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U.S. Copyright Office
SECTION 1201 ROUNDTABLE

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TUESDAY
APRIL 24, 2018

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The Section 1201 Roundtable met in Room 1314, UCLA School of Law, 385 Charles E Young Drive East, Los Angeles, California 90095 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
ANNA CHAUVET, U.S. Copyright Office
STACY CHENEY, National Telecommunications and
Information Administration
JOHN RILEY, U.S. Copyright Office
JULIE SALTMAN, U.S. Copyright Office

ALSO PRESENT

JAMES M. BURGER, Digital Content Protection,
L.L.C.

JACK LERNER, UCI Intellectual Property, Arts, and
Technology Clinic

ART NEILL, New Media Rights

ELIZABETH ROSENBLATT, Organization for
Transformative Works

BEN SHEFFNER, Motion Picture Association of
America, Inc.

DAVID J. TAYLOR, DVD CCA and AACIS LA

TISHA TURK, University of Minnesota, Morris

KIT WALSH, Electronic Frontier Foundation

J. MATTHEW WILLIAMS, Joint Creators II

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2 9:00 a.m.

3 MS. SMITH: All right. Good morning.
4 We are going to start. So, the live stream is on.
5 We're starting for Class 1, the section 1201
6 triennial rulemaking hearings.

7 My name is Regan Smith. And I'm the
8 Deputy General Counsel of the Copyright Office.
9 We're here for the next two hours to talk about
10 whether the current temporary regulatory
11 exemptions for certain uses of audiovisual works
12 should be expanded or modified.

13 And this will build upon both the written
14 comments everyone has submitted, as well as the
15 hearings we held in D.C. two weeks ago. So, we will
16 ask you to focus on narrowing both issues rather
17 than repeating things that have already been said
18 just so we can continue to build out the record.

19 Before we get started, a couple of
20 reminders. First is, there's a sign-up sheet in the
21 back if anyone wishes to speak on any other class,
22 to write a couple of minutes of comments.

23 We've called this audience
24 participation. And that will be tomorrow,
25 Wednesday. We're going to start it at 1:30 as
26 opposed to 2:30.

1 But, feel free to sign up if that's
2 something that interests you. And then secondly,
3 for the panelists, if you wish to speak, just tip
4 your placard up and we'll call on you.

5 And when you do speak, if you can repeat
6 your name for the reporter, that would be helpful.
7 There were some issues yesterday with understanding
8 who was talking because your backs are facing him.

9 So I think we're going to start out with
10 everyone introducing each other, themselves, and
11 their affiliations. And then we have a couple of
12 presentations.

13 MR. CHENEY: I'm Stacy Cheney, a Senior
14 Attorney-Advisor at NTIA, National
15 Telecommunications and Information
16 Administration.

17 MR. RILEY: Good morning. John Riley,
18 Copyright Office.

19 MS. CHAUVET: Anna Chauvet, Assistant
20 General Counsel at the Copyright Office.

21 MS. SALTMAN: Julie Saltman, Assistant
22 General Counsel at the Copyright Office.

23 MS. SMITH: Mr. Lerner?

24 MR. LERNER: Hi, I'm Jack Lerner. I'm
25 Director of the UCI Intellectual Property, Arts,
26 and Technology Clinic at UC Irvine Law School.

1 I'm here on behalf of Joint Filmmakers,
2 Film Independent International, International
3 Documentary Association and for Independent Films,
4 as well as the e-Book Authors for Class 1, Authors
5 Alliance, American Association of University
6 Professors, and others.

7 I am here mostly to answer questions and
8 provide clarification where needed today.

9 MS. TURK: I'm Tisha Turk. I'm an
10 English Professor at the University of Minnesota
11 at Morris. I'm also a video remix artist.

12 And I'm a member of the Organization for
13 Transformative Works. So, I'm here on behalf of
14 remix artists.

15 MR. NEILL: Hi everybody. Good
16 morning. My name is Art Neill. I'm the Executive
17 Director of New Media Rights.

18 I'm here representing New Media Rights
19 as well as our partners, EFF and OTW in regards to
20 the streamlined exemption proposal that we put
21 forward. So, good morning.

22 MS. ROSENBLATT: I'm Betsy Rosenblatt,
23 Associate Professor of Law and Director of the
24 Center for Intellectual Property Law at Whittier
25 Law School. In addition to being an IP law professor,
26 I am also the legal share of the Organization for

1 Transformative Works.

2 And I'm here on behalf of the
3 Organization for Transformative Works which
4 submitted two exemption requests. One for the
5 streamlined request. And the other relating to
6 multimedia e-books.

7 MR. WILLIAMS: Hi, Matt Williams from
8 MSK. I'm representing AAP, ESA, MPAA, and RIAA.
9 Thank you.

10 MR. SHEFFNER: Ben Sheffner with Motion
11 Picture Association of America.

12 MR. TAYLOR: David Taylor, Counsel to
13 the DVD CCA and AACLS LA.

14 MS. SMITH: Okay. Thank you everyone.
15 And welcome. I think we're going to start off --
16 we have two presentations regarding screen capture
17 technology.

18 So, let's start with Professor Turk.
19 And this will be Exhibit 1-G. And so all of these
20 Exhibits, including the ones from D.C., will be
21 posted on the website in the next week or two,
22 shortly. You'll be able to go back and refer to
23 them.

24 MS. TURK: Would you like me to
25 introduce the clip?

26 MS. SMITH: Sure.

1 MS. TURK: What do you -- okay. So this
2 is 30 seconds from the first episode of the TV show,
3 The Magicians, captured from -- this must have been
4 from Netflix. To illustrate some of the, some of
5 the potential problems with using screen capture
6 for remix video.

7 (Exhibit 1-G introduced)

8 MS. SMITH: And so what program did you
9 use to capture this?

10 MS. TURK: Movavi. Which says that it
11 is not for capturing copyrighted video
12 incidentally. But I did it anyway.

13 So there are several things to note about
14 this clip, right. The -- even leaving aside the
15 trial watermark, which obviously would not be there
16 if we were using the full version of the program.

17 The stuttering, the jerkiness, the
18 pause when the streaming has a glitch, and so we
19 just have a long still frame and then it jumps ahead
20 several seconds. These are the kinds of things that
21 make captured clips fine for just watching, but not
22 suitable for -- not aesthetically suitable for --
23 artists.

24 MR. RILEY: And you're saying that the
25 stuttering wouldn't be there with the non-trial
26 version?

1 MS. TURK: I have no idea. I haven't
2 used the non-trial version. I was talking about the
3 giant red watermark that says demo version.

4 You have to sort of ignore that. I
5 wasn't willing to pay money for this program, so.
6 They have a seven day free trial, which I used.

7 So that's a -- I have other examples of
8 other problems. But I think that's the -- I think
9 that's it.

10 (Off mic comment)

11 MS. TURK: What?

12 (Off mic comment)

13 MS. TURK: Yeah, I mean, it was only a
14 30 second clip, so.

15 MR. CHENEY: Do you know if that had to
16 circumvent a TPM in order to capture? Or was that
17 just a straight capture without the TPM or breaking
18 the TPM?

19 MS. TURK: I have no idea how screen
20 capture technology works. So, I can't tell you
21 that.

22 All I know is that I downloaded the
23 program, followed the directions. Loaded up an
24 episode of TV, you know, set the -- set the
25 dimensions to capture the actual image.

26 Which, side note, is not a standard --

1 it results in a nonstandard frame size. It would
2 be very difficult for me to load that into an editing
3 program and not have it have to either upscale or
4 downscale or do something else.

5 The frame size is not, for example, the
6 standard Blu-Ray, standard Blu-Ray from size
7 dimensions. Which is a separate set of -- that's
8 a set of technical problems you know, on top of the
9 aesthetic problems of capturing.

10 MR. CHENEY: I also noticed it didn't
11 have sound. Was that an issue with this? Or did
12 you just elect not to have the sound?

13 MS. TURK: Oh, no. I just didn't want
14 you all to have to listen to me swearing at the
15 program.

16 So, when I capture for vidding purposes,
17 I would never use the sound. The whole point is that
18 we lay things that, you know, we provide a separate
19 soundtrack.

20 So, I would never -- I would never
21 capture the sound. Other people might for other
22 purposes.

23 MS. SMITH: Some vidders would use
24 sound, right?

25 MS. TURK: Some vidders would. Yes,
26 some vidders do incorporate bits of dialog into the

1 videos that they make.

2 But, for -- that can be distracting,
3 right. Especially if there's background music, it
4 can create all sorts of problems with the music that
5 you're actually providing as a vidder.

6 So, yes. I think some people would.
7 But since it was not necessary for this purpose,
8 I didn't do it.

9 MS. SMITH: And then the editing
10 program, what editing program do you typically use
11 to make the remix video?

12 MS. TURK: I use Adobe Premiere.

13 MS. SMITH: Okay. And Adobe Premiere,
14 can it, I guess, ingest both the Blu-Ray framed sized
15 dimensions and this program? Or you would have to
16 convert it? Or do you have --

17 MS. TURK: I have to admit, I did -- I
18 do not have Adobe Premiere on the machine that I
19 have with me. And so I was not able to load this
20 clip into Adobe Premiere and see what would happen
21 with it, with this specific clip.

22 I can say that based on my past
23 experience, -- Adobe Premiere can load almost
24 anything as long as the codec is okay.

25 Where you run into problems is editing.
26 Especially if you're capturing and everything is

1 a slightly different size. Right?

2 So, combining clips and then exporting
3 at the end of the process can be a little -- can
4 be a little tricky.

5 But, at this point, the software has
6 advanced. The problem isn't usually importing.
7 The problem is editing and exporting.

8 MS. CHAUVET: And just to confirm, when
9 you're using Adobe Premiere, that's for when you're
10 not using screen capture? That's from when you're
11 circumventing?

12 MS. SMITH: Using either, I think.

13 MS. CHAUVET: It's in either
14 circumstance then?

15 MS. TURK: I don't use screen captured
16 clips. I use our exemption and rip from Blu-Ray or
17 from DVDs, increasingly from Blu-Ray because it's
18 prettier.

19 But there are a few things that I only
20 have on DVD, so.

21 MS. SMITH: All right. Is there
22 anything else you'd like to show us?

23 MS. TURK: I think that is -- I think
24 that will do for now actually.

25 MR. CHENEY: I have another question.
26 You said this was from Netflix, you thought. Is

1 that more difficult to catch the streaming versus
2 capturing something from a DVD or a Blu-Ray, for
3 the technology, do you think?

4 MS. TURK: Is it more difficult?

5 MR. CHENEY: Right. Because you'd said
6 here, you said for example that there was perhaps
7 interruption.

8 Maybe there was some slowing in the
9 loading of the Netflix video on your machine that
10 may have caused some of the jerkiness to that. Is
11 that a fair assessment of perhaps maybe one of the
12 dilemmas here?

13 MS. TURK: Yeah. I think that's fair,
14 that if you're capturing something that's
15 streaming, it's going to be more prone to glitches.

16 Because there are problems, there are
17 potentially problems with the internet connection.
18 Right. As opposed if you were capturing -- so if
19 you're streaming from iTunes, if you're streaming
20 from Netflix, if you're streaming from Amazon Prime,
21 that creates an additional layer of difficulty.

22 As opposed to if you're streaming as if
23 you're capturing say a Blu-Ray that's playing on
24 your computer. Though it's worth noting that many
25 computers do not have optical discs at this point.

26 So, if someone were going to use screen

1 capture, whether they would bother buying a Blu-Ray
2 or a DVD is, I think an interesting question. I
3 don't know.

4 I mean, I do purchase DVDs and Blu-Rays.
5 And so that's what I use.

6 MS. SMITH: Well, if you wanted to rip
7 a DVD or a Blu-Ray wouldn't you also need the player
8 in any event?

9 MS. TURK: Sorry?

10 MS. SMITH: Don't you need the optical
11 player?

12 MS. TURK: Yes. And I have one. I
13 mean, that's my point. I am able to use those things
14 precisely because that's my set up. I've been using
15 that for years at this point.

16 MS. SMITH: Okay. Mr. Taylor?

17 MR. TAYLOR: Yeah. David Taylor. I
18 would just point out that if I were to pick a screen
19 capture program and try to record it for the first
20 time, I would probably end up with the same result
21 that she did.

22 Every program requires you to learn
23 about it and learn what's the best optimal --

24 (Background interruption)

25 MS. SMITH: Oh. All right. Continue.

26 MR. TAYLOR: Every screen capture

1 program requires you to learn what are the optimal
2 settings for that program. And as well, you know,
3 what kind of machine are you using to use, to capture
4 it.

5 The programs that we have introduced all
6 have resolution settings on them where you can set
7 the screen size if you want it for DVD or if you
8 want it for HD.

9 Also another problem with that is that
10 it was streamed. And you don't know what the
11 internet connection is.

12 Another problem is that I don't know what
13 was the codec that was being used to record? Was
14 it Lossy or was it Lossless?

15 And you know, the Lossy format is going
16 to require a certain amount of compression. And you
17 just aren't always going to be able to sit down,
18 use a screen capture program for the first time and
19 get the most perfect result.

20 You will have to spend some time learning
21 its ins and outs. But the ones that we have offered,
22 fairly compensate for everything that she described
23 to be a problem.

24 MS. SMITH: So, are you familiar with
25 the program that Professor Turk was using?

26 MR. TAYLOR: I'm not. I'm familiar

1 with the ones that we have had to learn. I've had
2 to learn screen capture programs every three years
3 now. And just have not come across that one.

4 MS. SMITH: So, it sounds like there's
5 a variety out there.

6 MR. TAYLOR: Oh, there are infinite
7 numbers of programs.

8 MS. SMITH: Okay.

9 MR. TAYLOR: And I would also say that
10 screen capture programs are much easier to learn
11 than handbrake and video editing that is required.

12 So, anybody that is doing, that is a
13 hobbyist who's doing video editing, can spend --
14 can easily spend the time to learn how best to
15 maximize the results from a screen capture program.

16 MS. SMITH: So I think we'll just stop
17 you there, because we're going to let you do a
18 presentation next. But -- I'll just let -- if Mr.
19 Lerner wanted to speak to Professor Turk or had some
20 presentation.

21 MR. LERNER: Just wanted to make two
22 small points. One is that as Jim Morrissette noted
23 in his statement, which is attached to the Joint
24 Filmmakers comment from December, there are many
25 sound difficulties.

26 There's a question about sound.

1 Difficulties with syncing the sound. There's often
2 computer noise that's imported as well.

3 And of course, sometimes there are
4 stereo effects and other, you know, other important
5 parts of the sound that are not captured by screen
6 capture.

7 Also, I was surprised to hear that
8 there's an allegation that there would be lossless
9 screen capture. Our research indicates that no
10 screen capture can capture all the frames in a
11 Blu-Ray.

12 What they do is they compensate it.
13 Maybe the lossless maybe used here to refer to the
14 highest possible fidelity.

15 But, our contention is that we have not
16 been able to find a screen capture program that does
17 not drop frames and lead to stuttering and other
18 problems.

19 But we'd be happy to take a look at this
20 video and the one that was -- in fact -- would request
21 to be able to take a look at this video and the one
22 that was shown in April, in the hearing on April
23 11, and comment on that.

24 MS. SMITH: Professor Rosenblatt, did
25 you have a comment on Professor Turk's clip?

26 MS. ROSENBLATT: Yes.

1 MS. SMITH: Okay. Go ahead please.

2 MS. ROSENBLATT: A few responses
3 actually to questions posed to Professor Turk. One
4 is that Movavi is a popular -- is among the popular
5 screen capture softwares there are. There are
6 several, but Movavi is a popular one.

7 In response to the question that does
8 screen capture require or involve circumvention of
9 technological protection measures, nobody knows.
10 Which is one of the issues with an exemption that
11 re -- that deals with distinct -- making a
12 distinction between screen capture and ripping for
13 these purposes.

14 Another comment on Netflix. This
15 stream was from Netflix. But, we have at the OTW
16 reports that many who try to use -- who have tried
17 to use screen capture technologies from Netflix end
18 up with just a black screen rather than any visual
19 at all.

20 Which makes -- and this is true for other
21 DRM measures as well. That there are certain
22 sources from which screen capture is simply
23 inadequate.

24 As to whether screen capture from
25 streaming is different, it's necessary to use
26 streaming for some things, because that is the --

1 streaming is often the only or most timely source
2 for materials.

3 And so saying that one could have an
4 internet lag-free screen capture, is true only for
5 some materials.

6 Resetting the screen size, which was
7 suggested as an option, results not only in
8 difficulty loading into editing programs, but also
9 loss of material for example, on the size of the
10 screen. Because screen capture uses the aspect
11 ratio of whatever computer you're working on.

12 So, there may be material loss at the
13 edges of screens for resetting screen sizes. This
14 is something that Professor Turk can speak to with
15 other clips that she's brought.

16 And finally, to the extent that the
17 stutter in that was a result of internet lag, that
18 is something that -- but that happened to have been
19 done using a high speed DSL connection in a Los
20 Angeles home.

21 There are lots of people with less
22 reliable internet connections. But even in a
23 perfect internet connection situation, there is
24 frame loss and blurring that is an inevitable result
25 of using screen capture.

26 MS. SMITH: All right. Profes -- or Mr.

1 Taylor, if you want to give your presentation. And
2 then Mr. Williams, if it's short you can say it now.
3 Or you can wait until after.

4 MR. WILLIAMS: All right. Yeah, I'm
5 just going to --

6 MS. SMITH: Okay --

7 MR. WILLIAMS: I mean, the relevance of
8 screen capture at this point largely goes to whether
9 the existing exemption beneficiaries have to make
10 a good faith effort to use it, to get the quality
11 that they need before moving ahead with
12 circumvention.

13 And we've talked about this some in
14 Washington, and you had asked me what's the point
15 of including that in the exemptions? And why refer
16 to screen capture at all if it may or may not be
17 legal?

18 And we just heard, I think, the reason
19 why that happened. It's because the proponents
20 have consistently questioned whether it's legal or
21 not.

22 And said, we can't use it because we
23 don't know if it's legal. So that's why you've
24 included it.

25 And that's why I think you should retain
26 it. And largely the relevance of screen capture at

1 this point goes to that issue.

2 There's a little one, I think, category
3 of users in the existing regulations that can only
4 use screen capture. And there's nothing in this
5 record about K-12 students needing to use anything
6 more than screen capture.

7 MS. SMITH: I think the proponents are
8 sort of split as to whether the screen capture
9 exemption is helpful or hurtful.

10 Because some of them have asked to get
11 rid of it and said it was confusing. And some have
12 asked to keep it.

13 So, Mr. Taylor?

14 MR. TAYLOR: Yeah. I think I'm looking
15 at --

16 MS. CHAUVET: So this is going to be
17 Exhibit 1-H.

18 (Exhibit 1-H introduced)

19 MR. TAYLOR: Just press play and get it
20 out of the way.

21 (Video played)

22 MR. TAYLOR: So, -- what we had
23 delivered to her were a screen capture that we did
24 with the OBS. And OBS offers a lossless format.

25 And does it drop frames? Yes.

26 MS. SMITH: So, if it drops frames, how

1 is it lossless?

2 MR. TAYLOR: Well, they call it a
3 lossless format. Is it frame for frame, if you
4 lined it up, is it exact? No. It's not. I'm not
5 going to make that representation.

6 But for a screen capture that's
7 recording, it's picking up nine out of ten of those
8 frames.

9 MS. SMITH: Okay.

10 MR. TAYLOR: And there's a lot of frames
11 in there. So, what we delivered to her is not the
12 same quality that we had originally submitted to
13 you. Because there was a learning curve for us and
14 in figuring out what they advertised as lossless.

15 It result -- when you do it -- it results
16 in a huge file. So, it's not something that most
17 people are going to choose to use.

18 But, if you really are looking for high
19 quality screen capture, the OBS system delivers
20 something that somebody who works for Discovery and
21 delivers these products has said, you know, this
22 could be included in a final product.

23 Is it in itself, by itself with nothing
24 around it deliverable? No. It's not. But, when
25 it's just a small piece as all of the exemptions
26 are entitled to be, then it is perfectly fine.

1 And we've known this. Every work
2 requires some amount of post-production editing.
3 And nobody gets this perfect clip and is instantly
4 able to, you know, distribute it to the movie
5 theaters.

6 No. They have to process it. And you
7 know, this is somebody who evaluates clips. She
8 looked at our clip. She said what it honestly was.

9 And we believe that, you know, screen
10 capture can even serve the purposes of filmmakers.

11 MS. CHAUVET: Well, I guess, let's just
12 be clear. I mean, the Register found in the 2015
13 rulemaking that there were certain instances where
14 screen capture was not a viable alternative.

15 Which is why they're some -- for some
16 of the exemptions like for close analysis for
17 filmmaking, screen capture isn't.

18 So I just want to clarify that's the base
19 line that we're working from today.

20 MR. TAYLOR: And I would say that we have
21 now presented evidence that goes a little bit
22 further that says that screen capture has improved
23 to the extent that you can deliver a product that
24 will meet distribution standards.

25 Whether or not it is the close analysis
26 that is a specific question that I asked this expert

1 to opine on.

2 MS. SMITH: So she's saying, you can put
3 it on iTunes. Is that right?

4 MR. TAYLOR: She's saying that iTunes --

5 MS. SMITH: Because it's Apple who's the
6 pickiest.

7 MR. TAYLOR: Is the pickiest, right.

8 MS. SMITH: iTunes, that's the
9 distribution platform, I think that she was directed
10 at. Unless there's -- okay.

11 MR. TAYLOR: Yes. And we talked
12 extensively about PBS and Netflix. And she's like,
13 they don't matter. It's all about iTunes.

14 MS. CHAUVET: Okay. But you seem to be
15 admitting that even -- it's deliverable as a whole.
16 But they're -- it's okay that there are
17 imperfections in the screen clips that are being
18 used.

19 MR. TAYLOR: Yes. I mean that is -- and
20 that's always been the case with any documentary
21 film that's used archived clips.

22 You've never been, you know, if you're
23 using an archived clip it was, you know, film. And
24 it was from the '40s or the '20s.

25 And it always has to be processed to be
26 included in modern distribution media.

1 MS. CHAUVET: Okay. Ms. Turk? Oh, I'm
2 sorry, Professor Turk?

3 MS. TURK: I just wanted to clarify
4 something about codecs. Because you were asking
5 about lossless and dropped frames.

6 And a codec is just what encodes -- it's
7 the format in which something is encoded or decoded.
8 So something can be encoded with a lossless codec.

9 But all it can encode is the data stream
10 that it is fed. So it can encode a stream that has
11 dropped frames, that is pixilated or whatever.

12 MS. CHAUVET: Mr. Neill?

13 MR. NEILL: Yes. I just wanted to add
14 one point related to quality and the use of screen
15 capture.

16 And just relate the fact and point to
17 the record of a client that we mentioned in the joint
18 EFF, OTW, NMR comments where -- and just from
19 personal knowledge, working with people on
20 distribution contracts with broadcasters and with
21 online service providers.

22 I mean, I certainly have had people sent
23 back to the table to -- and told to even if it was
24 an older clip, you know, sent back and told to get
25 the source material use the source material, you
26 know, if possible.

1 And it's important to note that the
2 practical -- what happens practically there -- most
3 of the folks that are getting, say, contracts
4 related to non-fiction, a documentary or a short
5 film, something like that, these contracts are not
6 huge contracts to begin with.

7 The licensing fees are fairly modest.
8 So, if you're told to return to -- you know, to return
9 -- to have to recut your video to find the source
10 material clips that takes time. And it takes money.
11 And it does eat into the small fees those folks use
12 to even subsist and do their work.

13 Also, there are -- the other point is
14 that related, you know, upscaling certainly isn't
15 sufficient. And you know, there's actual -- you
16 know, Netflix has standards relating to upscaling
17 where they say, you know, upscaling isn't going to
18 be acceptable.

19 So, I think it's a bit farfetched to say
20 that distributors are just accepting across the
21 board. I mean, they certainly want to put the best
22 quality material forward.

23 And they will ask a filmmaker to go back
24 to get the source materials. So that does happen.

25 MS. CHAUVET: So that's helpful. Do
26 you, or can you point to specific examples on the

1 record? Or can you give specific examples of
2 specific films where that has been -- that has
3 happened?

4 MR. NEILL: Sure. We have an example in
5 our reply comments. I can get you the precise page
6 of the client that was sent back by a broadcaster
7 to have to go get source material because it wasn't
8 a high enough quality.

9 But, it --

10 MS. CHAUVET: And just to confirm that
11 it wasn't high enough quality because screen capture
12 was used when it was originally given to the
13 distributor?

14 MR. NEILL: That was a screen captured
15 clip, yes.

16 MS. CHAUVET: All right. Mr. Lerner?

17 MR. LERNER: Thank you. I want to
18 stress that this video mentions only getting the
19 frame rate correct.

20 But, there are many, many other flaws
21 that are introduced. Many, many other problems
22 that could cause a clip to be rejected.

23 If you look at Appendix B of our December
24 comment, you know, for the Joint Filmmakers, you
25 can see documentary evidence of this. As well as
26 evidence about broadcast standards.

1 Mr. Taylor asserted that PBS and Netflix
2 don't matter. However, to nearly all independent
3 documentary filmmakers, PBS and Netflix absolutely
4 do matter.

5 They're extremely important. And
6 Netflix is perhaps the most important distribution
7 site.

8 So, I'd like the record to -- I just want
9 to point out that the record here is only referring
10 to iTunes. And he said that this does not apply to
11 PBS and Netflix.

12 We have discussed in this proceeding and
13 before that -- and in our filings -- that PBS and
14 Netflix have very rigorous standards.

15 And we have not been able to find any
16 screen capture program, including OBS, which we
17 addressed in our comments, that actually works.
18 OBS does not work.

19 A couple of other quick comments. As
20 far as archival footage, absolutely if you have an
21 old video from the '70s, from news footage or
22 whatever it might be, that will be accepted.

23 But that's only -- that's because
24 broadcasters understand that there's absolutely
25 nothing else available. If you try to submit a
26 modern clip, that will be rejected.

1 And finally, I just want to point out
2 that no documentary evidence has been submitted by
3 the opposition about broadcast standards.
4 Whereas, we have done that in 2015 and again in the
5 2017/2018 proceeding.

6 And also, it's not clear who this expert
7 is, what her qualifications are. She's not
8 available for us to ask questions. And I'm not even
9 sure where she's employed.

10 Whereas Jim Morrissette, who's been the
11 technical director of one of the leading independent
12 film companies in the country for over 40 years,
13 made himself available in the previous hearing on
14 April 11.

15 MS. SMITH: But to that I would say that
16 he has represented she's employed at Discovery.
17 And this is what she works on.

18 And that we see the filmmakers provide
19 a variety of examples from filmmakers of things they
20 want to do. And we don't require them all to come
21 here and testify, so.

22 MR. LERNER: Okay. Understood. Thank
23 you.

24 MS. CHAUVET: Ms. Rosenblatt?

25 MS. ROSENBLATT: Thank you. I just
26 want to point out a brief sort of inconsistency in

1 the arguments here.

2 Which is that -- to the extent that many
3 including -- we argue that screen capture is not
4 circumvention. And therefore shouldn't even
5 require an exemption at all.

6 The argument that the quality of screen
7 capture is high enough for everything is
8 fundamentally inconsistent with the argument that
9 the DRM is necessary to prevent piracy. And we
10 would rebut that by saying that in fact pirates don't
11 need high quality. Artists do.

12 And that to the extent we're asking
13 people who make art and commentary to sacrifice
14 their artistic vision, we're asking too much of
15 them. And we're turning the Copyright Office into
16 art critics.

17 MS. CHAUVET: Thank you.

18 MS. SMITH: That is a helpful
19 perspective. But we're not here to discuss whether
20 DRM is valuable or not valuable generally.

21 MS. ROSENBLATT: Of course.

22 MS. SMITH: Right? We're just
23 administering the rulemaking under the standards
24 where we have regulatory authority to act or not
25 act. So, that's what we're focused on.

26 So, Mr. Williams?

1 MR. WILLIAMS: Yeah. Thank you. I
2 just wanted to return to the question that you asked
3 earlier about well, in the 2015 proceeding that a
4 certain baseline was established.

5 And I think we didn't oppose renewal of
6 the existing exemptions. Unless you start changing
7 the language they will be renewed as is.

8 And so I guess what's at issue here, is,
9 does David's presentation speak to any of the
10 requested expansions? And I think that it does in
11 this way.

12 For multiple cycles now, fictional
13 filmmakers, fictional e-book authors, and
14 commercial video makers have had a hard time
15 establishing under the law that their uses are
16 non-infringing.

17 And I think that's still true under the
18 existing record. And we can talk more about that.

19 But when you compare that with the
20 quality of screen capturing, it's kind of hard.
21 Because the room has a lot of light in it. So we
22 couldn't see. But, I think what we saw in
23 Washington was that the quality is pretty good.

24 And I think what this video shows is
25 that's true as well. And the experts are capable
26 of using it to achieve their purposes.

1 And so I think that you should take it
2 into account when you're comparing, okay, we've got
3 this kind of blurry issue of whether any of these
4 uses have established their non-infringing status.

5 Versus can they achieve this
6 practically. And if they can, then certainly the
7 legal issue shouldn't weigh in their favor when they
8 haven't been able to meet the burden.

9 And I did just want to point out, I think
10 you kind of addressed this, but for Jack to say that
11 well, that expert, we haven't provided enough
12 information. We've been dealing with anonymous
13 sources in this proceeding from the beginning.

14 And every year the proponents submit
15 anonymous sources. There are some in their
16 filings. So, I don't see how that could undermine
17 the credibility of what David presented.

18 MR. CHENEY: I have a question, Mr.
19 Williams, if you don't mind. I know that Mr.
20 Taylor's waiting there.

21 It's interesting in the formulation of
22 the current exemption that it basically asks the
23 person producing the film to go through the screen
24 capture process first.

25 Do you envision that that rule requires
26 them to go all the way to rejection as Mr. Neill

1 indicated? Or is there perhaps before they go to
2 some other version as the rule indicates, right?
3 That if that's not good enough quality then they
4 can use the circumvention.

5 Do you envision that that has to go all
6 the way to rejection that's talked about by Mr.
7 Neill? Or is there some intermediate sort of review
8 and say hey, this is not going to be good enough.
9 We can reject it before we go onto further
10 production.

11 What do you think about it?

12 MR. WILLIAMS: Sure. I think it's a
13 good faith standard. And it's meant to be kind of
14 a common sense standard.

15 And so I don't think it requires going
16 through to rejection in every instance. I do think
17 it requires sampling enough of the products on the
18 marketplace to figure out which ones work best.

19 And if you're working with a PBS for
20 example, and you've used the best product you can
21 find, and in the past you've been rejected. Or if
22 you compare the standards technically to what
23 they're saying you have to submit, then you've made
24 a good faith effort.

25 You wouldn't have to do that every single
26 time. Or you wouldn't have to submit something that

1 you know is going to get rejected and slow down your
2 project.

3 So I guess that's how I would read the
4 existing language.

5 MR. CHENEY: So in the example that Mr.
6 Neill gave, then that author potentially, now that
7 they've been rejected by that particular
8 broadcaster, they may not have to go back and use
9 the screen capture again.

10 They would just be able to go right into
11 the circumvention and use the tools that they have
12 available then. Is that what --

13 MR. WILLIAMS: I think that would be a
14 common sense approach. Although I don't recall the
15 specifics of that one individual example.

16 I don't know whether that was an e-book
17 involving film analysis. Or whether it was one that
18 would, you know, be eligible under the existing
19 exemption.

20 MR. CHENEY: Yeah. And I don't know
21 that he gave us enough information for that. But
22 if it were one of those that fit into that --

23 MR. WILLIAMS: Right.

24 MR. CHENEY: It would seem that that
25 would be enough then.

26 MR. WILLIAMS: Yeah. I think stay

1 abreast of what's available. As new things come
2 out, try them out. See what works best.

3 And then make a good faith effort.
4 There's a lot of standards that require good faith
5 efforts. Contracts do it all the time. And you
6 know, people manage to operate under that.

7 I do think that Ms. Rosenblatt's
8 comments again, underscore why the Office decided
9 to include references to screen capture in the
10 regulations. And why it does serve some purpose.

11 It both makes it clear that there is an
12 obligation to make these good faith efforts. But
13 it also says that if a product is marketed in a way
14 that makes the consumer believe that it is not a
15 circumvention device, then they're covered if that
16 product turns out to be a circumvention device.

17 They're eligible anyway for an
18 exemption.

19 MR. CHENEY: They would not be
20 prosecuted for circumvention if they were to use
21 it in this case, right?

22 MS. SMITH: Right. There's an
23 exemption for it.

24 MR. CHENEY: Yeah.

25 MS. CHAUVET: Great. Mr. Taylor and then
26 Mr. Lerner.

1 MR. TAYLOR: Yeah. David Taylor. I
2 just wanted to say that I have not said that PBS
3 and -- and I certainly didn't mean to say that PBS
4 and Netflix standards don't count.

5 What I said was that in my discussions
6 with the expert, I had her look at the PBS and Netflix
7 standards. And she offered that in her experience
8 of working with those companies, the most difficult
9 of companies is iTunes, is Apple.

10 And so that's all I was saying here.
11 Also, I do want to affirm Mr. Williams' comments
12 about the significance of screen capture at this
13 point in the proceeding that it really is an
14 alternative for those opportunities or those people
15 looking to expand the exemptions.

16 And to that extent all we're saying is
17 that screen capture has improved significantly.
18 And continues to improve.

19 So yeah. That's all I have.

20 MS. CHAUVET: Thank you. Mr. Lerner?

21 MR. LERNER: Thank you. Very quickly.
22 I want to respond to something that Matt said
23 regarding the use of anonymous film -- introduction
24 to anonymous filmmakers.

25 It's true that some of our filmmakers
26 wish to keep their name anonymous. They are our

1 clients. And people that we know.

2 And I think there's a difference between
3 saying that someone is an expert. And presenting
4 a video that person created and introducing one
5 among dozens of filmmakers or numerous authors.

6 So, I just wanted to make that
7 distinction. Thank you.

8 MS. CHAUVET: Thank you. We've spent a
9 lot of time talking about the filmmaking exemption.
10 Very quickly, Mr. Taylor had an Exhibit in the D.C.
11 hearings, Exhibit 1-B, which showed the IBook author
12 being used for e-books.

13 So I wanted to give Ms. Rosenblatt an
14 opportunity to refer to that to see if there's
15 anything she has to say about why screen capture
16 would not have been a suitable alternative in that
17 instance.

18 MS. ROSENBLATT: So, for multimedia
19 e-books, I think it depends entirely on what you
20 are doing. There are probably some uses for which
21 screen capture is absolutely adequate.

22 And there are some for which it is not.
23 One of the things that we've seen, again mostly
24 through anonymous sources who choose not to put
25 themselves on the record as possibly violating the
26 law for understandable reasons, say that what they

1 want to do is to be able to make seamless stories
2 that incorporate material from multiple sources.

3 It's difficult to do that when you're
4 dealing with different frame rates, different
5 screen sizes, that sort of thing.

6 Also, if what you want to do is really
7 focus in on a particular aspect of something that
8 you're using as we've heard some of Professor
9 Lerner's clients discuss, they simply cannot do that
10 dependably using a -- using something that's going
11 to result in loss of the size of screens or blurry
12 material.

13 To say that every single possible use
14 needs to be a fair use is, I think, asking too much.
15 To say that there's a significant possibility that
16 fair use will be chilled, is what we're here to do.

17 And I think that's something that is
18 within the realm of what we're establishing here.

19 MS. CHAUVET: And one other question I
20 wanted to ask is, can you speak to any examples where
21 a person engaging in circumvention is confused about
22 whether or not they reasonably believed that screen
23 capture is not an alternative to circumvention?

24 MS. ROSENBLATT: So, this is something
25 that I'd actually like Professor Turk to address
26 directly after me.

1 But, I will note some interesting
2 statistics about what sort of -- what we mean when
3 we say this is a law that has more effect on what
4 happens after someone makes something than on what
5 happens before they make something.

6 So, in February 2017, the OTW conducted
7 a survey of about three thousand fans. This was --
8 we posted on our website, hey, we have a survey.

9 And people came and did it. 1,845
10 responded to a question asking what the DMCA was.
11 Of these, 1,400, so way more than half either said
12 they had not heard of the DMCA or that they did not
13 know what it was.

14 Of the 440 who said that they did know
15 what the DMCA was, only 67 said anything at all about
16 it, including anti-circumvention. Of these, a
17 grand total of six mentioned the exemptions.

18 But, about as many used words like
19 complicated, confusing, and convoluted. So, those
20 who do know what it is, find it complicated,
21 confusing and convoluted.

22 You know, the people who actually sort
23 of knew something about it had narrative responses
24 like, I have little understanding of this due to
25 the confusing and vague language. I believe the
26 language of the Act is deliberately confusing.

1 Ha, ha, it's a protection of digital
2 copyright infringement that scared the pants off
3 of everyone in my middle school. That's the --
4 right, this is the sort of user we're dealing with,
5 who finds this very confusing.

6 That may not address directly your
7 question. But it speaks to I think what we're
8 talking about when we say that the exemption is
9 confusing.

10 And that people are unlikely to seek out
11 something that they know isn't going to work as well,
12 when there's an option out there that from the
13 consumer standpoint works. And they won't have to
14 go through these multiple steps.

15 They don't understand why doing one
16 thing would be infringing. And doing another thing
17 wouldn't when if what they're doing is fair use for
18 criticism and commentary that they don't understand
19 why those things would be different.

20 MS. SMITH: Thank you. So those
21 statistics are very interesting and helpful.

22 But, I want to -- hearing you say that
23 this is not about what happens -- this is about what
24 happens after you make something, than before you
25 make something seems at tension with what you said
26 before, which is that there's a chill upon uses.

1 Do you want to speak to that?

2 MS. ROSENBLATT: Sure. So, there is a
3 chill on uses from people who do know about the law.
4 And --

5 MS. SMITH: That sounds like that's very
6 few people. And everyone is still making their
7 thing.

8 MS. ROSENBLATT: I think that's fair.
9 I think that's fair. But, in circumstances where
10 people really do want to find out what the law is,
11 and do the research, they're going to be chilled.

12 A lot of the trouble with this comes in
13 when someone who isn't chilled, because they don't
14 know about the law, then has to interact with an
15 institution like a school, or a traditional
16 publisher, or a library, who has -- who won't
17 facilitate their work, who won't adopt their work.

18 Or when you have to talk to a lawyer,
19 whether it's responding to a take down or trying
20 to get insured, that's where this chilling effect
21 will happen, not in the initial creativity
22 standpoint, but in the context of when you actually
23 want to use what you've made.

24 So it turns the law into a trap for the
25 unwary essentially. And it makes fair uses more
26 vulnerable to take down.

1 And but the main reason that this is a
2 barrier is because when you encounter a gatekeeper
3 like an iTunes for example, it can turn out that
4 what you've done is illegal, even when it would have
5 been perfectly legal if you'd used a different
6 program.

7 MS. CHAUVET: So, just a thought. So,
8 obviously in your comments for OTW and NMR, and after
9 you've stated this is kind of confusing, that we
10 should -- that's why we should have this
11 streamlined. Kind of eliminate distinctions based
12 on use and user.

13 So, is it really just because people
14 don't know if they can use screen capture or not?
15 Is that the confusion that you're talking about?

16 MS. ROSENBLATT: There are a few levels
17 of confusion. One is that they don't know whether
18 they can use screen capture.

19 Another is that they don't know what
20 noncommercial means. For example, if you have
21 something that you're putting up on YouTube, and
22 someone's going to be putting ads against it. Is
23 that commercial or not?

24 MS. SMITH: But this is the third time
25 we've talked about the noncommercial agreements
26 video category, right?

1 MS. ROSENBLATT: Yeah.

2 MS. SMITH: And I think YouTube versions
3 have always been sort of contemplated not -- but
4 not trying to monetize it.

5 How real is that confusion? Because
6 that seems like something we could consider and find
7 some way to clear up.

8 MS. ROSENBLATT: Sorry, could you
9 repeat the question?

10 MS. SMITH: I mean, how real is that
11 confusion? Because I think the noncommercial
12 limitation came from things OTW itself submitted.

13 MS. ROSENBLATT: Um-hum.

14 MS. SMITH: So, it's sort of surprising
15 to hear now that noncommercial is posing a
16 difficulty in understanding how to use the
17 exemption.

18 MS. ROSENBLATT: So, I actually think
19 that times have changed a little bit regarding the
20 way content is delivered in the sense that
21 non-commerciality, in the sense of whether somebody
22 is personally making money off of their creation
23 is now -- it's just more complicated to know whether
24 that's going to happen when you post something.

25 I think the OTW is still very much about
26 noncommercial creation. And that's our focus.

1 But we've had increasingly people come to us
2 confused about what noncommercial means.

3 And that's something that's happened in
4 the last six years.

5 MS. CHAUVET: The filmmaking and e-book
6 exemptions are not limited by commerciality.

7 MS. ROSENBLATT: Correct.

8 MS. CHAUVET: So, are you proposing that
9 they should be? Or should not be? Or --

10 MS. ROSENBLATT: We're proposing no
11 change to those.

12 MS. CHAUVET: Okay. Mr. Williams?

13 MR. WILLIAMS: Yeah. Thank you. I
14 mean, we tried to say in our filing that, you know,
15 we support trying to make things simple and
16 understandable.

17 But, I don't think you can do it at the
18 expense of following the law, looking at the record
19 and applying the case law and the statute to it.
20 And then designing regulations that comply with the
21 instructions that you receive from Congress on what
22 to do here.

23 And I think even if you -- even if you
24 took the language that EFF proposed as simplified,
25 if you run it through these search engines that they
26 used in their comments to try to judge the level

1 of education you would need to understand it
2 properly, you still get a college aged education
3 level.

4 They said what we proposed was graduate
5 school level. But, it's difficult to craft legal
6 regulations that I think in those search engines,
7 which I don't know how they operate exactly, would
8 come out at something below a college level.

9 But I think it's important that you do
10 follow the case law. And even if you look at, for
11 example, some of the work that Michael Donaldson
12 has done, one of the things that he says -- he's
13 tried to simplify the fair use standard as I
14 understand it to kind of three bullet points instead
15 of four. And the third one is, would your use be
16 clear to the average viewer?

17 And I think if you apply that to most
18 of the examples in the record, if not almost all
19 of them, the fair use nature of it does not come
20 through. Often the point of the use is not clearly
21 perceivable to the average viewer.

22 And so that's why I think you've drawn
23 the lines where you've drawn them with respect to
24 filmmaking and with respect to e-book authorship.

25 There's a number of cases on this. We
26 cite to the Axanar case involving use of Star Trek

1 in a fan film as it was referred to.

2 There was no payment to be charged there.
3 And the court still said that that's not a fair use.

4 And it said there that the point of the
5 work could not readily be perceived to the court.
6 It felt a lot more like just kind of a celebration
7 of Star Wars --- Star Trek in a use to get attention
8 of fans instead of a parody.

9 So, I do think you have to be really
10 careful where you draw the lines. And I think
11 you've done a good job of that.

12 The noncommercial videos -- I think that
13 should be retained to noncommercial. Three years
14 ago there was an effort to make it primarily
15 noncommercial and the evidence didn't satisfy you
16 that that should be done.

17 Now they're trying to get all the way
18 to commercial. And I think there's actually fewer
19 examples of commercial remix videos in the record
20 this time than there was last time.

21 Of course commerciality does make a big
22 difference. And that's true even if for example
23 licensing is not available.

24 There's a case, Dr. Seuss Enterprises versus
25 ComicMix. And I pulled the two page summary from
26 the Copyright Office database of fair use.

1 And there they found that although there
2 was a transformative purpose, under the fourth
3 factor the case failed. And the fair use defense
4 failed as a matter of law because there's potential
5 harm under the fourth factor to derivative works.

6 Even if they had not established that
7 they had licensed mashups. So, I think that the
8 lines have been drawn carefully.

9 The law is not quite as simple as some
10 folks would like it to be. But that doesn't mean
11 that you should discard it and just write the
12 simplest regulation possible.

13 MS. SMITH: So there's a lot of placards
14 up, which we'll get to. But since we -- just to stick
15 on you for one more question.

16 MR. WILLIAMS: Yes.

17 MS. SMITH: Then maybe people can
18 respond to the full of Mr. Williams' explanation.

19 But, there are some examples of specific
20 types of e-books that individuals would like to
21 create that would not arguably fall -- well, I guess
22 arguably may or may not fall within the e-books
23 example.

24 Do you want to comment upon those?
25 Whether you think they fall within the existing
26 exemption?

1 Or whether, if they were noncommercial
2 in a similar way to the remix videos, whether you
3 think they would qualify as fair use?

4 MR. WILLIAMS: I think I'd have to go
5 through them one by one. Most of the e-book
6 examples that I recall seem to fit kind of into the
7 e-books category.

8 The things like the Digital Dubliners
9 book seemed like an e-book to me. So, I don't recall
10 the specific examples that were right on the line.

11 But I'd have to go through them one by
12 one.

13 MS. CHAUVET: Okay. I do -- I'm going
14 to call on people, but I do also want to ask, because
15 we talked about how the language is confusing --

16 So, my question is, rather than
17 eliminate distinctions based on user/user, would
18 it be possible just to clarify the regulatory
19 language to make it -- to give more guidance?

20 And so Professor Turk, you've had your
21 placard up for a while. So if you could please maybe
22 respond to that. And then any other comments you
23 have.

24 MS. TURK: I feel like as the only
25 non-lawyer in the room, I'm not sure how much I
26 should weigh in.

1 MS. CHAUVET: Well, then maybe you're
2 actually be the best person. Because you're
3 representing a group of people who are not lawyers,
4 but who may have to look to this for guidance of
5 whether or not they could use or develop an e-book
6 or a film.

7 MS. TURK: So, here's the thing about
8 the remix community. We use what works.

9 And so from my point of view, I mean,
10 I have to say that when I was reading and trying
11 to parse all the various comments that were being
12 filed, I deal with complicated language, but not
13 this kind of complicated language. So that was --
14 that was a little bit of a heavy lift for me.

15 I was sort of mystified that screen
16 capture came up at all. I couldn't sort of
17 understand why that was even in the things that I
18 was reading.

19 Because the goal for a remix artist is
20 to get good quality video onto the computer. And
21 I guess I didn't understand why anybody would be
22 asked to use something that usually doesn't work
23 as well.

24 We had a little bit of an exchange about
25 this earlier. Does something have to go all the way
26 to the point of failure before you say, well, I need

1 to try -- I should try something else?

2 Can't you just know from past experience
3 or from other people's experience that this
4 typically doesn't work? And there's a thing that
5 does work, and works really well.

6 And there's a whole community that's
7 built up around trading info about how to use this
8 kind of source. Which is, you know -- ripping
9 Blu-Ray is not uncomplicated.

10 But it's straightforward. And it gives
11 you a file that goes into a program easily and can
12 be worked with.

13 And so I guess I don't -- I guess I don't
14 understand how we can't just say, if it's fair use,
15 get the video in a way that works for you, go.

16 I mean, and maybe I'm missing something.
17 But I guess from my point of view, if someone wants
18 to use screen capture, I would never say don't use
19 screen capture.

20 I wouldn't do it. Because in my
21 experience, it doesn't work very well. There might
22 be cases where someone wants to do it or needs to
23 do it, but I'm interested in the end result.

24 I'm interested in, can I make the point
25 that I want to make? Is the quality going to be clear
26 enough that someone's not going to immediately hit

1 the back button?

2 And we have evidence that shows that
3 because -- because video quality is going up, and
4 because people are watching things on bigger TVs
5 and screen resolution is higher, if something looks
6 amateurish, people don't watch it.

7 MS. SMITH: Can I ask you for a second,
8 since you're here as a remix person and the
9 non-lawyer at the table, can you speak to remix in
10 educational sessions?

11 Because we had a professor in D.C.
12 talking about K-12 remix activities, she thought
13 that screen capture might be perfectly adequate.

14 Do you have any insight into that?

15 MS. TURK: It might be. I mean, I don't
16 know. I haven't used -- I haven't taught remix in
17 those kinds of settings.

18 MS. SMITH: That's all right.

19 MS. TURK: So, I would, you know, I would
20 -- I guess again, I come back to -- I would never
21 want to disallow that if someone thinks that works,
22 that's great.

23 But I wouldn't want to impose that on
24 people who have, you know, whose workflow or the
25 access to the technology that they have or whatever,
26 you know, works better with a different format.

1 MS. CHAUVET: Mr. Taylor?

2 MR. TAYLOR: Yes. I just want to -- from
3 the last hearing you had asked us whether or not
4 we had any ideas on this. And we kind of just looked
5 at you like deer in the headlights.

6 And we have since gone back to the
7 clients. And we're glad to be -- or happy to report
8 that we are able to endorse the Joint Creators
9 proposal for simplifying the regulatory language.

10 I personally feel that the regulatory
11 language that you have there is an amazing
12 improvement over the actual statute and the
13 exemptions that are created there by Congress.

14 So, I mean, I don't think that what
15 you've done is very difficult to understand.
16 Particularly once you start looking at it.

17 I think that maybe you may want to
18 consider -- if it's so confusing for people -- is
19 to actually provide them some examples of what the
20 activities would look like.

21 There are many regulatory agencies that
22 are now actually providing like well, if you're
23 doing it like this, then you can do this.

24 And so -- and actually walk people
25 through some of the uses that have actually been
26 presented in this rule making.

1 MS. CHAUVET: Mr. Neill?

2 MR. NEILL: Sure. Okay, just a couple
3 of comments. Sticking on this concept of
4 simplified language, of whether the language is
5 confusing or not.

6 I just -- to start off, this is directly
7 to what Mr. Williams was saying. I'd like to just,
8 as everyone knows around this table, we're dealing
9 with a subset of non-infringing uses when we're
10 here.

11 We're not talking about infringing
12 uses. We're really around the table talking about
13 only what types of non-infringing uses we're going
14 to allow.

15 So, that kind of the --

16 MS. SMITH: I think we're trying to look
17 at a category of uses and determine within that
18 category whether they're likely to be
19 non-infringing in part. Right?

20 So that explains whether some of the
21 distinctions in the current exemption -- and we're
22 exploring whether it might be appropriate to drop
23 some of those and maintain the registered
24 recommendation -- that they're likely to be
25 non-infringing if that makes sense.

26 MR. NEILL: Yeah. So that came up at the

1 last hearing. And I -- this is a great moment to
2 sort of explore that, I guess.

3 What I'd say in response to that is that
4 on a day to day basis, working with -- I work with
5 a variety of folks.

6 They could be podcasters. They could be
7 YouTubers. They could be documentary filmmakers.
8 They could be fictional filmmakers.

9 And the question is, you know, all of
10 these folks, when they use a clip, the analysis
11 happens on each individual clip.

12 There's never a situation where someone
13 sends me a video with clips and I say, oh, those
14 eight clips that you used are generally well within
15 the bounds of fair use. Right?

16 Or this type of thing. So you have to
17 really, each clip has to be analyzed. And so that's
18 how a real fair use analysis happens.

19 And so that -- I would -- that particular
20 question, I think is a really challenging one to
21 engage in. To say well, because on a day to day
22 basis, there are folks who are doing a variety of
23 things, a variety of different types of videos and
24 individual uses can be fair use or not within fair
25 use regardless of the, you know, the type of --
26 regardless of if it's a documentary. Or regardless

1 if it's a YouTube video or some other format.

2 So I guess if just to continue the
3 thought though about filmmakers and confusion, I
4 think this -- what we're trying to avoid is this
5 sort of haplessly violating the law when folks are
6 simply making a video on a day to day basis.

7 And there's a variety of ways that it
8 can be confusing to folks. Right? There's folks
9 who can misidentify themselves as included in a
10 particular category.

11 Folks who can misidentify themselves as
12 not included. There are folks who are -- what's
13 fascinating now a days, and I think we benefit so
14 much in this proceeding in 2018 from 15, 18 year,
15 now 18 years of proceedings, several proceedings
16 now.

17 And we can look back and we can see that
18 there are -- and one of the things that's evolved
19 is many filmmakers unlike 18 years ago do a variety
20 of different formats. Right?

21 So they're not just a documentary
22 filmmaker. They may also do fictional. They may
23 also do other types of filmmaking.

24 So, it's fascinating that somebody
25 could make a documentary film. And they could fall
26 within the documentary film exemption.

1 But they could turn around the next day,
2 right, and use the clip in a way that might be fairly
3 strongly fair use. Yet be excluded.

4 And so what we're trying to deal with,
5 with the streamlined exemption is to try to include
6 the folks that have been included. Deal with some
7 of the gaps that are there.

8 And I don't think that just providing
9 some examples of activities that are okay is going
10 to help. Because we still have all these additional
11 layers we've added.

12 But what happens is, you know, folks can
13 either haplessly, or they have to work with their
14 lawyer to sort of interpret things that many times
15 have never been actually developed in case law.

16 So, some of these things have never
17 really been, you know, I don't think so. But --

18 MS. SMITH: So the Copyright Office has
19 said that we're not looking to break new ground on
20 areas of fair use.

21 If it's not developed in case law and
22 there's not examples, how would the Office have
23 regulatory authority to broaden the exemption the
24 way you're requesting?

25 MR. NEILL: I'm sorry? The first part,
26 I just --

1 MS. SMITH: It's not supported by case
2 law. And if there's no examples, how would the
3 Office go about this project?

4 MR. NEILL: If what's not supported by
5 case law?

6 MS. SMITH: Well you've just said that
7 there may be examples that there's not case law tied
8 to it. And you can't necessarily point to specific
9 uses.

10 So then it becomes a little tricky for
11 us to understand how we could endorse dropping all
12 these limitations. I mean, if someone else wants
13 to jump in, Mr. Lerner I guess.

14 MR. NEILL: Oh, well I think -- oh sure.
15 And I just had one more thing to say to that, I guess,
16 which is, obviously, you've got exemptions where
17 folks have said that the -- that they need to use
18 motion picture clips.

19 You have these expanded exemptions
20 where there's a good record, particularly in the
21 fictional filmmaking. And so the idea that there
22 needs to be evidence regarding harm, absolutely.

23 But the idea that those criteria need
24 to be included, and be extra sort of limiters within
25 the statute, you know, isn't really even -- I mean,
26 in fact in the 2015 recommendation, and I'll leave

1 it here, you all quote back to the 2000 -- you quote
2 back to the 2000 recommendation.

3 And in that recommendation there's
4 actually specific calling out and I know I'm
5 speaking specifically to our streamlined exemption
6 -- where it says the House Commerce Committee
7 literally says, you know, maybe motion pictures and
8 audiovisual work might be a bit -- might not be the
9 appropriate class.

10 But motion pictures could be the
11 appropriate category. And by the way, the next --
12 they go on in the next sentence of two to talk about
13 the fact that what wouldn't be appropriate is to
14 go too narrow, talking about westerns and comedies
15 and other particular types of genres.

16 And so in terms of whether it's
17 statutorily allowed, I think we've put a lot on the
18 record as to why it is.

19 And then, as evidence wise, you know,
20 we have a lot of evidence from all the parties who
21 are participating and trying to renew and expand
22 various video-related exemptions that I think
23 supports that as well.

24 MS. SMITH: Thank you. So Mr. Lerner is
25 following you. And then we'll go to Mr. Williams
26 just to -- we're trying to form a discussion back

1 and forth.

2 So, but we realized you've been waiting
3 too.

4 MS. CHAUVET: And Mr. Lerner, if you
5 could also please, it's kind of related to what Mr.
6 Neill was just talking about. It's just that
7 Congress has mandated that for the exemptions, the
8 particular class of work should be narrow and
9 focused.

10 So, I want to understand if we were to
11 eliminate distinctions based -- basically we're
12 talking about all audiovisual works essentially.

13 How is that going to be a focused and
14 sufficiently narrow class under our regulatory
15 authority?

16 MR. LERNER: Well, I think that
17 restricting to short portions for purposes of
18 criticism and commentary and the other restrictions
19 without having the subclasses --

20 MS. CHAUVET: But that goes to how the
21 work is going to be used. It doesn't go to the class
22 of work itself, and that is what we have to really
23 focus on for it to be sufficiently narrow.

24 MR. LERNER: Sure. But if you said --
25 if you said motion pictures that are then restricted
26 in use and -- and in other ways, for example, short

1 portions -- I don't have the language right in front
2 of me but short portions, criticism and commentary,
3 you have a class of motion pictures that is then
4 narrowed in those ways. And I think that absolutely
5 passes muster both under the plain language of the
6 statute and what Congress asked or what Congress
7 said in legislative history, in my view.

8 I also want to just say two points I think
9 are really important points to make here. We are
10 not actually asking you today to make -- to break
11 new ground when it comes to these uses. These are
12 criticism and commentary and it is not a
13 controversial proposition to say that many fanworks
14 are fair use because they make criticism and
15 commentary. The Register is on the record
16 recognizing this in previous proceedings in the
17 context of the non-commercial vendor's exemption.

18 Vidding is a form of fanwork. It's
19 comment. It's saying I'm going to play with the
20 material; I'm going to remix the material; I'm going
21 to juxtapose different characters, different
22 things, different themes in order to say something
23 new. We're not talking about in the Axanar case
24 just writing a sequel. We're talking about someone
25 saying, "I'm going to critique Harry Potter or
26 whatever by showing something -- by showing

1 something, elucidating something about that
2 particular work," right.

3 So again, the Register is on the record
4 for this but also, there's numerous cases supporting
5 this proposition that many fanworks are fair use.
6 We talked about this last hearing so I'll be very
7 quick. We have the RDR Books v. Warner Brothers
8 case about the Harry Potter Lexicon, Gone with the
9 Wind case --

10 MS. CHAUVET: But that case actually
11 wasn't -- all of it was not fair use because there
12 were poems --

13 MR. LERNER: Sure.

14 MS. CHAUVET: So just -- just go ahead
15 but just to be clear, that's not an example --

16 MR. LERNER: Yes.

17 MS. CHAUVET: -- saying that --

18 MR. LERNER: Yes.

19 MS. CHAUVET: -- fan fiction is always
20 fair use.

21 MR. LERNER: No. I'm not saying --

22 MS. CHAUVET: Okay.

23 MR. LERNER: -- fan fiction is always
24 fair use. Absolutely not just as -- just as not
25 all excerpts that are going to be used are fair use.
26 What I'm saying is that many fanworks are fair use.

1 And I think that's the proposition that is --
2 shouldn't -- I don't think it's controversial given
3 the case law and the record. Numerous cases -- so
4 we got -- on Harry Potter, you're absolutely right.
5 The court said this is fair use. This is
6 appropriate but in this case, there was too much
7 reproduction. That worked out great for the public
8 and for the ultimate resolution because what
9 happened to my understanding is that the author
10 republished the book according to the court's
11 instructions and no litigation ensued. So -- but
12 then there's also the Suntrust v. Houghton Mifflin
13 case.

14 I also want to address something that
15 Matt said about the way that we have given or offered
16 examples of fair use. Film makers come into our
17 offices -- Mr. Neill, myself, Mr. Donaldson -- come
18 into our offices and say, I want to do something.
19 They sit down with us and we say, Okay, here's how
20 you do it. Here's what works. Here's a three-step
21 test. We use a three-step test. We also use, of
22 course, the four factors of section 107. When we
23 come out of that, we have a much more
24 closely-articulated clear example --

25 MS. CHAUVET: Sure, but not everyone is
26 necessarily given that guidance by a specific

1 person. They're just looking at the regulatory
2 language and you are talking specifically in the
3 fan fiction examples, so you have the Dr. Seuss
4 Enterprises v. ComicMix, where you have that mash-up
5 --

6 MR. LERNER: Sure.

7 MS. CHAUVET: -- of Star Trek and Dr.
8 Seuss which has found, although it's
9 transformative, it was not fair use because of the
10 --

11 MR. LERNER: Sure.

12 MS. CHAUVET: -- adverse effects on the
13 derivative market and you have Ms. Tandy in the
14 previous hearing testifying, when I asked her about
15 fan fiction and commenting, she said all fan fiction
16 is commenting. And so that's not really the case
17 here. And I think we are having to define -- maybe
18 perhaps you can give us more guidance of if there
19 is a specific type of use here that is sometimes
20 fair use and sometimes not. Where do we draw the
21 line? And especially if you want to eliminate
22 distinctions based on use and user, that becomes
23 even more complicated it seems.

24 MR. LERNER: Sure. So, you know, our
25 contention is that some portion of fanworks are fair
26 use. That is what we have said in our -- in the

1 record. We aren't -- you know, we're not as a party
2 --

3 MS. CHAUVET: I don't think anyone's
4 disputing that --

5 MR. LERNER: -- asserting --

6 MS. CHAUVET: -- as much as how do we
7 identify them so that we can categorically write
8 regulatory language so that we are --

9 MR. LERNER: I think --

10 MS. CHAUVET: -- incorporating those
11 types of fan fiction.

12 MR. LERNER: Sure. So -- so, you know,
13 I think if you can say: "Are you providing criticism
14 and commentary? What are you elucidating? What
15 new meaning, to quote Campbell, new meaning and
16 expression are you adding with this fanwork?" And
17 if you can --

18 MS. CHAUVET: But you also -- but -- like
19 in the Dr. Seuss example I gave, it's not just
20 whether or not it's transformative. It's whether
21 or not there's an effect on the derivative market.
22 So how are you providing that type of --

23 MR. LERNER: Sure.

24 MS. CHAUVET: -- I guess, advice, if at
25 all? Or how should people look to, you know --

26 MS. SMITH: Yes. And to that point, why

1 should we drop the non-commerciality limitation if
2 that's -- that seems like that might be relevant
3 to how a transformative work might affect the
4 derivative market?

5 MR. LERNER: Well, I will defer to Mr.
6 Neill and Ms. Rosenblatt on that question of
7 non-commerciality. Getting back to the question of
8 effect on the market, I think in most of these cases,
9 there is not an effect on the market. A lot of these
10 uses are permitted and the question is I think, if
11 something is sufficiently transformative, numerous
12 courts have said that that does trump the market
13 -- the Dr. Seuss case --

14 MS. CHAUVET: That -- actually, not.
15 The Supreme Court has, numerous times, said that
16 the fourth factor, effect on the market, is the most
17 important factor, and I just referenced a case where
18 it was transformative.

19 MR. LERNER: Thank you, yes.

20 MS. CHAUVET: So again, the question is
21 -- we can't just look at whether or not something
22 is transformative. You also have to look at the
23 commercial effects of that work. And so my question
24 is how can we --

25 MR. LERNER: Yes.

26 MS. CHAUVET: -- provide enough

1 guidance and regulatory language so that we're not
2 crossing one line into the other type of infringing
3 --

4 MR. LERNER: I think the best way to do
5 that is to say is it -- first of all, if someone
6 is crossing that line, even if they are able to take
7 advantage of the DMCA, there is still a remedy for
8 fair use. So I think that takes care of itself that
9 way but also, for -- excuse me- remedy, for you can
10 bring an action for copyright infringement, and so
11 now you're just --

12 MS. CHAUVET: Sure. But we're trying
13 to get into the point where we don't -- I don't think
14 anyone here wants anyone to have infringing use,
15 and so my question is how can we provide guidance
16 --

17 MR. LERNER: Sure.

18 MS. CHAUVET: -- and regulatory
19 language so that they don't cross that line?

20 MR. LERNER: Well --

21 MS. CHAUVET: Not whether or not they
22 can go and be sued later.

23 MR. LERNER: -- I think that, you know
24 -- I think the best answer to that, in addition to
25 what I've said previously, one, I think that by
26 restricting it to short portions, that does make

1 a -- make a real dent in this potential issue that
2 you're identifying. And the other one, I think, is
3 that, you know, it's not going to mash perfectly,
4 necessarily, but that is okay because there is a
5 remedy for copyright infringement, right? So I
6 think you could say short portions is in there, and
7 that is going to cut down on the kind of harm that,
8 my understanding, the opposition is mostly worried
9 about, which is copyright uses, which is
10 counterfeiting and that kind of thing.

11 And I would also say that, you know,
12 perhaps you could say an articulable criticism and
13 commentary, for example. I would not go much
14 further than that because then what you're going
15 to be doing is adding more restrictions even then
16 for documentary filmmaking or something like that.
17 But again, I think this is mostly a phantom threat.
18 I think this is not something that is realistically
19 going to happen. If someone is going to be
20 committing copyright infringement and they've
21 ripped in order to commit copyright infringement
22 that they are claiming is criticism or commentary,
23 you know, you have statutory damages to tune of --

24 MS. CHAUVET: Sure -- sure. And --

25 MR. LERNER: -- \$150,000.00 as opposed
26 to \$3,500.00 on the DMCA.

1 MS. CHAUVET: Sure. Thank you. I'm
2 just trying to keep this a little short because we
3 are --

4 MR. LERNER: Yes, please.

5 MS. CHAUVET: -- running a little bit
6 short on time. Mr. Williams, would you like to
7 respond?

8 MR. WILLIAMS: Yes. Thank you. So I
9 think, you know, this kind of discussion about how
10 we got here and why there are certain categories
11 of users, you know, historically, the reason for
12 that is, as I think you understand, the Office was
13 denying these types of requests outright, because
14 it could not come to the conclusion that all uses
15 of audiovisual works for fair use or whatever you
16 want to call it was an appropriate class of works.
17 And then the Office decided that if it would specify
18 certain categories of users, and that was done at
19 the request of proponents, then maybe it could get
20 there. Maybe it could grant some exemptions. And
21 so that's what it's tried to do in order to try to
22 give proponents who were willing to categorize a
23 specific type of use in a specific way an exemption.

24 But when you try to disregard the current
25 boundaries, that effort falls apart and it gets a
26 lot closer to all uses of motion pictures for fair

1 use purposes, which is not an appropriate class of
2 works. And as you were discussing, there are
3 multiple opinions, some of them quite recent, like
4 TVEyes, that say even if it's transformative, you
5 still have to look at the fourth factor, and there
6 still is potential market harm. And I think that
7 that process has to almost be done twice in the
8 context you're operating in.

9 First, they have to establish that there
10 are a significant number of non-infringing fair
11 uses, and part of that is looking at the fourth
12 factor, potential harm. And even if you get to the
13 conclusion that, well, there are a significant
14 number of potentially fair uses here, even if, as
15 you've said before, a lot of things in the fan
16 fiction world are infringing for a variety of
17 reasons, it's often very hard to perceive what the
18 parodic or criticism -- parodic purpose or criticism
19 is. They often use full songs without licenses.

20 But even if you can decide that some of
21 them are not infringing, under section 1201, you
22 then have to look at well, if we grant this because
23 there's some non-infringing uses, what's the
24 potential harm to copyrighted works under the four
25 1201 factors. And the fact that there are licensing
26 options for fictional filmmakers and for fictional

1 e-Book authors and potential markets in other spaces
2 comes into play once again. And so I think that's
3 why you've drawn the lines the way you have, and
4 I think that that makes a lot of sense.

5 And in Washington, we talked about some
6 what does criticism and comment mean. Is it
7 criticism and comment about the specific work that's
8 being copied or is it something broader? And I
9 think Jack's response was it needs to be much broader
10 than that. And while I wouldn't say that it's never
11 fair use to make criticism and comment in a broader
12 context, that, under all of the cases, is a harder
13 sell than when you're criticizing the work directly.
14 And I think that's why you've included the types
15 of works you have, because they're the types of works
16 that are speaking about the things being commented
17 on specifically. And these other categories, the
18 examples in the record, while a lot of them are very
19 interesting, they don't include commentary about
20 the work itself.

21 MS. SMITH: Professor Rosenblatt, if
22 you want to talk about that, and in particular, it
23 would be helpful for us to understand. To me,
24 there's almost two projects. There's whether it is
25 appropriate or necessary to clarify the existing
26 exemptions as they are, and also whether they should

1 be broadened, which you could see those projects
2 somewhat overlapping. But if there are examples of
3 things which are not included that need to be
4 included as part of that, that could be helpful.

5 MS. ROSENBLATT: Sure. So thank you
6 for that. I think one of the chief confusions, to
7 sort of return to the question about what are people
8 confused about at all -- one of the chief confusions,
9 and I think Art alluded to this, is that people are
10 confused about whether they fit into the type of
11 creator category that distinguishes between these
12 existing exemptions. And so we're not actually
13 here to re-litigate remix video, as you know, but
14 rather to talk about sort of where other things might
15 fit in, like multimedia e-Books, and also like, for
16 example, uses that attorneys might make in
17 litigation. So there's a great example. It's
18 become quite famous. There's a documentary about
19 it of somebody who was exonerated by footage showing
20 that they were at a baseball game during the time
21 when they were alleged to have committed this
22 capital crime. Or things like makeup tutorials or
23 things like YouTube reviews of movies.

24 So where do things fit in? There's a
25 great example I just came across yesterday, a makeup
26 tutorial that juxtaposes someone's face to a bit

1 from a movie. Is that remix video? It's certainly,
2 I think, a use for criticism and commentary. It's
3 using a short portion.

4 Also not included but something that
5 people have struggled with is audio-only uses of
6 audiovisual works. Increasingly, we see
7 podcasters who want to rip to get high-quality
8 audio, because people expect high-quality audio in
9 podcasts.

10 MS. SMITH: Could you provide -- point
11 us to examples of these e-Books or podcasts that
12 might not fall under the current remix exemption
13 that those people want to do, because I will say
14 like this morning, I went to look onto the Ren'Py
15 site -- I don't know if I'm saying that right --
16 and it was a lot of anime material, so I didn't really
17 see an example of uses or -- and I don't really see
18 many submissions of, you know, "here's my pitch,
19 here's what I'm planning to do but I can't do it."

20 MS. ROSENBLATT: So I think we can point
21 to those. I think we would do that in another
22 submission because I don't have them off the top
23 of my head. But I also think that part of what's
24 happening is there are a lot of questions about this
25 rather than concrete examples. So, for example, on
26 Quora, you've got a question that says, "Is it

1 illegal to use the audio for a movie trailer in my
2 podcast?" And the answers are all over the map.

3 Or, you know, Audacity, which is a
4 podcasting sound editing software where people on
5 forums say, "Well, if I want to get high-quality
6 audio, I have to rip first because Audacity won't
7 let me put this in," right. So it's not specific,
8 right. I didn't have specific podcast examples off
9 the top of my head but I have examples of people
10 making these questions. And that's something that
11 we could certainly make a follow-up submission on
12 if that's something you're interested in.

13 I'd also say here -- you asked about sort
14 of what can be done to clarify in a way that doesn't
15 open this up to all uses of clips for fair use, which
16 I understand isn't where you want to go with this,
17 and so I think right now we have the short portions
18 limitation in there. We have the, it must be fair
19 use limitation in there. We have the criticism and
20 commentary limitation in there. And right now, the
21 existing exemption has nothing in it that addresses
22 factor four. If you want it to address factor four,
23 we can take a cue from Canada's fair dealing
24 exemptions and say it does not usurp the market of
25 the copyright holder and include that in an
26 exemption, or you can more closely track something

1 specific.

2 So I think there are ways of making it
3 clear that don't involve chilling things that are
4 likely to be fair uses but aren't in one way or
5 another --

6 MS. CHAUVET: But one way that we do
7 that, would it be possible to, rather than making
8 it -- completely eliminating use or user but maybe
9 to exclude certain uses, but that --

10 MS. ROSENBLATT: I'm not sure I
11 understand the question.

12 MS. CHAUVET: So right now, basically,
13 you kind of have the use and user dictating whether
14 or not an exemption can be used, and you're saying
15 that that should be eliminated. Our question is if
16 it's possible, if there are certain types of uses
17 that fall more into the infringing side, if there's
18 a way to identify those and to exclude those types
19 of uses in regulatory language, which would provide
20 more guidance but it also might address some of the
21 concerns of opponents?

22 MS. ROSENBLATT: Yes. So I just want to
23 -- I want to clarify. I think we're not actually
24 arguing to eliminate use and user. We're arguing
25 to eliminate user. But in fact, limitations on the
26 kind of use are something that we feel comfortable

1 with.

2 MS. CHAUVET: Well, you kind of are
3 because you're talking about you're eliminating --
4 we're not talking about filmmaking anymore, we're
5 not -- so I feel like when I'm talking about use,
6 that's how I'm envisioning it.

7 MS. ROSENBLATT: I see, okay.

8 MS. CHAUVET: So you're basically
9 essentially collapsing all of that. So my question
10 is if there's a way to identify specific use which
11 is maybe more problematic, which maybe is on the
12 gray area which would be -- fall more on the
13 infringing side -- if there's a way to identify that
14 to exclude that type of use in regulatory language
15 which might provide more guidance?

16 MS. ROSENBLATT: This may not be a very
17 satisfying answer but I actually think the things
18 that are unlikely to be fair use are actually things
19 that are unlikely to use short clips.

20 MS. CHAUVET: Well, no one's asked to
21 take that limitation out, so is there another way
22 to add some other type of language?

23 MS. ROSENBLATT: Sure, but that's sort
24 of where I'm going with this is -- I think we may,
25 to a large extent, already have gotten there when
26 we have these --

1 MS. CHAUVET: But the opponents have
2 said that's basically not enough. So my question
3 is if there's a way to maybe without completely
4 broadening it to include all users and use, to make
5 it a little bit more finite in a different way?

6 MS. SMITH: I wonder if you could also
7 -- maybe another way to think about it, as Mr.
8 Williams keeps pitching certain language, which now
9 Mr. Taylor has said they like, do you think that
10 would simplify the projects; they had a submission,
11 a sample of language in their opposition, or I think
12 the Office has floated what about separating out
13 educational uses on the one hand and derivative uses
14 on the other so it's a little more usable to the
15 non-lawyers who are looking to engage in that.

16 MS. ROSENBLATT: I think separating
17 educational from derivative uses is not
18 unreasonable, but I also think that it's actually
19 really hard to separate those because a lot of
20 derivative uses are educational and --

21 MS. SMITH: That might not be mutually
22 --

23 MS. ROSENBLATT: -- so --

24 MS. SMITH: -- exclusive but you can say
25 "do I fall under this, do I fall under that?"

26 MS. ROSENBLATT: Right -- right. So I

1 can't speak -- I actually don't, off the top of my
2 head, have their language, so I don't feel
3 comfortable speaking directly to whether we endorse
4 it. That's something though --

5 MR. LERNER: Right.

6 MS. SMITH: Okay.

7 MS. ROSENBLATT: -- we could return to.

8 MS. SMITH: Thank you. Because we're
9 getting short on time, we're going to try to tighten
10 things up, and we do want to talk a lot about, I
11 think --

12 MS. CHAUVET: Licensing.

13 MS. SMITH: -- licensing next. Do -- so
14 do any of the proponents wish to comment on the
15 language Mr. Williams pointed to? Mr. Neill?

16 MR. NEILL: I'm sorry, could you just
17 clarify which language here so I can --

18 MS. SMITH: So they said if you were, the
19 Office, I guess, was inclined to simplify it -- this
20 is on -- it's not on -- I don't have the page --
21 but their submission had some proposed language of
22 how to do it that they say is simpler although
23 perhaps not as simple as the EFF/OTW/NMR proposal.

24 MR. NEILL: Sure. You know, I think
25 that that language had some problems. I think it
26 was probably at least two, almost two and a half,

1 three times as long as what we proposed. I think
2 that some of the language used in there was a bit
3 beyond what I think makes the language accessible
4 to folks who are not attorneys.

5 MS. SMITH: Can you point to any
6 specifics?

7 MR. NEILL: I think we already have some
8 on the record in our reply about that, about why
9 that's -- but I don't have the 332 words in front
10 of me so I can't at this point. I'm happy to discuss
11 that further but I can't point to anything at this
12 moment. But I know that for our reply comment, we
13 reviewed that. We spoke about it in our reply
14 comment.

15 I just -- it's related to that, though.
16 I think, you know, Mr. Williams brought up the fact
17 that you then have to look at what the harm is. And
18 it was interesting that we sort of skipped over
19 quickly, sort of -- well, I think it's a really --
20 and you were asking sort of how do we better clarify
21 this, how do we better craft this, and I think that
22 part of that determination, it's absolutely a tough
23 thing to do, but I think that it's a really good
24 question to ask what is the harm that's on the record
25 after so many proceedings. And so that's --

26 MS. SMITH: That is a great segue to Mr.

1 Sheffner I believe. Do you want to speak about what
2 might be your perceived harm if these exemptions
3 were broadened in this way?

4 MR. SHEFFNER: Sure. Ben Sheffner. So
5 the fourth fair use factor has reared its head over
6 the last few minutes, and I think there's been sort
7 of a theme running through some of the proponents'
8 presentations that there's really not a viable
9 licensing market in some of these areas for clips.
10 And I just want to spend a couple minutes talking
11 about that licensing market and providing some
12 follow-up.

13 MS. CHAUVET: And I definitely want you
14 to do that. I think what will be very helpful in
15 that context because in the 2015 rulemaking, the
16 Register noted that the record at that time did not
17 suggest that licensing was a viable alternative.
18 And so I think if you could speak to why the market
19 has changed since that rulemaking, I think -- and
20 how you were going to talk right now, I think it
21 would be helpful to add that context.

22 MS. SMITH: I think it's -- also, it's
23 tied to specific uses, too, so think about that,
24 right? There's some --

25 MS. CHAUVET: Right.

26 MS. SMITH: -- somewhere where there is

1 a licensing market and there are some places where
2 there may not be.

3 MS. CHAUVET: Yes. I should clarify
4 that. It was not a viable option for purposes of
5 comment and criticism. That's where --

6 MR. SHEFFNER: Sure. So -- and just as
7 a preface to what I'm about to discuss, let me just
8 say the MPAA represents six major movie studios,
9 and it's a little bit more complicated than that
10 because each of these major studios have different
11 divisions. They might have a movie studio, they
12 might have a television studio. Some of them have
13 news organizations and some of those companies, the
14 clip licensing function is centralized. In others,
15 they will have actually different clip licensing
16 functions for those different divisions. And, you
17 know, the studios all have different sort of
18 philosophies and business practices as to
19 licensing. So I'll be speaking in generalities and
20 in the aggregate, but I think you can -- there's
21 still some important take-aways.

22 Overall, every single one of the six
23 studios that we represent licenses clips. They all
24 have websites that you can go to, get information
25 about how to do this, and in most cases, it can be
26 all done online either through forums that they make

1 available, through email. They all provide phone
2 numbers.

3 One thing I wanted to address -- I think
4 it had come up in one of the filings or possibly
5 in DC -- is that there was the argument that one
6 of the studios only conducted these licensing
7 negotiations or interactions by fax. I think there
8 was a reference in an old FAQ to a fax number, but
9 if you actually look sort of more comprehensively
10 at the website, you'll see that there's actually
11 email and phone as well. So there's no fax-only
12 requirement.

13 MS. SMITH: Can you talk about -- I think
14 there was testimony in DC that some of the requests
15 get ignored, particularly if there is the sort of
16 smaller users or low dollar value, that it's not
17 really a market that the studios, as varied as they
18 are, may be interested in pursuing?

19 MR. SHEFFNER: Sure. So I did go back
20 and sort of survey all six of the studios to address
21 some of those issues. So one point was -- I think
22 there was the representation or the argument made
23 by some of the proponents in DC that some of the
24 studios, you know, have a policy that they do not
25 license to individuals; they only license to other
26 businesses. And here's what I found. None of the

1 companies have a policy where they refuse to license
2 to individuals. Now as a practical matter, the vast
3 majority of licenses are issued to businesses.
4 They are the ones that sort of have the wherewithal.
5 They're engaged in a project. It's usually not just
6 an individual who says, I'm going to produce, you
7 know, a documentary or a movie or TV show. They are
8 part of a company. So the vast majority of license
9 requests do come from business entities.

10 Nonetheless, they do, from
11 time-to-time, receive requests from individuals.
12 I will say that in a significant portion of those
13 cases, the individual is simply not able to afford
14 the price of the license. That doesn't mean there
15 is not a viable market. I mean I just was thinking
16 about how to address this and just to give you a
17 brief sort of analogy, just north of here is the
18 neighborhood of Bel Air, one of the most expensive
19 neighborhoods in Los Angeles. There is a very
20 viable real estate market there. People every day
21 sell houses for \$5 and \$10 and \$15 million apiece.
22 I can't participate in that market. I can't afford
23 that. They wouldn't even let me in the door because
24 they usually, you know, require proof of funds
25 before they'll even show you the house. Now I can't
26 participate in that market but that doesn't mean

1 there's not a viable real estate market in Bel Air.

2 MS. SMITH: If we tick through some of
3 the uses that we're talking about here to see whether
4 there's a market, like do they -- is there licensing
5 to remix artists, perhaps commercial remix artists,
6 right, something that wouldn't be included? Or
7 what about multimedia e-Books or things like
8 fictional uses that we're being asked to grant an
9 exemption for on the grounds that some of these uses
10 are likely to be fair or many of them may be likely
11 to be fair, how should we think about the 107
12 analysis when evaluating those comments?

13 MR. SHEFFNER: Sure. So there is
14 licensing in all of those categories you mentioned.

15 MS. SMITH: In paragraphs?

16 MR. SHEFFNER: Some of them more than
17 others. I mean, for example, e-Books --

18 MS. SMITH: Are the criteria the same
19 for the types of licenses?

20 MR. SHEFFNER: You know, again, it's
21 really hard to generalize because all six studios
22 and even within those studios may have different
23 policies. But again, none of them said we have an
24 absolute policy we will not issue licenses in those
25 areas.

26 MS. SMITH: Do you know if it's a

1 frequent occurrence; is it something material to
2 the business?

3 MR. SHEFFNER: I would say -- I can't
4 represent to you that it's a frequent occurrence
5 in those specific categories. You know, people
6 make the comment, for example, that e-Books is a
7 -- is sort of a nascent market. There have been
8 licenses issued for e-Books but again, it's a
9 relatively new thing. There was a lot of -- there's
10 some experimentation going on. There are licenses
11 issued in that. You know, if you look at some of
12 the foreign licenses that are available on the
13 websites, they'll talk about things like all uses
14 and, you know, all means all, so there's no
15 restriction -- or no prohibition against issuing
16 licenses in some of these categories.

17 You know, I just -- there are sort of
18 -- it's relatively unusual for licenses to be issued
19 to individuals. However, one thing that's not
20 terribly unusual is, say, remix videos that are
21 posted to YouTube. Some of those may be fair uses;
22 some of them may not be. But for example, the
23 content ID system in YouTube is able to identify,
24 you know, works that are owned by our studios and
25 monetize them. Those are not individually
26 negotiated licenses but the effect is that a lot

1 of those uses, including a lot of uses that are not
2 fair uses, are licensed, even though, again, it's
3 not, you know, A going to B and saying, "May I please
4 have a license."

5 MS. SMITH: So is that an example then
6 of maybe an alternative to getting the license? I
7 mean like then why -- it seems like in some
8 instances, you're okay with not licensing material
9 because you're still able to make money on it? Is
10 that --

11 MR. SHEFFNER: Well, I mean --

12 MS. SMITH: -- what I'm understanding?

13 MR. SHEFFNER: -- it's a
14 non-traditional kind of license. I mean, you know,
15 you might think of a directional license as, you
16 know, the --

17 MS. SMITH: Is it really a license or are
18 you just making money from their use?

19 MR. SHEFFNER: Well, it essentially --
20 it's a -- there's a license agreement with YouTube.
21 It's a little bit complicated because there's
22 multiple entities involved. There's a license
23 agreement between the studio and the copyright owner
24 and YouTube that essentially tolerates certain
25 uses. And I think that's actually -- you know,
26 there's a broad category of uses on YouTube and other

1 places that are probably not fair uses that,
2 nonetheless, our studios tolerate because the cost
3 of enforcement is too high to go after the -- even
4 if in the aggregate it would have some substantial
5 monetary effect. Or there's this mechanism which
6 is, you know, again, a sort of new business model
7 where the work is identified and essentially a
8 license is granted to YouTube in order to allow that
9 use, even if it otherwise might have been
10 infringing.

11 MS. SMITH: Can we ask you a couple more
12 factual questions about the licensing market? Do
13 you have a sense of the overall size, either on an
14 individual or aggregate basis, for the studios?

15 MR. SHEFFNER: Yes. So I can represent
16 that in the aggregate, the studio issues several
17 thousand clip licenses a year. I'm not able to give
18 you much of a breakdown, again, because there's --
19 the way that the different studios --

20 MS. SMITH: Whether they're for --

21 MR. SHEFFNER: -- conduct their own
22 businesses. So I can't tell you how many of those
23 are fiction versus non-fiction versus educational,
24 et cetera, but in the aggregate, several thousand
25 clip licenses per year.

26 MS. SMITH: And do you have a sense of

1 the monetary value?

2 MR. SHEFFNER: I can't give you a
3 number.

4 MS. SMITH: Okay. And -- but you think
5 each of those licenses would hit each of those
6 buckets although you're not sure what proportion?

7 MR. SHEFFNER: Yes. Absolutely, there
8 are licenses issued for fictional films, for
9 non-fictional films, for documentaries, for
10 e-Books, and for educational uses.

11 MS. SMITH: Do you know given -- this is
12 a filmmaking specific question but Mr. Lerner's
13 submission has a variety of films -- or Mr.
14 Donaldson, I guess, an index of films that they would
15 like to make that are fictional uses of clips,
16 whether the studios you represent have been
17 approached to license any of those?

18 MR. SHEFFNER: I can't tell you off the
19 top of my head whether those specific examples in
20 Mr. Lerner's submission, whether they were actually
21 approached.

22 MS. SMITH: Do you have a -- you may not
23 know this either but do you have a sense for whether,
24 of all those examples, a non-disparagement clause
25 would have prevented the licensing of the clips?

26 MR. SHEFFNER: Yes. So again, I can't

1 answer that as to the specific examples. I mean
2 there are examples in the record of the form licenses
3 that do include those non-disparagement clauses.
4 I obviously don't deny that. What I would say is
5 that the non-disparagement clauses have been
6 discussed in the last several cycles. The Office
7 or the Librarian, nonetheless, issued regulations
8 that, you know, after having heard evidence about
9 those. I'm not aware of any change in the record
10 since those previous cycles, so I'm not sure what
11 the justification would be for sort of giving
12 different weight to the --

13 MS. SMITH: I mean I think we're being
14 asked to consider different types of uses, different
15 films that people want to make, so we're looking
16 at different projects.

17 MR. SHEFFNER: Yes.

18 MS. SMITH: So if you have any opinions
19 on those?

20 MR. SHEFFNER: Well, again, they're
21 there. They're -- those are in the record. I would
22 say -- one other thing I'd say, though, is that this
23 is not -- it's not really an issue about 1201 itself.
24 This is a contractual issue. So if it was somehow
25 --

26 MS. CHAUVET: Well, but if it's -- I

1 guess it is an alternative to circumvention if the
2 use that they want to make is prohibited under the
3 contract?

4 MR. SHEFFNER: Right.

5 MS. CHAUVET: So then it really is no
6 longer -- so I think we're trying to ask these
7 questions to see whether or not it's really a
8 feasible alternative.

9 MR. SHEFFNER: Yes. So, you know, I
10 don't think there's much evidence in the record that
11 these non-disparagement clauses, which are -- you
12 know, vestiges probably existed in these contracts
13 for many, many decades -- have had any substantial
14 impact on people's ability to make fair uses.

15 MS. SMITH: Can you put the question
16 another way and if the proponents were to get the
17 exemption they requested, is that likely to have
18 -- what effect is that likely to have on the market
19 for copyrighted works, or the availability of
20 copyrighted works from your perspective?

21 MR. SHEFFNER: Well, again, the clip
22 licensing market is a real market. It's not the
23 biggest part of this. I won't represent that it's
24 the biggest part of the studios' revenue stream but
25 it's a significant revenue stream. The studios all
26 have people who are -- this is their job, they

1 license clips.

2 I did think it's important, you know,
3 in the fair use analysis, some -- you know, the
4 defendant will always make the argument, you know,
5 oh, it's just this one little clip in this one work
6 which is not, you know, the biggest deal in the
7 world. That's not going to have any impact on the
8 revenue of, you know, a multibillion dollar movie
9 studio. But that's not how the fair use analysis
10 works under the law. The law says, you know, you
11 have to look at if in the aggregate this kind of
12 activity were permitted, would that have a
13 substantial effect on the market. I think it
14 absolutely would. I mean the clip licensing
15 revenue, you know, would simply dry up if the --
16 if all of those kinds of activity -- if all fan uses,
17 if all, you know --

18 MS. CHAUVET: But we're not actually --
19 I mean just in fairness, we're not talking about
20 all uses, right.

21 MR. SHEFFNER: Sure.

22 MS. CHAUVET: We're specifically
23 talking about clips for what arguably would be fair
24 use because it's for purposes of comment and
25 criticism and proponents, in the previous hearings,
26 talk about "well, if the use is fair use then why

1 should I have to pay to license something if it's
2 fair use." So I don't know if you have a response
3 to that.

4 MR. SHEFFNER: Well --

5 MS. CHAUVET: Really, there's no
6 market, right? They're saying if I don't need to
7 get a license to it, I'm not really affecting the
8 market by not getting a license and engaging in fair
9 use.

10 MR. SHEFFNER: Right. But I think as
11 Mr. Williams pointed out a few minutes ago, the
12 section 1201 itself requires that you look at and
13 say, well, even if certain uses might be fair, would
14 allowing the exception to cause substantial harm
15 to the market. And I mean I do think it's fair to
16 say we also need to look in the aggregate. The more
17 and more and broader and broader the exceptions,
18 the more sort of normalized the activity of breaking
19 DRM becomes. That overall has a significant impact
20 on the studios' willingness to sort of engage and
21 do business models, etcetera. I mean I know you
22 heard testimony in DC and I think you'll hear it
23 again tomorrow from a representative of Disney who's
24 going to be talking about some of the new business
25 models. The studios, when they decide to enter any
26 of these new business models, whether it be things,

1 you know, like, you know, Movies Anywhere or any
2 of these new online distribution platforms, they
3 are asking can we keep the works protected, can we
4 keep the works protected. And --

5 MS. CHAUVET: Sure. But also, one of
6 your new business models is the YouTube one, right,
7 which is arguably they're not really being protected
8 in the traditional way that maybe you would be with
9 Movies Anywhere. So I guess my question is in terms
10 of monetizing the YouTube business model versus your
11 traditional clip licensing, if you have an idea of
12 which makes more and how much more, or maybe as a
13 percentage of the YouTube market that you're -- I
14 don't know what a percentage of the entire.

15 MR. SHEFFNER: Yes. For the -- I really
16 don't have sort of monetary statistics that I can
17 cite to you about the size of these particular
18 markets. But I mean again, I think the overall
19 point is that the more and more and more you expand
20 the ability to rip DRM, the, I think, to break DRM,
21 the less effective a tool for protection of
22 copyrighted works it becomes, and the less willing
23 studios are to engage in and do the licensing
24 practices' new business models that do depend on
25 the protection of the statute.

26 MS. SMITH: And so one more follow-up

1 question on that. In 2015, there was a gentleman
2 from Fox and he wasn't able to provide specifics,
3 I guess, about the effect that granting a broader
4 exemption or granting any exemption in that case
5 would have had upon the piracy of works. Are you
6 able to say anything more on that -- how real is
7 this risk?

8 MR. SHEFFNER: It's hard to answer sort
9 of that general a question and I think people use
10 the word piracy in different --

11 MS. SMITH: I guess I'm referring to as
12 opposed to -- I could have gotten a license and it
13 said they didn't take a license, right, use this
14 --

15 MR. SHEFFNER: Sorry?

16 MS. SMITH: Well, on the one hand, we've
17 been talking about for the specific use of the clip,
18 they could have gotten a license and maybe some
19 people won't, right, and that it might not be fair
20 use is, I guess, one potential effect on the
21 availability of copyrighted work so that's one
22 interpretation of it. But then secondly, is there
23 a concern that there is piracy of, I guess, entire
24 movies or is that anything separate that we should
25 be looking at when we're considering the
26 availability of copyrighted works under 1201?

1 MR. SHEFFNER: Well, I do think it's
2 fair. I mean it's this point that I made a couple
3 of minutes ago about sort of normalization of the
4 ripping activity. I mean as has been pointed
5 before, I mean the Office has said that the
6 exemptions need to remain narrow and focused, and
7 the -- you know, the broader and less focused they
8 become, the more it becomes not sort of a specialized
9 activity to rip for a specific purpose but, you know,
10 so the word gets out that, you know, ripping DRM
11 is a totally legitimate thing to do whenever you
12 want to engage in something that you think you should
13 be able to get to do.

14 And I think, you know, one of the reasons
15 that we come here, you know, in our view, not to
16 make the exemptions broader and less focused every
17 year is that we are concerned about the exemptions
18 swallowing the rule and, you know, pressure building
19 or making it easier and easier and easier to rip
20 or to break DRM which, again, has an impact on, you
21 know, the studios' decision-making process in
22 whether to engage in certain new distribution lines.

23 MS. SMITH: Okay. And it sounds like
24 there is nothing quantifiable you can offer us?

25 MR. SHEFFNER: It's difficult to
26 quantify. It's difficult.

1 MS. CHAUVET: Okay. Mr. Neill, you've
2 had your card up for a while.

3 MR. NEILL: Thanks. So, yes, in past
4 proceedings, you know, this discussion about piracy
5 came up and piracy was discussed generally, but I'd
6 just re-emphasize that we haven't seen direct
7 evidence why an educator or an artist or a film
8 maker's use of a short clip is going to create
9 piracy. And it's interesting that the -- if you
10 focus in on what the harm is then that the -- that's
11 being mentioned is being concerned about, so this
12 -- the Joint Creators, movie studios are able to
13 make money off of infringing uses through YouTube,
14 and so we talked about that, okay, but nobody here
15 is talking about, again, infringing uses. We are
16 as was mentioned, we're talking about
17 non-infringing uses.

18 And so the question is there's a --
19 basically an unidentified harm that these -- there's
20 an unsubstantiated harm that's claimed from folks
21 who are making non-infringing uses. And if there's
22 any harm that's claimed, it's the harm that we, as
23 movie -- you know, folks that are movie studios,
24 can't make -- can't get a license from folks who
25 are making otherwise non-infringing uses.

26 MS. CHAUVET: Well, what about the -- I

1 believe Mr. Williams, what he said is under the
2 fourth 1201 statutory factors, so it's not even just
3 the fact that it's non-infringing fair use but we
4 also have to consider a second time, if there's going
5 to be an adverse effect on the market. So what about
6 the effect on the derivative works market or on the
7 motion clip licensing market? So are you saying
8 that there isn't an adverse effect, or I just don't
9 know what your--

10 MR. NEILL: I think --

11 MS. CHAUVET: -- response would be.

12 MR. NEILL: -- I -- you know, I imagine
13 Professor Lerner has had this experience but I've
14 worked with folks who have both unlicensed and
15 licensed clips in their film, so you certainly have
16 folks who do both, and so there are certainly folks
17 who are -- you know, when a use is considered maybe
18 not appropriate to qualify or if we think it would
19 be a better idea to get a license, that certainly
20 happens. So those licensing markets are, you know
21 -- well, they're available to folks who want to make
22 uses that would be otherwise infringing. The
23 question is why are we concerned about making sure
24 that folks will license a non-infringing use.
25 That's kind of -- that's the question.

26 And we have, I think -- as Betsy

1 mentioned, when you look at our proposal, the
2 streamlined proposal, there are some specific
3 efforts we make. And as far as this idea that
4 there's going to be some sort of slippery slope,
5 that folks are going to suddenly say, oh, my gosh,
6 there's so much -- it's suddenly totally fine to
7 use DRM, our language is linguistic -- the words
8 are almost identical to past -- I just point out
9 they're almost identical to past exemptions but for
10 the removal of the user and the sort of similar
11 access controls language. And that's been around
12 now since at least 2009, the first ones, right? So
13 it's been nine years and we don't -- you know, I
14 don't think there's any evidence that's been offered
15 that there has been some slippery slope that there's
16 some vast expansion in circumvention.

17 MS. CHAUVET: Okay. Thank you. So Mr.
18 -- we're running out of time. I'm just warning
19 everyone now and we're still going to try to zig-zag,
20 so Mr. Williams and Mr. Lerner.

21 MR. WILLIAMS: Okay. Yes, thanks. I
22 just wanted to follow on a few of the things that
23 Ben was discussing. So one of the questions was are
24 licenses available to individuals, and I think, as
25 he said, there's no studio policy against that. We
26 do have some specific cites in the record that when

1 you to go to them, NBC archives site, the CNN site,
2 a number of the other sites, it's -- they don't ask
3 you to verify that you're a, you know, registered
4 corporation or anything like that before they issue
5 a license. So there is evidence of that market.

6 In addition to that, as we were
7 discussing with the *Dr. Seuss v. ComicMix* case,
8 there is case law that says that even if a plaintiff
9 doesn't have evidence that it has entered the mash
10 up market, that it is still a potential market as
11 long as it's licensed other types of uses of its
12 work. And so that, I think, plays into your
13 analysis.

14 On the e-Books category specifically,
15 a number of the sites that we refer to do have
16 publishing as a category or do have all media uses
17 as a category.

18 MS. SMITH: Can you get just publishing?
19 If you don't need to buy all uses, can you buy just
20 for an e-Book or just for a podcast?

21 MR. WILLIAMS: So there are some of the
22 sites that specifically have publishing as a
23 category. I think in other instances, you would
24 probably have to call the phone numbers and talk
25 to the people but in every instance, that is
26 available, either phone numbers or direct personal

1 email addresses.

2 MS. SMITH: Do you know if it's
3 available with -- I mean I assume there would be
4 a price differential if you don't want to exploit
5 the property in as many media it would go down?

6 MR. WILLIAMS: I suspect that's true.
7 I mean I think the question is about price, although
8 completely valid and about aggregate revenues --
9 although completely valid are very difficult to
10 answer when you're representing a number of
11 different competitors who treat that information
12 as proprietary. So it's hard to get into the very
13 specific numbers but yes, I suspect that's true.
14 And if you go on the CNN and NBC archives sites,
15 for example, it will give you a price almost
16 immediately for almost any type of different use
17 that you plug in for a specific clip. So you
18 actually get a popup window. You select the clip.
19 You say here's the uses I want. I think in some
20 instances, the category of use might just say "all
21 uses" depending on the clip at issue but you can
22 do that. And then there's the follow-up phone
23 numbers or email addresses.

24 MR. CHENEY: Mr. Williams --

25 MR. WILLIAMS: Yes.

26 MR. CHENEY: -- if I could interrupt

1 just a second? I don't want to make you lose your
2 train of thought but --

3 MR. WILLIAMS: Sure.

4 MR. CHENEY: -- in those clips, those
5 are clips that are already on the website. Can the
6 individuals that are coming to the studio say, "I
7 would like to make fair use of this 30-second clip.
8 I don't see it on your website. Can I use that?"
9 Is that service available in this clip service that
10 you're talking about?

11 MR. WILLIAMS: Yes. So these websites
12 are interactive sites that I think are designed to
13 make it as user-friendly as possible. Not every
14 copyright owner has one but there are a number in
15 the record. They also have contact points on the
16 same websites, so if you don't find what you're
17 looking for, you follow-up with someone else.
18 Whether in every instance each studio would agree
19 to go find the clip that you're looking for, I mean
20 it depends, I guess, on how much information you
21 can provide about what you want versus you just
22 saying well, I'm kind of hoping to find a clip that
23 has so and so in it from six years ago. I don't know
24 what each studio would do in response to those
25 individualized requests, but they do make contact
26 points available. Frequently, they'll segregate

1 them by business unit and by copyright owner,
2 because as Ben was saying, the news division might
3 be different from the studio that's involved in
4 narrative filmmaking, might be different from the
5 studio involved in producing a television
6 production series, so they do segregate those out
7 as necessary.

8 On e-Books, I just wanted to emphasize
9 that this is a market that the studios are already
10 in. There's a lot of enhanced edition e-Books.
11 There's not as many as maybe you would expect at
12 this point given it's been an idea that's been out
13 there or a long time, but there are a number I can
14 point you to. A few of these are in our comments,
15 a few of them aren't. There's an enhanced edition
16 Harry Potter series. There's an enhanced edition
17 Game of Thrones series. Those don't necessarily
18 use clips from the actual motion pictures. They
19 introduce kind of new animation that's alongside
20 the fiction, but you could easily imagine them
21 deciding they would have put clips from the actual
22 motion pictures in them. There's an enhanced
23 edition Roots book that contains a bunch of archival
24 footage of the author and him participating in
25 interviews from the kind of controversial time
26 around when that came out. There's a Making of Star

1 Wars series that has interviews with the cast, all
2 kinds of things of that nature. Nicholas Sparks
3 writes romance novels and several of them have been
4 made into movies. There are enhanced editions of
5 those.

6 There's - and then one thing I think is
7 important is -- so there's a Making of Indiana Jones
8 series that I don't think yet has become an enhanced
9 edition series, but it's full of stills and still
10 shots have always been licensed for publishing uses
11 by the studios, and enhanced editions are just the
12 next step as technology improves, as they find the
13 right partners to work with, the right publishers,
14 the right authors. It's a market they're going to
15 be in. So they -- I think as the copyright owner,
16 unless certain circumstances arise, have the right
17 to choose who they want to partner with and who they
18 want to license to.

19 Just quickly because I know we're out
20 of time but there were a number things said. With
21 content ID, and I'm not speaking on behalf of each
22 studio, my view of those licenses is they are
23 licenses to YouTube, not to the individual end
24 users. And whether that is monetized or not is not
25 something that we can say across the board is true.
26 Each individual copyright owner that participates

1 in content ID gets to select between monetization,
2 monitoring, or blocking. Then they also have to
3 respond, of course, if there's a counter notice from
4 the user claiming that they shouldn't have to do
5 any of those things. And so what each studio does
6 as a business practice, I can't tell you about and
7 all of those agreements with YouTube are highly
8 confidential.

9 But the fact that that program has been
10 made available by one website provider to try to
11 address some of the concerns of copyright owners
12 about the mass numbers of uses out there isn't
13 indicative of a lack of any harm. There's tons of
14 other websites out there that these videos are on
15 that don't provide that kind of copyright owner
16 response system and, you know, the proponents try
17 to say that, well, if we only license thousands of
18 uses per year but there are thousands per week on
19 YouTube that somehow that means there's no harm or
20 that our practices are insignificant, I don't think
21 that's the case. Just because there's lots of
22 unauthorized use doesn't mean that there is a lack
23 of harm or that the studios aren't trying to enter
24 a certain market.

25 With respect the piracy statistics,
26 again, my clients don't have a straight line of sight

1 into who is claiming to exercise an exemption into
2 who might have gotten a license but decided not to
3 because of the exemption. In the Caesar Chavez
4 example, my understanding is that some things were
5 licenses, some were not. I don't know the basis for
6 how those decisions were made or whether without
7 the exemption there would have been a license. I'm
8 moving quickly but I want to --

9 MS. SMITH: Yes.

10 MR. WILLIAMS: With non-disparagement
11 agreements, as Ben said, they were in the record
12 last time. I don't think it's entirely the case
13 that there are new uses as categories presented,
14 because all of the things that are being requested
15 last time -- or being requested this time were
16 actually being requested last time as well, in terms
17 of fictional films, fictional e-Books, commercial
18 videos. They wanted all of those things and they
19 did not get them. I would say with the film makers'
20 statements in the joint film makers' comments, I
21 don't think there is any that clearly are prohibited
22 by those non-disparagement clauses. I think
23 there's one that claims to be a parody of The
24 X-Files, but I couldn't tell from the description
25 whether it's a parody or it's not a parody. I
26 couldn't tell why a parody would need a direct clip

1 from the pre-existing motion picture instead of
2 creating a new work that easily relates back. So
3 that one was very unclear to me. The rest of them,
4 I didn't see any direct disparagement of the studios
5 or of even the content.

6 And then the very last thing is I just
7 wanted to make sure I was clear on, kind of, the
8 fair use fourth factor versus section 1201. I'm not
9 trying to say that if you conclude something is
10 always fair use then, therefore, you also have to
11 look at the fourth factor and see whether copyright
12 owners are harmed. I think that would defeat the
13 statute's purpose. What I do think you need to do
14 is, if there are some things that fit into a category
15 that you think are probably fair but there are also
16 a lot of things that you think probably aren't, you
17 have to look and see, if I grant an exemption in
18 this space, is the spillover going to cause harm
19 to a market. And I think that we've established
20 that.

21 MS. SMITH: The market largely being the
22 licensing market.

23 MR. WILLIAMS: Yes -- yes.

24 MS. SMITH: Okay. Thank you. So Mr.
25 Lerner, we are running out of time, a little bit
26 over.

1 MR. LERNER: Yes. I will be very quick.
2 I've been watching the clock. I'm well

3 --

4 MS. SMITH: Thank you.

5 MR. LERNER: -- I am definitely
6 considering that. Just to quickly speak to the
7 non-disparagement point, but I wanted to respond to
8 some things Mr. Sheffner said which I think are very
9 important. The Universal clips website, which is
10 cited in Joint Creators comments at page 13, is
11 extremely broad, requires users not to disparage,
12 criticize, belittle, parody, alter, or otherwise
13 negatively comment on the clip in connection with
14 the use, but there is also you can't criticize the
15 industry and other things. So this is like the DMCA,
16 a sword of Damocles that can be asserted anytime
17 someone doesn't like a use after -- even after it's
18 been licensed.

19 But I want to get back to some of the
20 things that Mr. Sheffner said. I think it's telling
21 that Mr. Sheffner has just compared the licensing
22 market to one of the most exclusive housing
23 communities in this country. That is an apt
24 metaphor. There is a licensing market; some of our
25 clients use it but it is not available to everyone
26 and in fact, like Bel Air, most people cannot access

1 it. And that's why we're here. That's the point
2 of this proceeding.

3 Modern technology has enabled a
4 cornucopia of creativity. So many people can
5 create now, individuals and businesses and a lot of
6 that is going to be fair use, and 1201 is holding
7 this back. And that's, I think, the point of this
8 proceeding. And let's keep that 30,000-foot view
9 because I want to ask, how much money have the
10 studios lost due to the existing criticism and
11 commentary-based DMCA exemptions? There is no
12 evidence in the record of any tangible harm to them.
13 In fact, the only articulable harm that they have
14 -- the only harm they've articulated here is the
15 threat of a marginal number of erstwhile fair uses
16 that actually turn out not to be fair. And nothing
17 Mr. Sheffner or Mr. Williams have said changes that
18 or the facts on the ground. Non-disparaging
19 clauses exist, sometimes the rights holder and even
20 if I don't concede that none of our proposed uses
21 would not run afoul of those clauses, but even if
22 they did, they don't represent everyone and not all
23 uses that people might want to license would meet
24 the standards of those non-disparagement clauses.

25 Sometimes rights holders do say no and
26 a great example of that is one of the members of the

1 MPAA actually had to make fair use in the Steve Jobs
2 film that was not in the record in 2015. It was not
3 permitted to be in the record because the record had
4 closed. So that's in the record now as Appendix S,
5 as in Sierra, to our comment. So sometimes rights
6 holders absolutely do say no.

7 Sometimes they don't call back. I've
8 observed this personally with a number of clients.
9 The MPAA does not represent every rights holder. In
10 fact, there's a huge orphan works problem which I
11 know several of you have worked on and, of course,
12 we have worked on that, as well. And finally, people
13 can't afford licenses.

14 So let's be clear here. The Dr. Seuss
15 case notwithstanding, if a use is sufficiently
16 transformative, you do not need to get a license.
17 And we're not talking about or asking to reduce a
18 legitimate market. We're -- I mean in the Campbell
19 case, for example, there were negotiations about a
20 license. Those negotiations broke down. The rap
21 group used the material anyway and the Supreme Court
22 said, yes, we are worried about derivative market,
23 particularly replacing the primary market for the
24 work. But the court did say yes, they negotiated
25 about a license. The negotiations broke down and
26 so now we're going to allow that to go forward. So

1 we're not --

2 MS. SMITH: Right, so that can't be held
3 against you in the first factor, and then they
4 remanded it to consider whether there's an effect,
5 and it turned out there wasn't, I guess, right?

6 MR. LERNER: Okay. I mean I think the
7 holding that's been cited repeatedly is that you
8 don't have a right to a derivative market for fair
9 use or for transformative uses, I think, is what it
10 said.

11 And finally, I just want to make one more
12 point because I know we're very short on time. The
13 recommended language by the MPAA, I took a look at
14 that in response. I don't see that that changes
15 anything. It looks like it's simply saying this is
16 rewording if you were to simply renew the existing
17 statute.

18 MS. SMITH: I think they were trying to
19 have a straight renewal in a simpler way, if I'm
20 paraphrasing what they were trying to achieve.

21 MR. LERNER: I actually think that the
22 existing language would be preferable to that.
23 That was -- I mean, again, I had not thought deeply
24 about that before this, so forgive me for that but
25 I think that the current language, if you're going
26 to simply renew the exemption, then just renew the

1 exemption.

2 MS. CHAUVET: Mr. Taylor?

3 MR. TAYLOR: Yes. That actually brings
4 me back to what I wanted to say. I'd be remiss if
5 I didn't point out in our endorsement of the Joint
6 Creators language that our clients wanted to make
7 it clear that it should not include AACS 2.0. And
8 I do want to raise the prospect of simplifying the
9 language to something we discussed during the study,
10 which would be to possibly give us, opponents and
11 proponents, everybody an opportunity to review any
12 language before you actually published it. And I
13 think that may help in the efforts to actually
14 resolve some confusion and simplify it.

15 And I'll just point out that the current
16 exemption has misidentified AACS as the Advanced
17 Access Control System, and it's actually --

18 MS. CHAUVET: I'm sorry, which specific
19 existing exemption?

20 MR. TAYLOR: The current temporary
21 exemptions misidentify it as the Advanced Access
22 Control System as opposed to the Advanced Access
23 Content System, and so if we had been given the
24 opportunity to comment on that before, we could have
25 corrected that. So just a point I --

26 MS. SMITH: Okay. We appreciate that

1 and regardless of anything else, we will probably
2 correct that.

3 (Laughter.)

4 MS. SMITH: Anything else? Actually, I
5 have one specific question about e-Books which may
6 really be a question for Ms. Tandy. So I'm looking
7 at one of you professors, Ms. Rosenblatt; do you know
8 if you were to make a sort of bitter equivalent in
9 the e-Books world, are you remixing the clip; is the
10 clip itself being edited or having a different song,
11 track, or sound on it, if that makes sense?

12 MS. ROSENBLATT: Sorry, can you clarify
13 what you're asking? I'm not --

14 MS. SMITH: So she said that a remix
15 artist may want to make e-Books and that's not
16 permitted in the current exemption. And so the
17 current remix video exemption is based on a lot of
18 examples where the video clip itself is edited,
19 either the image or the sound, and if this were to
20 be in an e-Book, is the video itself still edited
21 or is it, you know, unaltered clips with writing,
22 and I guess that context would make it
23 non-infringing, would be the theory?

24 MS. TURK: I don't know enough about
25 those kinds of -- about the e-Books under discussion
26 to speak to that.

1 MS. SMITH: Professor Rosenblatt?

2 MS. ROSENBLATT: So the answer is, yes,
3 sometimes those e-Books would need or want to alter
4 the images themselves or the sound. We've seen
5 examples; for example, I think some anonymous, but
6 they focus in on a particular subpart or split screen
7 or things like that where they are, for lack of
8 another word, remixing the video as well as
9 juxtaposing it and reordering it.

10 MS. SMITH: Thank you. That was my
11 question. So I think this is -- if anyone else still
12 wants to speak, we'll let you say your piece;
13 otherwise, we will conclude. Mr. Neill?

14 MR. NEILL: Just something really quick
15 since AACCS 2.0 was brought up right at the end there.

16 MS. SMITH: Yes.

17 MR. NEILL: Just a quick point that --
18 I just want to re-emphasize -- I know this is on the
19 record -- but the -- you know, the current video
20 exemptions and the sort of subclasses that exist,
21 those are the only place, that we could find in the
22 record at least, that called to specific
23 technologies related to anti-circumvention. So
24 when you compare the video exemption to other
25 exemptions, they aren't sort of saying the specific
26 types of technology, and so that's part of the reason

1 -- and part of the reason we had asked for similar
2 access controls is that you -- we benefit from the
3 hindsight again of seeing the evolution from, you
4 know, VHS wasn't enough and so we allowed DVDs, and
5 then DVDs weren't enough so there was the allowance
6 of Blu-Ray, and so in the record, there are some
7 comments about the fact that AACCS 2.0 is somehow
8 different than the other proceeding access
9 controls. And while it is a different and higher
10 level of video quality, I think that functionally,
11 it's quite similar to and we benefit from the
12 evolution that we saw in the past.

13 MS. SMITH: So thank you. Mr. Taylor,
14 we'll let you have the last word.

15 MR. TAYLOR: I guess I would just -- I
16 would say first of all, historically, I mean the
17 technology has been identified because the content
18 industries have developed these technologies and
19 that's how the 1201 proceeding grew out. Every --
20 the non-copyright industries, particularly where
21 exemptions have been employed, who knows what
22 technologies are at issue there. But we have been
23 able to identify the technologies because of the
24 historic nature of this proceeding.

25 And as far as AACCS 2, it is completely
26 different. It serves a completely different

1 format. And as far as historically, this
2 proceeding has given new formats an opportunity to
3 grow before an exemption is ever granted. And in
4 this case, they have made no case to warrant the
5 granting of an exemption for ultra-high-definition
6 Blu-Ray.

7 MS. SMITH: Mr. Lerner, did you want to
8 speak about AAC3 2 or I think we really do have to
9 wrap it up so.

10 MR. LERNER: No. I just wanted to say
11 we look forward to the opportunity to review the
12 videos that were submitted and to respond to them.
13 Thank you.

14 MS. SMITH: Mr. Neill, did you have
15 anything on that?

16 MR. NEILL: Yes. I just wanted to say
17 that there are pieces on the record that speak to
18 the evolution of AAC3 2.0. I think there was a quick
19 discussion in 2015. It was more of a developing
20 technology at that point, but I think there are
21 points made on the record that talk about the fact
22 that, you know, by 2021, by the next time we're
23 sitting here, you know, over 50 percent of the people
24 are going to have 4k televisions and so there are
25 points on the record about the demand for 4k.

26 There are certainly points from a film

1 maker who is named, Rick Bowman, in our filing
2 talking about the fact that at the big Los Angeles
3 film market, that, you know, the only acceptable
4 films from many distributors were only willing to
5 accept a certain level of quality, the 4k quality.
6 So I think we're at a -- also at a different point
7 regarding AACCS 2.0 than maybe we were three years
8 ago.

9 MS. SMITH: Okay. Thanks, everyone,
10 very much. I think that's the end of this hearing
11 but we'll be back at 1:00 p.m. for Class 4.

12 (Whereupon, the above-entitled matter
13 went off the record at 12:14 p.m. and resumed at 1:00
14 p.m.)

15 MS. SMITH: Welcome, everybody, I think
16 we're going to get started to continue with the
17 section 1201 rulemakings. And before we get to this
18 panel, which is Class 4, we have two housekeeping
19 matters to note. The first is, again, a reminder
20 if anyone wants to sign up for the audience
21 participation, it is up front.

22 We're going to start that at 1:30
23 tomorrow, if anyone wishes to speak briefly on any
24 of the classes that we're considering and did not
25 participate in the hearing.

26 And the second issue is for Class 1 there

1 are two documents, which all the panelists were
2 provided in advance right before the hearing, as
3 well as the Office and NTIA. We're just going to
4 label them on the record as a way to make clear what
5 they were, and they will also be on our website. So
6 they are Exhibits 1-I and 1-J, and we just wanted
7 to note that for our court reporter.

8 (Whereupon, the
9 above-referred to documents
10 were marked for
11 identification as Exhibits
12 1-I and 1-J.)

13 MS. SMITH: And I will also say, as we
14 start this hearing, we have been doing a pretty poor
15 job of announcing who's speaking, so if you can
16 remember to either say your name or be called upon
17 before responding, that would, I think, help out the
18 transcription that we're doing.

19 So we are here to now discuss Class 4,
20 which is a petition for an exemption for audiovisual
21 works that are protected by high-bandwidth digital
22 content protection, HDCP. It would cover a variety
23 of audiovisual works stored on a media that passes
24 over HDMI connections, and this is a request for a
25 new exemption that does not -- has not previously
26 been considered by the Copyright Office.

1 So my name's Regan Smith, I'm the Deputy
2 General Counsel, and I think first we'll announce
3 ourselves on this side. And if the panelists
4 introduce themselves, and then we'll get started.

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

9 MR. RILEY: John Riley,
10 Attorney-Advisor, Copyright Office.

11 MS. CHAUVET: Anna Chauvet, Assistant
12 General Counsel of the Copyright Office.

13 MS. SALTMAN: Julie Saltman, Assistant
14 General Counsel at the Copyright Office.

15 MS. SMITH: Ms. Walsh.

16 MS. WALSH: I'm Kit Walsh, I'm a Senior
17 Staff Attorney at the Electronic Frontier
18 Foundation. I'm here representing Dr. Bunnie
19 Huang, a petitioner seeking the exemption.

20 MS. SMITH: Thank you.

21 MR. WILLIAMS: Matt Williams from MSK,
22 representing AAP, ESA, RIAA, and MPAA.

23 MR. BURGER: Jim Burger from Thompson
24 Coburn, representing Digital Content Protection.
25 And if I could have two seconds after to clarify
26 something you just said.

1 MS. SMITH: Do you want to go ahead now?

2 MR. BURGER: Yeah, HDCP is not a storage
3 protection technology, it's a transmission
4 protection technology.

5 MS. SMITH: All right. Mr. Taylor, you
6 want to introduce yourself?

7 MR. TAYLOR: Yes, David Taylor, Counsel
8 to DVD CCA and AACLS LA.

9 MS. SMITH: All right, so Mr. Burger,
10 can you talk about, I guess I got it wrong, or perhaps
11 Petitioner got it wrong.

12 MR. BURGER: It's just a short distance
13 transmission protection. In other words, if a TPM,
14 for example, on AACLS on a Blu-Ray triggers HDCP, it
15 is deep compressed to a very large file, and little
16 packets are sent over and encrypted by HDCP that
17 checks that there's an HDCP device, license device
18 at the other end.

19 And it decrypts and goes to the display.
20 It's not a storage, you can store on HDCP, it's only
21 a transmission protection technology.

22 MS. SMITH: Got it. I think either what
23 I said or what I meant to say is that the audiovisual
24 works themselves may be stored on a variety of media
25 at the end and be transmitted.

26 MR. BURGER: May be stored also.

1 MS. SMITH: That sounds correct to you?

2 MR. BURGER: Yeah. That didn't, it
3 didn't come across to me, though.

4 MS. SMITH: All right, my apologies.
5 And Ms. Walsh, is this your understanding too of what
6 we're --

7 MR. BURGER: It's just important to the
8 case to understand what HDCP does and doesn't do.

9 MS. SMITH: Sure.

10 MR. BURGER: Thank you.

11 MS. WALSH: Or HDCP is the encryption
12 technology that's used in over the HDMI audiovisual
13 connection. So it does relate to that, as opposed
14 to works that are at rest. The works that are at
15 rest may be subject to any number of other
16 technological protection measures. HDCP is a sort
17 of common point through which a lot of different
18 types of audiovisual works flow.

19 It's a natural point to do
20 transformative things with that video because it's
21 single technology, as opposed to dozens of other
22 TPMs that you might have to engage with if you wanted
23 to approach the processing of that technology at a
24 different point.

25 MS. SMITH: So I just have a question
26 about how you said that. You said it's a natural

1 point to do transformative things. I think maybe
2 what you might mean, and tell me if I get this wrong,
3 is it's a natural point because it protects a variety
4 of media and a variety of TPMs to engage in
5 circumvention, to then get media, which perhaps you
6 store in whatever way in which you store it.

7 And then you do the transformative
8 things, is that right?

9 MS. WALSH: So, in part. The reason I say
10 in part is because only some of the uses that we've
11 talked about involve that storage step with respect
12 to the entire work. For many of the uses, there's
13 a buffer. So you have these packets coming along,
14 HDMI, you would need to decrypt them, create a
15 buffer, then do your analysis on it.

16 So if you wanted to translate Mandarin
17 characters into English, if you wanted to identify
18 your favorite baseball player and have an image
19 track them, you collect enough of the work on an
20 intermediate machine to do that, and then once
21 you've done the processing, you package it back up
22 and send it along to the display device.

23 MS. SMITH: Okay, so it's your
24 understanding that some of the uses that Dr. Huang
25 would seek to engage in might require copying the
26 whole work and some might not, because you would just

1 need to move it on the buffer in passing it along
2 and going to the next piece, correct? Is that more
3 or less what you're saying?

4 MS. WALSH: Yes, some of them would
5 involve the entire work and some would not.

6 MS. SMITH: Thank you. Mr. Burger.

7 MR. BURGER: I would disagree in the
8 sense that if this were the case, most of the, in
9 fact, all of the examples that are given are today
10 possible and in the clear content, which is most
11 content. And people don't do it in the HDMI world,
12 they don't use that as a common point.

13 Baseball is mostly all free to air, which
14 you could do all these. In fact, TV broadcasters
15 have done it, it's just not popular in the market
16 -- nobody's demanding it. It could be done in HDMI
17 but they don't, because it's not the place to do it.
18 It is in the set-top box where it comes in, or at
19 the smart TV at the other end.

20 We're again talking about exemptions
21 that are possible or not possible for other TPMs.
22 It doesn't make sense to do this at HDMI because it's
23 not the natural point to do it, because it would be
24 done in all these other examples. But it's not, it's
25 done in the devices that are either receiving it and
26 processing it, or the smart TV that is receiving it

1 and processing and doing.

2 But people don't do HDMI storage. They
3 don't do that as a storage mechanism, but more a
4 manipulation mechanism.

5 MS. SMITH: Ms. Walsh, did you want to
6 --

7 MS. WALSH: I don't know that that's the
8 question, though, here, right? HDMI is just the
9 transfer mechanism.

10 MR. BURGER: Right.

11 MS. WALSH: You're not doing anything in
12 there, rather than it's transporting over, and it
13 doesn't complete the transfer until that, the
14 circumvention or the TPM unlocks it to allow it to
15 complete the transaction, right?

16 MR. BURGER: That's if it's a TPM. The
17 majority of the examples that are given in Dr.
18 Huang's petition and in the reply are free to air
19 examples.

20 MS. WALSH: And they don't have a TPM.

21 MR. BURGER: They don't have TPM, it's
22 not triggered. It's only when you play a Blu-ray,
23 a high-definition Blu-Ray, in the process of handing
24 it over to the output, the HDMI output, it requires
25 HDCP to be triggered. But if you're just watching
26 any of your over-the-air channels, for example, any

1 of those channels, it's never triggered. It's not
2 protected.

3 It's only in high-value content that has
4 business models around the high value that I'm sure
5 you've heard in all the other audiovisual exemption
6 processes. That's where it gets triggered. But
7 for most of the content that flows over HDMI, it's
8 unencrypted.

9 MR. CHENEY: Would that include things
10 like Netflix?

11 MR. BURGER: No, Netflix, which is a
12 subscription service -- you're not buying the movie,
13 you are effectively renting it. And so that would
14 probably -- I don't know for a fact for Netflix
15 whether they require in their licenses, and Matt may
16 know the answer to this, whether they require HDCP
17 to be triggered.

18 MS. SMITH: Ms. Walsh.

19 MS. WALSH: Several points. One, many
20 of the examples involve the kind of entertainment
21 works like movies, etc., that by admission are
22 typically encumbered by HDCP. Two, many playback
23 devices default to, or in fact it's not just a
24 default, it cannot be disabled. The output is HDCP
25 encrypted. So for example, the Play Station 3
26 device.

1 MS. SMITH: Do you know -- about the
2 baseball example Mr. Burger said -- he said it would
3 come unencrypted -- whether an exemption would be
4 necessary?

5 MS. WALSH: I think that there are paid
6 sporting events for which HDCP would be applied.

7 MS. SMITH: Over-the-air broadcast.

8 MS. WALSH: But as for over-the-air
9 baseball, then it would be applied if your device
10 is one of those that always applies HDCP.

11 MS. SMITH: Mr. Burger.

12 MR. BURGER: But the PlayStation 3 is
13 obsolete, it is now PlayStation 4. And all of the
14 game software, all of the game play can be streamed
15 in the clear. Yes, for high value --

16 MS. SMITH: PS3?

17 MR. BURGER: I'm sorry?

18 MS. SMITH: PS3 game play?

19 MR. BURGER: No, PS3 is obsolete. I
20 mean, it proves the point that we're making. The
21 market, and where there is a demand and there is in
22 the clear, and again, putting aside the DVDs and pay
23 per view, which is protected because that's the
24 business model, and you deal with that in those TPM,
25 in the exemption requests for those TPM.

1 But again, the bulk of the data over,
2 including PlayStation 4, the bulk of the data is
3 unencrypted. And if a manufacturer turns something
4 on, I'm not aware of that. That's certainly
5 possible that they could do it improperly, but most
6 of the examples I know, they don't turn it on for
7 over the air, they don't turn it on for the game
8 machines.

9 None of the game machines turn it on now
10 for play except the old PS3, which people don't buy
11 anymore.

12 MS. WALSH: So I had a third point.

13 MS. SMITH: Yes, Ms. Walsh.

14 MS. WALSH: So with regard to the
15 license uses, these are I think what Mr. Cheney was
16 getting at, these are things that happen on a license
17 device as a result of decrypting HDCP. So if you
18 don't have a license or if you don't purchase that
19 device, then it's among the uses that require
20 circumvention.

21 Now, DCP Association is saying these
22 functions exist. They're available in the
23 marketplace. For instance, the new video game
24 consoles have the ability to turn off HDCP, which
25 if that's the way that devices worked by default,
26 then we probably wouldn't be here. So it's not

1 harmful --

2 MS. SMITH: So do you agree, for new
3 video games, you don't need this exemption?

4 MS. WALSH: For devices where the user
5 is in control and can turn off HDCP in order to make
6 those non-infringing uses, which includes the
7 PlayStation 4, yes.

8 MS. SMITH: I mean, they had submitted
9 a variety of video games and said PlayStation 3, I
10 guess, is the only one that does. And I know, I mean,
11 at least you go to Twitch and see PlayStation 3. I'm
12 not sure how that happens, and I don't know if you
13 know how that happens.

14 Mr. Williams is raising his hand, he
15 knows how that happens. But I'm trying to --
16 narrowing down on the video games specifically, why
17 is there a need for this exemption first, and then
18 get into some of these broader issues that he touched
19 upon.

20 MS. WALSH: Sure, so I don't think that
21 the PlayStation 3 is the only legacy console for
22 which this is true.

23 MS. SMITH: Can you point to another
24 one?

25 MS. WALSH: I'd have to get back to you.

26 MR. BURGER: We give the examples.

1 Sorry, go ahead, Matt.

2 MR. WILLIAMS: Sure, thanks. So we've
3 already touched on ten or twelve different types of
4 uses, and that's, in the first instance, why I think
5 this is an improper class. It's just pretty much
6 all motion pictures for all non-infringing uses.
7 So that, by itself is --

8 MS. SMITH: I think it's all audiovisual
9 works. So it's a little broader than that.

10 MR. WILLIAMS: Excuse -- all audio?
11 Good point, yes, because it includes video games.
12 Very good point.

13 So that's one reason to deny the class
14 in itself. I think even the specific
15 non-exhaustive list, there's no real meat on the
16 bones for most of these uses to enable you to analyze
17 whether they're fair or not in all instances.

18 The other primary problem is there are
19 alternatives. You've put your hand on it with the
20 new gaming consoles. But even if you're talking
21 about the PS3, there are multiple avenues, as I
22 understand it, to engage in these same uses.

23 So number one is you can get a lot of PS3
24 games through a service called PlayStation Now,
25 which is available on the PS4. And that's a
26 subscription service, but as I understand it, a lot

1 of the legacy games from PS3 are on PS4 through that
2 service.

3 There's not backward compatibility, as
4 I understand it, in the sense that you could use a
5 disk from the PS3 world and move it into the PS4
6 world. But you can still get a lot of those games
7 through that service on the new console.

8 Another thing is that even before the
9 PS4, I think a lot of people were using component
10 cables to extract game clips. And I mean, you know,
11 it's important to note -- know that the PS4 has been
12 around since before the last rulemaking cycle. So
13 this has been going on a long time.

14 But if you go, for example, onto Twitch,
15 and you look at how to broadcast console games,
16 there's an explanation of how to use the component
17 cable. I don't know if you're all familiar with --

18 MS. SMITH: This is a different output
19 than the --

20 MR. WILLIAMS: Yeah, right, the old ones
21 that you would use before, you just had one HDMI
22 cable that has the multiple colors. And as I
23 understand it and as described on Twitch at least,
24 you can still use those cables to export game content
25 from a PS3.

1 So I don't know that every device on the
2 market that enables that type of conduct, I hadn't
3 analyzed them all so I can't say they're all not
4 circumvention devices, but my understanding is that
5 there are avenues for that.

6 I think, you know, some of this is about
7 -- it's not about just enabling the circumvention
8 of HDCP. It's really about enabling Mr. Huang to
9 sell this device that he wants to sell to enable
10 everyone to make complete copies of in-the-clear
11 content.

12 And so when you put it up against the
13 potential harm of people, for example, buying
14 temporary access to a work like a movie and being
15 able to fully copy it and get full value purchase
16 price for permanent access, and you put that up
17 against the fact that there are all these
18 alternatives in the marketplace to do everything at
19 issue, I think it's just not a proper class for
20 consideration.

21 MS. SMITH: Ms. Walsh.

22 MS. WALSH: So Dr. Huang has always been
23 extraordinarily conscientious about adhering to the
24 law. And it's not proper, in my opinion, to
25 speculate that he would do something that he didn't
26 have the legal right to do.

1 MS. SMITH: I don't think Mr. Williams
2 was necessarily suggesting that, but we wouldn't be
3 entertaining an exemption just for Dr. Huang. So
4 I think you have to factor that into your answer too.

5 MS. WALSH: Sure. So in regard to the
6 suggestion that you don't need to be able to
7 circumvent the signal coming out of your PlayStation
8 3 because you could just spend a couple hundred
9 dollars on a new device, you just buy the same game
10 that you paid for again, or you could have a lower
11 quality component video -- none of those are
12 substitutions. You can't require someone to pay a
13 fee in order to do something that they have a legal
14 right to do. That's an adverse impact on a
15 non-infringing use. And the question in this
16 rulemaking is are there adverse effects on users'
17 ability to make non-infringing uses.

18 And we've gone through a very long list
19 of examples of non-infringing uses that are
20 adversely affected by the ban on circumventing HDCP,
21 including some very personal ones.

22 And Dr. Huang shouldn't necessarily
23 have to disclose that he's at elevated risk for early
24 onset Alzheimer's in order to explain why it's so
25 important that he be able to engage in
26 time-shifting, space-shifting of the works that

1 he's going to continue to enjoy.

2 MS. SMITH: What do you say to the
3 opposition briefs where they say there's literally
4 dozens of alternatives and different ways Dr. Huang
5 can make all of these uses that he seeks to do?

6 MS. WALSH: So the alternatives are you
7 buy a closet full of televisions that have the
8 capability --

9 MS. SMITH: I don't think, they have
10 dozens of examples, and I don't see in your written
11 comments that you've engaged with them at all. So
12 I think they have more specifics than that statement
13 would suggest.

14 Can you engage more specifically with
15 some of the appendices of different services or ways
16 you might be able to enable a smart television to
17 make some of these uses he seeks to engage in?

18 MS. WALSH: So I think that that is the
19 response to the idea that there are, you know, a
20 dozen different smart TVs that have different
21 subsets of functionality. Many of the examples
22 don't have --

23 MS. CHAUVET: Just in fairness, I don't,
24 I mean, not all of them are limited to just getting
25 another smart TV. When we're talking about typical
26 like VCR or equivalent functionality, they're

1 talking about there're numerous digital video
2 recording devices, which aren't necessarily just
3 this buying a smart TV. You could be ordering from
4 Comcast, or whoever, your provider could provide
5 something.

6 So I think to be more specific, but also
7 not just saying it's buying another smart TV -- I
8 think just, I think we're asking the same question,
9 it's just really responding to the dozens of
10 alternatives which seem to be present in the
11 marketplace that are not just buying another
12 television set.

13 MS. WALSH: Yeah, well, you could buy
14 another service or another device. But that's an
15 alternative to a world where someone has the freedom
16 to use their device that they like to program their
17 computer. So they don't need to clutter their house
18 with a whole bunch of devices, they don't need to
19 spend money that people don't have the right to
20 extract from them.

21 But they're able to take the Blu-Ray that
22 they purchased and the TV that they own and make
23 non-infringing uses without being required to pay
24 some additional tax or fee to a company that's
25 getting a license to HDCP.

26 MS. CHAUVET: Well, I guess my question,

1 relatedly, is -- because you keep talking about
2 non-infringing uses. For example, space-shifting,
3 time-shifting, courts have found that that is not,
4 or I should say space-shifting specifically has been
5 found not to constitute fair use. So what is the
6 basis then for saying that that's a non-infringing
7 use in this context?

8 MS. WALSH: So when it's personal and
9 noncommercial space-shifting, like the uses
10 contemplated by Dr. Huang, have not been subject to
11 a decision that they're infringing, and --

12 MS. CHAUVET: So how are the facts here
13 distinguishable then from the facts in like
14 VidAngel, or different things, where -- are you just
15 saying it's purely because it's noncommercial,
16 that's why?

17 MS. WALSH: I mean, VidAngel was an
18 extensive commercial service, and only the law in
19 the Ninth Circuit. And several of the uses that
20 we've talked about were explicitly -- are similar
21 to uses that were approved in the Betamax decision.
22 So for instance, the idea that you would time- and
23 space-shift an entertainment work to show to a
24 medical patient for therapeutic reasons is one of
25 the examples. So --

26 MS. SMITH: Sorry, go on.

1 MS. WALSH: I lost my train of thought.

2 MS. SMITH: Apologies. What, in your
3 view, would distinguish this proposal from prior
4 proposals that the Office has rejected as being too
5 overbroad? Or do you see it just -- it's rather a
6 request for the Office to sort of change its view
7 of its regulatory authority, I guess?

8 MS. WALSH: Yeah, so I think the statute
9 represents a method of regulation that is to impose
10 a really broad restriction, one that encompasses a
11 lot of protected speech, and then this rulemaking
12 is a mechanism to vindicate some portion of the
13 speech that is impeded. So the non-infringing uses
14 of these works are all First Amendment protected
15 activities that Dr. Huang would like to engage in.

16 This rulemaking is the process whereby
17 he can vindicate a set of those activities. And that
18 set, he put a bunch of sort of dots on the record,
19 and all those dots add up to a line, which is the
20 spectrum of non-infringing uses.

21 So given that it's been demonstrated
22 that the ban on circumvention of HDCP on audiovisual
23 works has an adverse impact on the ability to make
24 non-infringing uses, it's now mandatory for the
25 Librarian to publish the class -- the language of
26 1201(a)(d), 1201(a)(1)(d) is mandatory -- shall

1 publish a class for that set.

2 MR. CHENEY: So a question to follow up,
3 and just a little bit to probe, and if you could walk
4 us through how this would work. So one of your
5 examples that you used here is political expression,
6 you talk about First Amendment protection
7 potentially, displaying a live political debate
8 rescaled so the text of a commentator's live blog
9 is presented alongside it without obscuring the
10 image.

11 Can you describe the process that you
12 would have to go through to make this work, including
13 where the circumvention would happen of this
14 particular HDCP technology, so that this, you could
15 then do this thing that you're talking about?

16 MS. WALSH: Yes, so you have the signal
17 coming across HDCP, you --

18 MR. CHENEY: Let me stop you there,
19 because you lost me already. Coming across? So the
20 signal is coming into which device?

21 MS. WALSH: Oh, okay.

22 MR. CHENEY: So you're going to have to
23 make it pretty basic for me here so that I understand
24 how this is working through.

25 MS. WALSH: Right, so you have your
26 entertainment device, let's say it's a multimedia

1 playback device. It is encrypting content that
2 leaves it over the HDMI cable using HDCP. You need
3 to read that signal before it reaches your display
4 device, your TV.

5 So you have a device in between that's
6 reading in the HDCP-encumbered signal where this
7 debate is being conveyed. So you decrypt the frames
8 of that image so that you can rescale it. Because
9 without knowing what the image is, you can't output
10 a smaller version of it.

11 You need to be able to read that data in
12 order to do that scaling, to make it smaller so that
13 the whole thing is still visible when you add
14 commentary to the sides.

15 So the commentary is coming from a second
16 source. So your device here, that's the first sort
17 of stop on the road for the HDCP-encumbered HDMI
18 signal, has intelligence in it, in the sense that
19 it's a general purpose computer.

20 MR. CHENEY: That's where the
21 circumvention is occurring.

22 MS. WALSH: Right.

23 MR. CHENEY: Is that -- you've plugged
24 your HDMI cord into this device.

25 MS. WALSH: Mm hmm.

26 MR. CHENEY: That then is where the

1 circumvention is happening, so that you can then
2 play with the frames, so that you can then attach
3 your second device or another device here, so that
4 you can then put the two things together, the blog
5 or the commentary that's going to go beside them on
6 the screen when you're done. Is that --

7 MS. WALSH: Right, or a
8 picture-in-picture signal coming from another HDMI
9 signal. Anything that requires you to be able to
10 access the work to rescale it, to overlay it, to do
11 processing on it. That's where that happens.

12 And it could be a third device, or it
13 could be a part of a display device. You know, if
14 you have a smart TV that has a computer in it, then
15 it could be the device where this happens.

16 But in any event, it's at some point
17 before the sort of dumb display that's just the sort
18 of the pixels where you're going to be perceiving.

19 MR. CHENEY: And do you need then to
20 connect that HDMI cord again to the smart device for
21 that transfer, that second transfer, to happen?
22 Right, so that it then is expecting -- so you've
23 re-encrypted it at that point so that it goes back
24 to the second device, so that then it's displayed
25 with your additional content. Is that right?

26 MS. WALSH: That's right.

1 MS. CHAUVET: Just a quick follow up,
2 because in your opening to me, you were talking about
3 how there could be additional TPMs at the source,
4 like if we're talking about a DVD or a Blu-Ray. So
5 two questions. Why wouldn't it be more appropriate
6 to ask for an exemption to circumvent the source of
7 it, so like the DVD or the Blu-Ray?

8 And then secondly, if you kind of have
9 a second TPM, if you were to have an exemption for
10 HDCP, is it -- would that get past the second TPM
11 on the other end? Would it enable you to do what
12 you want to do?

13 MS. WALSH: So at the point that it's
14 traveling over HDMI, HDCP is the only TPM that is
15 preventing you from accessing that signal. And the
16 reason why it's more appropriate to seek an
17 exemption there, as opposed to exemptions for a
18 laundry list of any other possible TPM that can be
19 applied to an audiovisual work, is because that's
20 the logical point to do it at, because it's
21 relatively standard.

22 It's proprietary, but it's
23 standardized. So it's possible, rather than
24 addressing 30 different TPMs, to bypass HDCP and
25 perform all of these transformative uses on whatever
26 upstream content has wound up passing through the

1 HDMI cable.

2 MS. CHAUVET: Mr. Williams and Mr.
3 Burger have had your placards up for a while. So,
4 Mr. Williams or Mr. Burger.

5 MR. WILLIAMS: Yeah, I'll let Jim speak
6 to most of the technical questions. The political
7 debate question with the live-streaming content
8 beside it, I mean, we do have lots of examples of
9 TVs in the record that enable that. But even if you
10 want to say, well, someone shouldn't have to buy a
11 new TV to enable it, I think there's a couple of
12 problems with that theory.

13 One is Mr. Huang's already put a device
14 into the marketplace that he says is not a
15 circumvention device, at least based on the
16 marketing materials makes it sound like a lot of that
17 is already enabled. And so if you can do it without
18 circumvention, I'm not sure why he would get an
19 exception to do it here.

20 The other thing is, is as you heard the
21 description of that process, it's quite technically
22 complicated and difficult. So the only way to
23 satisfy a market for that exemption is to allow for
24 distribution of tools. And although I'm not
25 questioning Mr. Huang's personal motivations or
26 integrity, I think he has publicly stated that

1 that's the market he wants to fill.

2 He wants to sell a device that is an
3 altered version of the existing device that would
4 be a circumvention device. And so I would be very
5 cautious to grant an exemption when there are so many
6 alternatives and other ways of doing these things.

7 MR. CHENEY: Mr. Williams, if you could,
8 if you could sort of walk us through how one of those
9 smart TVs would do what was being talked about there.
10 Again, a little more in the technical sense, and
11 maybe Mr. Burger can help us with that as well.

12 MR. WILLIAMS: Sure.

13 MR. CHENEY: It sounds like that part of
14 what's going on here is a bit of a remix, right? So
15 you're taking a section of a live video or live video
16 while it's going on, and you're adding some of your
17 own commentary, and perhaps that's being streamed
18 elsewhere to your audience or whatever you might be
19 doing, right, so.

20 MR. BURGER: First of all, let's take
21 the example that Mr. Huang gives in his petition,
22 that there's a political speech and somebody's
23 blogging commentary. First of all, almost every
24 instance I'm aware of, political speech comes over
25 the air, it comes unencrypted, so it wouldn't have
26 HDCP.

1 But even if it did, Vizio has -- it's
2 called picture outside of picture. It's a function
3 on many smart TVs where basically it divides the TV
4 into two pieces. One piece it would be getting,
5 assuming, if it's within the TV itself, this is where
6 I'm confused about Mr. Huang's example, but if it's
7 in the TV itself, it's not encrypted with HDCP.

8 The TV just receives it. Even if it's
9 protected for some reason, and I don't know what
10 political speech would be protected, but assuming
11 it was protected, the TV doesn't even deal with HDCP.
12 It just puts up the screen, it decrypts from the
13 HDCPS, let's say one of the over-the-internet
14 encryption systems, decrypts it, displays it in half
15 the screen.

16 And then it would take the -internet
17 input off of the ethernet cable and put that in the
18 other half. And they'd be there. It's not
19 preventing speech in any way, and I'm having a
20 difficult time with that.

21 Also this idea that, oh, you're going to
22 have to buy another TV. I think you've answered that
23 to some degree. But I don't believe Mr. Huang is
24 an irrational manufacturer of devices. He's going
25 to charge you for that box, so you're going to have
26 to buy something else anyway. And the long list of

1 examples just again, most of them are free to air.

2 With respect to dementia and
3 Alzheimer's, I can refer Dr. Huang to several sites
4 which recommend do not let dementia or Alzheimer's
5 patients watch live video or even prerecorded,
6 unless it's prerecorded for them, and there's a
7 whole website of DVDs that you could buy for people
8 with Alzheimer's and dementia to not disturb them.

9 So I'm really confused by the speech is
10 impeded, because no speaker is impeded here. No
11 speaker is kept off of the television set by HDCP
12 that I'm aware of. So I just have problems with that
13 because it is being done, the functionality is there
14 today.

15 Whether users want it, most users are
16 two-screen people. Most users will have their, and
17 I know my kids are like that and I am sometimes too,
18 will have their smartphone or their tablet in front
19 of them while they're watching TV and will be
20 checking references and checking blogs. But it is
21 doable today, and there's nothing -- HDCP does not
22 stand in the way of that.

23 MS. SMITH: Ms. Walsh, did you want to
24 respond?

25 MS. WALSH: Sure. So two points.
26 First, it's not at all difficult to circumvent HDCP.

1 I've sort of described, you know, every step of how
2 the signal moves, but HDCP, the master keys are out
3 there, the academic literature on how you derive the
4 master key if you don't have it is out there. And
5 it's not a technically difficult thing to do.

6 So HDCP is not operating to prevent
7 people from accessing unencrypted content if they
8 don't care about adhering to the law. Let me say
9 that another way. If your intent is to break the
10 law, for example, you want to infringe, you want to
11 distribute an entirety of a copyrighted work in an
12 infringing way, you can do that. HDCP isn't
13 difficult to circumvent.

14 But as is usually the case, the fact that
15 there's this legal barrier means that people who
16 want to stay within the contours of the law are the
17 ones bearing the brunt of the prohibition. That's
18 my first point.

19 MS. SMITH: I guess Mr. Burger's filing
20 suggested it's a more inefficient way to engage in
21 these, the uses that Dr. Huang wishes to engage in.
22 Do you want to speak to that?

23 MS. WALSH: Sure. So there are two
24 categories of uses for which the answer to that,
25 there are different answers to that. So the first
26 is all of these uses where we're talking about doing

1 image processing, this is the place where you do it.
2 You're not going to wait for it to be at rest, you're
3 not going to grab your DVD.

4 You want to be able to do your image
5 processing on the stream as it's coming along in
6 order to, you know, to rescale it, to highlight, you
7 know, the feature that's of interest, to do
8 real-time translation from one language to another
9 and have it displayed on the screen. That's the
10 point where you want access to the uncompressed
11 signal in real time as it's passing along.

12 In regard to the other category of uses,
13 which are uses where you wind up storing something
14 at rest afterwards, you're going to have to
15 recompress it in any event anyway. And that's
16 likely the way that the licensed devices operate,
17 is they take the HDCP signal and they recompress it,
18 and then it's stored at rest.

19 So there's no illogic in doing it at that
20 step. And for both technical reasons and because
21 of the problem that I talked about earlier with the
22 multiplication of other possible TPMs, this is the
23 point where it makes practical and technological
24 sense to do it.

25 My second point is that many of these
26 features don't exist. So the idea that you can

1 connect your home assistant to your television and
2 have a blended overlay of information from your home
3 assistant and whatever you're trying to watch, that
4 doesn't exist in the market.

5 And the app ecosystem on smart TVs is
6 lagging way behind phones, in large part because
7 it's a closed ecosystem. There's one, you know,
8 standard for HDMI signals, and it's proprietary.

9 And you don't have the way you can point
10 your phone at Chinese characters and have it display
11 an English translation or opinion, you know, another
12 version of what you're looking at thanks to
13 processing that image, you know, even if that's a
14 copyrighted work. That's something that doesn't
15 exist for televisions in the absence of
16 circumvention.

17 MS. SMITH: Do you think translation
18 across the board is a non-infringing use?

19 MS. WALSH: Typically, the kinds of
20 translations that we're talking about, where you are
21 an individual and you want to circumvent HDCP in
22 order to do translation, those are non-infringing
23 uses.

24 MS. CHAUVET: And how is that not a
25 derivative work?

26 MS. WALSH: It's at least a fair use.

1 Look, you're not selling copies of your
2 translations. You are using it, in many cases, for
3 your own educational and personal reasons.

4 MR. CHENEY: If I could add also, how is
5 that -- can you not do that now with the smart TV
6 exemption that already exists? In other words, if
7 you wanted to do a translation of a work, doesn't
8 that, isn't there some allowability in the current
9 smart TV exemption for that kind of use?

10 MS. WALSH: I'd like to hear from the
11 folks who might bring a lawsuit in that case if they
12 think that that's covered.

13 MS. SMITH: Mr. Williams.

14 MR. WILLIAMS: I haven't seen that
15 question posed, so I'm responding on the fly. But
16 I think that what that exemption applies to is
17 rendering a smart TV interoperable with some other
18 application that's been developed. And so I guess
19 I would have to understand better exactly the
20 process by which this would be achieved.

21 I'm not sure that there's some piece of
22 software that the proponent here is trying to run
23 on a smart TV. I think the objective is to use a
24 device to hack the encryption within the cable that
25 connects the smart TV to another device.

26 MR. CHENEY: I guess my question is is

1 that say someone developed an app that was third
2 market, it wasn't part of the current app market for
3 the smart TV and then made that available. And
4 somebody then went through the process of decrypting
5 their smart TV and allowed that app to be functional
6 to do this language translation or one of these other
7 functions.

8 Is that -- would that not be covered
9 under that current exemption?

10 MR. WILLIAMS: I think the answer's no
11 if I understand the hypothetical. Because the
12 smart TV exemption is about circumventing a specific
13 access control on the firmware to install an
14 interoperable application. Whereas this would
15 involve another level of circumvention beyond that.

16 But if they don't hack the HDCP and they
17 can theoretically come up with an app that runs on
18 the TV that can do real-time translation, and if
19 that's determined to be a non-infringing use, which
20 I have some thoughts about, then arguably it would
21 fit.

22 We do have cases cited, I don't recall
23 if it's this class of works. I know we do in some
24 of the other classes of works. The case law on
25 unauthorized translations is very clear that that
26 requires licensing. Whether it requires licensing

1 for one individual person to do it in private in
2 their home, I don't think is a set of facts that's
3 ever been presented.

4 But there is clear case law that says
5 unauthorized translations that are distributed are
6 not lawful uses.

7 MS. SMITH: Mr. Taylor.

8 MR. TAYLOR: Yeah. David Taylor. What
9 I get here is that it's the, basically it's the
10 easiest point for them to attack all TPMs. And that
11 if they can't have this exemption, then they have
12 to go and talk to every TPM provider out there. And
13 that just simply, every exemption that we've created
14 that the Office has carefully weighed and every
15 limitation would be undone with this one, single
16 exemption.

17 So I just don't see how it is an
18 appropriate class. But more importantly, I don't
19 think HDCP 2.2 has been hacked. So, and even if it
20 were hacked, I mean, CSS was hacked a long time ago.
21 It still doesn't take away that the law protects it
22 as a matter.

23 And I would also say that I'm a lawyer,
24 I have some technological capabilities maybe. But
25 I could not hack the following instructions that
26 I've seen out there without it being severely

1 amplified or facilitated by some third-party
2 software, would I be able to like do it as easily
3 as you suggested.

4 And it just, it goes back to the point
5 that the only person who wants to do this is somebody
6 who's engaged or likely to be engaging in putting
7 into the marketplace a circumvention device.

8 MS. SMITH: Mr. Burger.

9 MR. BURGER: There's a whole bunch of
10 points. I just want to second what Mr. Taylor said.
11 HDCP 2.X, which we're now up to 2.2, has not been
12 hacked, so far as we know. That's an old hack of
13 HDCP 1.0.

14 And there's a lot of, even with HDCP
15 protected content, the HDCP license allows an
16 intermediary device or a television to image process
17 the HDCP protected, as long it's done within a
18 protected environment.

19 But also, you talk about all these
20 features and apps we're talking about, put aside the
21 protected world. Most video, I'm surprised how
22 many people still watch over-the-air video, either
23 through their cable system or over the air, is
24 unprotected. We don't see all these features, with
25 translation or whatever.

26 They're not available today, where they

1 could be used for the majority of the content that's
2 there. This is a market question, it's not a --

3 MS. SMITH: We've got a weird feedback,
4 and in DC moving our phones away helped. And these
5 are different microphones, so I don't know if
6 that'll help, but --

7 MR. WILLIAMS: It may be set to --

8 MS. SMITH: In the event it has gone
9 away.

10 MR. WILLIAMS: It may be set too
11 sensitive. I'll step back, hopefully you can still
12 hear me.

13 MS. SMITH: All right.

14 MR. WILLIAMS: The point being is this
15 is a market issue, and almost every consumer
16 electronics company in the world has an HDCP
17 license. And if they thought there was a market for
18 a particular feature, why aren't they doing it for
19 over-the-air television, which is a majority of
20 political speech, sports?

21 Yes, there are some protected sports
22 programming that you pay for that you wouldn't have
23 otherwise, unless you paid for. There's a whole
24 bunch of material that "could benefit," and I'd put
25 that in quotes, from all these apps, but nobody's
26 doing them because there isn't a market.

1 Where there is a market, for example,
2 Sony with PlayStation 3 realized they were falling
3 behind Xbox and other game consoles who permitted
4 unencrypted output of play, they said, "We're going
5 to go with the market." The problem with this is
6 it's a manufacturer who doesn't want to take a
7 license.

8 The idea that users, as Mr. Taylor said,
9 I spent ten years at Apple. I couldn't possibly
10 follow the instructions even to circumvent HDCP 1.0,
11 let alone 2.0. How am I going to, as a user, do all
12 of these functionalities when the companies who have
13 the interest, the economic interest, in doing it
14 have decided at this point in time it's not worth
15 it?

16 Translating audio, I assume he's
17 talking about translating audio, but even video is
18 a computer-intensive process. If you've ever
19 noticed close captioning, how it never keeps up and
20 does inaccurate translations, that's the same thing
21 with, you talk to Siri, which has got a massive
22 computer down in North Carolina doing the voice
23 recognition and translating it, you notice how it
24 gets things screwed up and sometimes takes time.

25 So these are things which will happen
26 when the processing power becomes cheap enough, the

1 apps are written, and there's a market demand. None
2 of these things, except with respect to
3 TPM-protected material -- and 30 TPMs? I'm not
4 aware of 30 TPMs. It just is not a problem in the
5 world.

6 MS. CHAUVET: So Mr. Burger, you just
7 mentioned licenses and implied Mr. Huang does not
8 want to seek a license from DCP. So has Mr. Huang
9 ever asked for a license?

10 MR. BURGER: Not that I'm aware of.
11 We've never, as far as I know -- we've never turned
12 somebody down. There may be a corner case, but as
13 far as I know. And also the idea that it's
14 expensive, yeah, we didn't, this isn't for an
15 individual user. Because as Mr. Taylor and I have
16 said, we can't do it, and we've got some technical
17 background.

18 MS. SMITH: I think Dr. Huang could do
19 it.

20 MR. BURGER: Yeah, Dr. Huang, of course
21 he can, and he wants to put it in a device that he
22 wants to sell to the public, which of course is not
23 permitted under the law. But individual users
24 won't --

25 MS. SMITH: So you would not give Dr.
26 Huang an individual license?

1 MR. BURGER: An individual license? We
2 give licenses, we don't, you know, all it says is
3 how you have to follow the rules. And he could do
4 what's called a repeater. And a lot of the video
5 image processing could be done. The problem is he's
6 going to have sell you a very expensive box to do
7 all of these things that he's proposing.

8 MS. CHAUVET: So if, hypothetically, if
9 Mr. Huang were to seek a license from DCP, would it
10 be granted to do whatever he's asking?

11 MR. BURGER: Yeah, it would be. We
12 don't ask what you're going to do with it. You sign
13 a license and agree to a set of rules. And if you're
14 going to do image processing, which is --

15 MS. CHAUVET: But would any of the rules
16 cover the proposed uses?

17 MR. BURGER: Yes.

18 MS. CHAUVET: So he really would not be
19 prohibited from doing --

20 MR. BURGER: No. Let's take the split
21 screen, for example. The blog content, so far as
22 I know, is coming in over the internet and is not
23 protected.

24 So what would happen would be you'd send
25 the, assuming the speech is protected, and again,
26 that's a big assumption, assuming the speech is

1 protected, the television would take it and say, I'm
2 putting that in this half, and I'm putting the
3 internet feed in the other half of the screen.

4 It just hasn't been, I mean, it's capable
5 of Vizio, but nobody I know is doing it, because for
6 political speech, because nobody's interested in
7 it. There's no demand for it. If there's a demand,
8 somebody could do an app. If Dr. Huang wanted to
9 do that processing, as long as it's in the protected
10 space, it's allowed under the license.

11 MS. CHAUVET: Ms. Walsh, would you like
12 to respond?

13 MS. WALSH: Yeah, so I think that we've
14 just heard some you know, valuable information about
15 why the devices aren't out there in the market that
16 let you do this. So Mr. Burger described a very
17 expensive box. It might be that there's not a mass
18 market for a display device or an intermediate
19 device that lets you do all of the things that Dr.
20 Huang wants to do.

21 That doesn't mean that he shouldn't have
22 the right to do it.

23 With regard to getting a license, I heard
24 licenses are not for individual use, and that's
25 borne out by the documentation of the licenses. It
26 also has various engineering requirements, scores

1 of pages of legalese. It does--- it restricts use
2 that requires digital output, such as processing
3 intensive applications in which Huang wishes to
4 engage. It's been shifting---

5 MS. SMITH: Has he ever approached DCP
6 for a license for commercial uses for the NeTVCR?
7 Am I saying it right, NeTVCR?

8 MS. WALSH: I don't believe so.

9 MS. SMITH: He has not approached for a
10 license, or that I was saying it wrong?

11 MS. WALSH: Sorry?

12 MS. SMITH: Has Dr. Huang ever sought a
13 license for the NeTVCR?

14 MS. WALSH: We're talking about
15 something outside of the scope of the rulemaking
16 now? He has never sought a license for his personal
17 uses.

18 MS. SMITH: What about the commercial
19 uses that the opponents have identified?

20 MS. WALSH: No, I don't believe he
21 sought a license for NeTVCR, which is a device that
22 doesn't exist yet.

23 MS. CHAUVET: And then Mr. Burger, just
24 a follow up, because DCP, in its comments, noted
25 that, DCP has taken action to remove more than 4000
26 online listings for devices designed to circumvent

1 HDCP. So was that because licenses were not sought?
2 And what was the basis for the -- ?

3 MR. BURGER: They were circumvention
4 devices.

5 MS. CHAUVET: So the 1201 claim.

6 MR. BURGER: The 1201(2) circumvention
7 device.

8 MS. CHAUVET: Okay. Mr. Williams.

9 MR. WILLIAMS: Yeah, thank you. I guess
10 I'm a little perplexed or confused by the notion that
11 this NeTVCR isn't in the record. I mean, we've cited
12 to the lawsuit that Ms. Walsh filed against the
13 government and Mr. Huang is plaintiff in. And it's
14 at issue there, as I understand it. And so I believe
15 it is a part of the record.

16 I'm interested to know that it does not
17 exist yet, because in other contexts, when there's
18 no working prototype, the Office has been quite
19 skeptical of whether the proposed goals can be
20 accomplished. And here where you have so many
21 wide-ranging goals that involve very different
22 types of alterations of content, I think that would
23 be a wise course to follow in this particular class
24 as well.

25 In addition, some of the things at issue
26 I would maintain are infringing uses. One thing

1 that's referred to is content editing, stripping
2 certain types of things out of the content. The
3 VidAngel opinion calls into question whether that
4 type of activity would be lawful. Some of the uses
5 involve advertising-related uses, which are not the
6 types of uses that are typically at issue in this
7 proceeding.

8 We've already talked about
9 space-shifting and the issues surrounding that.
10 And even though the VidAngel service was a
11 commercial service, the opinion goes beyond the
12 facts to say that the Copyright Office has been
13 getting this right for a long time, that no opinion
14 has endorsed space-shifting. So I don't think that
15 it should be resigned to its facts.

16 And one other thing I want to mention is
17 the First Amendment arguments, we talked about this
18 some with respect to security researchers.

19 Every case dealing with First Amendment
20 issues in section 1201 has applied intermediate
21 scrutiny, says it passes muster, says that it is
22 properly addressing important interests, including
23 free speech interests on the side of copyright
24 owners who have free speech interest, and on the side
25 of the public, who has an interest in copyright
26 continuing to spur innovative entertainment

1 products and other copyrighted content.

2 So I don't think the First Amendment
3 arguments are convincing. And even if some of them
4 were, there are other ways to get at content, aside
5 from circumventing HDCP. As I understand it, if
6 you're accessing a streaming service on your laptop,
7 for example, and you're not running a cable from your
8 laptop to your TV, that doesn't implicate HDCP.

9 If you're viewing a smart TV and
10 connecting directly to the internet to view a
11 streaming service instead of running it through a
12 set-top box and an HDMI cable, that doesn't
13 implicate HDCP. So I think there are alternatives
14 to everything in the record. And again, I just don't
15 see the basis for this one, given that it's
16 essentially all audiovisual works for any purpose
17 that we can think of.

18 MS. SMITH: So Ms. Walsh, just to
19 clarify what you were saying before, if this
20 exemption were adopted, is it -- would it apply to
21 NeTVCR, or would it not?

22 MS. WALSH: So the exemption is a
23 defense to 1201(a)(1), so a person, to take
24 advantage of the exemption, needs to create the
25 technology to do that for their own personal use.
26 So do you mean would Dr. Huang be able to create a

1 device for his personal use to take advantage of the
2 exemption? The answer is yes.

3 MS. SMITH: And that device could be the
4 NeTVCR. Or would be.

5 MS. WALSH: It could be.

6 MS. SMITH: So the opponents have
7 suggested the NeTV itself, which I understand
8 already does exist and is in the market, is not
9 circumventing, do I have all that right?

10 MS. WALSH: Right.

11 MS. SMITH: Okay, that would be an
12 alternative for many of the uses that Dr. Huang
13 wishes to engage in. Do you want to respond to that?

14 MS. WALSH: Sure. So because it doesn't
15 circumvent, it can't achieve any of the uses that
16 we're talking about here that require access to the
17 copyrighted work. So it can't do processing on the
18 image because it can't know what's in --

19 MS. CHAUVET: What does it do?

20 MS. WALSH: So that it enables you to
21 write your own pixel data, totally ignorant of
22 what's coming in, to write your own pixel data over
23 the output that goes to the television. So you
24 wouldn't be able to see the entirety of the image.

25 If you put an overlay on top of it, you
26 wouldn't be able to do transparency. You're not

1 able to do any of the image processing that we've
2 been talking about, and you're not able to do any
3 of the space- or time- or format-shifting that we've
4 been talking about, because it doesn't give you
5 access to the original work.

6 MS. SMITH: So Mr. Burger, leaving aside
7 the space- or time-shifting elements of it, do you
8 want to respond to what Ms. Walsh said?

9 MR. BURGER: Image processing is
10 specifically permitted in the license. In addition
11 to that, my TV at home, when I'm watching pay per
12 view with Cox, will tell me -- it has pixelated data
13 coming across telling me what number is calling so
14 I can decide whether I want to interrupt my TV show
15 or put it on pause.

16 And there are a number of security
17 systems which are linked up to -- Infinity for
18 example, that will overlay graphics on it, give you
19 a message that your front door is ajar. That's a
20 weird statement, but the point is that this is
21 perfectly doable today, it's perfectly legal. You
22 don't need to circumvent.

23 MS. SMITH: Do you have any specific
24 insight into -- so Dr. Huang has created a product
25 or a program called NeTV, which does not involve
26 circumvention -- whether that would allow some of

1 these uses? Because Ms. Walsh is saying it does not.

2 MR. BURGER: I'm not familiar with it,
3 I'm just not familiar with the product. I just know
4 that if he took a license, he'd be able to do many
5 of these things in his intermediate box. It is
6 permissible to in half store temporarily in the
7 clear the image and apply image processing.

8 MS. SMITH: Mr. Taylor.

9 MR. TAYLOR: Yeah. The fact that Dr.
10 Huang can do it himself or has a single device for
11 his personal use, I mean, this proceeding has
12 consistently held that that is de minimis use and
13 does not constitute a harm. We had the Linux
14 players, everybody wanted to play a Linux. And
15 there was a large group of people who wanted to have
16 a DVD Linux player.

17 And the Register had to refuse that and
18 said that they were inconvenienced. And so that
19 alone can't be the basis for granting exemption
20 here, that he himself can create a product for
21 himself.

22 MS. SMITH: Mr. Williams.

23 MR. WILLIAMS: Yes, so we have not done
24 a technical analysis of the device, so I don't want
25 to give the impression that I'm 100% sure it's not
26 a circumvention device. But it is marketed as if

1 it is not a circumvention device, and that is my
2 understanding of Mr. Huang's position on it.

3 I mean on page 14 of our opposition, we
4 quote some of the marketing for this NeTV starter
5 pack, and it does refer to things like, right out
6 of the box it enables overlay of Facebook and Twitter
7 feeds and SMSs from Android phones.

8 So while it might not enable some of the
9 content, the conduct at issues, like creating
10 complete, in-the-clear, space-shiftable copies, it
11 does appear to address the individual uses that
12 relate to, in real time, being able to both watch
13 TV and participate in a group online conversation
14 about the content that you're watching.

15 So if it was a political debate, you
16 wanted to see all of your friends' Twitter feeds,
17 I don't know if it enables all of them, but it appears
18 to enable Twitter feeds to be showing alongside as
19 you're watching so that you don't have to look at
20 your phone, which is of course another alternative,
21 or your laptop, or having two TVs.

22 This seems to enable you to see Facebook
23 messages and Twitter messages as you're consuming
24 the content. And it says you could even do it with
25 Blu-Ray, so I guess if everyone wanted to start a
26 movie at the exact same time and see what everyone's

1 reactions were, that seems possible here. So at
2 least some of the uses that are described here are
3 enabled, it appears.

4 And then I also just wanted to mention
5 that this licensing issue, I can't speak to when
6 licenses would or not issue from DCP. But I do think
7 it's important to know that Congress was very aware
8 at the time that the DMC had passed that these kinds
9 of standards-setting bodies were going to move
10 ahead.

11 And that's what going to enable all this
12 content to be distributed on different kinds of
13 devices through standards that enable encryption
14 and things like that.

15 So I don't -- I would suggest you should
16 not think about those kinds of licensing agreements
17 for devices and tools in exactly the same way you've
18 sometimes considered does someone need to get a
19 license to use, for a remix video, for example.

20 I think to call into question the whole
21 fabric of how legitimate devices and content have
22 been distributed would be a very different
23 undertaking. So I just want to try to draw that
24 line. It sounds like DCP would at least entertain
25 the notion of granting a license for a lot of what's
26 at issue here.

1 MS. CHAUVET: Ms. Walsh.

2 MS. WALSH: Sure. So I'll reiterate
3 that the license doesn't permit the space-shifting
4 type uses. It doesn't permit processing-intensive
5 uses that require that the information be sent to,
6 for instance, a more capable machine, a cloud
7 computing machine. As has been noted, a lot of these
8 uses are data intensive.

9 And so the image processing is easier to
10 accomplish. In some cases, you can accomplish more
11 than you can without the use of an external machine.
12 And that's prohibited under the HDCP license.

13 These are all part of the reason why
14 there isn't an open sort of innovation ecosystem
15 where people are able to create this functionality.
16 So the examples that exist aren't there because
17 people are free to compete or create the
18 functionality that they value, they're there
19 because they paid for the privilege.

20 MS. SMITH: But that's a little bit at
21 odds with -- they have a lot of examples of license
22 uses of HDCP, and then they've said, "Well, maybe
23 there's just not a market for this particular use.
24 Which may be an individual use," and it could be well
25 and good and we could still evaluate it, but maybe
26 you could speak to that.

1 MS. WALSH: I don't understand the
2 question.

3 MS. SMITH: Maybe, I don't understand
4 where you were going with what you were saying. You
5 said it's impeding innovation of a variety of
6 products, but they have listed a variety of products
7 that seem to be able to participate by taking a
8 license. So I'm -- why can't they take a license?

9 MS. WALSH: So I think two things. One,
10 the restrictions on the license, which I just spoke
11 about. And two, the idea that you shouldn't have
12 to pay a fee to engage in non-infringing activities
13 that you have every right to engage in.

14 MS. CHAUVET: What about Mr. Burger's
15 comment that in case the NeTVCR -- I'm not sure how
16 to pronounce the name of the product. Is the new
17 TV VCR, or the netVCR, Mr. Huang's product?

18 MS. WALSH: It's N-E-T-V-C-R.

19 MS. CHAUVET: N-E-T-V-C-R. I mean,
20 that would essentially be another product that
21 someone would purchase to do the circumvention. So
22 what -- do you have a response to that?

23 MS. WALSH: Sorry, what?

24 MS. CHAUVET: Because, Ms. Walsh, you
25 were just saying someone shouldn't have to buy
26 another device or shouldn't have to take another

1 license so that they can circumvent and engage in
2 these uses.

3 Mr. Burger noted that to perhaps
4 circumvent this HDCP to take advantage of your
5 proposed exemption, someone would have to buy the
6 NeTVCR, which would essentially be buying another
7 device anyway, so --

8 MS. WALSH: That's not the case. This
9 is about establishing the right for a person to
10 circumvent on their own, that's what the rule --

11 MS. CHAUVET: I guess my question is
12 then how would someone go about circumventing HDCP
13 on their own?

14 MS. WALSH: So given that the master
15 keys and the technologies are available and it's not
16 a terribly, you know, difficult technical problem,
17 someone who's familiar with image processing and
18 cryptography would program a device to do what I
19 described in the earlier dialogue in terms of all
20 the steps that --

21 MS. CHAUVET: Well, could they -- say it
22 became commercially available, could they purchase
23 the NeTVCR to circumvent to take advantage of this
24 proposed exemption?

25 MS. WALSH: If it were lawful for --

26 MS. CHAUVET: Let's keep the law out of

1 it and assume that an exemption is granted and all
2 of that. Is the NeTVCR device, is that something
3 that someone would use to circumvent if they wanted
4 to take advantage of this proposed exemption?

5 MS. WALSH: If it were lawful to do so,
6 then the NeTVCR device would enable someone, for
7 instance Dr. Huang, to take advantage of the
8 proposed exemption.

9 MS. CHAUVET: Mr. Burger.

10 MR. BURGER: That's really not the case,
11 because the law is clear that that would be a
12 circumventing device, which the Copyright Office
13 doesn't have the power. But yeah, sorry --

14 MS. CHAUVET: I think I was just purely,
15 in a hypothetical situation, asking if the NeTVCR
16 device were to allow someone to engage in the
17 proposed uses.

18 MR. BURGER: Right, pretend the law
19 doesn't forbid that.

20 MS. CHAUVET: Yes.

21 MR. BURGER: Okay. No, that's not
22 enough. You've just heard that you also need cloud
23 computing. Also, individuals are not going to be
24 able, unless they're Dr. Huang or you know, probably
25 in the entire country maybe a thousand people if
26 that, and none of them are in this proceeding.

1 This proceeding is at odds with the
2 filing in the Federal District Court that all of a
3 sudden we're magically transforming a person who
4 wants to sell a commercial product to do all this
5 to just be doing it for himself. There are no other
6 users in this proceeding who are saying they want
7 to do that. Because it's very difficult.

8 And again, the master key is not out for
9 2.x, what we're, what people are putting in their
10 devices now. And it would take, you know, a
11 laboratory of scientists to break it. I mean, we
12 all know that encryption ultimately is broken.

13 But the point I think Mr. Williams made
14 earlier is that it doesn't, what we're talking about
15 is enabling a market which has been fabulous. The
16 protection has enabled studios who were -- I was
17 involved way back when DVD was being decided, and
18 we knew that it would get broken.

19 But the point is that most people aren't
20 capable of doing that. So you have a market that's
21 established. Once you start letting Dr. Huang do
22 this, then I don't know what we're going to be up
23 against in terms of illegitimate boxes out there
24 that are not permitted by the law.

25 But you heard that you are going to need
26 cloud computing. This is not something for the

1 average user or the --

2 MS. CHAUVET: Would a user need anything
3 else besides cloud computing?

4 MR. BURGER: I don't even know that you
5 could do it with cloud computing real time. For
6 example, he talks about imposing faces over people.
7 Forget about rights of publicity and other issues
8 that that -- just think of the computer intensity
9 to do that.

10 I don't know if you've seen Beauty and
11 the Beast, but what they did there is they took, Dan
12 Stevens acted without makeup, acted the role of the
13 beast, and then they used servers and AI software
14 to do that. Maybe someday in the future, that'll
15 be doable by an individual, but it isn't today and
16 won't be for the foreseeable future.

17 So these things are just, it's like
18 throwing stuff against the wall.

19 MS. CHAUVET: Just because we are a
20 little bit running low on time. So I just want to,
21 thanks, that's very helpful. Ms. Walsh, I didn't
22 know if you had a response to that specifically, and
23 then also if you could answer, because you said if
24 someone were to have the NeTVCR device, they could
25 engage, again assuming it's lawful and everything
26 else, they could engage in the proposed uses.

1 But would they need anything else in
2 addition to that device, such as the cloud
3 computing?

4 MS. WALSH: So some of these uses are
5 doable on your phone. Like your phone can translate
6 Mandarin characters into English, your phone can
7 apply Snapchat filters, and so on. So the idea that
8 this is computationally unthinkable is not
9 accurate. There is a greater scope of uses that are
10 enabled by cloud computing, which is something that
11 happens in real time.

12 And so first of all, that's all doable.
13 Was there another part to your question? I have
14 another point.

15 MS. CHAUVET: No, no.

16 MS. WALSH: Okay.

17 MS. CHAUVET: It was more just if
18 anything else was needed beyond the NeTVCR device.

19 MS. WALSH: Your display device and your
20 playback device. So I want to go back a little bit
21 to the NeTV, which is the non-circumventing device,
22 and talk about how it enables a lesser form of some
23 of the uses that we're talking about.

24 So the reason, so it can't let you see
25 the entirety of what you're trying to watch while
26 it's doing an overlay. It can't make something

1 transparent so you can keep seeing it, we'll see more
2 information. It can't rescale something, it can't
3 do picture in picture. Basically, anything that
4 requires it to act on the incoming signal, it can't
5 do, because it never accesses that copyright work.

6 MS. CHAUVET: So I guess -- but it can
7 superimpose pixels onto an HDMI stream or enable
8 overlaying your web content on existing HDMI video
9 feeds.

10 MS. WALSH: Right, so you could cover up
11 part of a picture, but you can't rescale it.

12 MS. SMITH: Okay.

13 MS. WALSH: Yeah, all set.

14 MS. CHAUVET: Mr. Williams.

15 MR. WILLIAMS: Yes, you touched on this
16 earlier, and Jim I think addressed it in large part,
17 but we've got a few links in our comments to videos
18 that kind of show you what's involved with doing this
19 on a licensed TV in the marketplace. And it is
20 really just picking different ports and splitting
21 your screen, and you can do a lot of this on a lot
22 of different TVs.

23 And so I don't understand, I guess, why
24 that purchase of that type of television for someone
25 who really is interested in this kind of conduct is
26 so burdensome compared to having to do all of the

1 things that Ms. Walsh is describing. And so I think
2 those alternatives alone defeat this class.

3 I think it's really impossible to answer
4 the question could the NeTVCR do all of this because
5 there's so many things at issue. It's a
6 non-exhaustive list of things, and to even try to
7 write that exemption would require you to just say
8 audiovisual works for all lawful purposes. And the
9 one limiting factor would maybe be that they were
10 being transmitted through HDCP.

11 But that, you know, a very large
12 percentage of audiovisual works at some point in
13 their life cycle will be transmitted through HDCP.
14 So it's impossible to know technically whether it
15 can be achieved. We've heard the device doesn't yet
16 exist, and it's impossible to analyze whether all
17 of these things are fair uses because the comments
18 give us very little detail about what's actually
19 involved.

20 And so I again just strongly weigh in
21 against this class. It's one in the cycle that I
22 feel like is completely beyond the pale.

23 MS. SMITH: Mr. Burger.

24 MR. BURGER: I just, one small point,
25 and I hate to point out an inconsistency. In
26 response to your last question about can it be done

1 without cloud computing, Ms. Walsh said it's not
2 computational intense, therefore it could be done
3 with an HDCP license. It's not computationally
4 intense.

5 MS. CHAUVET: Okay, thank you, that's
6 helpful. I just wanted to ask a follow-up question.
7 We've talked about a lot of the proposed uses. I
8 guess my question for you, Ms. Walsh, is that
9 wouldn't some of these proposed uses already be
10 covered by some of the current exemptions or
11 proposed exemptions? Like for example, for some of
12 the educational purposes?

13 MS. WALSH: Yes, I think, and I think
14 that the record of people having need of those
15 exemptions bolsters the need for this exemption as
16 well.

17 MS. CHAUVET: But if the current
18 exemptions already cover that activity, why is an
19 additional exemption necessary?

20 MS. WALSH: An exemption is necessary
21 for the full scope of non-infringing uses, not just
22 for those activities where there's overlap.

23 MS. CHAUVET: And Mr. Williams.

24 MR. WILLIAMS: Yes, I think it's a good
25 question. I think that some of these activities are
26 clearly covered by the existing exemptions. I

1 don't think that circumvention of HDCP was
2 contemplated by the existing exemptions. And as I
3 was referencing earlier, there are ways of accessing
4 content that don't involve HDCP.

5 And so I think when we were having the
6 discussion three years ago about, you know, is the
7 exemption limited only to distributions of works,
8 and you revised the language some to make it clear
9 that it also covers streaming services, part of that
10 discussion did not involve HDCP. And I think the
11 fact that they're asking for an HDCP-specific class
12 here bears that out.

13 So yes, I would say there are other ways
14 of exercising those exemptions that don't involve
15 HDCP.

16 MS. CHAUVET: Ms. Walsh, has HDCP 2.x
17 been broken?

18 MS. WALSH: I believe that it has, yes.

19 MR. BURGER: Not to my knowledge.

20 MS. SMITH: All right, we have a
21 disagreement.

22 MR. TAYLOR: I'm not sure what Jim means
23 by HDCP 2.x, but 2.2, the last I saw, I did not see
24 that it was hacked, but.

25 MS. SMITH: Ms. Walsh do you know
26 whether 2.0, 2.2, 2.x, have they all been broken?

1 MS. WALSH: A quick Google search
2 indicates that there are 2.2 strippers out there.
3 We'd say yes.

4 MR. TAYLOR: Strippers --

5 MS. CHAUVET: Mr. Taylor.

6 MR. TAYLOR: Excuse me, David Taylor.
7 Stripping HDCP is different than breaking the
8 encryption, right?

9 MS. CHAUVET: What's the difference?

10 MR. TAYLOR: Well, the way I understand
11 it, stripping takes the signal and splits it, as
12 opposed to how the signal passes. It's not
13 decrypted. So the stripping is different than a
14 hack of the encryption. And I'm sorry, I'll have
15 to get back to you. That's the better answer, I'll
16 get back to you on that.

17 MS. CHAUVET: Okay, no problem.

18 MS. WALSH: We will as well.

19 MS. CHAUVET: Opponents, you've touched
20 on this a little already, but I just didn't --

21 MS. SMITH: I think maybe Ms. Walsh
22 wanted to --

23 MS. CHAUVET: Oh, I'm sorry, Ms. Walsh.

24 MS. WALSH: I think in any event it's
25 clear that many of the devices that are out there
26 in the public and in Dr. Huang's home, use versions

1 of HDCP that have been, for which circumvention is
2 readily possible.

3 MS. CHAUVET: So thank you, that was
4 helpful. So for the opponents, you've touched a
5 little bit on kind of the anti-trafficking
6 provisions that might be implicated in this
7 exemption. I didn't know if you wanted to speak more
8 about that. Mr. Williams.

9 MR. WILLIAMS: Matt Williams, I'm happy
10 to speak a little bit about it. I mean, I think the
11 Office has been hesitant rightly to grant exemptions
12 where it almost invites the market to be created for
13 a certain type of tool.

14 And in the section 1201 study, the Office
15 rightly concluded that the circulation of tools is
16 impossible to control and the downstream
17 consequences are quite harmful. So this isn't even
18 one that involves, say like the repair shop issues
19 we'll discuss tomorrow, where we're debating
20 services-related issues.

21 This is circulation of a device that
22 could really lead to a lot of unlawful copying, and
23 it's a device that currently doesn't exist
24 apparently and isn't on the marketplace, depending
25 on which side you believe in terms of whether HDCP
26 in its current form has been encrypted.

1 So I think it would send the wrong signal
2 to invite these kinds of devices to be generated and
3 put out into the distribution stream.

4 MS. CHAUVET: Ms. Walsh.

5 MS. WALSH: So first of all, Dr. Huang
6 has the capability to make the device and cares about
7 complying with the law.

8 Second, there's never been any evidence
9 that any of the exemptions that have been granted
10 have led to infringement. There's no evidence that
11 that would occur, that creating an ability to
12 circumvent for non-infringing uses would lead to
13 infringement. As I've explained, if your goal is
14 infringement, it's easy enough to do that without
15 getting this exemption.

16 MS. CHAUVET: So if the Office were to,
17 or propose or recommend adoption of this proposed
18 exemption, what would be the impact on Mr. Huang's
19 plans to offer his NeTVCR device commercially?

20 MS. WALSH: I don't believe it would
21 impact those plans. It would impact his --

22 MS. CHAUVET: So he would get --

23 MS. WALSH: Ability to -- it would
24 impact his ability to engage in the non-infringing
25 uses himself to circumvent access controls.

26 MS. CHAUVET: So if the exemption were

1 adopted, he would not offer his NeTVCR device
2 commercially to third parties?

3 MS. WALSH: Not without establishing
4 the legal right to do so.

5 MS. CHAUVET: I guess other than the
6 exemption, what would give him that legal guidance
7 that it would be permitted?

8 MS. WALSH: The trafficking permission
9 is part of the Green v. DOJ lawsuit in which Huang
10 is challenging the constitutionality of section
11 1201.

12 MS. CHAUVET: So essentially he would
13 want this exemption, and then he would want to have
14 the court case resolved before he would offer his
15 own device commercially, assuming the court went in
16 his favor?

17 MS. WALSH: That would be one path
18 forward. But as I said, he's very conscientious
19 about not violating the law.

20 MS. SMITH: Mr. Williams, did you want
21 to speak to that?

22 MR. WILLIAMS: Yeah, I don't pretend to
23 know his personal business, but the allegation is
24 that he doesn't even live inside the United States.
25 So I don't understand how anything within your
26 authority could be impacted in his personal daily

1 life with respect to granting an exemption. If he
2 lives in Hong Kong, your exemption doesn't authorize
3 his activities.

4 MS. SMITH: I believe he lives in
5 Singapore.

6 MR. WILLIAMS: I'm sorry, I
7 mis-recalled that. But it's something that I don't
8 think has come up before, but especially now that
9 the focus seems to be only on his personal conduct,
10 the fact that he's outside of the country seems to
11 be relevant to whether you could to help him with
12 respect to his personal conduct.

13 MS. SMITH: A slightly different train
14 of questions for Ms. Walsh. Do you know -- do HDMI
15 capture cards circumvent HDCP?

16 MS. WALSH: I'm not familiar with that
17 technology by that name.

18 MS. SMITH: Okay. Do you know, is it
19 possible to run the HDCP-protected signal through
20 a computer or other device that can do a screen
21 overlay or other manipulation, or even I guess
22 running the rescaling or screen capture, without
23 circumventing HDCP?

24 MS. WALSH: I'm unpacking the different
25 elements of that question. So circumventing HDCP
26 is required to engage in the uses that are in our

1 filings in the record.

2 MS. SMITH: Well, I guess it's -- could
3 you take the HDCP-protected signal, run it through
4 a computer, maybe you're making temporary copies or
5 something, engage in the rescaling of these variety
6 of uses while the content is steaming without
7 circumventing HDCP?

8 MS. WALSH: No, you need to circumvent
9 HDCP to do that all with streaming.

10 MS. SMITH: Okay, Mr. Burger do you have
11 any --

12 MR. BURGER: No, I disagree with that.
13 Again --

14 MS. SMITH: Okay, why?

15 MR. BURGER: This is computationally
16 intense criteria. But as long as, and Ms. Walsh said
17 there were a number of those, it could be done. It
18 could be what's called a repeater. And as long as
19 it takes the, it has HDCP and it's got a license,
20 it takes it and decrypts it, temporarily stores it.

21 It can do video manipulation, triple
22 play, lots of different things, many of the things
23 that are in Mr. Huang's petition. And then it
24 re-encrypts it and sends it to a screen. Or it could
25 send it to the computer screen.

26 MS. WALSH: That's right, decryption is

1 necessary.

2 MR. BURGER: Yeah, it's legal
3 decryption. It's not circumventing HDCP, it is
4 decrypting it under the license, keeping it
5 protected. Manipulate what you want to do with the
6 video, and then you don't have to re-encrypt it if
7 you send it right to the screen, right to the video
8 buffer.

9 But if you want to send it to a large
10 screen, you'd have to re-encrypt it with HDCP. It's
11 called a repeater function, it's right in the
12 license and in the specifications. And you would
13 re-encrypt it, send it to a TV that's got HDCP, which
14 all TVs have today. And it would decrypt it and
15 display it. So you could do that.

16 Again, I agree if that -- if you needed
17 a super-computer to impose people's faces on other
18 people's faces, you would not be permitted to do that
19 with HDCP. You've got to send it to a cloud computer
20 for computationally intense functionality.

21 MR. CHENEY: So Mr. Burger, can you give
22 us an example of some of these repeaters? Are they,
23 do they come currently equipped on laptops,
24 computers now?

25 MR. BURGER: No.

26 MR. CHENEY: You have to buy a separate

1 device for that?

2 MR. BURGER: As far as I know, there are
3 only separate devices. There are a lot of them out
4 there. They're like an entertainment center, it
5 has a lot of different functionality, and one is to
6 transmit the video. In fact, in the early days, I
7 had one of those, and it worked really well.

8 I would have -- I downloaded from iTunes
9 a HD movie onto my tablet, connected it to this
10 repeater. It would then send it to the TV screen,
11 which I couldn't do at that point directly with my
12 tablet.

13 The problem is that this is what Mr.
14 Huang wants to do personally. As far as we know,
15 for many of these things, they've either been tried,
16 like the baseball statistics, it just didn't work,
17 it wasn't a popular application. There isn't a big
18 market for translating in Pinyin, whatever that is,
19 Chinese.

20 I think that if there's a market out
21 there like there is for live-streaming games, a huge
22 market, I mean millions of people are doing it. You
23 know, if you're not in the market doing that with
24 a device, you're going to be left behind. So that's
25 the PS4 came out with live game streaming.

26 MR. RILEY: Can you buy an HDMI to RCA

1 converter? And if so, does that only convert
2 non-encrypted streams, or non-encrypted signals?

3 MR. BURGER: RCA, you're talking about
4 component video?

5 MR. RILEY: Yeah.

6 MR. BURGER: I don't know, I can find
7 out.

8 MS. SMITH: Mr. Williams.

9 MR. WILLIAMS: Mr. Williams, I don't
10 know if this is what you're referring to. One thing
11 that is referred to on the Twitch "how to broadcast"
12 page that I referenced earlier is the Roxio Game
13 Capture HD Pro.

14 Now, I haven't analyzed that particular
15 device, but that is one device that they say can be
16 used to elevate your ability to use component
17 cables, for example, to run the content through that
18 device and then create clips.

19 There was a reference earlier to it being
20 a lower quality. I think it's still 1080i, or in
21 some instances 1080p, so it's still a high quality
22 with component cables.

23 MS. WALSH: I just wanted to add that Dr.
24 Huang spends significant time in the United States
25 and runs a business in the United States and is often
26 in the United States.

1 MS. SMITH: All right, unless anyone
2 would like to get a final word, I think we're done
3 with the session. Thank you very much for all of
4 your information and your participation.

5 (Whereupon, the above-entitled matter
6 went off the record at 2:22 p.m.)

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