spoken to some of the ways that you can help
6 to alleviate potential risks, while also allowing
7 for the uses that are legitimate.

8 So I think that's why we would advocate
9 for preserving them the way they are, is that we've
10 basically got the same record that we had last time,
11 and all of the contours were drawn based on the
12 record.

13 MR. MIDGLEY: So if I may just respond
14 -- this is Peter Midgley from BYU -- our proposal
15 is that we should, instead of drawing these
16 artificial distinctions between different
17 categories of educational users, that we should just
18 recognize them as a group in the same way that the
19 statute does.

20 So 110(1) and 110(2) are very clear; they
21 don't make distinctions between film studies
22 professors or K-12 educators or anything else. So
23 we view the best way to proceed, to simplify and
24 consolidate this, is to just tie the exemption to

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1 the conditions that have already been codified and
2 set forth in the statute.

3 MS. SMITH: Mr. Band?

4 MR. BAND: So following on that, I mean,
5 it's --- if you just look at the existing exemptions,
6 I mean, the amount of words that are devoted to these
7 educational exemptions is extremely long. It's very
8 complicated, and certainly as indicated in the EFF
9 submission but certainly our experience, I'm sure
10 Mr. Midgley has the same experience.

11 It's so complicated that it's hard to
12 use, and you basically would need to consult with
13 an attorney before you can do anything with it.
14 That just is sort of unworkable and unnecessarily
15 unworkable.

16 And it's both, in terms of having this
17 tiered approach where, certainly from the point of
18 view of educators, you know, education is education.
19 And you might be the same person teaching at
20 different levels, depending on, you know, the day
21 of the week. But the basic process is the same, and
22 the needs are the same, and the students' needs ---
23 it doesn't matter whether you're a high-school
24 student or a college student; either way, your needs

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1 are the same.

2 But the existing system is just so
3 complicated that a lot of people just kind of throw
4 their hands up into the air and do one of two things:
5 they either just say, I'm not going to deal with
6 this, and that harms education; or they're going
7 to say, I'm not going to worry about this, and just
8 do whatever they are going to do.

9 And neither outcome is a desirable one,
10 right? We don't want people not using the best
11 materials possible to educate students in this
12 country. At the same time, we don't want people to
13 disregard the law. And so the right approach is to
14 figure out how do we make it easier for people to
15 comply with the law, and that's why we're here.

16 We could easily just say we're not going
17 to worry about the likelihood that an MPAA member
18 is actually going to sue a high-school teacher for
19 what she does in her classroom is pretty small, but
20 again, that's not the point. We want to comply with
21 the law, and at the same time, we think we should
22 be able to make the best use of these materials.

23 You would think that the
24 rights-holders, for their part, would want

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1 educators to use these materials as much as
2 possible, because they have created fabulous
3 content, which is part of our national dialogue.
4 And, you know, you can't conduct education in almost
5 any area without using this material, okay. This
6 is the world the students live in.

7 So that is a tribute to the enormous
8 creative activity of the folks in the motion picture
9 industry in particular. So they should make it as
10 easy as possible for us to study it, and for us to
11 teach students how to use these materials and
12 understand these materials. And that's --- at the
13 end of the day, that's what we're really trying to
14 do, is to just make it easier to use these materials
15 and comply with the law, and at the same time, none
16 of this, in our view, in any way harms the interests
17 of the rights-holders.

18 MS. SMITH: Thank you, Mr. Band. I
19 would like to offer you the opportunity to build
20 up on that, or respond to that, Professor Hobbs.
21 And I think part of why I think your perspective
22 will be valuable next is that the existing
23 exemptions are kind of here, they've evolved based
24 on the record.

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1 And so, can you speak to --- Mr. Band
2 just said that the needs are the same from whether
3 you're a student, whether you're participating in
4 media literacy, K-12, or university, depending on
5 the subject matter, you still have the same needs,
6 versus Mr. Williams has suggested that maybe the
7 needs area different, depending upon the activity
8 that is being engaged in.

9 So any specific examples you can provide
10 us from your educative experience would be very
11 helpful as we evaluate this.

12 MS. HOBBS: Thank you. Mr. Band is
13 right in that anything you can do to simplify and
14 streamline the law and to bring it into alignment
15 with section 110 would be great. It's extremely
16 confusing for teachers. The group of teachers who
17 are most struggling with the law in its current
18 formulation are K-12 teachers who also participate
19 in teacher education programs at colleges and
20 universities.

21 As you know, it's very common for a
22 high-school teacher, a middle-school teacher, to
23 teach also in a university context. So there's a
24 situation where, well, which part of the law should

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1 she feel responsible to model, to comply with? This
2 is a particular confusion to them, and I think that
3 has an impact on how the next generation of teachers
4 is taught how to use audiovisual resources
5 effectively for purposes of teaching and learning.

6 So you asked me to talk about are the
7 needs different between different types of users.

8 MS. SMITH: Right, and in the past,
9 we've said maybe as screen-capture techniques get
10 better and better, and they're very simple to use,
11 that might be fine if you're just wanting to show
12 something as part of, you know, a science project
13 or something, compared to when you need to look at
14 the image quality and really understand what was
15 going into composition of the image -- things like
16 that is what I was referring to.

17 MS. HOBBS: Got it. So the one place
18 where I think we're seeing an evidence base arising
19 about differences in use has to do with the narrow
20 formulation of the phrase, criticism and comment,
21 right.

22 We're learning from the literature on
23 teaching media literacy to younger users, that some
24 pedagogical activities that are building blocks of

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1 learning might not actually narrowly fit under that
2 narrow formulation.

3 So we're in agreement with the BYU
4 proposal that any educational uses should be
5 important and that --- we are also in agreement that
6 we would like to remove the restriction on short
7 portions, as we feel like that also unnecessarily
8 compromises teachers' ability to be --- to use
9 pedagogically researched and well-informed
10 practices.

11 MS. CHAUVET: Just a quick follow-up
12 question on the short portions, because you want
13 to comply with section 110, but you also have section
14 110(2), which, while granted, doesn't use the term
15 short portions, but that is essentially when you're
16 dealing with distance learning, that's really all
17 you're allowed, like a reasonable amount. It's not
18 supposed to be the whole motion picture.

19 So in cases where you're dealing with
20 compliance of 110(2), would it be reasonable -- or
21 I should say, when you're dealing with distance
22 education, and if you're trying to comply with
23 110(2), if you want us to incorporate that into the
24 exemption, presumably keeping the short portions

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1 for that type of learning and teaching would be
2 appropriate?

3 MR. MIDGLEY: Well, I think -- if I may
4 -- so our proposal, again, would just be to tie it
5 to the underlying activity. In other words, the
6 purpose of this proceeding is to decide when
7 circumvention is appropriate. And if a user is
8 ultimately going to use more than the reasonable
9 and limited portions that are permitted under
10 110(2), then that's an act of infringement, and the
11 circumvention that might have preceded that act of
12 infringement would not be eligible for the exemption
13 that we're proposing.

14 In other words, the exemption is tied
15 directly -- if the underlying use is not infringing,
16 then the circumvention that got you to that use is
17 not a violation of 1201.

18 And so it's just -- there's no need to
19 try to bake into these rules a separate set of
20 requirements. You just say, ultimately, a
21 non-infringing use, which is one of the conditions
22 for granting these rules, that satisfies the
23 conditions of 110(1) -- and again, 110(1) has no
24 short-portions limitations, you can show the entire

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1 film in a face-to-face classroom setting. And if
2 circumvention was required to get you to that
3 performance, then that circumvention, we submit,
4 should not be a violation of 1201. And the
5 reasonable limited portions that you need for
6 110(2), the same thing.

7 So again, instead of trying to
8 re-litigate the policy issues that were underlying
9 the infringement conversations that happened in the
10 '70s around 110(1) and 110(2), we would rather just
11 focus this proceeding on the circumvention that may
12 prevent educators from taking advantage of those
13 exemptions that already exist in the law. They're
14 already codified, and they're already there.

15 One other point that I neglected to
16 mention earlier that I feel like I should is, with
17 all due respect to our e-book authors and filmmakers
18 and other folks who were here earlier as well,
19 lumping the educators together with that group of
20 people may cause some problems.

21 So this may be a situation where it may
22 make sense to have -- even though, in general, of
23 course, we support the notion of simplification,
24 consolidation, making it easier for people to use

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1 -- there really is a special statutory preference
2 that's shown for non-profit educational users,
3 which we don't think has come through adequately
4 in the current rules. And that may be due in part
5 to the fact that the educators have been lumped in
6 with another group of people, and that might not
7 be appropriate either.

8 MS. CHAUVET: So would it be reasonable,
9 then, to hypothetically like have two exemptions
10 for this, like you had to have one for educational
11 purposes, which would encompass the educational
12 uses that are currently covered, and then you might
13 have one, say, for non-commercial purposes, which
14 could include e-books and filmmaking and
15 non-commercial videos?

16 MR. MIDGLEY: Right. So again,
17 educators, of course, are all the time making use
18 of 107, just like our documentary filmmaker
19 counterparts and you know, the e-book authors and
20 other folks who are making fair uses, non-infringing
21 fair uses, and educators certainly make those kinds
22 of uses.

23 But in addition to those, we also have
24 separate statutory exemptions in 110(1) and 110(2)

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1 which have been specifically negotiated, hashed
2 out, and we think that 1201 should reflect the same
3 policy that's already sitting in there in the
4 statute for 110(1) and 110(2).

5 So that may -- we're just proposing that
6 that might be a way to simplify the educational
7 exemptions so that what Mr. Band is talking about,
8 that educators have a very simple exemption, a 1201
9 exemption, that enables them to do whatever they
10 need to do to get to a non-infringing performance
11 for educational purposes.

12 MS. CHAUVET: So I know -- I see a few
13 placards up. I believe it was Joint Creators that
14 commented that not all educational uses are
15 necessarily fair use. Perhaps Mr. Williams, you
16 might want to touch on that, and if you have any
17 suggestions on like, trying to divide
18 non-infringing versus infringing use in an
19 educational context.

20 MR. WILLIAMS: Thank you, yes. First,
21 I wanted to say that --- so section 110 is about
22 performance and display, so circumvention is not
23 required to take a lawful copy that you purchased
24 into the classroom and engage in a public

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1 performance that's covered by section 110.

2 There are also ways of performing it
3 online that would not necessarily require
4 circumvention. What the circumvention is getting
5 at is the desire to make copies, right, and so the
6 exemptions are already going beyond section 110,
7 because they are enabling, or at least saying that
8 in many instances, some level of copying is fair
9 use, not that it's expressly covered by section 110.
10 So I just wanted to clarify that issue.

11 The implication of the fact that the
12 reproduction right is not covered in 110, and the
13 implication of the fact that 110 has boundaries,
14 is that when you exceed those boundaries there is
15 a question as to whether the conduct is lawful or
16 not.

17 So of course, there are things that
18 educators could do that would be unlawful. I would
19 submit that what BYU is proposing, basically just
20 hacking all of their disk and passing around digital
21 copies around the campus, that's not a fair use,
22 and it's a form of space shifting that is not a fair
23 use.

24 So I don't think that in this proceeding

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1 we're going to be able to define everything that
2 might be done in an educational context that would
3 qualify as infringing. What I think you have to do
4 is look at the record, see what they've put forward
5 to establish non-infringing uses, and then try to
6 draw the exemptions to address what they've put
7 forward. And I think that's what you've already
8 essentially done.

9 So I don't think there needs to be any
10 change, other than as we offered, a shortening of
11 the language, which can be done in various ways.

12 MS. SMITH: I guess I have sort of two
13 follow-up questions for you on that. I mean, first
14 is, what would you say to 107, which supposedly says
15 that multiple copies for classroom use are likely
16 to be a fair use?

17 And then second, I'm wondering how much
18 -- you've said you're taking issue with whether the
19 uses would be non-infringing, but is really more,
20 is it separately a concern that whole works would
21 then be in-the-clear distributed? Like going to a
22 1201 issue of access, as opposed to, that the actual
23 classroom use itself would be infringing?

24 MR. WILLIAMS: I would not say that the

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1 concern about in-the-clear copies is necessarily
2 more the issue, but it is a big part of the issue.
3 Of course, when you're dealing with hacked disks
4 or in-the-clear digital copies that can be spread
5 around quite quickly, harm can result quite quickly,
6 and there's no way for my clients to monitor the
7 source of that harm.

8 The proponents often say, well, no one's
9 ever been able to point to someone who claimed to
10 use an exemption, and then the copy fell into the
11 wrong hands. There's no way for us to do that. We
12 have no line of sight into who is using the
13 exemptions, and who might be misusing them. So
14 that's just something we can't proffer.

15 I'm also quite concerned about the
16 acquisition of copies of works that should be paid
17 for. There's nothing that says that all copying by
18 educational institutions is fair use. You're
19 correct that there is a reference to
20 multiple-classroom-use copies; I think that was
21 really referring more to the literary work context,
22 and to the need, on occasion, to essentially create
23 a couple of copies to use in the classroom.

24 That's a big difference between having

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1 a university hack into disks or other digital
2 copies, create a bunch of server copies or pass them
3 around campus. It's very distinct from what was
4 being talked about in 1976, when that language was
5 included. So I guess that's how I would address it.

6 MS. SMITH: Professor Decherney?

7 MR. DECHERNEY: Thank you, Peter
8 Decherney. I'm a little hesitant to say this
9 because I'm not sure which side it helps. As I
10 understand it as a non-lawyer, both 110(1) and
11 110(2) are safe harbors. They are not coincident
12 with fair use. In many cases, they allow for uses
13 which are not fair use, like showing an entire work,
14 which may or may not be fair use, but we don't know.

15 There are also many cases when using
16 work, both in an online teaching environment and
17 in a residential teaching environment may be fair
18 use but are not covered by section 110. 1201, as
19 I understand it, should be about protecting section
20 107, about protecting fair use --

21 MS. SMITH: It could be about
22 non-infringing use as general, so --

23 (Simultaneous speaking.)

24 MR. DECHERNEY: Exactly. And I was

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1 skeptical when the EFF wanted to propose a kind of
2 joint, amalgamated exemption, and I actually think
3 they did a very nice job of trying to bring together
4 and synthesize the way many of the exemptions work.

5 I don't know if it will work in every
6 case; maybe there should be two rather than seven,
7 not one. But definitely some kind of amalgamation
8 would be really helpful.

9 I know it's not just that users need to
10 hire lawyers to understand the exemptions
11 increasingly. But even when you see these
12 exemptions reported in the popular press, and even
13 in the kind of technical press, I'm amazed at how
14 often they get it wrong.

15 One case that surprised me the last time
16 was TechCrunch, usually very good in the policy
17 reporting. They said in the MOOC exemption that
18 Coursera courses were not -- could not take
19 advantage of the exemption because they were
20 for-profit, when it's very clear in the way you've
21 drafted it that as long as the offering institution
22 is non-profit, it's okay if the platform is
23 for-profit.

24 MS. SMITH: Thank you. Mr. Midgley,

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1 then Mr. Band.

2 MR. MIDGLEY: Yes, just a couple of
3 points in response to this notion of -- of course,
4 we understand that 110(1) and 110(2) are about
5 performances, not copies. That's what 112(f) is
6 for; 112(f) specifically talks about the copies that
7 are necessary to make 110(2) performances. So, and
8 to the extent that you have --

9 MS. SMITH: But that's not what -- the
10 exemption you are seeking would be permanent copies,
11 right?

12 MR. MIDGLEY: Well, my point is simply
13 that the circumvention that you would need to get
14 yourself to the non-infringing performance of
15 110(1) and 110(2), if there's an intermediate copy
16 that's necessary that's a non-infringing copy,
17 either under 112(f) or under 107.

18 And I would just point to, you know,
19 Google Books and HathiTrust as examples of cases
20 where full copies of millions of works reside, right
21 now, on servers hosted by a for-profit, private
22 company, and the court has ruled in that specific
23 instance that those full copies that exist are fair,
24 because they enable the transformative use that

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1 researchers need to make downstream.

2 And so in a very similar way, the server
3 copies, the intermediate, temporary server copies
4 that would need to exist to make these
5 non-infringing performances under 110(1) and
6 110(2) would be covered either under 112(f) or under
7 107 as fair uses.

8 MS. SMITH: So if you're traveling into
9 107, I mean Google Books said a full copy is fine
10 for search purposes, because it doesn't substitute
11 the market for purchasing. Is it your contention
12 that that would stretch over into full copies for
13 educational uses?

14 MR. MIDGLEY: I'm simply trying to make
15 the analogy that a full copy of work -- millions
16 of full copies of works, residing on a server --
17 when the court looked at that issue, the ultimate
18 underlying use was -- the non-infringing use that
19 you had to make in that instance was key-word
20 searchability of the full text of those works.

21 And an intermediate step that was
22 required was to have a fully copy residing on the
23 server that still resides there to this day, and
24 that full server copy is a fair use, because the

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1 ultimate underlying objective is to make a
2 non-infringing fair use of the full server copy.

3 It's the same example here. We're
4 trying to make a non-infringing use -- that is, a
5 non-infringing performance in a classroom, a
6 face-to-face classroom teaching situation -- and
7 again, to do that, you need a full copy if you want
8 to show the full movie. And that necessary
9 intermediate copy that you need, in the exact same
10 way that the full copies that sit there on the Google
11 servers, is a fair use if it's not covered
12 specifically under the 112(f) provision for
13 ephemeral recordings.

14 MS. CHAUVET: A few follow-up questions
15 on that, because for Google Books, the court found
16 that the use was transformative, because people
17 could search it. So it was not the exact same ---
18 it's not like they were just putting the books up,
19 and people could look at them in their original form.

20 Like here, you're basically ripping a
21 movie and just showing the exact same movie. What's
22 transformative about that use?

23 MR. MIDGLEY: Well, it may be
24 transformative, depending on, you know, the

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1 specific teaching context in which it's being used.
2 But whether it's transformative or not, it's
3 non-infringing. It's non-infringing under 110(1)
4 or 110(2), or the exemption that we're seeking
5 wouldn't apply. If you're using it in an infringing
6 way, then the exemption doesn't apply.

7 MS. CHAUVET: But you keep saying the
8 use is fair use. So I guess I'm wondering like, so
9 are you using fair use as the basis for your
10 position, or?

11 MR. MIDGLEY: Yes, sorry if that's not
12 being clear. So what we're saying is, there's an
13 ultimate use; that's the performance, the
14 non-infringing performance that's going to happen
15 either in a classroom or in an online distance
16 education setting under 110(1) or 110(2). And that
17 performance is non-infringing as long as it meets
18 the statutory requirements that are set forth in
19 those provisions.

20 So for example, it doesn't cover the use
21 of, you know, if we have a student club, the Harry
22 Potter Fan Club on campus that wants to get together
23 and have a Harry Potter movie marathon in a theater
24 on campus. That's not a non-infringing

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1 performance. That requires a license, and we ---
2 believe me, we get those licenses when we need to
3 do that.

4 So we're not talking about all
5 performances everywhere on campus. We're talking
6 about the specific, non-infringing performances
7 that meet the conditions that are set forth in the
8 statute.

9 In order to make those performances,
10 what we need in some cases is a full copy of the
11 movie that sits on a server somewhere. And that
12 copy --- that's the copy that I'm talking about
13 that's covered either under 112 or under 107.

14 MS. CHAUVET: So just to follow up,
15 because that, as Mr. Williams noted, implicates a
16 right of reproduction; it's not just the performance
17 anymore, under 110. So when you look at 112(f) --
18 like section 112 is subject to a statutory license,
19 actually, and it doesn't apply to motion pictures.
20 So how is it relevant to this proposed exemption?

21 MR. MIDGLEY: Let me get the language of
22 112 in front of me. I'll defer to others.

23 MS. CHAUVET: Sure. Or Professor
24 Decherney, while we wait.

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1 MR. DECHERNEY: Yes, Peter Decherney.
2 I'm just thinking about the history of the exemption
3 process, and the history of fair use, and I realized
4 that 2006 is an important moment for both. That's
5 when the educational exemption begins; it's also
6 when the DK Publishing case happens --- I think it's
7 2006.

8 For me, that's when transformative use
9 kind of crystallizes, so we have all these ways of
10 trying to bring the exemption process in line with
11 fair use, focusing on short portions, comment and
12 criticism. But as far as I remember, the word
13 transformative doesn't appear in any of the
14 exemptions.

15 Maybe there's a way to bring
16 transformative use into the exemption process
17 without these other kinds of definitions and
18 limitations.

19 MR. BAND: I'm not sure that we want to
20 bring transformative use into -- I would think that,
21 frankly that we're saying it for educational
22 purposes, that's already a re-contextualization
23 and re-purposing that is more than adequate.

24 I also think that, although this

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1 discussion about exactly the bounds of what is
2 infringing or non-infringing is interesting, it's
3 really not that relevant, because at the end of the
4 day, I mean, the existing exemption, the way it's
5 worded under the existing regulation creating
6 exemptions, it says, you know, that the prohibitions
7 in section 1201(a)(1), (a)(1)(A), shall not apply
8 to persons who engage in infringing uses of the
9 following classes of work.

10 So ultimately what is going to be
11 determined -- we don't need to go all --- you know,
12 consider every possible permutation of what, you
13 know, how BYU decides -- where it decides to store
14 things. I mean if --- that's a separate question.
15 If that's infringing, then they can be sued and be
16 found liable for infringement.

17 You know, here we're looking at what's
18 happening -- you know, the end use; that's the real
19 scope of inquiry. And again, if it's infringing,
20 it's infringing. That's different from whether the
21 circumvention was lawful or not. So again, as long
22 as you --- Mr. Williams' concern about maybe this
23 is infringement, maybe that's infringement -- the
24 point is, if it's infringing, it's infringing, and

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1 that's the end of that discussion.

2 The other point I'd like to make is with
3 respect to sort of making this entire exemption --
4 the educational pieces of it -- more useable, is
5 the restriction about requiring close analysis of
6 film and media excerpts. And sort of like this
7 requiring close analysis is a difficult standard
8 for teachers in the field to apply. I mean, and
9 they're trying to say, well, do I really require
10 close analysis? So it's like, you know, it has to
11 be required. It has to be close. And that's ---
12 those are hard standards to meet.

13 And interestingly, you don't have those
14 standards with respect to documentary filmmaking
15 or non-commercial video, and so you have this kind
16 of funny situation where, if a student wants to make
17 a video or a remix for his own pleasure to put up
18 on YouTube, he doesn't need to worry about well,
19 does this require close analysis, right. I mean,
20 they can simply do it.

21 But in the educational context, the same
22 student, if he's making a remix for educational
23 purposes, he has to worry about okay, is this, you
24 know, if it's a psych class -- I mean, there's really

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1 no reason to have this close analysis restriction,
2 especially in light of the fact that, again, the
3 same people in a different context don't have it,
4 and the likelihood of -- again, it's one of these
5 artificial distinctions that really doesn't
6 benefit anyone, except just drive teachers crazy.

7 MS. CHAUVET: Noted. I think one of the
8 reasons why that limitation is included, though,
9 is because the record in the 2015 rulemaking, like,
10 those were the examples that were presented as
11 actually needing to circumvent, whereas maybe
12 screen capture would have been appropriate.

13 So I think what would be very helpful
14 -- and perhaps Professor Hobbs can speak to this
15 is -- you talked about the needs as being the same,
16 regardless of who you're teaching. But can you
17 provide any specific examples where circumvention
18 is required, and it's not just for close analysis
19 of films?

20 MS. HOBBS: I would be happy to, because
21 of course, to prepare for this meeting, I went to
22 my wonderful network and asked them to share with
23 me stories. Here's an example, and it's an example
24 of how -- Mr. Band is right about how the limiting

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1 language of close analysis is a problem. Here's a
2 middle-school teacher who is doing a unit on
3 architecture, right, and the focus is, how do houses
4 get built? She wants to use --

5 MS. CHAUVET: I'm sorry, which grade is
6 this for?

7 MS. HOBBS: This is middle school. She
8 wants to use a DVD of a film called Alone in the
9 Wilderness, which apparently features a guy who is
10 building a house. She's intending to have kids
11 watch clips from this film so that they see the steps
12 in the process, and then she wants them to
13 essentially make their own how-to video.

14 They're not really engaging in close
15 analysis the way we would conceptualize it in media
16 literacy education; they're not really analyzing
17 the author, the purpose, the point of view, right?
18 She wants to use these short portions to show steps
19 in a process. It's a much broader
20 conceptualization of educational media use.

21 MS. CHAUVET: And how would
22 circumvention prevent her from doing that?

23 MS. HOBBS: So queuing up and using the
24 12 portions, versus having a clip compilation tape

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1 with a room full of squirmy 13-year-olds in a
2 42-minute lesson, the best way for her to do that
3 is through a clip compilation.

4 MS. CHAUVET: And why would screen
5 capture not be a feasible alternative?

6 MS. HOBBS: Screen capture might be an
7 alternative.

8 MS. CHAUVET: Mr. Midgley?

9 MR. MIDGLEY: Yes, a couple of points.
10 The demo that I have illustrates --

11 MS. CHAUVET: I was thinking maybe we
12 could go ahead and do that. If you could please
13 enter as Exhibit 1-E, as an exhibit.

14 (Whereupon, the above-referred to
15 document was marked as Exhibit No. 1-E for
16 identification.)

17 MR. MIDGLEY: So this demo is a
18 foreign-language instruction demo that we hope
19 illustrates why --

20 (Video played.)

21 MR. MIDGLEY: I guess I didn't need to
22 be standing here while it played. We can just watch
23 it over and over again, as far as I'm concerned.

24 MS. CHAUVET: Mr. Turnbull?

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1 MR. TURNBULL: Let me first say that in
2 my view, and maybe this is a drafting point which
3 I wasn't quite prepared for initially, but that's
4 exactly what close analysis relates to, in my view.
5 In this case, it isn't close analysis, perhaps, of
6 the image of the faces or whatever, but it's close
7 analysis of a part of the film. And so the existing
8 exemption works perfectly well for this example.
9 So I don't see what the problem is with that.

10 Going back for just a minute, the whole
11 premise that's been advocated by the far end of the
12 table here seems to me turns this proceeding upside
13 down. The proceeding starts with the proposition
14 that circumvention is prohibited, and then says,
15 are there particular non-infringing uses that are
16 somehow being prevented by a technological
17 protection measure that then should enable
18 circumvention for those particular purposes where
19 the record has demonstrated them?

20 All of the education provisions that
21 we're talking about -- except the MOOC one, which
22 we'll get to -- existed. Congress did not say
23 circumvention is prohibited except for educational
24 uses; circumvention is prohibited except for fair

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1 uses. Congress didn't say that. Congress said
2 circumvention is prohibited, period, and then went
3 on to say, in certain circumstances, where it is
4 demonstrated that a particular non-infringing use
5 is being prevented by a TPM, circumvention may be
6 exempted, or the prohibition may be lifted for those
7 particular uses.

8 And that seems to me from the standpoint
9 of the technological protection measure provider,
10 is absolutely critical to the statutory structure.
11 I'm sorry about that it overrides some of the other
12 provisions that are generic with regard to
13 education, but it does, and that was the choice that
14 Congress made.

15 MS. CHAUVET: So, Mr. Midgley, it seems
16 that Mr. Turnbull seems to think that your example
17 would be covered by the current exemption, and I
18 know some proponents have expressed that the term
19 close analysis is ambiguous. So is there perhaps
20 alternative language that could be used that might
21 appear to be broader, that would make people feel
22 more comfortable?

23 MR. MIDGLEY: Sure. I go back to 110(1)
24 and 110(2). That's the alternative language;

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1 that's the simplest solution to this problem. The
2 current exemption would not, for example, cover --
3 if you wanted to watch that entire film in a French
4 class and have the instructor standing at the
5 podium, deciding to turn on and off subtitles as
6 needed during the class, that is perfectly
7 permissible under 110(1), the entire film. But the
8 current exemption wouldn't allow that because it's
9 limited to short portions.

10 In its current form, even if we
11 considered that to be a close analysis of film --
12 and you may have noticed that the quality of that
13 was not all that high. I specifically chose a film
14 with fairly low resolution to illustrate that there
15 are non-film studies situations where you need to
16 circumvent not because you need
17 super-high-resolution capability, but there are
18 other reasons why you need it in various educational
19 settings.

20 So from our standpoint, we're not here
21 saying, we need yet another -- we need an eighth
22 category now, for foreign language instructors,
23 because we've now brought that use case. And three
24 years from now, I don't know who is going to be coming

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1 in next, history professors and so on.

2 Taking the approach that's being
3 advocated by our friends on the other side has led
4 us to where we are right now. And as Mr. Band alluded
5 to earlier, it's a completely unworkable mess.

6 So the solution here is not, let's
7 further subdivide and complicate, and wait for more
8 people to come forward and deal with very specific
9 use cases. Rather, the solution is, let's make the
10 prohibition on circumvention match the policy that
11 was already enacted for this very specific category
12 of users.

13 It's the non-profit educational users,
14 and that's it. It doesn't go beyond that, it
15 doesn't cover all uses by those organizations; it
16 covers very specific performances that meet the
17 statutory conditions that are set forth in 110(1)
18 and 110(2).

19 MS. CHAUVET: So, we'll definitely talk
20 more about 110; but just as a preliminary matter,
21 Joint Educators proposed exemption asks us to
22 completely eliminate references to section 110.
23 And you want that to be the guide, so how do we
24 reconcile that, if we are going to have a single

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1 educational use exemption?

2 MR. MIDGLEY: You use your judgment.
3 We've come forward with a specific proposal that
4 we think addresses this issue, and again, we fully
5 support the general notion that's being advocated
6 by EFF and others, that what is needed here is
7 simplification, consolidation, to make it useful
8 to the people who presumably are the intended
9 beneficiaries.

10 That's how we understand this
11 rulemaking to be -- and again, with all due respect,
12 if you look at the legislative history behind the
13 DMCA, again, non-profit educational users were
14 specifically called out. It's in the statute
15 itself --

16 MS. CHAUVET: I hear what you're saying,
17 but I think we obviously have exemptions for
18 educational purposes, realizing that there is
19 value. So I think we want to do exactly what you're
20 asking, but in terms of simplifying, it seems like
21 by having a broader educational exemption could
22 potentially be that. I guess we're asking for
23 guidance, if you have completely different,
24 conflicting goals, how do we resolve those issues?

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1 MR. MIDGLEY: From our standpoint, our
2 specific recommendation or proposal is the simplest
3 way to address this is just tie it to the statutory
4 language and conditions that are already there.
5 There is safety in sticking with the statute.
6 Although we certainly appreciate other
7 perspectives, and if there's another way that the
8 Office wants to try to bring the simplicity that's
9 needed, we're definitely open to that. But our
10 recommendation, for what it's worth, is just tie
11 into the statute.

12 Sorry, one other housekeeping thing --
13 I was asked earlier about 112 and the provisions
14 in 112(a) that were being referenced --

15 MS. CHAUVET: You referenced 112(f).

16 MR. MIDGLEY: Yes, exactly. And if you
17 look at 112(f), it doesn't have the same
18 restrictions that were being mentioned about
19 excluding motion pictures and the need for a
20 license. I just call that to the attention --

21 MS. CHAUVET: But it is subject to a
22 statutory license, so it's not like people can just
23 go do this for free, like they are doing it, so that
24 they will pay a statutory license under section 114.

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1 So how do you --

2 MR. MIDGLEY: This may require some
3 post-hearing briefing, and we would certainly be
4 happy to participate in that. To the extent that
5 -- again, we submit that these copies would be
6 covered under 107 anyway, but 112(f) is also there
7 as another safe harbor for those temporary copies.

8 MS. CHAUVET: All right, thank you. Mr.
9 Williams?

10 MR. WILLIAMS: Thank you. I can't say
11 I've memorized section 112, but 112(f) seems to
12 relate back to 110(2); 110(2) involves transmission
13 of portions of works. What Mr. Midgley so far has
14 been talking about, I think in every example is whole
15 copies of works. So I'm not so sure that you can
16 fit what he's looking to do into section 112. And
17 section 110 itself does not specifically enable the
18 copying.

19 So I still think you have to go to section
20 107 to get where he wants to go, and I would submit
21 that, at least for some of what he's put forward,
22 107 would not apply.

23 I think one of the issues here is whether
24 -- he's talking about needing to circumvent to get

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1 digital copies in order to make the performances
2 that he wants to make, and I don't see why he has
3 to circumvent to create digital copies when he
4 already has lawful copies that he's purchased, that
5 he can use to make all of these transmissions.

6 I don't think that was in the record,
7 what he showed us just now, so it's hard to process
8 it quickly on the fly, and I'm not sure I understood
9 everything that was going on. But I think what was
10 done is a complete, in-the-clear copy was made, and
11 then they wanted to use it in the classroom to move
12 back and forth between different languages, and back
13 and forth between either different scenes or
14 different chapters within a disk. I think that's
15 probably achievable with most disks.

16 MS. SMITH: Yes, I was also a little
17 confused why you couldn't just use the disk as
18 purchased.

19 MR. WILLIAMS: Yes, and I think that's
20 even more true of digital copies that you obtain
21 through a streaming service, for example, where you
22 can switch back and forth without going back to the
23 beginning of the movie or anything. You can just
24 go into the subtitles menu, switch the language,

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1 and then move ahead.

2 So I still don't think they've
3 identified anything where they don't have a lawful
4 alternative to engage in the conduct. Not wanting
5 to have DVD players or optical disk drives in the
6 classroom, for example, is not something that I
7 think is reasonable, given that they are asking for
8 an exemption just to avoid that.

9 So I do think that there are
10 alternatives; I don't think they need to create
11 in-the-clear copies to achieve what they've been
12 showing us. I also don't think that section 110 or
13 112(f) expressly covers the creation of complete
14 copies like the ones they want to create.

15 MS. SMITH: I don't know who would like
16 to respond to what Mr. Williams said, but I think
17 part of tying together with what Mr. Midgley said,
18 part of our project here is to examine the
19 availability for use of works for educational
20 purposes in general.

21 So if access controls are impeding that
22 availability for use, that would militate towards
23 recommending an exemption. But are works already
24 available for educational purposes, or if not, how

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1 are they not, if you can purchase a copy or stream
2 a copy, or download a copy or display them on a
3 screen, they circumvent their existing exemptions,
4 or with screen capture, yada, yada, yada?

5 Is this impeding educational purposes
6 having what remains of the prohibition on
7 circumvention? And if so, how?

8 MR. BAND: Related to that -- I think
9 this ties into the discussion we've just been having
10 -- certainly a lot of what we're really interested
11 in, and certainly what Professor Decherney has
12 always been talking about, are these compilations.
13 And as Professor Hobbs was saying, when you're in
14 a middle-school class, or even if we were trying
15 to show something here, having the clip compilation
16 will make it much faster to navigate, as opposed
17 to trying to zip back and forth within --

18 MS. SMITH: Right. Just try to -- we're
19 going to come back and look at what we have, to say,
20 when we look at the second factor statutorily, how
21 we consider it. Sorry to drill down on you, but I
22 want to do this with everyone. You can use
23 screen-capture techniques, and you can also use a
24 temporary exemption to make these clip

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1 compilations. So is there a problem with --

2 MR. BAND: But I think we just saw, in
3 that example, it's a language course; screen capture
4 would not allow you to make the kind of compilation
5 with these different subtitles without going into
6 much, much more work. As you said, it's like having
7 to go through it three different times. So it's
8 much more efficient to just use circumvention rather
9 than screen capture, and conceivably a better
10 product as a result.

11 But the further point is -- and we can't
12 overstate this -- is operationalizing this in an
13 educational context. And that is -- and this goes
14 back to Professor Hobbs' example with the middle
15 school and the architecture -- maybe in that
16 specific example, screen capture might be good
17 enough. But what about what was going on in the
18 language class next door? And they're not the ones
19 doing the circumvention, it's some tech support
20 person who's doing the circumvention.

21 So to try to have him say, okay, under
22 these circumstances, you need to use this
23 technology. Under those circumstances, you need to
24 use the other technology. It's unworkable.

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1 MS. SMITH: I hear you, and we're taking
2 that seriously. We just want to make sure we cover
3 all the issues. So if we can move on to --

4 MR. BAND: Right, but I was just trying
5 to explain why, even though you can pull one example
6 and say, well, yes, that conceivably, in the context
7 of this room, we could say that would work with
8 screen capture.

9 I'm trying to say that doesn't work in
10 the real world, where you're dealing with people
11 who are non-lawyers. The tech guy is getting 25
12 requests for making all of these compilations, and
13 then has to make these additional decisions. Is
14 this close analysis? If it's close analysis, then
15 it needs to be X. If it's not close analysis, then
16 it needs to be Y. It just doesn't work.

17 MS. SMITH: Professor Hobbs?

18 MS. HOBBS: You asked about situations
19 where the quality of teaching and learning is being
20 impeded by the current language of the law. I want
21 to speak to the part of the law that says, short
22 portions. A teacher came to me with this really
23 interesting case study. She felt that, under the
24 current law, she couldn't design this activity, but

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1 here's what she wanted to do.

2 This is a high-school English teacher;
3 they just keep using Romeo and Juliet, year after
4 year. I don't know why, but this time she wanted
5 to do a comparison between one of the classic
6 versions of Romeo and Juliet and the animated film,
7 Gnomeo and Juliet. Have you seen that one? The
8 animated one featuring the gnomes.

9 But the thing she was working on with
10 students was looking at rising action and the role
11 of conflict and character in narrative structure.
12 So her plan was to have students create a visual
13 map of all of Act II, that's the middle portion of
14 Gnomeo and Juliet, where students had to visually
15 map the characters, the rising action, the conflict
16 and identify the culminating point in the narrative
17 that then pushed it into Act III.

18 She knew that her kids would be
19 interested in doing this challenge. She was trying
20 to build digital literacy competencies in, so she
21 wanted them to do this fully online; that is, they
22 would be drawing the map online in their Google
23 classrooms.

24 But she ultimately determined that

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1 perhaps using all of Act II was not what the law
2 would consider a short portion, so she forewent that
3 opportunity. And I feel like that's an example of
4 where the short portions restriction is limiting
5 the innovation of teachers to make effective use
6 of audio-visual media for learning purposes.

7 MR. MIDGLEY: I would also like to say
8 that the notion of equipping every classroom in
9 America with a DVD player -- which serves no
10 educational purpose beyond playing this
11 increasingly outmoded media -- in addition to all
12 of the logistical issues which have been mentioned,
13 bringing in stacks of DVDs and trying to fumble with
14 all of that -- just the sheer cost, is something
15 I think that should be taken into consideration,
16 candidly.

17 Obviously, the nature of these
18 proceedings is a balancing, and we're balancing,
19 on the one hand, the interests of copyright holders.
20 As a university, we have the utmost respect for
21 copyright holders. We generate all kinds of
22 content on campus, and we're training a whole
23 generation of future filmmakers and creators in all
24 sorts of spaces. We're not coming to these

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1 proceedings suggesting that the rights of copyright
2 holders should be just ignored or disregarded in
3 any way.

4 But by the same token, they have to be
5 balanced against the needs of users. And for
6 non-profit educational institutions, which are
7 very-budget conscious organizations, often funded
8 with public taxpayer funds, the idea of equipping
9 classrooms with personal computers is hard enough,
10 and that's a device that has a wide range of
11 potential educational uses, and there's ample
12 evidence in the record that computers are
13 increasingly coming without optical drives in them.

14 So from our vantage point, it makes no
15 sense to say that the balance should be struck in
16 such a way that we want non-profit educational
17 institutions to be forced to expend millions of
18 dollars to bring this one piece of equipment into
19 the classroom which has no function other than this
20 one limited function, which admittedly, would do
21 away with the need for what we're talking about in
22 very specific circumstances, even though it has the
23 additional logistical costs associated with it --
24 again, something that we think should be taken into

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1 account.

2 When you look at that whole picture, we
3 feel that the record amply demonstrates that the
4 balance can very comfortably be set in favor of the
5 exemption we're proposing.

6 MS. CHAUVET: Just a quick follow-up
7 question on the issue of cost: For example, section
8 108, which allows libraries to make replacement
9 copies in certain circumstances, like if the
10 technology is becoming obsolete; in that instance,
11 libraries still have to make a reasonable effort
12 to go out in the marketplace to see if there are
13 unused versions that they could purchase,
14 obviously, at a reasonable price. You can't expect
15 to spend \$3,000 on a first-edition book or something
16 like that.

17 So if Congress foresaw an obligation for
18 libraries to do something like that, why isn't the
19 same thing true for educational institutions?

20 MR. MIDGLEY: Again, it's simply a
21 balancing act. On the subject of cost and turning
22 to the topic of streaming services, that's another
23 example that's been cited. Why don't we, as
24 institutions, just go pay for streaming licenses

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1 for all of this content?

2 There are a couple of responses to that,
3 and one of them goes directly to the cost issue that
4 you talked about. In our reply brief, we included
5 an article from some scholars who were looking at
6 a specific case study at George Mason University,
7 and in their research, they found the average cost
8 for a perpetual streaming license was \$520 per
9 title, \$369 for five years, \$297 for a 3-year
10 license. And when DVDs are costing \$60 on average,
11 you're talking about a different order of magnitude
12 in terms of the cost.

13 And whether or not that's an appropriate
14 cost-shifting analysis, we leave that in the
15 judgment of the Office. But certainly our position
16 is, if you look at the requirements for the rule,
17 which talk about the underlying non-infringing
18 uses, the performances we're talking about and the
19 circumvention that you need strictly to get to those
20 uses, we think that's a very reasonable place to
21 strike the balance, given the overarching
22 preference that non-profit educational
23 institutions enjoy.

24 MS. SMITH: Thank you. Just following
25 up a little bit on the cost -- I assume, since this
26 is about circumventing DVDs, for example, that BYU

1 has DVD players, both on computers and, perhaps,
2 purchased separately. Probably you've bought
3 players and maybe you are expanding, for maybe they
4 break, and you need to replace them. Have you
5 factored in how much of a problem it is to not be
6 able to play the DVDs that BYU has already purchased?
7 Do you factor in a budget line item to replace these
8 optical drives? It's hard to understand how
9 palpable a concern this is.

10 MR. MIDGLEY: Yes, what we brought
11 forward in our initial comments was the decision
12 that our university has made. We filed jointly with
13 our companion university, BYU Idaho; both of our
14 IT departments have independently concluded that
15 we are phasing out DVD players. Again, I can't
16 speak broadly for what others --

17 MS. SMITH: Was that your conclusion
18 based on, we're phasing out DVD players and, uh-oh,
19 how will we watch all of these DVDs you've invested
20 in for classroom use, or was that decision made
21 because classroom uses were going to be relying more
22 on streaming materials or other materials?

23 MR. MIDGLEY: I can't speak to the
24 underlying budgetary decision-making process, but
25 again, you have limited funds to furnish these
26 technology-enabled classrooms, and the people who

1 look at these issues very carefully and consider
2 how much money should be invested in the projectors
3 in the room, and all of the computer equipment. It
4 isn't a cheap undertaking, and when that analysis
5 was done, the ultimate net conclusion that was
6 reached was that the benefits of having the DVD
7 players in the classrooms -- the costs outweighed
8 whatever benefit there might be. That was the
9 decision.

10 Again, although we can't speak for what
11 universities or K-12 institutions are doing
12 nation-wide, we just point to that same article on
13 the George Mason study, which found the same thing.
14 It's difficult to us to imagine that we are an
15 outlier in reaching this decision, given the overall
16 national trends away from physical optical media.
17 But that's the evidence that we can bring forward,
18 what we're doing on our own campus, and what we hear
19 from what other institutions are doing.

20 MR. CHENEY: So just a follow-up
21 question to that, if I might: If you could describe
22 for us how you're now going to take a DVD from your
23 library, break the encryption and project that in
24 each of the classrooms. How is that process working
25 for BYU, and what are they thinking going forward
26 in how that's going to work?

1 MR. MIDGLEY: Sure. It needs to be
2 developed, obviously, depending on the outcome of
3 this rulemaking. But the thought would be that
4 these performances -- we would undertake an effort
5 to ensure that we're complying, if our proposal is
6 accepted, with 110(1) and 110(2). In other words,
7 contrary to the concerns that have been expressed,
8 whatever intermediate copies would be made would
9 be very carefully controlled, would not exist in
10 the wild. Access would be limited to registered
11 students in specific courses. For example, there's
12 a range of technological measures that we might
13 undertake --

14 MS. CHAUVET: Section 110 specifically
15 relates to classroom use. So how would it be
16 available to students outside the classroom? I'm
17 just trying to clarify, when you say it's available
18 for students, are you really saying it's available
19 for faculty to show to students, or -- what do you
20 mean?

21 MR. MIDGLEY: Oh, yes. Sorry. So
22 110(1) is related to live, face-to-face classroom
23 teaching, so in that situation, obviously it would
24 be individual professors like these two esteemed
25 colleagues seated next to me, who would have access
26 to make the performance that they would need to make

1 in a live, face-to-face classroom teaching
2 situation. And that performance, of course, would
3 need to meet all of the statutory requirements that
4 are set forth. It would need to take place in a
5 classroom or a similar place devoted to instruction,
6 all the requirements.

7 In a 110(2) context, if we wanted to make
8 performance in that setting, then the systems would
9 need to be developed that would restrict access to
10 the students who are enrolled in the course. In
11 that setting, of course, we wouldn't be showing full
12 movies, because it's limited to reasonable and
13 limited portions, exactly what the conditions are
14 that are set forth in 110(2).

15 So those systems would need to be
16 developed, and we would just develop them in line
17 with whatever the conditions are that are set forth
18 in the statute.

19 MR. CHENEY: So would that copy exist on
20 one server and then be streamed to any classroom
21 that has that on their syllabus for the year? How
22 do you envision that process -- it's got one master
23 copy sitting on a server, and then it's streamed
24 or how are you thinking that --

25 MR. MIDGLEY: It's a good question. We
26 haven't developed exactly the parameters of how that

1 system might work, but something along the lines
2 of what you're suggesting I think seems reasonable
3 as I sit here. We would have a master copy sitting
4 somewhere and make sure that the performance of that
5 film is done in a way that complies with 110(1) in
6 a face-to-face classroom situation.

7 MR. CHENEY: So a follow-up question, if
8 I might, Mr. Williams, if you can help me with this:
9 Is there a licensing available for this type of
10 thing, for universities if they want a master copy
11 of a work so they could stream it to classrooms?
12 Is that sort of service available today?

13 MR. WILLIAMS: I don't know the answer
14 to that, to tell you the truth. Bruce and David
15 might, but I can try to get an answer by the time
16 we're in LA for the hearings there.

17 I had some other follow-up, but if you
18 had more questions --

19 MS. CHAUVET: I was going to call on you,
20 so why don't you go ahead?

21 MR. WILLIAMS: Okay, thank you. I
22 think Bruce put his placard up, so I think he's
23 probably going to address much of what was just said
24 about the obsolescence of disk players and things
25 of that nature. There's no reason that every single
26 classroom needs one; not everyone is watching a

1 movie every minute in every classroom all around
2 the campus. So the numbers that they're throwing
3 out about cost are nowhere close to what would
4 actually be required, because what's done is, you
5 buy a certain number that meet your needs, and then
6 you move those around. I think that's far
7 overstated, but I'll let Bruce talk more to that.

8 I think some of the misunderstanding
9 that was just expressed about the scope of 110 is
10 in part what we're concerned about. You're going
11 to have all these copies being made; maybe they're
12 given out to students, maybe they aren't, that's
13 a concern. But going back to something that
14 Jonathan said earlier that I think is very
15 important, I can tell that, of course everyone would
16 prefer something simple, and that you're doing your
17 best to look for a simple solution. But not every
18 problem can be resolved in an effective way in one
19 sentence.

20 If you look at the provisions that we're
21 talking about -- section 110, section 112, section
22 108 -- Congress has repeatedly tried to address real
23 policy issues that require careful balancing, and
24 quite frequently that requires some substantial
25 drafting.

26 The notion that no one can make use of

1 any of these exemptions because they're too
2 complicated, I think is flawed. I think these
3 educational institutions are quite capable of
4 analyzing section 110 and deciding what they think
5 is or is not covered, and that Congress has not tried
6 to throw up its hands and say, if we can't get it
7 done in one sentence, then nothing should be done.
8 What they tried to do is to carefully balance out
9 the equities and reach results that make sense for
10 people.

11 So I think that's your job, the task
12 that's been assigned to you as well is, you have
13 analyze, are there alternatives, what are the lawful
14 uses that we've actually been shown in the record?
15 How quickly is this problem coming if it is coming?
16 I think BYU has said it's going to be several years
17 before they implement this plan to stop buying disk
18 drives, and they've not developed a plan of how to
19 make the access available. It's clear.

20 I just want to emphasize that sometimes
21 to get it right you do have to draft something with
22 some detail, and that's not necessarily a bad thing.
23 Although I also wish that it was all simple, it's
24 really not. Some of these things are complicated.

25 MS. SMITH: Mr. Turnbull?

26 MR. TURNBULL: Yes, Matt anticipated --

1 obviously, from our perspective, the viability of
2 the DVD and Blu-Ray formats is very much good and
3 remains good and is expected to be very strong for
4 decades in our view, and I would agree.

5 Now, the other thing is, if you don't
6 want to buy the freestanding DVD player, the set-top
7 kind of player you can buy, or a DVD or a Blu-Ray
8 drive that will connect to a computer. Again, you
9 don't need one for every classroom, you need however
10 many you need based on what you think your likely
11 demand is on any given day and find a way to share
12 them.

13 So both in terms of the utility, an
14 external drive that can be connected through a USB
15 port or equivalent, would work just as well as the
16 stand-alone DVD player and might have other uses.

17 MS. CHAUVET: So Mr. Midgley, perhaps
18 you can respond directly? Opponents have
19 essentially said that this adverse effect is of
20 BYU's own making, or decision not to purchase
21 additional optical readers, and it seems like they
22 are still available on the market. There are
23 alternatives. So what would your response to that
24 be?

25 MR. MIDGLEY: Well, several things:
26 First of all, it was all the way back in 2006, and

1 although we're participating in these proceedings
2 for the first time, I understand and have reviewed
3 prior proceedings that the same set of arguments
4 comes up every time. And every time, the Office,
5 I believe, has found that the social costs of taking
6 the time in class to fumble around with DVDs and
7 cue them up and sift through copyright warning
8 screens -- which, in general, are my favorite
9 screens of most movies, as the copyright guy on
10 campus -- I think that the social cost of that time
11 that could otherwise be spent on instruction
12 outweighs whatever benefits to copyright holders
13 there might be by requiring a shared DVD player
14 network on campuses or in K-12 institutions. So
15 rather than --

16 MS. CHAUVET: Just -- can I clarify?
17 Because you're saying it's taking away from
18 educational time. So is it not that there are not
19 optical readers? It's more that optical readers
20 take too long, and you want an alternative, faster
21 way to show these motion pictures?

22 MR. MIDGLEY: Yes. The cost associated
23 with purchasing the optical drive, the time it takes
24 to cue up what you're trying to do in the classroom
25 -- and if the solution to this problem is, well,
26 you can save the money by taking more time by trying

1 to wheel around DVD players between classrooms on
2 a campus the size of BYU -- I don't think that's
3 a viable solution, frankly.

4 And again, it's a balance. We
5 understand that to some extent I suppose as a purely
6 theoretical matter, a talented hacker or something
7 could gain access and some infringing uses might
8 occur, even though there's no evidence of that. And
9 if that were to occur, then as Mr. Band alluded to
10 earlier, then it would be infringement, and any
11 institution would be liable for whatever happens
12 there. All we're talking about is facilitating the
13 non-infringing uses that have been set aside in the
14 statute.

15 MS. CHAUVET: One other quick
16 follow-up, and then I'll move on. BYU also talked
17 about in its comments that it was going to phase
18 out; you're not going to replace any machines that
19 I presume break down. So what is the adverse effect
20 now, and what is the likely adverse effect of the
21 next three years? Because that's the determination
22 that we have to look at here.

23 MR. MIDGLEY: Sure. I would say that
24 the adverse effect relates to the wasted class time
25 that I was just alluding to. That's one immediate
26 adverse effect.

1 MS. CHAUVET: But is that caused by a
2 TPM?

3 MR. MIDGLEY: Yes. What we're hearing
4 from the other side is, the solution to this problem
5 is just bring the disks to class with you and play
6 them using the licensed players that are sitting
7 there in the classroom. Or, if you don't want to
8 spend the money on licensed players for every
9 classroom, just buy a few and share them around the
10 classrooms to meet your needs.

11 That necessarily requires time to cue
12 that up, and that time is caused by the fact that
13 we can't stream the movies into the classroom in
14 the way that we're talking about.

15 I would just also -- I think we've
16 entered these exhibits in as well. You know, BYU
17 has been at this for a while. We were developing
18 video disks decades ago --

19 MS. SMITH: What is this that you have?
20 I actually don't think --

21 MR. MIDGLEY: I gave these to somebody
22 earlier.

23 MR. SLOAN: This is 1-F.

24 (Whereupon, the above-referred to
25 document was marked as Exhibit No. 1-F for
26 identification.)

1 MS. SMITH: Can you pass that around as
2 you talk about it?

3 MR. MIDGLEY: Sure, I'd be happy to pass
4 it around. This is an old DVD player that was
5 available years ago that was bar-code enabled, so
6 that instructors could get to -- what you saw on
7 that film, where people could get to specific
8 portions of a movie by selecting the text -- so BYU
9 invested a lot of money in developing this foreign
10 language, this Italian DVD, and the book that goes
11 with it has individualized bar codes for every line
12 of dialogue in the film.

13 The idea was that Pioneer was making
14 these DVD players that had a bar code scanner, and
15 you could scan the bar code and get to the film.
16 That was all in an effort to overcome these
17 challenges that I'm talking about -- the waste of
18 class time we're trying to get there.

19 My point is simply that as an
20 institution, we understand the need and the desire
21 to go in through the front door, so to speak. We've
22 been at this a long time, and we want to do it in
23 a way that is compliant with the law.

24 The fact that this DVD player, which
25 existed years ago -- it was actually referenced in
26 the 2006 rulemaking, and no longer exists today --

1 is further evidence of the fact that, as an
2 institution, we make substantial investments,
3 relying on particular technology that's available
4 at the time, only to find that within a few years,
5 that technology is no longer available on the
6 market. It's gone away.

7 That has real, substantial costs, not
8 only in terms of the wasted class time that I'm
9 talking about, but the money that was necessary to
10 develop this kind of material.

11 So for a variety of reasons, being
12 beholden to whatever the current technological or
13 preferred media delivery format of Hollywood is,
14 doesn't seem like it's the right balance to strike
15 for non-profit educational users who enjoy this
16 preferred status in the statute.

17 MS. CHAUVET: Professor Hobbs?

18 MS. HOBBS: I think there is a point that
19 hasn't yet been made. You asked us to identify
20 adverse effects, right? And I want to share a story
21 about trying to find a DVD player at West Warwick
22 Public Schools, where I was doing a staff
23 development program for teachers.

24 I was able to find one, but it took me
25 about 30 minutes. At West Warwick High School,
26 which is in a poor, urban community right outside

1 of Providence, the entire school district has moved
2 to a one-to-one laptop situation. Every kid has
3 Chromebook or a laptop, and the expectation is that
4 all of the learning resources that you're going to
5 use are here, on your laptop.

6 So it was unusual for me to go to the
7 program and say, I'd like to show you this clip in
8 the DVD. They were like, oh, we -- well, they did
9 find one. But it's not normative, because the
10 expectation is, all of the digital resources that
11 we need to use should be at our fingertips.

12 The adverse consequences of this
13 rulemaking proceedings is to maintain this idea that
14 audiovisual resources are for transmission only,
15 i.e., receive, view, watch. The generation of kids
16 that are growing up today are using create-to-learn
17 pedagogies, where they're not just watching,
18 they're actually remixing and creating. As part of
19 the learning experience, they're manipulating
20 image, language, and sound.

21 So in some ways that pedagogy gets
22 stymied when the idea is, well, all of the motion
23 picture content is only available through this one
24 mechanism of this --

25 MS. SMITH: Can I ask you a question
26 about how it works in practice? This came up the

1 last time too, and now I have a child in elementary
2 school. She is also shooting, she is using the
3 camera, and then she goes in and does all of this
4 create and learn. So she doesn't need to circumvent
5 anything, because it is her content.

6 Can you speak more in the context of why
7 she would need to circumvent, or why it's necessary
8 to circumvent TPMs on the Blu-Ray, for example, to
9 engage in this, as opposed to in this type of
10 classroom learning that you're talking about?

11 MS. HOBBS: Sure, absolutely. It's
12 great to hear that your child is experiencing some
13 media literacy pedagogy in the context of elementary
14 education. What happens is, as children start to
15 want to create more sophisticated products, they
16 have to do what authors have done through all of
17 human history: We quote from, we excerpt, we rely
18 on the knowledge community.

19 In building our own ideas, we use the
20 ideas of other people. So it's very common that as
21 we learn to do more academic writing, we learn to
22 quote from and excerpt. And so for that purpose,
23 remixing bits of motion picture media to develop
24 your own ideas and your own argument is becoming
25 a normative practice of quotation, just as it was
26 for many years in writing academic essays.

1 MS. SMITH: Mr. Turnbull?

2 MR. TURNBULL: First of all, in order to
3 do circumvention, you have to have a drive and a
4 player. So to start out with, unless this is
5 completely not about DVDs and Blu-Rays, somebody
6 in the school is going to have to have a drive and
7 a player, because otherwise you can't get to content
8 on the Blu-Ray or the DVD. So we're not eliminating
9 them entirely.

10 Second of all, the screen capture
11 software that David used and presented in the
12 exhibits that were submitted is free. And as he
13 demonstrated in the previous panel, it's very easy
14 to use. Now, in that panel he was doing it into an
15 e-book, but it could easily be done into a video
16 as well.

17 This is not expensive or complicated
18 equipment that we're talking about as alternatives.
19 And in the K-12 student example, it's limited to
20 screen capture, but for the teachers, it's not
21 limited to screen capture. If what you need to do
22 isn't accommodated by the screen capture, and you
23 really need the quality that's there, the exemption
24 already exists.

25 We're arguing about a lot of things, and
26 to go back to the 2006 -- I mean, I was here. I was

1 the lawyer who presented the witness who
2 demonstrated the Pioneer player. It was
3 excruciating.

4 (Laughter.)

5 MR. TURNBULL: And Professor Decherney
6 did an excellent job of dismantling us in that
7 context. No one is proposing to use that product,
8 and the exemptions that we currently have were a
9 result of the fact that the market didn't produce
10 that product in a way that was viable and usable.

11 But the exemptions already exist, and
12 the only point that we were talking about was using
13 a player, whether in a drive or a set-top kind of
14 player to play the whole movie. And there you could
15 cue it up and get past the FBI warnings and all of
16 that sort of thing before the class starts and be
17 all ready to play the whole movie if that's what
18 you were going to do.

19 MS. CHAUVET: So a quick follow-up
20 question, and then I do want to move to MOOCs, just
21 in the interest of time. Mr. Turnbull, you seem to
22 be saying to use screen capture when you can, unless
23 you need some kind of close analysis. Then you can
24 circumvent.

25 So if we were to keep those distinctions,
26 would it be appropriate, then, to eliminate

1 distinctions between educational levels, like
2 anyone in education can, if they need to, have a
3 close analysis, can circumvent, and alternatively
4 -- just if we can do that?

5 MR. TURNBULL: I think that we would say
6 that the record doesn't support it for the K-12
7 students. On the other hand, I understand, and I've
8 heard the simplicity and the concern. And I've also
9 heard the close analysis, and I can understand where
10 there may be some confusion about that.

11 To me, what that meant was, do you really
12 need to see the close facial expressions? Do you
13 really need to see the closed-captions, the
14 subtitles? That sort of thing. Or can you --

15 MS. CHAUVET: But if you do, and you're
16 K-12, would that be reasonable to have that
17 available?

18 MR. TURNBULL: Yes. If that's what the
19 Office decides is reasonable to propose here. It's
20 not something that we would propose, because we
21 think the screen capture works for the those
22 purposes, and we don't think the record has been
23 developed to support the need for anything more than
24 that.

25 MS. CHAUVET: Mr. Band, you've had your
26 placard up for a while, so maybe we'll take this

1 one last, and then we'll move to MOOCs.

2 MR. BAND: I appreciate that. This
3 follows from what Mr. Turnbull was saying, and also
4 would comment on what Mr. Williams said earlier.
5 It's true that Congress, in some of these areas,
6 has come up with very complicated exemptions. But
7 110(1) is the essence of simplicity; it's one
8 sentence; I forget if it's 32 words or 36 words.
9 Everyone understands it, and it's easy to use, and
10 it's widely used.

11 In contrast, 110(2) is the product of
12 extensive negotiations between stakeholders, it's
13 complicated, and it's not used because it has
14 ambiguities, complexities, and so forth. So that's
15 why sometimes it's hard to make it simple, but I
16 think simple is better. And certainly in this
17 instance, the easiest thing you can do, without
18 doing anything else, is collapse the four separate
19 categories into one. I don't know if there is such
20 a thing as a highest common denominator, but there's
21 probably a mathematical term that's appropriate to
22 that.

23 So that would be the first step. Then
24 make them all one, and then, within the one, the
25 highest standard, so that would probably be the college
26 and university one. Then start making some of the

1 other changes or suggesting -- it shouldn't be that
2 hard, and that simplicity would be enormously
3 beneficial.

4 MS. CHAUVET: Great, thank you. I
5 think Ms. Kleiner -- before we move to MOOCs, Ms.
6 Kleiner had one question.

7 MS. KLEINER: In her 2015
8 recommendation, the Register noted that the desire
9 to engage in criticism or commentary was a critical
10 factor in her recommendation to adopt the existing
11 exemptions relating to educational purposes.
12 BYU's proposed regulatory language eliminates the
13 criticism and comment limitation. Why should the
14 criticism and comment limitation be removed?

15 MR. MIDGLEY: I will take the liberty of
16 responding to that, if I may. It should be removed
17 because it's not a condition of the statute. The
18 purpose of the rule --

19 MS. CHAUVET: When you say the statute,
20 are you referring to 110?

21 MR. MIDGLEY: Yes, sorry; it is not a
22 condition of 110. Again, the purpose of this
23 rulemaking is to identify non-infringing uses.
24 This may be another example where lumping the
25 educational users together with other fair users
26 may have led to incorporating a limitation that's

1 inappropriate for educational users.

2 Section 110(1), the model of simplicity
3 that was just alluded to, has no condition or
4 requirement for criticism or comment. That
5 shouldn't be a condition for the educational users.
6 It may well be an appropriate condition for other
7 fair users, but we're not really commenting on that.

8 Our point is simply to simplify,
9 consolidate, and make it usable. The easiest way
10 to do that is to just align it with the statute,
11 with 110(1).

12 MS. CHAUVET: Great, thank you. Mr.
13 Turnbull, Mr. Taylor, you have your presentation
14 relating to MOOCs, so why don't we go ahead and start
15 with that, and then we can have some specific
16 discussion?

17 (Video plays.)

18 MS. CHAUVET: Mr. Turnbull, Mr. Taylor,
19 did you want to say anything in addition to showing
20 us the video presentation? Then we can go to
21 Professor Decherney, who, I'm sure, will have
22 something to say.

23 MS. SMITH: I have some questions too,
24 if you would like to know where to start.

25 We did not receive an opposition to
26 renewing the current exemption for a MOOC, so what

1 are we to make or your presentation? Mr. Decherney
2 made use of the current temporary exemption, and
3 that was fine. You showed how it can be saved to
4 your desktop.

5 Can you tie this into -- is it going into
6 the existing exemption, or towards the expansion,
7 which he's asked to take it out of edX, which doesn't
8 seem as directly relevant to your presentation, and
9 to also remove other TEACH Act restrictions, which,
10 I guess, what edX you saw was within the bounds of
11 all these limitations that are already there?

12 MR. TAYLOR: To be frank, we discovered
13 this as we were going along. If we had known about
14 it at the time that renewals had come up, we would
15 have raised an objection then. But in the course
16 of this proceeding, we looked at the evidence, and
17 it occurred to us that this doesn't seem like there's
18 a technological protection measure.

19 When they insisted that there was, we
20 in fact are now demonstrating that there's not. We
21 think that, as far as --

22 MS. SMITH: So you're saying --

23 MR. TAYLOR: -- current -- if I can just
24 finish one thought. As far as looking at expanding
25 the exemption, I think it's even more troublesome
26 to operators who we don't know. We may have more

1 faith in Professor Decherney and his course and
2 being with an institution than with any provider
3 doing anything.

4 MS. SMITH: Do either of you want to
5 speak? Okay.

6 MR. DECHERNEY: We are actually in new
7 territory, since this is the first year in which
8 we've been able to work through renewals and have
9 opposition before the hearing, so I'll let you guide
10 us on how to work with that.

11 I'm happy to see that Mr. Taylor is now
12 an enrolled student in my course, because he had
13 to do that in order to view the video. As far as
14 I knew, downloading had been disabled; there's
15 obviously a workaround, and I will send an email
16 to edX immediately after this.

17 MS. SMITH: Okay. Could you talk a
18 little bit more about that, your understanding that
19 downloading was disabled?

20 MR. DECHERNEY: Yes. Most edX videos
21 actually have a button and allow you to download
22 material, allow you to download just the audio, and
23 I agree. I think it's an important aspect of
24 creating access.

25 People who have the most trouble
26 accessing it with the slowest connections need to

1 download video. But in order to comply with the
2 last rulemaking, we instructed edX that downstream
3 misuse was something to be careful about, and that
4 downloading had to be prevented. So I'm actually
5 a little surprised that it's possible.

6 MS. CHAUVET: And just a follow-up:
7 How would you respond to the concern expressed that,
8 obviously this was a section 110(2), having a TPM
9 or something to protect the MOOC from this
10 happening? What do you say to the concern about
11 your wanting to remove all of section 110(2)
12 limitations? Is this going to happen again? Is
13 this going to be more prevalent by other professors?
14 Not you, of course.

15 MR. DECHERNEY: Yeah, so we haven't
16 asked to remove all section 110(2) limitations. We
17 would like to expand the exemption so that it
18 includes for-profit institutions and unaccredited
19 institutions, like Khan Academy. But we are still
20 okay with limiting access to registered students
21 and to reasonable prevention of downstream misuse.

22 MS. CHAUVET: Okay, because you do say
23 the TEACH Act limitations should be removed. So
24 you're not talking about all of --

25 MR. DECHERNEY: Yeah, some but not all.

26 MS. CHAUVET: Okay. That is a good

1 clarification.

2 MS. SMITH: Maybe if we could hear from
3 Mr. Band and let Mr. Taylor sort of respond to both
4 issues.

5 MR. BAND: Just a couple quick points.
6 First, with respect to that example, it could very
7 well be that they have not applied, in this instance,
8 a technological measure that reasonably prevents
9 unauthorized further dissemination. And if that's
10 the case, then the recourse is for the rights-holder
11 to -- you know, for Humphrey Bogart to call up edX
12 and say, "Okay, there's a problem here," and then
13 edX has to deal with it.

14 I mean, the problem is not with the
15 exemption, it's with what someone is doing, whether
16 they are complying or not complying with the
17 exemptions.

18 MS. SMITH: And am I correct, no one is
19 trying to remove that language from the exemption,
20 of applying technological measures that reasonably
21 prevent unauthorized further dissemination?
22 Everyone is nodding at me. Okay.

23 MR. BAND: I guess the second point with
24 respect to that is, at least to me, that was kind
25 of complicated, meaning, that was a lot of steps.
26 Not that easy -- I mean, certainly I would not be

1 capable of doing that. Anything more than three
2 steps is beyond my capability.

3 But I would also submit that I'm sure
4 that someone in this room who is much more
5 technologically capable than me can find copies of
6 Casablanca -- the greatest film ever made, by the
7 way -- find copies of Casablanca available from many
8 sources, and it would probably take a lot fewer steps
9 to download than all of the steps taken there.

10 So, again, let's be real here about what
11 the real adverse impact is. I mean, how many people
12 are likely to want to download the 7 minutes from
13 this MOOC when they can -- again, I'm sure someone
14 here is already Googling it and finding the website
15 where they -- and I'm not defending them. I'm just
16 saying, you know, we shouldn't make it so difficult
17 to have educational uses when we know that this isn't
18 how they are going to access Casablanca. No one is
19 going to download the 7 minutes when they can get
20 the whole thing for free somewhere else with one
21 step.

22 MS. SMITH: Mr. Taylor?

23 MR. TAYLOR: Well, I think the problem
24 is that it creates a question of fact for the
25 offender down the road, that you're giving them this
26 larger shield. And you're going to have to litigate

1 that issue, do you qualify under the exemptions?

2 So I do think that there is a significant
3 harm there. And I just want to clarify that I am
4 not an enrolled student in Professor Decherney's
5 course. All I needed was my Facebook account, and
6 I was logged in. And as far as the difficulty, other
7 than logging onto the site, it was literally three
8 steps.

9 MR. DECHERNEY: He is absolutely an
10 enrolled student in my class. And if we had a few
11 minutes, I could look up his exam grades, if he took
12 any of the quizzes or participated in discussions.

13 MR. BAND: And he also probably breached
14 the terms of service, so.

15 MS. SMITH: Okay, I'm going to refrain
16 from making a joke about Facebook today. So, Mr.
17 Midgley?

18 MR. MIDGLEY: I think there is an
19 important point that was alluded to, which is, in
20 the end, I think one of the goals of this proceeding
21 should be to try to match what's happening on the
22 ground, what the expectations are of modern students
23 and instructors are when they arrive on campus.

24 This is a generation of folks who have
25 been raised experiencing media primarily through
26 streaming services. I mean, that's just the

1 reality of the situation that we find. And so if
2 this set of rules becomes so complicated that
3 students and instructors just reject -- they look
4 at it, they feel like it's too complicated, "I don't
5 want to mess with it," the alternative is a much
6 worse state of affairs. The piracy concerns and
7 other things that I think are legitimate worries
8 of content owners I think are going to be
9 exacerbated, not helped, by making this set of rules
10 more complicated.

11 It's easier for people who sit in chairs
12 like mine. You know, I'm the copyright officer for
13 my university. I'm trying hard to get students and
14 professors to follow the rules, to go in through
15 the front door. And the more straightforward and
16 easier that is, it's easier for people like me to
17 do their jobs. The more complicated we make it, the
18 result is not that people just forego the experience
19 altogether; they find other, more troublesome ways
20 of solving the problem. And I just feel like that
21 needs to be said.

22 MS. CHAUVET: Sure. And just to be
23 clear, we're not trying to make things more
24 complicated. We are definitely hoping to have
25 something less complicated at the end of this
26 rulemaking.

1 But I do want to ask a few questions,
2 and they will be directed to you, Professor
3 Decherney, because they are specifically about
4 MOOCs. So, you can respond, I know you had your
5 placard up, but, Professor Decherney, can you
6 provide any examples of specific MOOCs that
7 professors want to use at for-profit educational
8 institutions but cannot under the current
9 exemption?

10 MR. DECHERNEY: Yes, great question,
11 thank you. I just want to say that the last
12 exemption for MOOCs has made a really palpable,
13 tremendous difference. So, this course could not
14 have existed before. I told you I would not have
15 created it unless you created the exemption. You
16 did. It took me 9 months of doing very little else
17 to create this MOOC. Over 30,000 people have taken
18 it in 170 countries.

19 The very first comment on the discussion
20 board was from a father who said he was
21 home-schooling his children. He had always wanted
22 to offer them a film course, and he finally could.
23 A harm I didn't even know existed. Several other
24 universities have created courses using the
25 exemption since, and so it's done a great job
26 already.

1 Increasingly, the lines between
2 for-profit and non-profit educational institutions
3 are blurring. The kinds of resources that are being
4 used are being mixed by accredited and
5 non-accredited institutions. Something Renee was
6 starting to talk about earlier was the flipped model
7 of classrooms, that increasingly lectures are being
8 put online and in-class work is more active, more
9 activity-based.

10 And so things like Khan Academy,
11 Lynda.com, these unaccredited -- one for-profit,
12 one non-profit -- institutions are actually
13 creating resources that get used more and more in
14 accredited institutions.

15 So, let me give you one example through
16 Khan Academy. Most people here have used Khan
17 Academy, most likely for a math or science video.

18 MS. CHAUVET: Sure. We can talk about
19 Khan Academy, because that specifically goes to an
20 unaccredited educational institution, and you did
21 reference it, but are there any specific MOOCs that
22 Khan Academy wants to offer but cannot? Like, we
23 saw it referenced, and it has an online education,
24 but how is it being prevented from offering that
25 education due to TPMs?

26 MR. DECHERNEY: Yeah, so if you look at

1 their courses on history or art history, you'll see
2 that they only use public domain material; they only
3 use still images. They have a big section of videos
4 about the filmmakers Ken Loach and Christopher
5 Nolan, and they talk about how they've been
6 influenced by Hogarth and Francis Bacon,
7 respectively. And you would expect to see a film
8 clip in a half-hour interview with Christopher
9 Nolan. And yet there are none.

10 MS. CHAUVET: Have you spoken to any
11 professors at Khan Academy who want to offer MOOCs
12 but who cannot, or is this just you looking at --

13 MR. DECHERNEY: I assume that the
14 reasons they are using public domain material and
15 still images and not film clips or more recent
16 material is that they can't.

17 MS. CHAUVET: So you just looked at
18 their website? You haven't spoken to anyone?

19 MR. DECHERNEY: I haven't spoken to Khan
20 Academy.

21 MS. CHAUVET: Okay, and have you spoken
22 to anyone at Full Sail University, which was an
23 example of --

24 MR. DECHERNEY: No. So, I have spoken
25 to people at Duke University and the head of their
26 online programs. Duke has an MBA program in which

1 they have online courses. They offer MOOCs. They
2 offer, obviously, residential courses to MBA
3 students. They have a for-profit executive
4 education wing in the business school, and they
5 can't offer the same kinds of lectures that they
6 can offer to students who are enrolled in a course.

7 MS. CHAUVET: And I appreciate that
8 you're saying that they cannot because the exemption
9 doesn't extend to for-profit, it doesn't extend to
10 unaccredited educational institutions. I think
11 because we have to create a record of concrete
12 examples, so do you have any concrete examples by
13 having spoken to professors or seeing professors
14 say online that they want to offer a specific MOOC
15 at an unaccredited institution or at a for-profit
16 institution? I think concrete examples of those
17 instances would be most helpful.

18 MR. DECHERNEY: Okay, so these are in
19 some ways opportunity costs, what was being
20 discussed in the last panel. Whole genres of
21 documentary films weren't being made for years until
22 the best practices in documentary film statement
23 was created, insurers started to accept it, and then
24 all of a sudden we started to get more history films,
25 more films that used archival material.

26 I think we see the same things in the

1 MOOC world. It's not a coincidence that all the
2 MOOCs that took advantage of the last exemption over
3 the past two-and-a-half years have all been offered
4 by accredited non-profit institutions. For-profit
5 unaccredited institutions can't take advantage of
6 it. They haven't been the ones to create the
7 courses.

8 MS. CHAUVET: So, perhaps one of the
9 opponents could respond to this, but would it be
10 reasonable to expand the exemption to for-profit
11 educational institutions?

12 MR. WILLIAMS: I mean, there doesn't
13 seem to be a demand for it. I don't recall seeing
14 anything in the record from any of them; none of
15 them are here to testify in support of it. I
16 appreciate that Professor Decherney is passionate
17 about making sure as many people can be included
18 as possible, but I think what you're confronted with
19 is what's in the record that shows us there is a
20 demand to engage in a certain type of use. And then,
21 if there is, is it non-infringing, or are there
22 alternatives, etc.?

23 And I don't see that the demand has been
24 presented. Section 110 does refer to non-profit
25 institutions, so that would factor into the analysis
26 to some extent.

1 I think a bigger concern for me is, how
2 far does it go? I've only heard Professor Decherney
3 so far talk about actual institutions. But I didn't
4 gather from the comments that this was really
5 bounded in any way. So, what qualifies as an
6 educational online use? What qualifies as a
7 registered student, if you're just someone who has
8 opened up a blog and say that anyone who logs in
9 I'm going to help teach them about something?

10 It seems contour-less, and I think the
11 way that you've traditionally drawn contours into
12 exemptions is by seeing who has put evidence into
13 the record and then looking to define the exemption
14 accordingly. So I think that's still how it should
15 be done here. So I wouldn't change the way it's
16 drafted now.

17 MS. CHAUVET: And so your position would
18 be the same with unaccredited institutions?

19 MR. WILLIAMS: That's my understanding.
20 I don't think any have put anything into the record.
21 If they did, I missed it. I know that there is a
22 number of organizations on the Joint Educators'
23 comments, and I don't know who all of their members
24 are.

25 MS. CHAUVET: Great. So, kind of going
26 off of something that Mr. Williams just mentioned,

1 is just how to define an online course. So perhaps
2 Professor Decherney can help us with this, but where
3 is the line between an online course, something that
4 could qualify as a MOOC, something that you do,
5 versus something that's arguably an instructional
6 video on YouTube?

7 MR. DECHERNEY: So, there are a number
8 of issues, I guess. One is there are organizations,
9 for-profit educational institutions and
10 unaccredited institutions, some of them overlap
11 with societies and groups that also represent
12 accredited non-profits. So, the groups of faculty
13 organizations that are part of the Joint Educators,
14 you know, many of their members are also teaching
15 at unaccredited institutions or for-profit
16 institutions. So they are, in some ways, part of
17 the record.

18 What is a course? You know, that's
19 something that's evolving.

20 MS. CHAUVET: Or an online course/
21 Because you want to extend the exemption to all
22 online courses. So how will we go about defining
23 that?

24 MS. SMITH: Yeah, I wonder if, in your
25 answer, I'm kind of a little confused as to what
26 you're advocating for. Is it all online courses,

1 including if you're for-profit or unaccredited? Or
2 are all online courses, you don't need to log in,
3 there doesn't need to be any type of instructional
4 component, it could something on YouTube that's
5 educational generally?

6 MR. DECHERNEY: No. We are proposing
7 all online courses. We still think that there
8 should be a limitation to registered students and
9 there should be a reasonable attempt to stop
10 downstream misuse. And, of course, edX will get a
11 call immediately after this to make sure that they
12 are complying, that we are complying.

13 But what is an online course is something
14 that's obviously changing and expanding through
15 places like edX and Coursera and Udacity. They're
16 actually expanding in the other direction now,
17 offering larger, full online degree programs. They
18 are also offering smaller and more modular courses,
19 things that are shorter, that might only take a week
20 rather than a full semester.

21 This is the way that online education
22 is going. Increasingly, they are offering skills.
23 This is what students are asking for. Millennials
24 change jobs every few years and are looking for
25 shorter, skills-based courses. We provide some of
26 them through Penn, but many others are offered

1 through these online platforms.

2 So, Google offers IT courses through
3 Coursera these days. So there is definitely an
4 array, a continuum of some that are very short to
5 some that are now multi-year degree programs.

6 MS. SMITH: Professor Hobbs?

7 MS. HOBBS: I would agree with that, and
8 I would suggest that the critical dimension is the
9 concept of registered user. I myself offer online
10 courses in the form of online formal courses through
11 the University of Rhode Island that students have
12 to sign up for to take online, and my students come
13 from all over the country.

14 But I also offer webinars. And a
15 webinar, no one needs to register. They click to
16 enter the video conference space. They exchange
17 information and they receive information, just as
18 a student would. They're learning, but I don't
19 consider it a course because I don't register them,
20 right? Actually it's come as you are.

21 So I think one way we could define pretty
22 clearly about an online course is students are
23 registered. It's not whether they pay, right, it's
24 whether they register.

25 MS. CHAUVET: Registered where?
26 Registered with a university?

1 MS. HOBBS: Submit an email
2 identification. That would be registered.

3 MS. SMITH: That may be more onerous
4 than the edX example now where you just need to click
5 through your Facebook login and you're in the edX
6 program.

7 MS. HOBBS: Sure. So a Facebook login
8 would be a form of registration. You're still
9 supplying a -- whereas, in my webinar, you don't
10 even need to do that.

11 MS. SMITH: All right. So I just want
12 to understand your view of how the world would work.
13 I think probably most people, when they watch on
14 YouTube, are logged in to keep track of what they
15 are watching. I think that's how they're
16 advertised against. So as long as it's
17 educational, would that qualify? Or would that not
18 be a course?

19 I think a week-long course, for example,
20 might be permitted under the current exemption.

21 MR. DECHERNEY: Only if it's an
22 accredited non-profit --

23 MS. SMITH: If it's tied to somebody,
24 right.

25 MR. DECHERNEY: Right. But something
26 like if you want to take the history of western

1 civilization through Kahn Academy, that would not
2 be okay. You could look at public domain material,
3 still images, but at some point, no videos and the
4 20th century gets short shrift. Same thing with
5 something like Lynda.com.

6 MS. SMITH: None of those videos for a
7 prior century either.

8 MR. DECHERNEY: Right. No, no,
9 exactly, yeah. So, Lynda.com, actually a very
10 helpful, educational resource, something that's
11 been interesting to see at my university,
12 subscriptions have been small and localized, and
13 now everyone in the university has access. It
14 provides some skills-based training that's often
15 used as a supplement to existing on-campus courses.
16 But it's a for-profit owned by Microsoft.

17 And so they offer film courses, they
18 offer lots of courses that deal with media in
19 different ways, production courses, and those are
20 obviously not covered by the current exemption.

21 MS. SMITH: Okay, Mr. Williams?

22 MR. WILLIAMS: Thank you. I think
23 we've kind of lost sight of what's in the existing
24 exemption with respect to enrollment, because it
25 applies to accredited non-profit educational
26 institutions to officially enrolled students.

1 I think the intent there was to say, "in
2 those institutions," not just that someone's signed
3 up for Facebook and that means they're officially
4 enrolled. And so Professor Decherney is saying
5 that David is officially enrolled now at University
6 of Pennsylvania because he's got a Facebook account
7 and can click through that website's terms.

8 I don't think that's what was intended
9 by the existing exemption. You could tell me I'm
10 wrong, but it applies to students who are officially
11 enrolled in the non-profit educational
12 institutions. And I don't think, just by clicking
13 that button, David became a UPenn student.

14 MR. DECHERNEY: So, you'd be surprised
15 if you went across the street and found out how much
16 information Facebook has about you and how much we
17 now have as part of your enrollment. Even though
18 it was easy, you've actually enrolled in the course,
19 which is offered by an accredited non-profit
20 institution. You're not a student of the
21 University of Pennsylvania, I'm sorry to say.

22 But you are a student in my course and
23 you can interact with students from all over the
24 world and have discussions about media and history.
25 We have burgeoning filmmakers who will be members
26 of your associations very soon.

1 So the course is offered by an accredited
2 non-profit institution. That doesn't mean you're
3 a student at the institution. We actually call you
4 a learner. You're there to be part of the course,
5 but you don't get the services that a student at
6 the university would get.

7 MR. BAND: Also, if I just might add, I
8 mean, the exemption applies to massive open online
9 courses. It's understood that it's an open,
10 massive course. I mean, that's not an online course
11 of students who are enrolled at the University of
12 Pennsylvania. That's a totally different
13 category. I mean, everyone knows what a massive
14 open online course is, that's why the term was used
15 by the Copyright Office.

16 MS. CHAUVET: Mr. Taylor?

17 MR. TAYLOR: I would just like to
18 address that. When we did the exemption last cycle,
19 they came to us with the term "MOOCs," and that was
20 the term that they used, and after that, there was
21 the imposition of the TEACH requirements on it. And
22 I think it was just a legacy issue, as Mr. Williams
23 has already suggested.

24 The understanding that we had developed
25 certainly was that they were supposed to be enrolled
26 at the institution and that you were not having a

1 worldwide event.

2 But what I also wanted to say is that,
3 as far as Khan Academy, just because Khan Academy
4 cannot take advantage of the exemption here doesn't
5 necessarily mean that they don't have exciting
6 courses like Professor Decherney's. In fact, they
7 do have a very amazing course on movies and the film
8 industry and video processing that's been put
9 together by Pixar.

10 So, even these institutions have
11 similar, if not better, programming available to
12 them without the benefit of the exemption.

13 MS. CHAUVET: So, because we're talking
14 about some of the section 110 requirements,
15 Professor Decherney, just to confirm, you believe
16 it's reasonable to keep the officially enrolled
17 students limitation, you believe it's reasonable
18 to keep the short portion limitation, you believe
19 it's reasonable to the limitation requiring the
20 instituting of copyright policies and providing
21 copyright informational materials to faculty,
22 students, and relevant staff members.

23 MR. DECHERNEY: Yes.

24 MS. CHAUVET: Okay. And you believe
25 it's reasonable to keep the limitation that "under
26 the actual supervision of an instructor as an

1 integral part of the class session offered as a
2 regular part of the systematic media instructional
3 activities of an educational institution?"

4 MR. DECHERNEY: That's actually one
5 that sometimes can be confusing to interpret, but
6 basically, yes.

7 MS. CHAUVET: Okay.

8 MR. DECHERNEY: And I will just say that
9 our students who are already enrolled at the
10 university taking online courses have been
11 protected by 110(2) since 2001. At the last
12 rulemaking, we expanded that, I think, to students
13 who are enrolled in MOOCs.

14 And now I think there's more
15 discriminating against universities,
16 institutions, that operate for profit and are
17 unaccredited and sometimes actually serve the
18 students who have the hardest time accessing
19 education. And I'd love to expand it a little bit
20 more so that those students and other faculty
21 members could be included.

22 MS. CHAUVET: So I guess that's kind of
23 a follow-up question, because you do talk about how
24 there's a huge increase in online education and
25 that's really important. But if the online
26 education is flourishing despite the fact that

1 certain institutions are not covered by this
2 exemption, why is a circumvention necessary for
3 these institutions if they are able to be successful
4 without it?

5 MR. DECHERNEY: They are, but we are
6 pointing to holes in the kind of education they can
7 offer. They can offer great math classes; they can
8 actually offer terrific film classes if they are
9 Pixar, but not if they're not using content they
10 already own and have created and aren't a major
11 studio, in fact the biggest studio in the world.

12 MS. CHAUVET: I have a couple of
13 questions relating to, kind of going back to BYU
14 a little bit, alternatives to circumvention. So,
15 we have services such as Vudu, or redeem codes, so
16 why are those not sufficient alternatives to
17 circumvention?

18 MR. MIDGLEY: Yeah, great question. A
19 few reasons. First, the offerings through those
20 services are limited. They are generally directed
21 at more mass audiences, where educators often have
22 very specific niche kinds of films that you can't
23 find. For example, at BYU we have a huge foreign
24 language program. We have a Tahitian class, and the
25 desire was to show Moana in Tahitian. Well, Moana
26 is available on Netflix right now. That's great,

1 but not in Tahitian.

2 And so you can get that movie and have
3 it on DVD and use it in that form, but there's an
4 example, and there are many, many examples. Having
5 looked at the thousands of films that our foreign
6 language instructors have requested over the years
7 and trying to compare it against all of the online
8 streaming services of which we're aware, it's only
9 a small fraction that are available through those
10 services.

11 MS. CHAUVET: So, is Moana available in
12 Tahitian anywhere, or are you --

13 MR. MIDGLEY: Yes.

14 MS. CHAUVET: Okay. So you're just
15 saying it's available on a DVD that you claim you
16 can't play because you don't have optical readers?
17 I'm just trying to understand.

18 MR. MIDGLEY: No, no, I'm just giving
19 that as an example of a film that's not available
20 through a streaming service. Even though Moana's
21 a very popular film, the version that we need for
22 use in the educational setting, we can't get it
23 through Vudu or Netflix or anywhere else. And there
24 are many, many examples. I could go on there. So
25 that's one reason that streaming service is not a
26 viable alternative for us.

1 Another reason are licensing
2 restrictions. It's a fairly common practice,
3 actually, for individual instructors to wander into
4 a classroom, log in with their own personal Netflix
5 credentials, and start streaming Netflix content
6 into a classroom. The performance that's happening
7 is non-infringing under 110(1), but there's a decent
8 chance that that individual professor is in
9 violation of their personal terms of use that
10 they've signed with Netflix.

11 And attempts to reach out to Netflix and
12 other streaming providers to try to negotiate large
13 institutional licenses to try to address this issue
14 so we can -- again, universities are accustomed to
15 paying ASCAP, BMI, other large performing rights
16 organizations for the rights to perform on campus.
17 But, at least as of right now, the streaming
18 services, you can go one-by-one through them, none
19 of them offer licensing that's appropriate for our
20 kinds of use.

21 MS. CHAUVET: So, if the teachers are
22 not allowed to basically use Netflix for the
23 purposes of 110, which it sounds like what you're
24 saying, why are you seeking an exemption that
25 extends to internet streaming services? In that
26 case, wouldn't it be more appropriate to limit the

1 exemption just to DVD and Blu-ray?

2 MR. MIDGLEY: No, what I was saying is
3 that -- I'm just addressing the question of why
4 streaming services are an inadequate alternative
5 to circumvention.

6 MS. CHAUVET: Right. But you're also
7 asking for the exemption to cover internet streaming
8 services. So if that, in and of itself, is not a
9 possibility for teachers to use, why should the
10 exemption extend to internet streaming services?

11 MR. MIDGLEY: Oh. Well, there is
12 certain content that's only available through
13 streaming services. That's another phenomenon
14 that we're seeing increasingly. We found over 75
15 documentaries, for example, that are only available
16 through Netflix. You can't get them anywhere else.

17 MS. CHAUVET: But weren't you just
18 saying that teachers aren't allowed to use Netflix
19 because of contractual issues?

20 MR. MIDGLEY: Yes.

21 MS. CHAUVET: So I guess my question is,
22 if you're not able to because of contractual issues
23 -- I don't know if all internet streaming services,
24 if you're seeing they have the same contractual
25 limitations, but, if so, then why should the
26 exemption extend to services that you are precluded

1 from using under contractual --

2 MR. MIDGLEY: Well, that's not a
3 copyright issue. Again, I'm responding to the
4 question about why the streaming services are
5 inadequate as an alternative to circumvention.

6 So, the reason that we're seeking an
7 exemption to cover certain content that's available
8 through streaming services is because it's the only
9 place where that content is available to us. And
10 that's a question for our general counsel's office,
11 to decide whether they are comfortable breaching
12 a contract in a particular case or trying to work
13 out an agreeable contractual relationship with the
14 streaming provider, from a copyright standpoint,
15 for the non-infringing performance that would be
16 made of the content that's available that way.

17 But as things stand right now, there is
18 no perfectly safe, legal mechanism that makes guys
19 like me happy. We're certainly familiar with this
20 phenomenon that's going on on campus. We know about
21 it. And, frankly, Netflix and other streaming
22 services are aware of it as well. And everybody
23 right now seems to be looking the other way.

24 But, again, that's the point of this
25 proceeding. We're trying to bring these issues to
26 the fore so we can deal with them.

1 MS. CHAUVET: Sure. Just in the
2 interest of time, because we are already over, Mr.
3 Williams, do you have a response?

4 MR. WILLIAMS: Yes, just very briefly.
5 And I'm not here representing Netflix, but, as was
6 described, the issue there is a terms of service
7 issue. It's not an issue that's being caused by
8 section 1201. So I don't think that that justifies
9 an exemption. You have to look for things that are
10 being caused by section 1201.

11 And it's also a little bit of an odd
12 suggestion, because, on the one hand, they're
13 requesting an exemption to hack the service, which
14 is also a terms of service violation, obviously.
15 But they're doing that because they don't want to
16 violate the terms of service by just playing it in
17 an authorized manner and then having to get into
18 whether it applies to an institution versus the
19 individual. So, to me, this is not an issue caused
20 by section 1201.

21 MS. CHAUVET: Thank you. I have a few
22 quick questions about the market. So, BYU, you
23 stated in your comments that instructors regularly
24 make non-infringing performances of motion
25 pictures in a wide range of educational settings.
26 If that is true, why is an expanded exemption

1 necessary?

2 MR. MIDGLEY: The point is, right now,
3 the current exemption draws a distinction between
4 film studies courses or other courses requiring
5 close analysis of films. And that statement that
6 you just cited was offered in support of our position
7 that trying to carve up the world of audiovisual
8 works around a film studies limitation that doesn't
9 exist in the statute is not helpful, because in
10 foreign language classes, like we demonstrated, in
11 history classes, in a wide range of classes, there
12 is a different set of rules that apply.

13 So, that's the reason why a broader
14 exemption is necessary, to make these works
15 available in a way that's clear to educators across
16 a wide variety of disciplines and do away with these
17 artificial distinctions for film studies
18 professors.

19 MS. CHAUVET: Okay. Just because you
20 say you regularly make non-infringing
21 performances, so, I understand you're talking about
22 a wide range of not just only film classes, but you
23 are talking about how they are currently making
24 performances. So, if they are able to regularly
25 make those performances, why is an exemption
26 necessary?

1 MR. MIDGLEY: Oh, for all the reasons we
2 were discussing earlier. These performances are
3 being made in sub-optimal ways, you know, by
4 fumbling with DVDs in the classroom or being limited
5 in certain ways in other ways. So, exemptions are
6 necessary to facilitate learning, as was
7 demonstrated in the example that we provided.

8 MS. CHAUVET: Great, thank you. Mr.
9 Williams, a few questions. So, there have been some
10 articles about Disney Movies Anywhere kind of going
11 away and the creation of a larger Movies Anywhere.
12 I don't know if you want to talk about what the future
13 of Movies Anywhere is, like if it's sticking around
14 or going away, that would be good to hear about,
15 please.

16 MR. WILLIAMS: Yes, and we have a
17 witness from Disney who will present on Movies
18 Anywhere in Los Angeles. And we tried to cover this
19 in our comments. Essentially, there was
20 UltraViolet at the 2015 proceeding, and there was
21 a large number of participants in that. And then
22 there was Disney Movies Anywhere. And Disney
23 essentially had its own cloud service, essentially.

24 And there was some overlap, but
25 different retailers operated with one or the other.
26 And essentially what has happened is almost all of

1 the MPAA members, you can now get their titles
2 through either one. And so Movies Anywhere has
3 expanded in its reach, and that means that titles
4 are available on more retailers than they were three
5 years ago.

6 Now iTunes and Google Play, that were
7 working with Disney Movies Anywhere, other studios'
8 titles that are purchased through those retailers
9 can be accessed through Movies Anywhere.

10 In most cases, they could also be
11 accessed through UltraViolet depending on which
12 retailer you buy from. Vudu, for example, you could
13 go to either one of the two platforms. And there
14 are additional participants beyond MPAA members
15 alone in UltraViolet, and I believe in Movies
16 Anywhere as well, if I recall.

17 So it's not that it's going away, it's
18 that Movies Anywhere expanded its reach. And
19 UltraViolet is still there. There's still a number
20 of retailers and studios participating in that as
21 well. So, the Disney witness will try to provide
22 more detail on that.

23 MS. CHAUVET: Does Movies Anywhere
24 offer Moana in Tahitian?

25 (Laughter.)

26 MR. WILLIAMS: I will make a note to try

1 to look into that. I imagine that that's
2 potentially a regionally specific offering based
3 on demand, but given the nature of the film, which
4 I haven't seen, I've only seen clips of it, it might
5 be available just because of the nature of the movie.

6 But these cloud services really do
7 provide pretty a pretty unthinkable level of access
8 if you go to what we had before section 1201 was
9 created. They're exactly the types of things that
10 Congress wanted to come about, and they are coming
11 about.

12 You can buy a copy in a variety of ways:
13 you can buy it in the store, you can buy it through
14 digital retailers, and then you can move it into,
15 not only Movies Anywhere or UltraViolet, but say
16 you bought it from Vudu, you move it into Movies
17 Anywhere, and you want to access it through your
18 iTunes account, or your son or daughter wants to
19 do that. It's available across multiple retailers
20 so that different people in the family who use
21 different devices or different services can access
22 the same title. So there's a lot of benefits there
23 to those services.

24 MR. DECHERNEY: I'm just curious if
25 they're available to be licensed for educational
26 use.

1 MR. WILLIAMS: My understanding is they
2 probably are in the terms limited to personal use.
3 We've talked about that that is not a section 1201
4 issue per se, but there is a contractual issue there.
5 Mr. Midgley said that he had been reaching out to
6 try to get licenses. I'm not aware of those
7 discussions, so I can't speak to them.

8 MS. CHAUVET: Great, and one last --

9 MR. BAND: The other point, just to
10 reinforce what Mr. Midgley was saying, the vast
11 majority of films are not distributed by the major
12 motion picture studios. We have many, many foreign
13 films that we need in the educational context, or
14 older films. So many of the newer films might be
15 available, but not the older, foreign, independent
16 films that are so essential. So, again, it's a
17 matter of what's available.

18 MS. SMITH: Do you want to speak to that,
19 Mr. Williams, how the back catalogs are moving
20 beyond the major studios?

21 MR. WILLIAMS: Yeah, just very quickly,
22 because I know we're over. We tried to address this
23 issue of back titles in our comments, and we pointed
24 to a number of online services where you can get
25 older titles. You can get a lot of older titles in
26 Movies Anywhere, in UltraViolet, because they are

1 being sold by the retailers, by Amazon, by Vudu,
2 and they are available on disc, and can often be
3 converted up into those services through disc to
4 digital.

5 With respect to foreign titles, it used
6 to be that people would make an attempt in the
7 proceeding to put titles in the record and say, "We
8 can't get a number of titles that we want." That's
9 just not been done, and so it's a little hard to
10 respond at this point in the proceeding because we
11 do try to go through the comments and look for
12 titles, because people frequently say, "I can't find
13 this anywhere," and we find it pretty quickly.

14 So, it may be true that there are some
15 titles out there that are not available through a
16 digital retailer. But I don't think there are any
17 in the record, that I recall.

18 MS. CHAUVET: One other question, Mr.
19 Williams, regarding MOOCs. Or, actually, Mr.
20 Turnbull and Mr. Taylor may want to comment. But
21 would the size, openness, or other distribution
22 aspects of a MOOC create a greater effect on the
23 potential market for the underlying works? And if
24 so, how?

25 MR. WILLIAMS: I mean, I think yes, that
26 is an issue that would need to be looked at if you

1 were analyzing the fair use factors. How many
2 people are getting access to a work? Of course,
3 you'd have to apply all of the factors and look at
4 the purpose of the use, how long was the clip, a
5 variety of things.

6 But, yes, the broader the reach, the
7 larger the potential impact, especially if you
8 remove the limitation that requires some protection
9 measures to be in place.

10 MS. CHAUVET: Thank you. I have two
11 questions. Mr. Midgley, I'll go ahead and ask you
12 since you raised your placard. So, if your proposed
13 exemption relating to section 110 were adopted, how
14 would it differ from the current MOOC exemption that
15 we already have?

16 MR. MIDGLEY: Let's see. I would have
17 to pull up the specific language to answer that.
18 I was just going to say, if there is a desire, we
19 would be happy to furnish a list of movies that are
20 unavailable to us in post-hearing briefing. It
21 would start with Star Wars in Navajo, incidentally.
22 I'd love to find where we can get that.

23 MS. SMITH: You mean get it anywhere, or
24 at all?

25 MR. MIDGLEY: Yeah, we have a licensed
26 copy of Star Wars in Navajo, but it would be

1 interesting to see if that's available to us for
2 digital purchase through Movies Anywhere or another
3 platform.

4 Anyway, the broader point is I'd be happy
5 to furnish a much longer list if that's something
6 of interest to the Office.

7 MS. CHAUVET: And while you're looking
8 at your notes, Professor Decherney, you state in
9 your initial comments that incorporating section
10 110(2) into the existing exemption limits the scope
11 of the fair use doctrine. Can you provide specific
12 examples of what you mean by that?

13 MR. DECHERNEY: Yes. So, as you know,
14 it's a safe harbor, but outside of that there are
15 lots of uses that could be fair uses that wouldn't
16 be covered by section 110(2). It says at the
17 beginning these are uses that are non-infringing.

18 MS. CHAUVET: But can you give any
19 specific examples?

20 (Pause.)

21 MR. DECHERNEY: Can I give an example?

22 MR. BAND: Well, again, it could be
23 something that's something that might be longer than
24 a short excerpt, but could still be for purposes
25 of commentary, criticism. And, obviously, it's a
26 different purpose because it's an educational use.

1 So I think it would comfortably fit within fair use,
2 but it might not fit within 110(2).

3 MR. MIDGLEY: So, just to come back to
4 earlier, a lot of the same comments, I would say
5 our proposal would do away with a lot of the language
6 that's in the preamble. So, it's not the
7 MOOC-specific language, but sort of the current
8 very, very top of the rule that makes use of
9 criticism and comment and short portions. We feel
10 like that language are unnecessary limitations.
11 So, those are inherent in the MOOC-specific
12 subsection. That's one major difference.

13 Another would be the officially
14 enrolled students. That's not a limitation of
15 110(1). And in general --

16 MS. CHAUVET: But it is for 110(2).

17 MR. MIDGLEY: Yes, yes. So, the idea is
18 that any non-infringing performance under either
19 110(1) or 110(2), the specific performance at issue
20 would have to meet the requirements of that specific
21 section. But to try to limit your 110(1)
22 performances to all of the conditions for 110(2)
23 we think is inappropriate.

24 MS. CHAUVET: I guess I was more
25 specifically thinking about the difference between
26 the MOOCs exemption and your proposed exemption

1 under 110(2), because those are both dealing with
2 distance education.

3 MR. MIDGLEY: Okay. Yeah, those are
4 much closer, other than the preamble that we
5 mentioned earlier.

6 MR. DECHERNEY: But also, obviously,
7 for-profit and unaccredited institutions could
8 teach using a clip using fair use if it weren't for
9 1201.

10 MS. SMITH: Thank you. Again, we
11 appreciate everyone's willingness to participate
12 in the panel and the valuable insight you've shared
13 with us. I think we're going to wrap up only 25
14 minutes past the hour and then start again at 9:00
15 a.m. So, thank you again very much.

16 (Whereupon, the above-entitled matter
17 went off the record at 4:56 p.m.)

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