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IN THE MATTER OF: )  
 )  
UNITED STATES COPYRIGHT OFFICE )  
SECTION 1201 PUBLIC HEARINGS )  
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Remote Roundtable  
 Suite 206  
 Heritage Reporting  
 Corporation  
 1220 L Street, N.W.  
 Washington, D.C.

Monday,  
 April 5, 2021

The parties met remotely, pursuant to notice,  
 at 10:32 a.m.

PARTICIPANTS:

## Government Representatives:

REGAN SMITH, General Counsel of the U.S.  
 Copyright Office  
 NICK BARTELT, U.S. Copyright Office  
 ANNA CHAUVET, U.S. Copyright Office  
 STACY CHENEY, National Telecommunications and  
 Information Administration  
 MARK GRAY, U.S. Copyright Office  
 MELINDA KERN, U.S. Copyright Office

## Panelists:

JONATHAN BAND, Library Copyright Alliance  
 SCOTT A. GOODSTEIN, Samuelson-Glushko Technology  
 Law & Policy Clinic at Colorado Law  
 DAKOTAH HAMILTON, Samuelson-Glushko Technology  
 Law & Policy Clinic at Colorado Law  
 RACHEL HERSCH, Samuelson-Glushko Technology Law &  
 Policy Clinic at Colorado Law  
 JASON KAPCALA, West Virginia University  
 BLAKE REID, Samuelson-Glushko Technology Law &  
 Policy Clinic at Colorado Law

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PARTICIPANTS: (Cont'd)

Panelists: (Cont'd)

JASON KAPCALA, West Virginia University

GABRIEL LENNON, Samuelson-Glushko Technology Law  
& Policy Clinic at Colorado Law

DEAN MARKS, AACLS LA

BLAKE REID, Samuelson-Glushko Technology Law &  
Policy Clinic at Colorado Law

CLARK RACHFAL, American Council of the Blind

MARK RICHERT, Association for Education and  
Rehabilitation of the Blind and Visually  
Impaired

HOWARD ROSENBLUM, National Association of the  
Deaf

DAVID J. TAYLOR, DVD CCA

CHRISTIAN VOGLER, Gallaudet University Technology  
Access Program

J. MATTHEW WILLIAMS, Joint Creators and Copyright  
Owners

P R O C E E D I N G S

(10:32 a.m.)

1  
2  
3 MS. SMITH: All right. Well, good morning.  
4 Thank you for being here with us virtually. My name  
5 is Regan Smith. I'm General Counsel of the United  
6 States Copyright Office, and this is the first day,  
7 the first session of our hearings for the § 1201  
8 rulemaking.

9 I think, first, we will start with  
10 introducing ourselves from the Copyright Office side  
11 along with NTIA. So, Ms. Chauvet?

12 MS. CHAUVET: Good morning. My name is Anna  
13 Chauvet. I serve as Associate General Counsel.

14 MS. SMITH: Mr. Gray?

15 MR. GRAY: Hi, everyone. I'm Mark Gray.  
16 I'm an Attorney-Advisor here at the Office of General  
17 Counsel.

18 MS. SMITH: Ms. Kern?

19 MS. KERN: Melinda Kern, Ringer Fellow.

20 MS. SMITH: Thank you. Mr. Cheney?

21 MR. CHENEY: Good morning. Stacy Cheney,  
22 Office of Chief Counsel at NTIA.

23 MS. SMITH: And we'll introduce the  
24 panelists in a second, but, first, I wanted to sort of  
25 explain our format now that we are all virtual, as

1 well as the hearings. I think many of you have  
2 participated in a § 1201 rulemaking before, but I will  
3 go over how it will work since not everyone has been  
4 here.

5 The goal of our hearings is to analyze and  
6 further develop the administrative record in relation  
7 to proposed exemptions to the anti-circumvention  
8 provisions in § 1201 of the Copyright Act. We are  
9 focused on clarifying and honing in on issues which  
10 were surfaced in the written comments, particularly  
11 the areas of dispute or where the record may be a bit  
12 patchy.

13 So this first session will focus on proposed  
14 adjustments to the exemption that currently permits  
15 circumvention of technological protection measures  
16 protecting motion pictures for disability service  
17 professionals and educational settings to create an  
18 accessible version.

19 So a couple logistics. The Copyright Office  
20 and NTIA will be moderating it. We can pose questions  
21 and call on you to respond either verbally, but you  
22 may also use the Zoom feature of "Raise Hand," or you  
23 may physically wave, and we'll try to get to you. If  
24 you can please try to keep your response relatively  
25 brief and to the question posed, I think we'll have

1 time to air out all of the issues.

2 Secondly, there's three sessions today.  
3 They can all be accessed by the same Zoom link we're  
4 using now for those who are watching. So there's no  
5 need to -- you can stay clicked-on all day. Anyone  
6 having technical difficulties, you can type in the Q&A  
7 or the chat, and someone from the Copyright Office  
8 will respond and help.

9 And, finally, I wanted to let people know  
10 that our last session of the week is an audience  
11 participation session where members of the public may  
12 provide comments for the record or perhaps panelists  
13 who did not sign up for a particular session. There  
14 will be a link in the chat to a SurveyMonkey where you  
15 can indicate what you would like to speak on. And  
16 we're asking people to limit comments to around three  
17 minutes on any of the topics at issue in the study.

18 So, next, let's call on the participants.  
19 If you could please just explain your name and your  
20 affiliation, we'll start with some broad questions and  
21 then move from there. So I think, to start, Mr. Band?

22 MR. BAND: Hi, I'm Jonathan Band. I  
23 represent the Library Copyright Alliance.

24 MS. SMITH: Thank you. Professor Reid?

25 MR. REID: Thanks, Ms. Smith. Blake Reid,

1 Director of the Samuelson-Glushko Technology Law &  
2 Policy Clinic at Colorado Law. We're here  
3 representing the Association of Transcribers and  
4 Speech-to-Text Providers, ATSP. Thanks very much.

5 MS. SMITH: Thank you. Would you like to  
6 have your student attorneys introduce themselves too?

7 MR. REID: Yeah, that'd be great. If we  
8 could go with Ms. Hamilton and Ms. Goodstein -- or Mr.  
9 Goodstein, excuse me.

10 MS. HAMILTON: Good morning. My name's  
11 Dakotah Hamilton, and I'm also part of the  
12 Samuelson-Glushko Technology Law & Policy Clinic under  
13 Professor Reid.

14 MR. GOODSTEIN: Good morning. My name is  
15 Scott A. Goodstein, and I am a student attorney at the  
16 Samuelson-Glushko Technology Law & Policy Clinic with  
17 Professor Reid.

18 MS. SMITH: Thank you, both of you, for  
19 being here. We appreciate it. Now Mr. Marks, please?

20 MR. MARKS: Thank you. Good morning. My  
21 name is Dean Marks, and I'm outside counsel to AACCS LA  
22 and DVD CCA. Thanks.

23 MS. SMITH: Thank you. Mr. Kapcala? I'm  
24 not sure if I'm saying that correctly.

25 MR. KAPCALA: Hi, thanks. My name's Jason

1 Kapcala. I'm the Assistant Director of Captioning and  
2 Interpreting at West Virginia University and  
3 past-President of the Association of Transcribers and  
4 Speech-to-Text Providers.

5 MS. SMITH: Thank you. Mr. Williams?

6 MR. WILLIAMS: Good morning. Matthew  
7 Williams from Mitchell, Silberberg & Knupp. I'm  
8 representing the Joint Creators and Copyright Owners.

9 MS. CHAUVET: Thank you. And Mr. Taylor?

10 MR. TAYLOR: Good morning. David Taylor  
11 representing DVD Copy Control Association and AACCS LA,  
12 Licensing Administrator.

13 MR. REID: Ms. Smith, I'm not sure if it's  
14 just me, but I think we may have lost your audio.

15 MS. SMITH: Oh, it was not just you.  
16 Apologies. So I'll remind everyone to please speak  
17 slowly and clearly, including myself, for the benefit  
18 of the captioners and to make sure your audio is not  
19 muted.

20 I think, before we dig into all of the  
21 details, I wondered if, Professor Reid, you wanted to  
22 explain from the perspective of the requestors what  
23 are the key features we should focus on for the  
24 hearing because I think there is a -- we have found  
25 through the briefings there's been a lot of



1 commonalities and areas that are not in dispute. What  
2 do you think are the remaining areas to focus on?

3 MR. REID: If it's okay with you, Ms. Smith,  
4 I may hand it off to Ms. Hamilton to take that on.

5 MS. HAMILTON: Good morning. So, from the  
6 commentors -- response comments that we received, we  
7 believe that there are two main areas that still need  
8 to be discussed. These include the proactive  
9 remediation expansion and the accessible versions of  
10 sufficient quality expansion. So we are hoping with  
11 the proactive remediation expansion, we are hoping to  
12 explicitly include any exemption that disability  
13 services professionals may proactively remediate  
14 videos that they expect to be used in classrooms and  
15 additionally, that when videos have captions that are  
16 of insufficient quality, they can remediate those as  
17 well.

18 MR. REID: And perhaps before we dive in, I  
19 just wanted to extend our appreciation to Mr.  
20 Williams, Mr. Taylor, Mr. Marks. It seems like a lot  
21 of the requests were agreeable, and we appreciate the  
22 understanding. And I think the clarifying questions  
23 and the comments were helpful.

24 And hopefully we can get to the bottom of --  
25 it seems like there are some fairly minor differences

1 and minor miscommunications, but I think we can get  
2 through all of them today. So appreciate the spirit  
3 of cooperation on this one.

4 MS. SMITH: So I see some nodding. Mr.  
5 Williams perhaps? Would you like to -- do you agree  
6 with Ms. Hamilton? Is there anything you would like  
7 to say as an opening?

8 MR. WILLIAMS: Yes, thank you, and thanks to  
9 Blake for that acknowledgement. We did want to try to  
10 reach agreement on as many of these proposals as  
11 possible, and we did, I think, basically achieve that,  
12 with the exception of the two that Ms. Hamilton  
13 mentioned. My clients definitely take these issues  
14 seriously, and so we appreciate the opportunity here  
15 to talk through the points of clarification that we  
16 asked for.

17 On the proactive remediation issue, I think  
18 Ms. Hamilton described it as works that they do  
19 anticipate using in the classroom, and so I think that  
20 might get us close to what we proposed, which is,  
21 essentially, if it's something that's on a course  
22 syllabus or something where the school already knows  
23 that it's going to be used in a class, that it was  
24 used the prior semester, for example, we're okay with  
25 the proactive remediation there, even though it's

1       arguably not required by the disability statutes.

2               What, you know, we were concerned about is  
3       more of a exemption that basically allows for the  
4       entire library catalogue to be circumvented in advance  
5       so that when something is added to a class, it can be  
6       rendered accessible or, basically, the whole catalogue  
7       is in advance rendered accessible.

8               And some of our concerns with that relate to  
9       the fact that there is a market check requirement  
10       here, and there are some other parts to the existing  
11       exemption that would perhaps be read out of the  
12       exemption if the proactive remediation went too  
13       broadly. So that's our primary concern on that issue.

14              And I will say that in one of the written  
15       statements that was submitted -- I believe it was the  
16       one under an anonymous name -- there was a mention of  
17       school guidelines that sometimes require captioning on  
18       every single video that is shown to a class, even if  
19       there's no disabled student or faculty member in that  
20       class. So I do have some questions about exactly how  
21       broad this may go, but I do think we're pretty close  
22       to agreement on it.

23              And with the sufficient quality, as you  
24       know, we were just hoping to come up with some  
25       reasonable objective standard that we could point to.

1 The proponents have, you know, kind of questioned  
2 whether the FCC standards would be the right place to  
3 look, and we're open to considering other standards,  
4 including some of the ones the FCC is looking at in  
5 their processes, but we would just like the regulation  
6 to have some contours beyond just sufficient quality.

7 MS. SMITH: Well, thank you both. I think  
8 the Office really appreciates everyone coming here to  
9 the roundtables in a constructive manner ready to dig  
10 into the issues. I think I will now turn it over to  
11 Ms. Chauvet.

12 MS. CHAUVET: Thank you, Ms. Smith. One  
13 other area where there does seem to be some  
14 disagreement is about whether the exemption should be  
15 expanded to cover Advanced Access Content System  
16 technology, also known as AACS2 technology. For the  
17 proponents, your reply comments note that in the last  
18 rulemaking, the Office declined to extend the  
19 exemption to AACS2 technology because of the lack of  
20 record at that time.

21 So, for this rulemaking, do you have any  
22 evidence to support a finding that AACS2 technology is  
23 adversely affecting non-infringing uses or that it is  
24 sufficiently similar to AACS1 technology to be covered  
25 under the current exemption?

1 MR. REID: I --

2 MS. CHAUVET: Mr. Reid? And, I'm sorry, if  
3 you could please just wait for us to call on you, just  
4 for the purpose of the captioner and the court  
5 reporter? So please go ahead, Mr. Reid.

6 MR. REID: Absolutely. Apologies for  
7 butting in, Ms. Chauvet. If I could turn it over to  
8 Mr. Goodstein for this one?

9 MS. CHAUVET: Mr. Goodstein, go ahead.

10 MR. GOODSTEIN: Thank you. We weren't  
11 explicit in our comment regarding AACCS2 because we  
12 feel that there is no real distinction in principle  
13 between captioning a video that is in AACCS format and  
14 captioning a video that's in AACCS2 format. And  
15 teachers certainly aren't choosing their classroom  
16 videos based on whether a video is in AACCS format or  
17 AACCS2 format. The statute is -- or the exemption is  
18 concerned with the rights of users. So we feel that  
19 it doesn't make sense to try to divide the extension  
20 up by marginal differences in format.

21 MR. REID: If I could, Ms. Chauvet, just to  
22 add, you know, with that, we understand that the  
23 Office declined to draw or to accept an argument along  
24 those lines in the previous rulemaking. And in  
25 consulting with our clients and disability services

1 professionals, it doesn't sound like there is a strong  
2 need to circumvent AACSB videos. That hasn't been a  
3 significant number of requests into disability  
4 services offices.

5 We would urge the Office to consider the  
6 likelihood of changed circumstances over the next  
7 three-year period. You know, I don't think anyone  
8 expected the uptake in the use of videos that has  
9 occurred over the last year as learning has shifted  
10 online as a result of the pandemic.

11 And so the modalities of what instructors  
12 and faculty are using in the classroom has changed  
13 dramatically in the last year. And Mr. Kapcala can  
14 speak to the immense increase in the number of videos  
15 that need to be captioned. We'd urge the Office to  
16 consider whether to draw fine-grain distinctions like  
17 the version number of a particular DRM when it's  
18 considering all the equities that are at play in this  
19 exemption.

20 Given that the needs are likely to shift  
21 over time and, indeed, to avoid the sort of  
22 incremental need to come back and relitigate aspects  
23 of the exemption as facts on the ground change, the  
24 existing class, which covers streaming video, DVD in  
25 AACSB, one of the really nice features of that class is

1 that it has been broadly scoped and has avoided these  
2 sorts of fights about particular DRM schemes and the  
3 extent to which they proliferate in the market.

4 But, you know, we wanted to be  
5 straightforward about that, you know, AAC2.0 and 2.1  
6 have not been a significant factor at this point for  
7 disability services folks.

8 MS. CHAUVET: Mr. Marks and Mr. Taylor --  
9 Mr. Taylor, you have your hand raised. Why don't you  
10 go ahead and respond, please.

11 MR. TAYLOR: Thanks. I do think that the  
12 record actually matters in this case because the  
13 exemption that we're talking about, we're talking  
14 about modifications. And the record that has been  
15 built has been presented on DVDs and Blu-ray discs and  
16 whether or not the captioning and audio description in  
17 those products are sufficient or need to be  
18 circumvented for the purposes of making captioning  
19 more readily accessible.

20 And in this case, the record just simply, as  
21 Mr. Reid has indicated, has not indicated that there  
22 is a big need in this area. Maybe it's probably  
23 because the titles that come out on UHD Blu-ray are  
24 more of the big blockbuster hits that you would expect  
25 the content providers to already have captioning in

1 and audio description in, and, therefore, you don't  
2 see a big request in the Student Services Offices to  
3 assist with captioning those products.

4 MS. CHAUVET: Thank you. Mr. Marks?

5 MR. MARKS: Thank you very much. Just to  
6 add onto that that it actually is for a different  
7 format, the ultra-high-definition format of the film,  
8 and as Mr. Taylor said, because it's a newer format,  
9 I'm not aware of titles that don't have closed  
10 captioning or audio descriptions in that format.

11 And so that's another reason why we felt  
12 that there wasn't a justification to circumvent that  
13 particular technology. It really is -- an  
14 ultra-high-definition disc encrypted with AAC2 won't  
15 play on a standard DVD or Blu-ray player. And so it  
16 really isn't like, oh, well, it's just operating on  
17 the same technology. It's really a different product.

18 I do, though, want to also say how much we  
19 appreciate the collaborative work and the comments,  
20 both oral and written, from Mr. Reid and others to  
21 work towards consensus in this area, and it's really  
22 much appreciated, and I feel like this is what this  
23 rulemaking is all about. So thank you.

24 MS. CHAUVET: Thank you. So moving to an  
25 area where there was agreement about permitting



1 re-use. So, proponents, you proposed expanding the  
2 exemption to allow re-use of accessible materials that  
3 have been created by using the exemption. Opponents  
4 did not object to this expansion. Very briefly, just  
5 for purposes of the record, will you explain why this  
6 expansion is necessary?

7 MR. REID: I might actually defer --

8 MS. CHAUVET: Mr. Reid, I'm sorry, I just  
9 need to call on you for the court reporter. Please go  
10 ahead, Mr. Reid.

11 MR. REID: Thank you. I apologize. I'll do  
12 my best to stop stepping in like that. I wonder if I  
13 might call on Mr. Kapcala to speak to the need for  
14 re-use and the need to or the desire among disability  
15 services offices to not re-caption, re-describe  
16 materials?

17 MS. CHAUVET: And just to expand on that,  
18 so, if the existing exemption were not expanded to  
19 include re-use, would it adversely affect  
20 non-infringing uses, Mr. Reid?

21 MR. REID: Yes, I think that's correct. And  
22 I think what Mr. Kapcala can speak to is that,  
23 basically, without that expansion, what disability  
24 services offices are encountering is the need to  
25 basically go and re-do captions -- basically, throw

1 away captioned versions of video and do them again  
2 when they're -- when a video is re-used in a  
3 subsequent semester in a class that uses video  
4 repeatedly. But Mr. Kapcala's better positioned to  
5 speak to that than I am.

6 MS. CHAUVET: Mr. Kapcala, do you have  
7 anything briefly to add?

8 MR. KAPCALA: Yeah. So, as Mr. Reid pointed  
9 out, you know, we do have a high volume of videos that  
10 we receive for accommodation captioning, and that has  
11 really gone up since the pandemic over the last year.

12 Just to kind of provide a context for that,  
13 in a normal year, we might expect to see 75 videos per  
14 semester as far as requests go for captioning. And  
15 this past fall, we received 749 videos, and we are at  
16 593 now with four weeks left in this semester. So the  
17 pandemic really has pushed things online. We do see a  
18 lot more video being used and created. You know,  
19 quite a bit of it is whiteboard video and lecture.

20 And so, in that kind of new environment,  
21 we're having to find ways to meet that demand, and we  
22 do expect that some of that will be here to stay even  
23 after the pandemic kind of passes. And so, in that  
24 scenario, when you have a class like Psychology 101,  
25 for instance, that has perhaps 20 sections and they

1 have a standard curriculum across those 20 sections  
2 and that curriculum stays the same or stays fairly  
3 consistent from year to year, if we were to caption  
4 that video over and over and over again or caption it  
5 and then destroy it and then have to re-caption it the  
6 next semester and continue to do that, that would  
7 represent a significant amount of time that really  
8 doesn't make a whole lot of sense and really kind of  
9 stands in the way of our providers doing other  
10 captioning or their other work.

11 Their primary duty is not to be closed  
12 captioners. It's to be live transcribers in classes,  
13 and that takes up about 80 percent of their time. So  
14 we wouldn't have to shift resources away from that as  
15 much if we were able to use and re-use and store  
16 securely the captioning that we've done.

17 MS. CHAUVET: Great, thank you. Ms. Kern, I  
18 believe you have a question relating to the expansion  
19 to faculty and staff?

20 MS. KERN: Yes, thank you, Ms. Chauvet. So  
21 I have a quick question. So the proponents propose  
22 expanding the existing exemption to allow  
23 circumvention to provide accessibility services for  
24 faculty and staff in addition to students.

25 This was an aspect of the proposed expansion

1 that the opponents didn't object to. So, if the  
2 proponents could briefly explain why this expansion is  
3 necessary, and if the proposed exemption isn't  
4 expanded to include faculty and staff, would that have  
5 an adverse effect on non-infringing uses?

6 MS. CHAUVET: Mr. Reid, did you want to  
7 respond?

8 MR. REID: If I could, I'll turn it to Ms.  
9 Hamilton for this one.

10 MS. CHAUVET: Ms. Hamilton, please go ahead.

11 MS. HAMILTON: Hi, thank you. So the root  
12 of this exemption is that, first, there are many  
13 instances where drawing the line between instructor,  
14 faculty, staff, aren't super clear-cut, and expanding  
15 this exemption this way, we don't see any downside  
16 necessarily.

17 And, additionally, there are circumstances  
18 where faculty and staff need something like a training  
19 video, for example, that will go through disability  
20 services offices and be used in an educational context  
21 that we don't think is necessary to limit with this  
22 exemption.

23 MS. CHAUVET: Okay, thank you. So one other  
24 thing I wanted to ask for the proponents is about the  
25 removal of the reference to disability laws in the

1 existing exemption. Your class eliminates references  
2 to, like, the American Disabilities Act, which is just  
3 one of the disability laws referenced in the existing  
4 exemption. And instead, your proposed language says,  
5 "students, faculty, or staff with disabilities." So  
6 why should the reference to disability laws be  
7 removed, and, more importantly, like, why is that  
8 necessary? Mr. Reid?

9 MR. REID: Yeah, I'll be happy to take that  
10 one. I think that was part of the mechanical change  
11 that we suggested for allowing proactive remediation.  
12 And I think this gets to comments that Mr. Williams  
13 raised in his opening, and perhaps it would be helpful  
14 for us to sort of move there at this point.

15 Obviously, there are a lot of circumstances.  
16 A student comes in, makes an accommodation request  
17 where captioning or description is very clearly  
18 required, and the contours of it are very clearly  
19 required by disability law. There are also a number  
20 of areas where the state of disability law and the  
21 extent to which it applies to a circumstance.

22 So think about proactive remediation, as an  
23 example, where the extent to which disability law  
24 binds the university is not clear and might actually  
25 be -- sort of diverging opinions on that within the

1 university.

2           So, just to give you an example, there may  
3 be university counsel taking a fairly narrow view of  
4 that question to try to avoid liability. There may be  
5 folks involved in setting the university's  
6 accessibility policy that take a broader view of that.  
7 There may be faculty governance boards that take yet a  
8 third view of that question.

9           That view may change over time, for example,  
10 as the Department of Justice, as it often does,  
11 engages in settlements within an institution, and, as  
12 part of the settlement, a university may agree to take  
13 a more proactive approach.

14           So what we're trying to get at there is  
15 basically so that disability services offices don't  
16 have to, when they are faced with a request from a  
17 faculty member or something comes into their  
18 workstream, that they don't have to then engage  
19 university counsel and say, is it okay for us to  
20 caption this, is it okay for us to describe this, that  
21 if it's within their judgment, it's within a request  
22 that's come in pursuant to a university's policy  
23 perhaps, that they can say, yeah, we've got a  
24 legitimate reason to go about captioning or describing  
25 this and that we don't have to sort of ask fine-grain

1 questions about the extent to which disability law  
2 applies and, you know, creating this sort of  
3 additional headache of engaging with university  
4 counsel for a disability services office to figure out  
5 if it's okay in a particular circumstance.

6 MS. CHAUVET: Thank you, Mr. Reid. I guess,  
7 so the existing exemption from the last rulemaking  
8 exists because disability laws create an obligation  
9 for disability services offices to create accessible  
10 versions. So I guess my question is then, why, if  
11 that's the reason for the exemption, why is it  
12 unreasonable to eliminate the -- or to keep the  
13 reference to the disability laws in the exemption?  
14 Mr. Reid?

15 MR. REID: So I think the reason that we  
16 eliminated those specific references in our proposed  
17 language was just to accommodate the insertion of the  
18 proactive possibility. I think if the Office were to  
19 recommend language that included a reference to those  
20 laws but otherwise were able to accommodate proactive  
21 remediation to the extent we've requested, I don't  
22 think we would object to the continued inclusion of  
23 the reference to the ADA and IDEA, and I think § 504  
24 is in there as well.

25 I don't think anyone is concerned about

1 those. We just want to make sure that that doesn't -  
2 that those aren't read to preclude, for example,  
3 proactive remediation or, to the other point that Mr.  
4 Williams raised, that they're not read to preclude the  
5 improvement of quality, you know, and quality is  
6 another area where the extent to which disability law  
7 can be a lens to determine whether quality is  
8 sufficient enough, a really difficult problem.

9 And so we just want to make sure that the  
10 inclusion of those references to disability law aren't  
11 read as restrictions on the ability of disability  
12 services professionals to exercise their judgment and  
13 comply with university policies and so forth.

14 MS. SMITH: Can I ask, do you think that's  
15 something the Office can clarify in the preamble? Is  
16 there -- yeah, that's my question.

17 MS. CHAUVET: Mr. Reid?

18 MR. REID: Can I ask, Ms. Smith, by the  
19 preamble, do you mean the preamble to the exemption  
20 language itself in the C.F.R. or in the order?

21 MS. SMITH: I guess I mean the register's  
22 recommendation --

23 MR. REID: Yeah.

24 MS. SMITH: -- or the librarian's preamble  
25 in the Federal Register rule.



1           MR. REID: Yeah, I think that clarification  
2 is always helpful, and in particular, as we reviewed  
3 with disability services professionals this exemption  
4 in particular, many of the clarifications in the  
5 record last time -- or, sorry, in the final  
6 recommendation last time around, for example, around  
7 the commercial availability requirement were quite  
8 helpful. So I think that would be a great place to do  
9 it. You know, there are a lot of different ways to  
10 get there, and, you know, that could make sense.

11           MS. CHAUVET: Thank you. Mr. Band, you've  
12 had your hand raised. Would you like to add to that?

13           MR. BAND: Just very briefly. I just wanted  
14 to amplify what Blake was saying and say also just  
15 because, you know, the language of the references to  
16 the ADA and the other disability statutes shouldn't in  
17 any way be limiting, you know, the whole point is to  
18 make -- I mean, the goal here is accessibility, and,  
19 you know, there's no reason to limit that in any way.

20           And there's no reason for those other  
21 statutes to be seen as a ceiling. And so, you know,  
22 it seems that everyone is on the same wavelength here.  
23 So there's no reason to have artificial limitations.

24           MS. CHAUVET: Thank you. So, if the Office  
25 were to eliminate the reference to the ADA and other

1 disability laws in the existing exemption, how then  
2 should disabilities be defined? And this is really  
3 more so that people who want to circumvent know that  
4 the exemption can apply to their circumstances. Mr.  
5 Reid?

6 MR. REID: So I think a broad-based  
7 reference to captioning and description to serve  
8 faculty and staff with disabilities, accompanied by a  
9 clarification perhaps in the final rule or in the  
10 register's recommendation that it's intended to take  
11 an expansive view of the particular disabilities that  
12 are served by captions, which, by the way -- and  
13 descriptions, which, by the way, may be quite  
14 extensive.

15 They may be what we would typically think  
16 of, people with hearing disabilities that would rely  
17 on captions, students who are blind or visually  
18 impaired who might rely on description, but might also  
19 be folks with intellectual and cognitive disabilities  
20 who rely on captioning for basically educational  
21 purposes to help make the content more accessible.

22 So I think a broad-based reference, coupled  
23 with the fact that the exemption is focused on  
24 disability services professionals, I think the people  
25 that you have executing the use here are going to be

1 very well-suited to understand what the scope -- the  
2 reasonable scope of disabilities is.

3 And I think some language, like I say, in  
4 the surrounding orders that suggest that it's not  
5 intended to be a narrow conception of disabilities but  
6 whatever in the judgment of a disability services  
7 professional sort of counts there, I think that would  
8 be a workable approach.

9 Alternatively, if the Office feels  
10 uncomfortable with that, making some reference to the  
11 scope of disabilities in the Americans with  
12 Disabilities Act might be -- obviously, coupled with  
13 the Americans with Disabilities Amendments Act, that  
14 would be another, I think, satisfactory way to  
15 encompass the relevant scope.

16 MS. CHAUVET: Thank you, Mr. Reid. Mr.  
17 Williams, I see your hand is raised.

18 MR. WILLIAMS: Yes, thank you for that. I  
19 think the Office is right to ask these questions given  
20 that the real heart of the fair use analysis in the  
21 last cycle was based on the need to comply with these  
22 other statutes. So I do think it's worth considering  
23 finding a way to keep them as referenced in the  
24 exemption or to rely on them in the recommendation.

25 We, after reviewing the filings, did not

1 feel it was appropriate for us to take the position  
2 that they must basically prove that they would be  
3 violating those statutes in order to do something like  
4 proactive remediation. The current exemption could be  
5 read that way to say unless you're violating the law,  
6 then you can't engage in this good work.

7 So we took the position that we're okay with  
8 that, even though, arguably, some of these things may  
9 not be required by the disability statutes. But, that  
10 said, I do think it's worth continuing to use them as  
11 a benchmark of sorts to speak to the type of conduct  
12 and the type of disabilities that we're really  
13 thinking about here.

14 We just don't want there to be some  
15 technical error committed by a disability services  
16 officer who's trying to do good work but accidentally  
17 did something that doesn't comply with the statute.  
18 We don't feel like that should cause them to lose the  
19 benefit of the exemption.

20 So that's where we were coming from on that  
21 issue, and we can speak, hopefully, again later about  
22 the sufficient quality point.

23 MS. CHAUVET: Yes, we'll definitely get to  
24 that later. Mr. Marks, I see your hand is raised.

25 MR. MARKS: Thank you very much. Just to

1 follow up with Mr. Williams, we agree with that, and I  
2 feel that Mr. Reid has already articulated some really  
3 good potential paths forward. We're talking about  
4 disability services officers and professionals, and I  
5 think we have confidence in their good-faith judgment.

6 And the notion that -- I don't think any of  
7 us were thinking that a disability service office  
8 would need to consult with the general counsel of a  
9 university or institution every time they sought to,  
10 you know, do remediation. So I think the notion of  
11 the sort of, like, judgment of the disability services  
12 offices is that they're engaging in these activities,  
13 and referencing the laws could possibly be a path  
14 forward. And, again, I want to thank Mr. Reid for,  
15 you know, this whole collaborative approach.

16 MS. CHAUVET: Thank you. So, proponents,  
17 your initial comments stated about one-third of  
18 disabilities on our campus request accommodation, but  
19 that does not obviate our responsibility to provide  
20 equal access to the other two-thirds who choose not to  
21 self-identify.

22 So, under the existing exemption, wouldn't  
23 the student or faculty member obtain the remediated  
24 version from the disability services office? How does  
25 the proposed exemption address individuals who do not

1 self-identify? Mr. Reid?

2 MR. REID: So I think, you know, when we're  
3 talking about remediated materials, you know, that's a  
4 typical path, obviously, is for a student to request  
5 accommodation, work closely with a faculty member,  
6 with the disability services office kind of in tandem  
7 to make sure that they receive the materials.

8 But another path is -- and this is  
9 increasingly true of faculty members, which I can  
10 speak to in my kind of personal capacity -- which is  
11 that we're increasingly aware that there may be  
12 students with disabilities in our courses who don't  
13 self-identify.

14 And, for example, in a law school, we have a  
15 number of students with disabilities who don't  
16 self-identify and don't go through the formal  
17 accommodations process because it creates significant  
18 risk for them, for example, to apply to sit for the  
19 bar exam.

20 So, you know, there's a lot of litigation  
21 about the extent to which a disability can be used to  
22 bar a student for sitting for the bar. So we have a  
23 lot of students who don't go through the formal  
24 accommodations process and request it but may reveal  
25 to us privately or may come to us and say, listen, I'm

1 really struggling in class, I think I might need an  
2 accommodation of some sort, or it would really help me  
3 if the videos that we're showing here, if we could get  
4 captions for those.

5 And at a university like Colorado, I can  
6 actually go to -- our disability services office runs  
7 a captioning service, and I can go seek captions for  
8 the videos that I'm using independent of an  
9 accommodation request. So that's just an example of  
10 the kinds of informal approaches to accessibility  
11 that, for very good reasons, may not run through a  
12 formal accommodations process.

13 I don't know if Mr. Kapcala's got anything  
14 to add to that, but may have some additional thoughts.

15 MS. CHAUVET: Mr. Kapcala?

16 MR. KAPCALA: Yeah. I would just add that,  
17 you know, what we're advocating for is a proactive  
18 approach rather than a reactive approach to  
19 accessibility. So accommodations are reactive. You  
20 know, a student requests an accommodation, and then we  
21 provide it.

22 But, as Mr. Reid pointed out, there are a  
23 lot of students who don't do that for whatever reason.  
24 Perhaps they don't recognize the extent of their  
25 disability. Perhaps they don't feel comfortable, you

1 know, disclosing and self-advocating, you know, with  
2 regard to their disability. And so, if we are taking  
3 a stance that video content can and perhaps should be  
4 made accessible regardless, then students who are in  
5 that class are receiving an accessible experience.  
6 They don't have to wait for accommodation, you know.

7           And for that matter also, I would add that  
8 there are also scenarios in which we have students who  
9 do request accommodation who we know need  
10 accommodation semester to semester but just haven't  
11 gone through renewing their accommodation for a given  
12 semester and won't be able to have the interactive  
13 discussion with their faculty member with regards to  
14 implementing that accommodation until the first week  
15 of the semester.

16           I would say, if we have 700 videos that need  
17 captioning, we'd like to be able to get working on  
18 those in the interim periods between semesters knowing  
19 that the student is in that class and that the student  
20 is going to want those accommodations. We wouldn't  
21 want to be restricted or waiting just because they  
22 haven't had a chance to have that authorization be  
23 processed yet.

24           MS. CHAUVET: Thank you. I have one  
25 follow-up question, and then I see Mr. Cheney has a



1 question also. So what you were just talking about  
2 with students who have not self-identified or who  
3 don't want to go through, like, the formal  
4 accommodation process, is that the reason why you are  
5 proposing to take out the limitation of necessary  
6 accommodation? I just want to clarify your position,  
7 please. Mr. Reid?

8 MR. REID: Yeah, I would say it actually  
9 goes a -- so that's certainly part of it. But I think  
10 you also see -- and let me preface this answer by  
11 saying we should have a complicated mental model of  
12 how disability services and accessibilities play out  
13 in a university context. It's not the same at every  
14 university.

15 There are universities that have very small  
16 disability services offices who insist on having a  
17 formal accommodation request, basically, to provide  
18 any services to a student. There are universities at  
19 the other end of the spectrum that are adopting  
20 proactive policies that say we want, as a matter of  
21 universal design, for all of our courses to be  
22 accessible because we'd actually like to advertise  
23 that to our students, perhaps because we serve a  
24 population of students with disabilities or a  
25 significant population of students with disabilities.

1 And then you've kind of got everything in between.

2 So I think what we're trying to get at here  
3 is to enable disability services offices who are at  
4 universities who don't take that sort of bare minimum  
5 approach of saying we will only respond to  
6 accommodations who say, you know what, we have  
7 students in here all the time who fall through the  
8 cracks of the accommodation process, but we know them,  
9 or we have faculty members who know them. We have  
10 things that don't quite fit in.

11 Or we have a broader campus policy that says  
12 we really ought to be proactive because that's a core  
13 part of our educational mission and we might actually  
14 be getting sort of direction from on high. We want to  
15 be able to accommodate all of those different  
16 approaches that different disability services  
17 professionals have in the context of different  
18 universities.

19 And so I just would urge the Office to  
20 consider that there isn't one model for how these  
21 services are provided in every single university  
22 across the country or every single K through 12  
23 institution. There are a range of factors around  
24 resources. There are a range of factors around the  
25 philosophy that offices take.

1           And what this exemption can do with this  
2 particular modification is say to them, making sure  
3 that your content is accessible to students with  
4 disabilities, if that's what you choose to do, is a  
5 legitimate exercise, and please go ahead and do it,  
6 and don't feel like you have to go consult with  
7 counsel to make sure that it's strictly within the  
8 bounds of what the most narrow conception of  
9 disability law might require.

10           MS. CHAUVET: Thank you. Mr. Cheney, did  
11 you have a question you wanted to pose?

12           MR. CHENEY: Yeah, if I could. Thank you,  
13 Ms. Chauvet. If I could, Mr. Reid, just to follow up  
14 and sort of add to what we're talking about -- and you  
15 added sort of towards the end there most of our  
16 discussion has been about the university-level  
17 accommodations.

18           I don't know if you or your panelists could  
19 add more information about the K through 12 process as  
20 well and how that perhaps needs to be as flexible as  
21 possible as it may take time for a 504 plan to get  
22 worked out and for the accommodation to be made while  
23 a student can't participate effectively in a class.  
24 Can you talk more about that from the K through 12  
25 from the perspective as well that the student may not

1 be very proactive at all in the first, second, or  
2 third grade, for example? Thank you.

3 MR. REID: So I will have to caveat my  
4 response here with our client primarily represents  
5 disability services professionals in a higher  
6 education context, and so, you know, the bulk of the  
7 evidence that we've provided and the suggestions we've  
8 offered are geared in that direction.

9 But I don't think it takes a big stretch to  
10 understand that many of these same dynamics and often  
11 in worse circumstances occur in K through 12 contexts.  
12 When you think about the difficulty that, you know,  
13 adult college students may face in seeking  
14 accommodation and some of the dynamics that you've  
15 just described, extend that in a virtual learning  
16 environment to every family of every child in a  
17 school, ranging down to kids like my son, who's in  
18 kindergarten who's 5 years old.

19 When I see the quantity of videos that have  
20 been used in his class for virtual kindergarten and I  
21 think through the immense complexity of, you know,  
22 just figuring out who to talk to at our school  
23 district, I -- you know, it would take me the better  
24 part of a day to track down a person who's nominally  
25 responsible for this.

1           So the difficulties that are facing families  
2           that are already on the wrong side of the digital  
3           inclusion gap, who are struggling to get internet  
4           access, who are struggling to get access to equipment,  
5           who are struggling to access virtual learning, who are  
6           trying to deal with the burdens of childcare while  
7           their -- you know, while their young children are  
8           trying to attend virtual school in the middle of the  
9           pandemic and then, on the other side, school districts  
10          who are facing significant funding shortfalls,  
11          significant funding gaps, and trying to do the best  
12          they can to drift oftentimes multiple times in the  
13          middle of the semester between virtual and in-person  
14          environments, shifting in new materials and not.

15                 These sorts of issues, I guarantee, are  
16                 going to be on the list of school districts across the  
17                 country this summer as they look forward to how do we  
18                 do -- hopefully coming out of the pandemic, but we're  
19                 not sure -- school in the fall, how do we plan better  
20                 for making sure that our students with disabilities  
21                 don't get sort of left in the lurch as we shift these  
22                 modalities, as we do hybrid stuff in the fall.

23                 So I can't speak on behalf of our clients  
24                 with specificity to the K through 12 context, but I'm  
25                 fairly confident based on what we're seeing in a

1 higher education context that those issues are likely  
2 to filter down. That's what I see as a parent. And  
3 Mr. Kapcala may have some additional thoughts to add  
4 there.

5 MS. CHAUVET: Actually, if it's okay, Mr.  
6 Reid, Mr. Marks had his hand raised, and if I could  
7 please remind people, if we could try to keep comments  
8 to around two minutes just in the interest of time?  
9 We still have a lot to get to. Mr. Marks?

10 MR. MARKS: Thank you very much. I hope  
11 folks can hear me now. I understand I was having some  
12 audio problems. I just wanted to add one quick  
13 clarification that we, in our discussions about  
14 proactive remediation and finding a workable  
15 compromise, at least from AACCS and DVD CCA's  
16 perspective, we were not saying that should only be  
17 limited to universities. And so we had agreed that  
18 for disability services for K through 12 that that was  
19 included, and so I wanted to have that clarified in  
20 terms of our position here. Thanks.

21 MS. SMITH: Okay. So, just to wrap up this  
22 focus, I think, Mr. Reid, you are suggesting, on K  
23 through 12, the school districts, due to a need, may  
24 have the same sort of good judgment that you would  
25 expect to see at a college or university level, is

1 that right?

2 MR. REID: I think that's right.

3 MS. SMITH: Okay. Maybe Mr. Williams, and  
4 then I will hand it back to Ms. Chauvet.

5 MR. WILLIAMS: Sure, thank you. So one  
6 thing that we did mention in our comments, and there  
7 was some response to it in the reply comments, is just  
8 the issue of what exactly is a reasonable level of  
9 security for the copies that are created during all of  
10 this.

11 And I understand that it's usually not  
12 preferable to specify some individual brand of TPM  
13 that must be used or to always get all the way into  
14 the weeds and that's why we have a kind of reasonably  
15 sufficient standard right now. And I understand why  
16 the petitioners would like to keep that somewhat  
17 open-ended.

18 But given the increased number of copies  
19 that are likely to be involved and given that perhaps  
20 some K through 12 systems will not have a  
21 sophisticated understanding of TPMs, what's available,  
22 and what they should be using, we do think it would be  
23 helpful to provide, you know, some recommendations or  
24 best practices at least in the recommendation as to  
25 what steps should be taken because, if all that's

1 done, for example, is the copy is put on a website and  
2 the website requires a username and password, there's  
3 really no other layers of protection after that.  
4 Especially if downloads are enabled, we think it would  
5 be helpful that there be some guidance that more than  
6 that would be a good standard to use just to try to  
7 protect these copies.

8           And then just very quickly on the proactive  
9 remediation and the standards for who should be  
10 receiving these, as I mentioned at the outset, I do  
11 have a bit of a concern with the notion that pretty  
12 much every video shown to any class must always be  
13 remediated just because, at some point, that really  
14 does overlap with the proposal that we'll deal with  
15 tomorrow that BYU made.

16           And so I'd just like you guys to be  
17 cognizant of that as you think these issues through,  
18 is that if it really is that broad, which I can  
19 understand some services offices wanting to make sure  
20 even if someone hasn't self-reported that they're  
21 taken care of, I'd just like, you know, for all of us  
22 to think about how do we draw some lines here between  
23 the different classes.

24           MS. CHAUVET: Thank you. Mr. Reid, I want  
25 to definitely focus on proactive remediation because



1 we also want to get to questions about sufficient  
2 quality and market price. So, if we could please try  
3 to keep concise responses, that would be great.

4 So, for the proponents for proactive  
5 remediation, the proposed changes you made to the  
6 language of the existing exemption do not expressly  
7 allow proactive remediation. So, just for  
8 clarification, are you seeking that either the  
9 register's recommendation or that the preamble to the  
10 final rule make that clarification, or are you asking  
11 for specific regulatory language changes? Mr. Reid?

12 MR. REID: So I wonder if I might call on  
13 Mr. Goodstein or Ms. Hamilton to speak to the specific  
14 language. Sorry, I'm just tracking it down, if one of  
15 you has it right in front of you.

16 MS. CHAUVET: Ms. Hamilton?

17 MS. HAMILTON: My apologies. I'm going to  
18 pass that one to Mr. Goodstein, please.

19 MS. CHAUVET: Okay. Mr. Goodstein?

20 MR. GOODSTEIN: I apologize. The question  
21 came a little bit garbled through my speakers. Would  
22 you mind please repeating the question?

23 MS. CHAUVET: Sure. The question is, the  
24 proposed regulatory changes that you made to the  
25 existing exemption do not include a specific reference

1 to allow proactive remediation. So my question is,  
2 are you asking for just clarification in the  
3 register's recommendation or the preamble to the final  
4 rule, or are you asking for regulatory changes to  
5 allow proactive remediation? Mr. Reid?

6 MR. REID: I'm sorry, I've got the language  
7 in front of me now. I apologize for the glitch there.  
8 I don't think that we asked for proactive remediation  
9 to be addressed specifically because of the other  
10 changes that we made to the exemption, including the  
11 removal of the specific call-out to disability law.

12 We think it's sort of implicit in the  
13 language that we've proposed. And then, obviously,  
14 some accompaniment with something in the  
15 recommendation that made that clear would be great.  
16 If the Office chooses to make a different formulation  
17 that approaches some of the issues we've talked about  
18 today in a different way, then it may be appropriate  
19 to ask -- to include proactive remediation explicitly  
20 in the regulatory language.

21 And I think we'd defer to the Office as to  
22 how you are formulating the language, how you are  
23 balancing all the issues that we've talked about  
24 today. Depending on what other changes you make, it  
25 may make sense to include that specifically. We just

1 ask --

2 MS. CHAUVET: Okay, great. I'm so sorry, I  
3 have to -- we have to keep moving on. I'm sorry to  
4 interrupt. But going to the opponents, you have  
5 expressed concerns about proactive remediation. So,  
6 if the Office were to adopt DVD CCA's recommended  
7 approach that requires instructors to know or  
8 reasonably believe his or her course will make use of  
9 a particular work, would that be reasonable to address  
10 your concerns? Mr. Taylor, I see you have your hand  
11 raised. You're muted, Mr. Taylor.

12 MR. TAYLOR: I've been talking on Zoom for a  
13 year now. I still haven't learned to unmute myself  
14 before I talk. So I apologize. Absolutely. I mean,  
15 I think that is the point here that Mr. Reid was  
16 trying to make, that if you, say, at the end of the  
17 exemption, to create an accessible version for  
18 anticipated classroom use, then I think that kind of  
19 puts better contours around the proposed exemption and  
20 how it could facilitate the use but, at the same time,  
21 make sure that we don't create this blanket license  
22 for everything.

23 MS. CHAUVET: Mr. Williams, I'd like to see  
24 if you have a response if that included language about  
25 the instructor reasonably believing that the motion

1 picture would be used in a class, if that would  
2 address your concerns about proactive remediation?

3 MR. WILLIAMS: Yes. I think, to a large  
4 extent, it would. As I said at the outset, we do  
5 think there should be some parameters to include  
6 something on a class syllabus. I think we're okay  
7 with it if an instructor has a reasonable belief that  
8 something's going to be used in a class.

9 You know, I assume you would want to go a  
10 little bit beyond that with respect to students  
11 because it might be that a student has a need to use  
12 something in a class presentation or a project of some  
13 kind. So that should probably be covered as well, but  
14 we do think it should stop short of, you know, an  
15 entire school's catalogue of motion pictures being  
16 circumvented in advance without some kind of  
17 expectation of use in an actual class setting or in a  
18 class project.

19 MS. CHAUVET: Okay. Because the proponents  
20 -- thank you, Mr. Williams -- the proponents do assert  
21 that the market check would still be -- like, is still  
22 part of their proposal. So I assume then the  
23 combination of including that or keeping that and then  
24 having, like, an instructor reasonably believe that  
25 this motion picture would be used and would need an

1 accessible version, that would meet your concern then,  
2 Mr. Williams?

3 MR. WILLIAMS: Yes. We think the market  
4 check remains essential, and that is a big helpful  
5 aspect of all of this and makes it easier for us to be  
6 agreeable. And then we just have to get into that  
7 issue of sufficient quality with the market check  
8 approach and what that means.

9 MS. CHAUVET: Well, let's go ahead and turn  
10 to that. I believe my colleague, Mr. Gray, has some  
11 questions about the sufficient quality limitation.

12 MR. GRAY: Thanks, Anna. So, for Mr. Reid,  
13 your proposed language clarified that circumvention  
14 would be permitted where the accessible version -  
15 where you can't obtain an accessible version of  
16 "sufficient quality at a fair market price."

17 So could you explain a little bit more just  
18 sort of for the record why this exemption is  
19 necessary? I know, in your initial comments, you  
20 mentioned something about some institutions having  
21 confusion about when and when they cannot circumvent  
22 depending on the quality of the captions.

23 And so it would be helpful to have a little  
24 bit more information about kind of how you see this  
25 applying and why there's an adverse effect here.

1           MR. REID: Thank you, Mr. Gray. So I want  
2 to quickly tag on because I think the answer to the  
3 previous question and the answer to this one are the  
4 same, which is we hope that the exemption would be  
5 formulated with reference to the judgment of the  
6 disability services professional who is making the  
7 use. That's who's eligible for the exemption.

8           One thing on the previous one, we're not, in  
9 principle, opposed to what Mr. Williams and Mr. Taylor  
10 laid out with respect to an instructor expressing a  
11 need to use this in class. That's a pretty typical  
12 scenario, but we want to leave that judgment in the  
13 hands of the disability services professional, that  
14 there's a reasonable belief that this is going to be  
15 needed for some kind of educational purposes.

16           Likewise, with respect to quality, the piece  
17 that we'd like to underscore about quality is that  
18 this is not an objective standard, right? This is not  
19 an objective process. I think, as anyone who has gone  
20 through, in the K through 12 context, an IEP plan for  
21 their child, it's a very individualized process.

22           And this is so true -- also true in a  
23 university context. This is a conversation with a  
24 disability services professional about what a student  
25 needs in class. And so the question about quality is

1 a video might be getting used in different contexts,  
2 right? It might be getting used in a cinema class,  
3 where particular nuances about the sound design or the  
4 caption -- or the dialogue are very important, and  
5 having the utmost care around the quality of the  
6 captions is really important.

7 We've also heard scenarios where someone  
8 might look at this and say, gee, this falls way short.  
9 The captions on this video are really terrible and are  
10 short of what, for example, the FCC might expect if it  
11 were aired on broadcast television.

12 But the student says, no, this is okay, this  
13 is actually good enough for me because I'm just hard  
14 of hearing, and I'm just using the captions to help  
15 kind of fill in some blanks. So, actually, we don't  
16 need to remediate this one.

17 So what we're asking for with respect to  
18 quality -- and, Mr. Gray, I apologize, I've diverged  
19 from your question a little bit -- is basically to  
20 allow the subjective judgment of the -- or the  
21 reasonable judgment of the disability services  
22 professional to say, with this video with this student  
23 with this class or with this particular set of  
24 students that might be likely to take this class, that  
25 we need to really burnish the captions here and we

1 really need to make them better.

2 Or, alternatively, to say, you know what,  
3 for this context, it's actually not necessary for us  
4 to do it. So we want to leave that judgment in the  
5 hands of the disability services professional.

6 MR. GRAY: Right. So you mentioned the FCC  
7 regulations or the proposal, I think, from the  
8 Disability Advisory Committee. I have two questions  
9 to follow up on that.

10 So the first one is, so I understand your  
11 position that you kind of want to defer to the  
12 judgment of the professionals where we can. If the  
13 Office considered maybe being a little bit more  
14 explicit and did something like defining insufficient  
15 quality as insufficient to fulfill the institution's,  
16 ADA obligations or keeping the penumbra of  
17 disabilities laws that we discussed earlier, would  
18 that be sufficient? Would that be reasonable? Would  
19 there be some gaps there?

20 MR. REID: Yeah, I'd suggest that the Office  
21 not do that approach, and the reason I would suggest  
22 that is because the disability laws that are  
23 referenced, and you sort of point to the penumbra,  
24 don't have detailed regulations for the quality of  
25 accommodations, right? The Department of Justice



1 hasn't promulgated, for example, detailed regulations  
2 about the quality of descriptions or captions.

3 I think, if you wanted to make reference to  
4 or allusion to the FCC's standards, I think those are  
5 the closest thing we have to an objective set of  
6 standards for captioning out there.

7 For description, we've got that Disability  
8 Advisory Committee recommendation, which is kind of a  
9 start, but I would urge you not to frame it in terms  
10 of compliance with those standards because those  
11 standards are in significant part recommendations and  
12 best practices for captioners.

13 So, for example, they're just lots of  
14 suggestions for people who are creating the  
15 descriptions and the captions. They're not the kind  
16 of standards that you could sit down and really  
17 carefully, after the fact, say, for this context, for  
18 this student, for this video, if we sort of put it  
19 through the rubric of the standard, it complied or it  
20 didn't.

21 And, actually, if you look at the FCC  
22 standards even for broadcast television, they ask  
23 questions about, well, were the errors de minimis? Is  
24 this part of a pattern of what the station does? Were  
25 all the people involved following best practices and

1 so on and so forth.

2 So I would just urge you not to peg  
3 compliance with those standards as the keystone  
4 because it's a very hard question to calculate whether  
5 something is compliant or not, right? And I'd urge  
6 you to talk to the folks at the FCC about the holes in  
7 these standards, and one of the things we've actually  
8 asked the FCC to do is to promulgate more objective  
9 metrics for evaluating television stations, but that  
10 doesn't exist yet. So we've got loose standards that  
11 are going to be difficult to apply in context, and  
12 that's why we think referring to the judgment of the  
13 disability services professional is a better way to  
14 approach this.

15 MR. GRAY: Great. And so I see, Mr. Band,  
16 you want to respond. And then, after you do, Mr.  
17 Cheney, I'd be happy to talk to you and have you ask  
18 any questions you have.

19 MR. BAND: Yes, thank you. So both this  
20 line of questioning and the questions dealing with the  
21 preemptive remediation almost seem to suggest that all  
22 of these activities by the disability services office  
23 are without a cost, like that they could just go ahead  
24 and do whatever they want. They have limitless  
25 budgets, limitless time, and that they would do more

1 than the absolute minimum that they need to do to  
2 fulfil their legal obligation, their moral obligation,  
3 to satisfy educational needs.

4 But that's not the real world. In the real  
5 world, budgets are tight, time is tight, and they just  
6 need -- you know, they're only going to do what they  
7 absolutely need to do. They're not going to remediate  
8 something, you know, when they think, oh, you know,  
9 yeah, the quality isn't quite as good as it could be.

10 I mean, they're only going to do it if it  
11 really doesn't -- whatever's available doesn't meet  
12 the student's needs. And that's the reality of the  
13 disability services offices, and that's the reality,  
14 you know, that the Office should be bringing to this  
15 situation and make it, you know, the least burdensome  
16 approach, you know, because there is this enormous  
17 burden out there, there's enormous constraint out  
18 there, which is the budgetary constraint that operates  
19 on the DSOs.

20 MR. GRAY: And so I see we have two more  
21 hands raised. I just want to remind everyone we  
22 technically only have seven minutes left in this  
23 panel, and we haven't gotten to the reasonable  
24 effort/fair price issue. So, very quickly, Mr.  
25 Williams, if you could respond? But I just want to

1 make sure we're staying on time.

2 MR. WILLIAMS: Yes, thank you. So, as we  
3 said in our comments, we would prefer some kind of  
4 standard here, but we do understand where the other  
5 participants are coming from on this, and we certainly  
6 don't want to suggest that disability services  
7 officers are commonly engaging in improper conduct.  
8 And I understand what Jonathan said, but that's  
9 certainly not what we're suggesting.

10 On the other hand, we do think, you know,  
11 regulations, for a number of reasons, should have  
12 some -- they should be spelled out in a way that  
13 people can understand them.

14 And so the FCC guidelines on captioning, the  
15 47 C.F.R. § 79.1 standards, they do include a lot of  
16 what I understand to be the important issues, not in a  
17 granular way, but they say, you know, synchronicity is  
18 important. Completeness is important. Placement is  
19 important. Those kinds of things that I think are  
20 commonly understood to -- and accuracy.

21 And so, you know, my one concern, although I  
22 take the issue seriously, is if de minimis errors are  
23 a huge problem, I think you could probably find what I  
24 would consider to be a de minimis error in potentially  
25 every single captioned or described work, and so, you

1 know, that does really bump into the marketplace check  
2 requirement and, depending on someone's point of view,  
3 could, you know, undermine that market check  
4 requirement. So that's where we're coming from. We'd  
5 like to be as reasonable as we can.

6 MR. GRAY: Great. Mr. Kapcala, would you  
7 like to respond quickly?

8 MR. KAPCALA: Yeah. And I understand that.  
9 I actually think the more reasonable approach is  
10 probably the opposite in some ways. So, we are --  
11 just to provide a context, this semester was the first  
12 semester where we used some third-party remediation,  
13 and it cost, to Mr. Band's point, it cost us about two  
14 grand to do 15 videos. So we're certainly not looking  
15 to caption videos that don't need to be captioned as  
16 that becomes an expensive prospect.

17 But one thing our office does have to do by  
18 law is engage in an interactive, individualized  
19 process with individuals when they request  
20 accommodation, and, as part of that, when it's  
21 reasonable to do so and possible to do so, we can  
22 adjust accommodations and should adjust accommodations  
23 to meet students' needs. And students are given  
24 primary consideration under the ADA for determining  
25 what is and isn't effective, and so that would include

1 captioning.

2           And, so, if there's a blanket standard in  
3 place, you know, there may be things for a student,  
4 for instance, who's deaf who's using ASL -- ASL is  
5 their first language; English is their second  
6 language. There may be things that they need that we  
7 can do just in the way that we break lines or time  
8 captions that would allow that individual to better  
9 process the information in the captions that would be  
10 not necessarily our standard way of captioning but  
11 would still be possible.

12           It's also a two-way street, right? So, as  
13 Mr. Reid mentioned, there are a number of students who  
14 will tell us, oh, you know, I don't think I need  
15 captions in this context or this class, or they're  
16 good enough, don't worry about them.

17           And we might be looking at them and cringing  
18 and thinking these are awful, but we don't twist the  
19 student's arm. If the student says they're effective,  
20 then they're effective. I think, if there were  
21 stricter rules in place, then we would feel obligated  
22 to make new captions regardless because we would want  
23 the captions to abide by those rules.

24           But, to Mr. Williams' point, we don't want  
25 to caption things. We don't have the resources, the

1 personnel, the money, the budgetary considerations to  
2 caption things that don't really need it. So we  
3 wouldn't, of course, go, oh, look, three missing  
4 commas in these captions, better go caption these.  
5 You know, we would only caption things when it served  
6 a specific need or purpose.

7 MR. GRAY: Great. And then my next  
8 question, I guess, is for Mr. Reid, or if you want to  
9 have your students answer this, you can. You know, in  
10 your written comments, you talked a little bit about  
11 kind of examples of videos that don't have sufficient  
12 quality captions.

13 Could you just speak a little bit more for  
14 the sake of providing a record here, what sort of  
15 captions, audio descriptions, are we talking about?  
16 Are we talking about items that are represented as  
17 maybe having audio descriptions that aren't? Are we  
18 talking about auto-generated ones on, like, a YouTube  
19 video? You know, what's sort of the library or sort  
20 of the spectrum of works that we're talking about  
21 here?

22 MR. REID: So, I mean, I think, if your  
23 question, Mr. Gray, is directed at the kinds of  
24 captioning and description errors that we might be  
25 concerned with, I actually think the FCC documents

1 that we pointed to give you a pretty good spectrum of  
2 the kinds of problems that can happen.

3 So, with captions, you know, obviously,  
4 we're not talking about missing captions here because  
5 then we're in the exemption no matter what. But we're  
6 talking about incomplete captions, missing words,  
7 misspellings of proper nouns, lack of punctuation.

8 If you turn on the closed captions of this  
9 Zoom conference, and the captioner's doing a very nice  
10 job, but they're not synchronous, right? They're  
11 delayed, and so that may impair understanding. There  
12 may be, if we're talking about automatic speech  
13 recognition generated captions, there may be places  
14 where the ASR engine just goes off the rails and  
15 starts captioning not what's being said. Depending on  
16 the context, we may be talking about speaker  
17 identification missing or missing sound effects that  
18 may be really important to understanding and so on and  
19 so forth.

20 Description, same sort of things that you  
21 might imagine. I always say a picture is worth 1,000  
22 words, and you've got 24 or 30 frames a second worth  
23 of things flying by on the screen, and you've got to  
24 make particular decisions about what to say about  
25 what's happening. And depending on the context, you



1 may not be getting the most important thing. You may  
2 not be speaking in a way that's clear. You may not be  
3 identifying key information that's important for a  
4 particular context.

5 So I think those are the kinds of errors  
6 that we see, and urge you to just hop onto YouTube and  
7 turn on the captions on a given video, and you will  
8 probably see the kinds of things that Mr. Kapcala and  
9 his colleagues encounter on a daily basis.

10 And I think, honestly, when we're talking  
11 about description, go look on YouTube and see if you  
12 can find description. You won't even find a button  
13 because most of the videos that you will find on  
14 YouTube are not described. So, for the most part,  
15 when we're talking about description, we're probably  
16 talking about missing descriptions.

17 But, again, you may have a blind or visually  
18 impaired student that needs them for a particular  
19 context, and the track that's included, for example,  
20 on a disc may not be sufficient because it's missing  
21 key information.

22 MR. GRAY: Great, thank you. So I think  
23 we're just going to go over about five minutes so we  
24 can ask a few more questions about reasonable effort,  
25 and then I want to make sure, I think Mr. Cheney had

1 his hand raised earlier, and I want to make sure he  
2 has the chance to ask any final questions.

3 So in your comments, you propose clarifying  
4 the reasonable effort language to specifically  
5 address, you know, when someone buys perhaps a  
6 textbook, and there's an accompanying audiovisual work  
7 that comes with it that may not be captioned. So can  
8 you describe more, you know, is this addressing  
9 uncertainties around digital texts? Is it with media  
10 generally? Is this sort of this one specific  
11 circumstances? You know, if you could give us a  
12 little bit more information to kind of clarify, like,  
13 what the situation looks like and how often it  
14 happens, that would be helpful.

15 MR. REID: I'm going to go fast here. Ms.  
16 Hamilton, please chime in if I miss anything.

17 So I think the reasonable market check has  
18 actually been fairly easy for folks to comply with  
19 thanks to the language that the Office included in the  
20 last recommendation for most videos, which is, you  
21 know, you go on Amazon Prime, you go on Netflix, you  
22 go on Hulu, you look for, is this available on a  
23 commercial platform? And the answer is sort of yes,  
24 sort of no.

25 I think the circumstance that we are a

1 little bit worried about here, and the feedback that  
2 we've gotten from some of ATSP's members on this, is  
3 that when they're dealing with videos that are  
4 associated with a textbook, that commercial  
5 availability search looks different. It means you  
6 pick up the phone and you call a publisher, right?

7 Because the kinds of videos that are  
8 typically included in a textbook are not the kind of  
9 things that would be on Netflix or Hulu or Amazon  
10 Prime or that sort of thing. You're going to call the  
11 publisher and say, hey, do you have a version of this  
12 video that has got captions for it.

13 And what we are worried about is just having  
14 some contours on how that conversation could go and  
15 making sure that that conversation can't be, well, we  
16 know about this reasonable market search requirement,  
17 and we're going to demand from you a higher price than  
18 it would cost you to caption it yourself and we'll do  
19 it for you, but you need to pay us a premium for it.

20 I think that's the circumstance that folks  
21 are worried about. And so we would welcome any sort  
22 of clarification from the Office of just when the  
23 reasonable market search is necessarily a conversation  
24 and not just searching commercial platforms to see yes  
25 or no, is it available, what are the terms of that

1 negotiation? What's acceptable for a textbook  
2 publisher to charge? And just to make sure that  
3 disability services offices aren't stuck in an  
4 uncomfortable position of saying, gee, we'd -- because  
5 I think Mr. Kapcala would say, if a publisher has the  
6 captioned or described version of the video and is  
7 willing to hand it over, they will take that 10 times  
8 out of 10.

9 But we want to make sure that the situation  
10 doesn't arise where they say it's going to cost you  
11 more than what would be a reasonable amount for you to  
12 do it yourself. Maybe Mr. Kapcala's got clarification  
13 on that.

14 MR. GRAY: Sure. But quickly, just to kind  
15 of follow up on that, could you clarify just a little  
16 bit more? You know, is this a situation that has  
17 happened and so we're talking about something that we  
18 know has happened and may happen again, or are we  
19 talking sort of future-looking, we expect this will  
20 happen or you expect this will happen?

21 MR. REID: So I think this was born out of  
22 questions from ATSP's members about how to approach  
23 these conversations, just to know what is reasonable.  
24 Mr. Kapcala may be able to speak more to that.

25 MR. GRAY: Mr. Kapcala?

1           MR. KAPCALA: Yeah. So I do think it is,  
2 you know, largely forward-looking, although we have  
3 had to reach out to textbook publishers to ask that  
4 they caption materials. And in those situations, you  
5 know, if the student has purchased the textbook and  
6 that textbook comes with online video, then that  
7 student shouldn't -- it would be discriminatory to ask  
8 that student to then pay for, you know, video content  
9 that's made available to every other student already  
10 just because they have a disability.

11           And so our position is that the video should  
12 have captions on it, and if it doesn't, then we should  
13 be allowed to make those captions, and we shouldn't  
14 have to pay for that. We're not talking about, from  
15 our perspective -- I mean, I've already purchased  
16 plenty of movies, you know, off Amazon, you know, sent  
17 students, you know, credit on Amazon to watch a movie  
18 with captions when the version that the instructor was  
19 using didn't have captions or something.

20           That's not a problem. We're happy to do  
21 that if an existing one exists. We would rather pay  
22 2.99 than spend seven hours or 14 hours captioning a  
23 two-hour video. That's a good deal for us every time.  
24 But if there is a textbook -- and it's also a time  
25 matter.

1           You know, in the case of the textbook  
2 publisher that we reached out to, it was going to take  
3 them two weeks to get us those captions. Well, by  
4 that point, that lesson's over and the student's moved  
5 on to something else. We can have those captions done  
6 much quicker. And so that would be another, you know,  
7 wrinkle to that.

8           MR. GRAY: Great. And then, Mr. Cheney,  
9 would you like to ask any last questions you had?

10          MR. CHENEY: I think we're over time, and I  
11 think my questions have been answered by the panelists  
12 in the interim. So I think I'm good.

13          MS. SMITH: Thank you. We appreciate  
14 everyone's participation and also sense of the time.  
15 We're going to conclude now, and I just want to  
16 explain, since this is our first break, our break is  
17 now 55 minutes long. So everyone can, you know --  
18 when we're done, we can turn our videos off, and we  
19 can make sure to mute people.

20          But we will still have a live feed. This  
21 live feed will be the same feed for the whole day.  
22 And so what we're going to do is in about 25 minutes,  
23 so at 12:15 Eastern, anyone who's on the second panel,  
24 which is for Class 17, should hop back on. We're  
25 going to do an audio check and do a run-through to

1 make sure that we are fully set up to have an  
2 accessible hearing for the second one of the day.

3 So thank you again for the participation.  
4 So everyone now can turn off the video and mute, and  
5 we will reconvene, if you're in the audience, at 12:45  
6 Eastern. And at 12:15, hop back on if you're a  
7 panelist for the next time. Thank you.

8 (Whereupon, at 11:50 a.m., the hearing in  
9 the above-entitled matter recessed, to reconvene at  
10 12:45 p.m. this same day, Monday, April 5, 2021.)

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A F T E R N O O N S E S S I O N

(12:48 p.m.)

MS. SMITH: Welcome back, everyone. I think -- yes, I see our interpreter has their video on. I have my video on. So this is the second session of the Copyright Office's hearings on the § 1201 rulemaking. This is Class 17, which is examining a proposed exemption for all uses for accessibility purposes.

My name is Regan Smith. I'm General Counsel of the Copyright Office, and I think some were listening to the hearing earlier this morning, but just to briefly go through the rules of the road, we are trying to focus on clarifying and honing in on issues raised by the comments and are excited to hear from everyone today.

The questions will be moderated by Copyright Office attorneys or our colleagues at the NTIA. If you wish to speak, we are recommending that you use the "Raise Hand" feature in Zoom, it's a little button on the side, and to please mute your audio to minimize any extraneous noise.

We are also asking for this session that if you are not speaking and you are not the interpreter, you turn off your video to promote accessibility for



1 this hearing. You can use the chat if you have any  
2 questions, and someone from the Copyright Office will  
3 answer and try to facilitate any issues.

4 We are asking, because we have limited time,  
5 to please try to limit your responses to the question  
6 posed. I think everyone will get a chance to  
7 contribute and to dive into the issues.

8 And then, one last note, this is the same  
9 Zoom link for the whole day. So, if you wish to  
10 listen in on the last session, which will follow at  
11 2:30 Eastern, just stay on the line.

12 So now I will call on the government  
13 officials to introduce themselves and then the  
14 participants, and then we will get started. So, Ms.  
15 Chauvet?

16 MS. CHAUVET: Yes, hello. My name is Anna  
17 Chauvet. I serve as Associate General Counsel.

18 MS. SMITH: Thank you. Mr. Bartelt?

19 MR. BARTELT: Hi, my name is Nick Bartelt.  
20 I'm an Attorney-Advisor with the Office of General  
21 Counsel.

22 MS. SMITH: Thank you. Mr. Gray?

23 MR. GRAY: Hi, everyone. I'm Mark Gray.  
24 I'm also an Attorney-Advisor here in the Office of  
25 General Counsel.

1 MS. SMITH: Thank you. And Mr. Cheney?

2 MR. CHENEY: Good afternoon. My name is  
3 Stacy Cheney. I'm a Senior Attorney-Advisor at the  
4 Office of Chief Counsel at NTIA.

5 MS. SMITH: Thank you. So now I'm going to  
6 ask the panelists to introduce each other. I'm going  
7 to try to go in alphabetical order. So, Mr. Band?

8 MR. BAND: Hi, I'm Jonathan Band. I  
9 represent the Library Copyright Alliance.

10 MS. SMITH: Thank you. Mr. Bernard?

11 MR. BERNARD: Hi, I'm Jack Bernard, and I'm  
12 an attorney and faculty member at the University of  
13 Michigan.

14 MS. SMITH: I believe next we have Ms.  
15 Charlson?

16 MS. CHARLSON: Yes, thank you. I'm Kim  
17 Charlson. I'm the Executive Director of the Perkins  
18 Braille and Talking Book Library in Watertown,  
19 Massachusetts.

20 MS. SMITH: Thank you. I think next is Mr.  
21 Rachfal. Hopefully, I'm saying that close.

22 MR. RACHFAL: Hi, yes. This is Clark  
23 Rachfal. I'm the Director of Advocacy and  
24 Governmental Affairs for the American Council of the  
25 Blind.

1 MS. SMITH: Thank you. Next, we have Mr.  
2 Reid, and if you could please -- I don't know --  
3 introduce any student attorneys with you as well.

4 MR. REID: Thank you. Blake Reid for the  
5 Samuelson-Glushko Technology Law & Policy Clinic at  
6 the University of Colorado. We're here representing  
7 the American Council of the Blind, and I'm joined by  
8 my colleague, Rachel Hersch. Rachel, do you want to  
9 chime in?

10 MS. HERSCH: Hi, my name's Rachel Hersch.  
11 I'm a 2L at Colorado Law.

12 MS. SMITH: Thank you. Mr. Richert?

13 MR. RICHERT: Hi. Mark Richert, Executive  
14 Director of the Association for Education and  
15 Rehabilitation of the Blind and Visually Impaired.

16 MS. SMITH: Thank you. Mr. Rosenblum?

17 MR. ROSENBLUM: Hello. I am Howard  
18 Rosenblum, the CEO and Executive Director of Legal  
19 Services at the National Association of the Deaf. I'm  
20 happy to be here.

21 MS. SMITH: Thank you. Mr. Vogler?

22 DR. VOGLER: Hi, I am Christian Vogler. I  
23 am a Professor and Administrator of the Technology  
24 Access Program, the Director. Thank you very much.

25 MS. SMITH: Next, Mr. Marks?

1           MR. MARKS: Hello. My name is Dean Marks,  
2 and I am outside counsel to AACCS LA and to DVD Copy  
3 Control Association. Thank you very much.

4           MS. SMITH: Thank you. Mr. Taylor?

5           MR. TAYLOR: Hello. I'm David Taylor. I  
6 represent DVD Copy Control Association and the AACCS  
7 Licensing Administrator, otherwise known as AACCS LA.  
8 Thank you.

9           MS. SMITH: Thank you. And I believe our  
10 last panelist is Mr. Williams.

11           MR. WILLIAMS: Hello, thank you. Matthew  
12 Williams from Mitchell, Silberberg, and Knupp. I'm  
13 representing the Joint Creators and Copyright Owners.

14           MS. SMITH: So thank you, everyone, for  
15 being here today. We're glad that we were able to  
16 convene virtually. I think to start the questioning  
17 will be Ms. Chauvet.

18           MS. CHAUVET: Thank you, Ms. Smith. For the  
19 proponents, the proposed exemption would extend to any  
20 work protected by a technological protection measure  
21 where circumvention is undertaken for the purpose of  
22 creating an accessible version for work for people  
23 with disabilities, though the proposed language does  
24 not define disabilities. So, purposes of the  
25 exemption, how should disabilities be defined? Should

1 the exemption refer to disability laws for a  
2 definition? Mr. Reid, may I start with you, please?

3 MR. REID: Thank you for the question, Ms.  
4 Chauvet, and I may tag Mr. Bernard to respond to this.  
5 But picking up on the discussion from the earlier  
6 hearing, I think this is one where the Office could  
7 either just promulgate the language as proposed with  
8 some explanatory language in the final recommendation  
9 or the Librarian's final rule explaining that we're  
10 talking about disabilities broadly conceived.

11 Alternatively, I think pointing to the  
12 definitions in the Americans with Disabilities Act as  
13 amended could be a workable approach.

14 Mr. Bernard, I'm not sure if you have  
15 anything to add on that front?

16 MR. BERNARD: All I'll add is that while the  
17 ADA is certainly a good place to point if we're  
18 thinking we want to point to someplace, we should also  
19 be mindful that the public may be constrained by laws  
20 in their own state. And so I think we would want to  
21 leave open the opportunity that somebody who's trying  
22 to comport with a law that defines a person with a  
23 disability more broadly in their own state, that they  
24 would also be able to do that.

25 MS. CHAUVET: Thank you. If the exemption

1 does not reference a specific disability law, how  
2 should the Office ensure that the exemption applies  
3 only where circumvention is necessary to provide  
4 accessible copies of work to those who need them?

5 MR. REID: Well, I think the terms of --

6 MS. CHAUVET: Mr. Reid?

7 MR. REID: I'm sorry, Ms. Chauvet, I'll get  
8 my timing down, I swear. I think the language of the  
9 exemption as proposed does just that. It ensures that  
10 uses that are aimed at accessibility for people with  
11 disabilities would be covered.

12 And I think the court's opinion in  
13 HathiTrust is a good exemplar of the ability to figure  
14 this out. I think, as we sit here and think about  
15 promulgating regulatory language, we can come up with  
16 lots of complex hypotheticals. But I think, when  
17 faced with actual uses in practice, we don't have a  
18 particularly complicated time identifying what  
19 accessibility purposes are.

20 And I think, to the point that Mr. Bernard  
21 just made, there are a wide array of circumstances  
22 under which either a person with a disability or a  
23 third-party seeking to assist them is going to engage  
24 in accessibility. And we think including those terms  
25 along perhaps with some guidance in the recommendation

1 is good enough to set the scope.

2 MS. CHAUVET: Thank you. Mr. Williams,  
3 would you like to respond on this issue?

4 MR. WILLIAMS: Thank you. As we discussed  
5 in the last panel a little bit, I do think it would be  
6 good to have a reference to the laws in place to try  
7 to define the scope of what we're talking about here.  
8 That said, we do understand the point being made by  
9 the proponents here that that might be overly  
10 restrictive. So I think they could be used as  
11 guideposts, and it could be emphasized that the fair  
12 use analysis as it was conducted three years ago is  
13 based in large part on the need to comply with laws  
14 such as those that define the term "disabled."

15 MS. CHAUVET: Thank you. Mr. Reid, I see  
16 your hand is raised.

17 MR. REID: Yeah, and I wonder, Ms. Chauvet,  
18 and please tell me if this line of remark is out of  
19 scope, but I think it would be helpful to have some  
20 discussion about the need for this exemption beyond  
21 just the definition of people with disabilities and  
22 the definition of accessibility, which, I think, as we  
23 explained in our comments, extends quite far beyond  
24 the bounds of what disability law requires.

25 In other words, unlike the previous

1 exemption we discussed this morning, this exemption is  
2 designed to enable accessibility activities by  
3 individuals and third parties that may not be bound at  
4 all by disability law but are, in fact, on sort of the  
5 cutting edge of making copyrighted works accessible.  
6 And I wonder if I could tag in Mr. Bernard to speak a  
7 little bit to that?

8 MS. CHAUVET: Mr. Bernard, would you like to  
9 add to that?

10 MR. BERNARD: Sure. So I think one of the  
11 concerns that the proposed language is trying to  
12 address is the opportunity for people who have  
13 disabilities to equitably participate in society, to  
14 be able to work, to be able to take care of their  
15 children, to shop, to do all the kinds of things that  
16 people do.

17 And when we have a system in place that says  
18 to people with disabilities, you can't have access to  
19 the same thing that everyone else has access to  
20 because it stands behind a kind of digital wall and  
21 you will have to wait three years in order to be able  
22 to even bring forward a concern, or up to three years,  
23 that this is systemically excluding people who the  
24 government, the clear public policy of the United  
25 States, is to try to include.



1           And so the reason for a broader scope here  
2 looking at all the categories and classes of works is  
3 to facilitate the kind of structure that exists  
4 already in the United States that is framed by its  
5 laws that are both proactive -- so requiring things  
6 like the width of a door to be of a certain length or  
7 a curb cut -- and responsive so that when someone who  
8 needs an accommodation requests it, they can have that  
9 accommodation in order to participate in society. And  
10 so this is why we're looking at the broader language  
11 here, is to enable equitable participation that's  
12 consistent with U.S. public policy.

13           MS. CHAUVET: Thank you. Ms. Smith, before  
14 I turn to questions about the scope or the class of  
15 works, did you have any further questions?

16           MS. SMITH: Thank you. You know, I have one  
17 question related to the panel we had earlier this  
18 morning where there seemed to be some agreement that,  
19 since the circumvention would be conducted by  
20 disability service professionals or educators, it may  
21 be appropriate to make the language a little bit more  
22 flexible because they would be able to exercise  
23 reasonable and good judgment.

24           I understand that this request is not, you  
25 know, so constrained for reasons that have been

1 articulated in the record, and I just wonder, does  
2 that relate to our understanding of whether a proposed  
3 exemption should reference the specific federal or  
4 state laws or connect the exemption to specific  
5 accessibility uses? I see -- and so, Mr. Bernard, you  
6 raised your hand? Thank you.

7 MR. BERNARD: Yeah, I'll try to address what  
8 I think you are asking about, but if I'm confused,  
9 that's possible. I got my second COVID shot  
10 yesterday, and I appear to be in the group of people  
11 who aren't responding well to it. So feel free to  
12 nudge me back into place.

13 But you harkened back to the discussion  
14 about the professional judgment of people who help  
15 students who have disabilities receive accommodations  
16 at educational institutions.

17 But I think, when we're talking about  
18 judgment here, that the fundamental judgment we're  
19 thinking about is a person who says, "I bought this  
20 service, I bought this technology, I bought this work,  
21 and I can't access it because it's inaccessible to  
22 me."

23 And the judgment that I think we're talking  
24 about is the judgment to say this is not accessible,  
25 and now I want to make it accessible so that I can

1 have the same benefits that everyone else has. If the  
2 work is not in a digital format, well, then people who  
3 have disabilities are able to make those kinds of  
4 accommodations for themselves, and people who are  
5 trying to access works that happen to be in digital  
6 format, which is increasingly the case, they would not  
7 be able to feel comfortable making those kinds of  
8 accommodations. Thank you.

9 MS. CHAUVET: Thank you. Mr. Marks, I see  
10 you had your hand raised. Would you like to add to  
11 that? And then Mr. Reid.

12 MR. MARKS: Yes, thank you very much, and I  
13 appreciate the remark that Mr. Bernard just made. One  
14 of the issues we were, frankly, having with the  
15 exemption as proposed was that it was so open-ended.  
16 So, for example, Mr. Bernard just mentioned about a  
17 person with disability challenges having acquired a  
18 subscription to a service or lawfully acquired a copy  
19 of the work and not being able to access it.

20 That is a sort of parameter that I think  
21 would be moving in the right direction to be able to  
22 properly stoke an exemption. But, as written, there's  
23 no qualification that, in fact, a person who's seeking  
24 to circumvent a technological protection measure has  
25 actually lawfully acquired the work.

1           And so, as we try to balance the issues of  
2 copyrights and disability rights, we want to try at  
3 least from our perspective of the licensors of the  
4 technical customizers to see if we can come to some  
5 sort of, you know, equitable balance as we feel we  
6 were able to do in the last session last spring.

7           MS. CHAUVET: Thank you. Mr. Reid?

8           MR. REID: I wanted to appreciate Mr. Marks'  
9 comment about remuneration as an issue that, I think,  
10 if we were looking to refine the exemption in some  
11 way, would certainly be an issue that we could talk  
12 about.

13           Ms. Smith, to your question, just to tag on  
14 to what Mr. Bernard had to say, I would add here that  
15 what we are trying to do with the previous exemption  
16 and the exemption that we'll discuss later in the day  
17 is working very closely within the confines of this  
18 proceeding to try and incrementally, to the extent  
19 that we can meet the extraordinarily high bar that the  
20 Office has chosen to impose on granting exemptions in  
21 this space, and we're doing the very best we can to do  
22 that with those intentions.

23           But what we are trying to do with this  
24 exemption, what we're urging the Office to do with  
25 this exemption is to reconsider where that bar is set

1 and to consider setting it at a different place  
2 because we are trying to go beyond the bounds of what  
3 disability law specifically requires.

4 In particular, we're talking about access to  
5 works whose creators, whose distributors have opposed  
6 the extension of disability law in the past, including  
7 some of the organizations represented here today.  
8 What we are trying to get to a place is for those  
9 categories of works where we have faced arguments that  
10 require them to be accessible under disability law,  
11 under the Americans with Disabilities Act, the  
12 Telecommunications Act and its associated regulations  
13 or the panoply of other disabilities laws, where  
14 rightsholders have said please don't make us, we  
15 cannot be made to do this, it will be too expensive.

16 We've heard arguments that it might violate  
17 their First Amendment rights and so on and so forth to  
18 put into the range of new technologies for what the  
19 application of disability law has faced difficulty in  
20 keeping up and for the kinds of exemptions that we  
21 have discussed with the Office both today and in the  
22 past -- I'm thinking back to the exemption that we  
23 proposed back in 2012 around accessibility research --  
24 to say this incremental process of describing in great  
25 detail before an activity can take place legally

1 exactly how it is likely to play out, to basically  
2 prove that level of -- to raise that level of evidence  
3 before the Office in every single circumstance is not  
4 tenable for people with disabilities, it's not tenable  
5 for the third parties that help them.

6           And I would point the Office to the fact  
7 that it's taken us the better part of 20 years to get  
8 to an eBook accessibility exemption that -- and Mr.  
9 Richert and others on the call here have participated  
10 in -- just to get that refined to recognize what's a  
11 pretty uncontroversial point, which is that blind and  
12 visually impaired and other people with print  
13 disabilities have the right to read. It's taken 20  
14 years and an international treaty and countless hours  
15 and countless pages to get us to that result.

16           And when we think about the wide range of  
17 disabilities, the wide range of copyrighted works, and  
18 the wide range of techniques that it takes to make  
19 those works accessible to all of those communities of  
20 people with disabilities, that we need a different  
21 approach than the extremely incremental approach that  
22 has been adopted so far.

23           So I think we are keen to discuss issues  
24 like the one Mr. Marks raised up about remuneration.  
25 That makes sense. But we are asking the Office to

1 reconsider the approach that it has taken to these  
2 issues over the past two decades and put the needs of  
3 people with disabilities first. Thanks.

4 MS. SMITH: Thank you, Mr. Reid. I do want  
5 to say as we -- let's turn to that issue about the  
6 breadth of the proposed exemption, and I want to say  
7 that I don't believe the Office has asked for great  
8 detail exactly how circumvention would be used in  
9 every single instance. So I do want to sort of point  
10 the comments a little bit to our Notice of Inquiry and  
11 our proposed rule because I'm not quite sure that's  
12 been the standard at which the Office has been  
13 evaluating not just for accessibility issues but  
14 across the board the various exemptions that have been  
15 adopted through this rulemaking.

16 But I do take your point that you are asking  
17 the Office to consider an exemption for all works for  
18 a perhaps broader set of instances than we have  
19 before. I guess I will bring the question back to  
20 you, or if you believe there is another proponent who  
21 would be better suited, feel free to redirect.

22 Could you explain why you think there are  
23 adequate commonalities across the various  
24 technological protection measures, types of works, as  
25 well as effects on the market or adverse effects, to

1 make this a suitable exemption?

2 MR. REID: Sure, I'd be happy to jump in  
3 here, and I think maybe the best way for us to answer  
4 this question is to first turn to Mr. Rosenblum and  
5 then turn to Mr. Rachfal after that to speak to the  
6 salience of these issues both as they affect the deaf  
7 and hard-of-hearing community and as they affect the  
8 blind and visually impaired community. If I can call  
9 on Mr. Rosenblum first?

10 MS. CHAUVET: Mr. Rosenblum, please go  
11 ahead.

12 MR. ROSENBLUM: Hello. Thank you so much,  
13 Mr. Reid. The Joint Creators and Copyright Owners and  
14 others like them seek to keep the status quo, which is  
15 to require any accessibility to copyrighted products  
16 to only be allowed under the narrow and strict  
17 parameters that currently exist.

18 The current copyright regime is inaccessible  
19 and must change. I'll give you a few examples. The  
20 NAD has a subsidiary, Described and Captioned Media  
21 Program, DCMP, which provides captioning and audio  
22 description for educational video content. Their  
23 shared content is shared at no cost to schools and  
24 students across the country via YouTube.

25 However, we have had to deal with threats



1 and actual shutdowns of the DCMP YouTube page because  
2 what was thought to be an agreement with the content  
3 copyright owner for a single video was later found to  
4 be incorrect.

5 If the provision of captioning or audio  
6 description on any copyrighted content were not  
7 considered a copyright infringement simply because it  
8 is the provision of accessibility, then we would not  
9 have this problem.

10 MS. CHAUVET: Mr. Rosenblum, may I please  
11 ask a follow-up question for that? There is the  
12 existence --

13 MR. ROSENBLUM: Oh, actually, I wasn't  
14 finished. I'm sorry. I was just reading. Thank you.

15 MS. CHAUVET: I'm sorry. Please continue.

16 MR. ROSENBLUM: Perfect. It is not enough  
17 to only have a commitment from the Joint Creators and  
18 Copyright Owners as there are thousands of content  
19 creators who do not provide captioning or audio  
20 description. Worse yet, even when there are community  
21 volunteers or organizations such as DCMP offering to  
22 do the captioning or audio description at no cost,  
23 it's nevertheless often a struggle to just get the  
24 permission to do so. Captioning and audio description  
25 should be a mandate, not an option.

1           Also, where there have been discriminatory  
2 barriers, it's been my pleasure to litigate to bring  
3 those unnecessary barriers down, and we have  
4 successfully litigated against Netflix, Harvard, and  
5 MIT simply because they refused to caption content.  
6 They all argued copyright protections were a barrier.  
7 Netflix specifically attempted to argue that it was  
8 not responsible for or able to provide captioning on  
9 content that it did not only merely distribute, but  
10 they cited § 1201 as part of this argument. We did  
11 get around these arguments, but it took years to  
12 complete this litigation and obtain the needed relief.

13           The bottom line here is that the burden has  
14 been on people with disabilities to bring forth  
15 examples of barriers as they come up each time under  
16 existing and new technologies. This is problematic on  
17 so many levels. There's so much content that is not  
18 captioned or audio-described, and it's not possible  
19 for us to address them all under the current copyright  
20 system.

21           More importantly, a large percent of people  
22 with disabilities are underemployed or unemployed, and  
23 yet your current system requires these long-oppressed  
24 people to secure legal representation to navigate  
25 complex legal issues, all of this for everyday people

1 with disabilities to simply be able to enjoy  
2 copyrighted works to the same extent as everyone else.

3           So what should the policy for copyright be?  
4 To make it as difficult for people with disabilities  
5 to access works that are available to everyone else?  
6 To make people with disabilities bring each specific  
7 instance of inaccessibility in a constantly and  
8 quickly changing field of technology to the Copyright  
9 Office and then wait months and years before they are  
10 finally given access?

11           What's the flip side? Copyright owners  
12 having to vigilantly guard against infringing use.  
13 But isn't that what they're supposed to do? Shouldn't  
14 the burden be on them to stop infringing use rather  
15 than on people with disabilities to gain access?

16           In fact, there's no evidence introduced by  
17 anyone that shows preemptive accessibility would lead  
18 to an increase in copyright infringement. As a matter  
19 of public policy, this choice is easy. The Joint  
20 Creators and Copyright Owners are basically saying  
21 that people with disabilities must anticipate every  
22 technological barrier, seek regulatory review for each  
23 and every one of them, and hope for a favorable  
24 outcome long after the desired time of access.

25           This is not tenable, efficient, or

1 effective. All parties here should agree upon a  
2 system that incorporates accessibility as an inherent  
3 aspect of copyright law and determine how best to best  
4 guard against abuses without putting that burden on  
5 people with disabilities.

6 History is replete with examples of  
7 oppressed and marginalized groups being denied access  
8 to publicly available programs and services. The  
9 current set of copyright requirements creates barriers  
10 that contribute to this continued oppression and  
11 marginalization for people with disabilities. We ask  
12 that you be on the right side of history and get rid  
13 of an oppressive copyright structure that stands in  
14 the way of accessibility. Thank you.

15 MS. CHAUVET: Thank you.

16 Mr. Williams, I think you have perhaps a lot  
17 to respond to. I know, for example, you are here  
18 representing Netflix, so if you would like to speak  
19 specifically on that matter, you can, or the original  
20 question, which I will also pose to you, is whether  
21 you think there is sufficient commonality across uses  
22 of works, or if there's other ways the Office could  
23 approach these very important policy issues from  
24 within the regulatory authority granted to it? Thank  
25 you.

1           MR. WILLIAMS: Yes, thank you. And, to be  
2 clear, one member of my coalition is the Motion  
3 Picture Association, and Netflix is a member of that  
4 trade association, but I'm not here today appearing  
5 directly on behalf of Netflix as an individual  
6 company.

7           And I appreciate the overview that Mr.  
8 Rosenblum gave, and I appreciate his passion, but I do  
9 think some of what he had to say about our positions  
10 are inaccurate. He said, for example, and I'm  
11 paraphrasing, that, you know, we're here in this  
12 proceeding trying to preserve every restriction that's  
13 currently in place with respect to these issues.

14           And as the panel prior to this one  
15 displayed, that's not correct. We agreed to a number  
16 of the requests for expansion there. We are not  
17 opposing the exemption that would broaden the eBooks  
18 exemption to meet the Marrakesh standards. And so we  
19 are not trying to take a maximalist approach here.

20           That said, the immediately proposed  
21 exemption is so broad that we did feel that we needed  
22 to oppose it, and there's a number of reasons for  
23 that. You asked if there are commonalities across all  
24 works that would allow you to change the ground rules  
25 here and grant an all-works exemption, and to my

1 knowledge, there are not.

2           There are different issues with respect to  
3 different categories of works, and that's one reason  
4 why the proceeding was designed the way it was, to try  
5 to focus in on specific classes of works and provide  
6 the Office with some flexibility to address specific  
7 issues that come up without using a blunt instrument  
8 that goes to every issue that might be out there in  
9 the marketplace.

10           So there's a number of things with this  
11 proposal, in addition to the all-works issue, that  
12 there's just not limitations of the sort we tend to  
13 see in the proceeding. One that we touched on earlier  
14 after Ms. Chauvet's question was there's not really an  
15 identification of who would be the ones engaging in  
16 the circumvention the way there was in Class 3 that we  
17 discussed earlier. There's not a market check  
18 requirement or a requirement that there be no  
19 alternative to circumvention. The focus on how the  
20 copies are obtained is lacking in the proposal. The  
21 security measures that might be implemented to protect  
22 the copies after circumvention are lacking. There's  
23 no use of the sole purpose language that the Office  
24 tends to use. There's not language to address how the  
25 copies would be disseminated and by who.

1           And so all of those things, while we do want  
2           to try to work with folks to address this important  
3           issue, are things that give us pause and have caused  
4           us to oppose this exemption.

5           And just my last point on the scope here is  
6           that the rulemaking and the way it's structured, this  
7           is not the only set of issues that it's designed to  
8           deal with, and if you were to start adopting all works  
9           proposals, there's a whole range of things that will  
10          be proposed and that have been in the past that  
11          present lots of different difficult problems.

12          There could be an all-works for educational  
13          purposes, all-works for criticism and comment,  
14          all-works for remix, and, ultimately, all-works for  
15          any lawful purpose, which is a proposal that's been  
16          out there since well before the DMCA was passed and  
17          was not included in the statute by Congress. And this  
18          rulemaking was instead to try to address specific  
19          issues.

20          So, while we do recognize the import of the  
21          issues here, we also feel it's very important to  
22          preserve the ground rules here in the proceeding. And  
23          I thank you.

24          MS. SMITH: Thank you. And I know we have a  
25          lot of other hands up, but I think I would like to

1 pose one follow-up question to Mr. Williams before we  
2 get to some others, because I know Joint Creators have  
3 participated in many of these classes, and we'll hear  
4 from you, you know, throughout the week.

5           When you talk about the potential effect to  
6 other exemptions, is it your client's view that this  
7 would pose issues for the other exemptions? And if  
8 so, why? I mean, do you see all works having  
9 different market effects or different adverse effects?  
10 Could you connect that to the statute? Or is it more  
11 of just a concern about the Office's authority, or  
12 both? Thank you.

13           MR. WILLIAMS: I would say it is both. I  
14 think the Office has been right to look to the statute  
15 and legislative history in terms of defining the scope  
16 of its authority. But also, the purpose, I think, of  
17 limiting that authority was to create a proceeding  
18 that has the benefit of allowing the Office to  
19 flexibly deal with different issues in different  
20 spaces with respect to different type of works and  
21 actually look through those specifics to determine  
22 what are the needs that are not being met in the  
23 marketplace, what are the problems that are  
24 unresolved, and how can you act in a way that is  
25 contoured to address those specifics.



1           So I think there was a reason that it was  
2           designed the way it is, and I do think it has  
3           benefits. I think the expansion in 2006 that you made  
4           to what would be considered in the proceeding for  
5           being granted, you know, it pushed the outer limits of  
6           the statute. It was a new approach from the Office as  
7           to how exemptions could be crafted.

8           But it did ultimately allow you to grant  
9           more exemptions rather than fewer exemptions, and I  
10          think that's what the Office has acknowledged over  
11          time, that the focus on user groups combined with a  
12          focus on specific classes of copyrighted works has  
13          actually led to more exemptions, not fewer, because  
14          you're able to more narrowly tailor them to address  
15          specific issues. So that's how I see the way this  
16          proceeding was set up and the way it's supposed to  
17          work.

18                 MS. SMITH: Thank you, Mr. Williams.

19                 To try to go in order, Mr. Bernard, I think  
20          you had your hand up next, and then we will go to Mr.  
21          Band. So, Mr. Bernard, if you would like to answer  
22          the question about whether you feel that this class  
23          has sufficient commonalities, or alternatively, I  
24          think my next question is, if the Office felt  
25          constrained in its authority, given the statutory

1 language, to focus on a particular class of works,  
2 could you maybe suggest what classes of works we might  
3 be able to consider in this request?

4 MR. BERNARD: Sure. So I think the  
5 commonality is that the works are inaccessible to  
6 somebody, that is, that a member of the public is not  
7 able to access these works, whatever they are. And  
8 this is very difficult to predict. There are hundreds  
9 of different kinds of disabilities out there. There  
10 are eight categories of works that are protected that  
11 fall into smaller units depending upon the line of the  
12 Copyright Act you're looking toward, and there are  
13 many thousands of different types of technologies that  
14 are emerging, all at the same time. So the idea here  
15 about looking at the commonality of the works as being  
16 the work is inaccessible to a qualified person with a  
17 disability, this, I think, is all you need.

18 When Mr. Williams talks about changing the  
19 ground rules, the ground rules in question are within  
20 the purview of the Copyright Office to consider  
21 adjusting the ground rules so that for this class of  
22 individuals, that is, people who have disabilities who  
23 are not able to equitably participate in society  
24 because they cannot access copyrighted works that just  
25 happen to be in a box, a digital box, this is the kind

1 of constraint that the Copyright Office can actually  
2 address without having to run afoul of § 1201.

3 The room is in there. 1201 doesn't  
4 prescribe a circumstance where you couldn't identify  
5 all classes of works that meet a certain set of  
6 criteria. And here are the criteria, is that they are  
7 wanting to be used by a person who has a disability in  
8 order to access that work.

9 So I do think that that is what's at the  
10 heart of the issue here, and I think the Copyright  
11 Office is well-situated to address this fundamental  
12 public policy concern. Thank you.

13 MS. SMITH: Thank you.

14 So, Mr. Band, from you next, and, again, I  
15 think, one, to keep us moving on and put a spin as we  
16 call on you, the record suggests that sound recordings  
17 may not have TPMs on them, and, of course, there is an  
18 existing exemption for literary works, which will get  
19 into a hearing later, and audiovisual works.

20 And I think, without -- you know, this is  
21 not directed at questioning the public policy reasons  
22 behind this request, but is there a need to have an  
23 exemption for sound recordings or literary works? And  
24 if so, you know, please let us know. Mr. Band?

25 MR. BAND: Sure. So an answer to that

1 question is even if maybe there are -- generally,  
2 sound recordings don't have technological protections,  
3 but that doesn't mean that there are no sound  
4 recordings without technological protections or that  
5 there will be no sound recordings in the next three  
6 years that will have technological protections.

7 But it all goes to the bigger point in terms  
8 of the commonality, and the commonality is this, and  
9 this is also how it's very different from, you know,  
10 Mr. Williams' parade of horrors and the floodgates  
11 opening, is these communities are seeking an exemption  
12 because the rightsholders have not met their legal  
13 obligation to provide all of these works in accessible  
14 format, meaning they have a legal obligation to  
15 provide everything in an ADA-compliant way and they  
16 aren't doing that. And so, because they aren't  
17 meeting their legal obligation, this community is  
18 seeking the opportunity to self-help because, again,  
19 the rightsholders have to do it.

20 MS. SMITH: Well, can I just ask one  
21 question? I mean, is the exemption when there is not  
22 an accessible version? Is that, like, a market check  
23 to build into that? Because I think starting out the  
24 question was, if we're not seeing it for sound  
25 recordings and finding that tricky to square with what

1 you just said now, which is that the rightsholders are  
2 failing at their obligation if they're not even using  
3 TPMs, is that what's happening? I just wanted to make  
4 sure I understand your position.

5 MR. BAND: Well, certainly, with most sound  
6 recordings, there isn't an issue. But that's not the  
7 case, certainly not the case for -- you know, all  
8 sound recordings are certainly possible that within  
9 the next three years this will be an issue with sound  
10 recordings, you know, but it's all part of the bigger  
11 problem, which is, again, that -- and this is, again,  
12 how you distinguish it from all educational uses,  
13 because, you know, there is no legal obligation to  
14 make everything available for educational uses for all  
15 people. And so, you know, there is a common -- my  
16 point here is there is a commonality here and there's  
17 a way of distinguishing this set of uses from all  
18 others.

19 MS. SMITH: Okay. Thank you.

20 I think, Mr. Reid, if you would like to  
21 respond to some of that and, you know, similarly, I  
22 think the question of -- I appreciate the nature of  
23 the request, but if you also wanted to address, do you  
24 have an opinion, if the Office felt like it needed to  
25 delineate, what might be appropriate? And I think, in

1 particular, literary works or sound recordings, or I  
2 think the request referenced sculptural works. And  
3 I'm just trying to understand, you know, like, what  
4 the use-case is for that. So thank you.

5 MR. REID: Thanks, Ms. Smith, and I'll try  
6 and tee up a couple of directions that we may want to  
7 head as we head into the next phase of the hearing.  
8 But I wanted to briefly respond to Mr. Williams'  
9 comment, which conceptualizes this proceeding as sort  
10 of a neutral one, and what I want to underscore is  
11 that this is not a neutral proceeding.

12 The experience of most people when they seek  
13 to experience, purchase, access to a copyrighted work  
14 or a subscription service that provides access to a  
15 copyrighted work is to pay their money and then get  
16 access as advertised. And the experience for people  
17 with disabilities has long been filtered through a  
18 permission structure, and that permission structure  
19 comes from copyright, and this is not new. This dates  
20 back to the 1930s, when the Pratt-Smoot Act put the  
21 Library in the position of distributing braille and  
22 other accessible versions of books. There was an  
23 insistence from the publishers that they be asked  
24 permission.

25 In the leadup to the 1976 Copyright Act,

1 publishers appeared before Congress and demanded to be  
2 asked permission, which gave us § 710 of the Copyright  
3 Act of 1976, which basically required the Copyright  
4 Office to promulgate forms strictly for the purpose of  
5 asking permission.

6 And when that permission wasn't provided,  
7 that finally led us to the Chafee Amendment, which  
8 made that permission compulsory. But you have to  
9 understand that that permission structure is far and  
10 away more than people without disabilities typically  
11 face when they are trying to get access to a work.

12 People without disabilities who want to  
13 access a work don't have to come to the Copyright  
14 Office and ask permission to do that. They simply get  
15 it. So we're working against this historical  
16 permission structure, and we're trying to say, yes,  
17 you could be supportive of accessibility, as many  
18 folks were in their comments, as the Office was in the  
19 Notice of Proposed Rulemaking here.

20 But actually being supportive of  
21 accessibility requires saying that people with  
22 disabilities have got a civil right and a human right  
23 to access copyrighted works on equal terms. And any  
24 place that we impose the permission structure of §  
25 1201 in this proceeding in front of them and say you

1 have to come and ask and you have to come prove all of  
2 the specific types of works that you'd like to access,  
3 the particular ways that you want to do them, you're  
4 putting them in a different place than people without  
5 disabilities.

6 So I just want to make sure that we have  
7 that historical background here. This is not a  
8 neutral proceeding. This is one that stacks the deck  
9 against people with disabilities, and we're trying to  
10 get to one that's a little bit more egalitarian. And  
11 I'm happy to move us on here, but I'm happy to yield  
12 the floor.

13 MS. SMITH: Okay, thank you. Mr. Marks,  
14 would you like to respond?

15 MR. MARKS: Thank you very much. I wanted  
16 to first say that, you know, I appreciate the  
17 frustrations that have been expressed by Mr. Rosenblum  
18 and Mr. Reid, and I think it's the advocacy that has  
19 pushed disability rights forward. It's very, very  
20 important.

21 I think what we're trying to get at with our  
22 opposition here is, is there a place where we can  
23 achieve some balance. So even with the Chafee  
24 Amendment, right, there are limitations that the works  
25 have to be distributed in this specialized form to



1 enable meeting the challenges of disabled people, and  
2 it shouldn't be distributed beyond disabled people.

3           Those are the sorts of parameters that I  
4 think that we feel should be in place in order to  
5 serve the purposes that need to be served for disabled  
6 people while still recognizing that the problem with  
7 digital works is that they're so easily infringed in a  
8 digital environment. And so, if we can build in  
9 parameters, not necessarily -- in this, I'm expressing  
10 my personal view of every single possible type of  
11 class of work -- but more happening, the uses will be  
12 limited to disabled people who have legally acquired  
13 access to legally acquire the work, whether they  
14 bought it, they have a subscription to the work, you  
15 know, that there are ways to limit when the TPMs are  
16 circumvented to enable the work to be more accessible  
17 that it's limited to those people who have  
18 disabilities, that it's not made available to the  
19 general public at large.

20           These are the sorts of issues that I think  
21 are giving us a lot of pause with the proposal as it's  
22 currently been put forward. Thank you.

23           MS. SMITH: Thank you. I think next I will  
24 call on Mr. Taylor, and then we will start to move on.  
25 And I guess, Mr. Taylor, I would be curious whether

1 you agree with Mr. Marks? And then, to sort of keep  
2 it moving, I'm asking you two points. Do you agree?  
3 It almost seems to me in this hearing that there is  
4 beginning to be a consensus that legally acquired or  
5 some sort of a remuneration, you know, qualification  
6 is what is intended, part one.

7 And then, part two, I think part of my  
8 question is, is it helpful to promulgate an exemption  
9 that might be surplusage, or is it not helpful to do  
10 that in light of some of the policy considerations? I  
11 realize you're the person who got called on, although  
12 you may not be the person best suited to answer that.  
13 So, if you wish to, that is my next question. Mr.  
14 Taylor?

15 MR. TAYLOR: Right. Well, I do agree mostly  
16 with Mr. Marks. Not to throw him under the bus or  
17 anything, but I do have to point out that this is a  
18 rulemaking proceeding, and in the rulemaking  
19 proceeding, an agency only has so much authority, and  
20 you do have to follow the law, and that law says that  
21 you create exemptions for works. And this rulemaking  
22 is supposed to be a fail-safe. So, to the extent that  
23 anybody, any group, any type of uses want to be able  
24 to circumvent, everybody has to come here.

25 And so, when Congress created this, they

1 intended that everybody comes here and identifies  
2 where it gets in the way. And I think that, in this  
3 case, for this group of users, this process is also  
4 very helpful because it allows issues to actually boil  
5 up that we can respond to.

6 When disability issues first came into the  
7 DVD area, it was making players more accessible, and  
8 our immediate response was, how can we do this? And  
9 you don't have to rely on the rulemaking to come to  
10 talk to us. So every time that we are made aware of  
11 an issue, at least DVD CCA and AACCS LA, we have tried  
12 to do whatever we can to be more responsive and make  
13 sure that we come up with an approach that honors the  
14 law and makes sure that 1201 and this rulemaking  
15 process really reaches an equitable balance between  
16 protecting copyrights in the digital marketplace and  
17 serving those needs of the communities that make use  
18 of those copyrights.

19 And I'm not sure if I answered your  
20 question, Ms. Smith, but if you want to repeat it, I'm  
21 happy to try.

22 MS. SMITH: I think that's okay. I think  
23 we'll move on. Thank you, though, Mr. Taylor. And I  
24 think next Ms. Chauvet has a question.

25 MS. CHAUVET: Yes, thank you. I see Mr.

1 Williams has his hand raised, so I would also like you  
2 to please comment on this next question. We talked  
3 about the history. So the legislative history,  
4 specifically, the House Manager's Report, states that  
5 § 102 categories of works are only a starting point  
6 for defining a class of works because, for example,  
7 books and computer programs may technically both be  
8 literary works, but it is exceedingly unlikely that  
9 the impact of the prohibition on the circumvention of  
10 access-control technologies will be the same for  
11 scientific journals as it is for computer operating  
12 systems.

13 So, Mr. Williams, if you could please answer  
14 this specific question of, like, how does proponents'  
15 approach align or misalign with this legislative  
16 history, and then, if you could add on what you were  
17 planning to discuss, that would be great. Thank you.

18 MR. WILLIAMS: Sure, thank you. Yes, so  
19 that legislative history, you know, rather than  
20 suggesting that the proceeding over time would likely  
21 expand to an all-works type of approach for  
22 exemptions, it actually suggests that the more likely  
23 outcome of marketplace and legal developments would be  
24 that the 102 categories of works are unlikely to  
25 experience the exact same issues, and, therefore, the

1 exemptions would usually, maybe not always, be refined  
2 even more than just referencing one of the 102  
3 categories of works because there are differences in  
4 markets for things like books and for computer  
5 operating systems, even though they are both literary  
6 works.

7           And so I don't think that that history that  
8 you just pointed to implies that the kind of proposal  
9 here is what was intended for the proceeding. I will  
10 say there are differences, and one, I think, is maybe  
11 highlighted by something that was in the reply  
12 comments from the proponents here.

13           They cited to a YouTube video about an  
14 individual who had created his own gaming setup for  
15 purposes of enabling him to have a more accessible and  
16 enjoyable experience playing a PC game on a Microsoft  
17 operating system. And Microsoft has really taken big  
18 strides to address these issues, including releasing  
19 an adaptive controller that's available in the  
20 marketplace, and they've worked extensively with  
21 disability advocates and that community to try to  
22 address as many of these needs as possible, including  
23 by issuing best practices, kind of guidelines for  
24 developers to try to make sure that people understand  
25 and can anticipate these issues.

1           And so companies like that, as well as the  
2 motion picture studios, have really been investing a  
3 lot in trying to address these issues, and there's  
4 been some mentions of these companies failing to  
5 comply with disabilities laws or their obligations.  
6 And my understanding is there is a very large amount  
7 of compliance. I do understand that there were prior  
8 lawsuits like the one mentioned earlier against  
9 Netflix, but these companies have really come a long  
10 way and are working very hard, I know, to try to  
11 address these issues and really want to address them.

12           And so I can't speak to the details that Mr.  
13 Rosenblum spoke to about the Netflix litigation, but I  
14 know they have received awards for their work in this  
15 space, that they frequently exceed their legal  
16 obligations. So I just didn't want those comments  
17 about this widespread failure to comply with legal  
18 obligations to go unresponded to.

19           With respect to the Microsoft controller I  
20 mentioned, it actually has ports on it that  
21 third-party devices may be plugged into. My  
22 understanding is using those unaffiliated devices  
23 doesn't require circumvention for people who want to  
24 create their own setups, and my understanding is  
25 that's probably also true -- although the video that

1 was included from YouTube didn't provide all the  
2 specifics we would need, it's very likely the case  
3 that that individual who was able to create his own  
4 setup, it didn't look like he had to engage in  
5 circumvention to that.

6 And so I do think that analyzing that issue  
7 may be different than analyzing eBooks that don't have  
8 a read-aloud function as you have in the past. Those  
9 are two different questions with potentially two  
10 different answers when it comes to whether  
11 circumvention is necessary. And so that's the main  
12 point I wanted to make.

13 MS. CHAUVET: Thank you, Mr. Williams.

14 I want to give Mr. Reid or Ms. Hersch an  
15 opportunity to respond about the legislative history  
16 and whether the approach proposed by the proponents  
17 aligns with that, but also, in light of the House  
18 Manager Report, also seeing a distinction between the  
19 types of work where the availability for fair use  
20 purposes is unlikely to be affected by laws against  
21 circumvention of TPMs in the same way. So, again, how  
22 does your approach align with the legislative history?  
23 Mr. Reid or Ms. Hersch?

24 MR. REID: And I'll hand off to Ms. Hersch  
25 to address the legislative history. I just wanted to

1 observe quickly in response to Mr. Taylor and Mr.  
2 Williams that, in part, much of the progress that was  
3 achieved by the ESA's member companies was spurred by  
4 more than a decade-long dispute with the Federal  
5 Communications Commission where, as early as 2012, the  
6 ESA was filing exemption waivers trying to get out  
7 from under the FCC's rules.

8 I would also note that the Consumer  
9 Electronics Association, or what was then the Consumer  
10 Electronics Association, opposed regulations by the  
11 FCC to extend closed captioning mandates to DVD  
12 players and other optical media players after the  
13 exemption was narrowly granted but was largely  
14 difficult to be used by the Office back in the 2012  
15 rulemaking.

16 I also just wanted to underscore before we  
17 hand it off to Ms. Hersch to talk about the  
18 legislative history, I do want to make sure we get a  
19 chance for Mr. Rachfal, Mr. Richert, Ms. Charlson, and  
20 Mr. Vogler to speak to both the issues that are facing  
21 the blind and visually impaired community, to speak to  
22 the issues that are facing libraries that work  
23 specifically in this space, and to Mr. Vogler to talk  
24 about the work that technologists are doing to improve  
25 accessibility on this front. But I'll hand it off to



1 Ms. Hersch to talk about the legislative history.

2 Thanks.

3 MS. CHAUVET: Thank you. Ms. Hersch? And  
4 then I would like to also -- I would like to hear from  
5 the people you named, Mr. Reid, on their views, and I  
6 think it would be helpful to next turn to questions,  
7 which I will after Ms. Hersch speaks, about the  
8 examples that are currently in the record. So go  
9 ahead, Ms. Hersch.

10 MS. HERSCH: Thank you. So there was a few  
11 points that Mr. Williams brought up that I'd like to  
12 respond to. I think, most importantly, it's that the  
13 legislative history doesn't dictate one exact approach  
14 to the rulemaking process. It gives the register the  
15 ability to make some decisions.

16 And so the quote that you brought up from  
17 the House Committee Report, there's a quote -- the  
18 House Committee Report says that -- they write that  
19 they were concerned that the marketplace realities may  
20 someday dictate a different outcome, resulting in less  
21 access rather than more to copyrighted materials that  
22 are important to education, scholarship, and other  
23 socially vital endeavors.

24 And I think what we're seeing here today and  
25 what we've been seeing is this exact problem, that the

1 rulemaking process is ultimately stifling access.  
2 It's in many situations cutting off access to  
3 copyrighted materials for people with disabilities.  
4 And as that quote shows, that was a real fear.

5           What we see in the 1975 House Judiciary  
6 Report speaks further to this fear and, in particular,  
7 to the § 102 categories. So the 1975 House Judiciary  
8 Committee Report explains that the second sentence of  
9 § 102 lists seven broad categories, which the concept  
10 of works of authorship is set to include.

11           The use of the word "include" as defined in  
12 § 101 makes clear that the listing is illustrative and  
13 not limitive and that the seven categories do not  
14 necessarily exhaust the scope of original works of  
15 authorship that the bill is intended to protect.

16           A little bit later, they also say in this --

17           MS. CHAUVET: Thank you, Ms. Hersch. I'm so  
18 sorry. I realize that we just have about 20 minutes  
19 left, so I'm going to go ahead and ask some questions.  
20 And feel free to answer this first question about the  
21 examples that have been provided in the record.

22           The first is that there's one example  
23 including a discussion of video conferencing  
24 platforms, such as Zoom, which proponents say have  
25 raised significant accessibility issues in a variety

1 of employment, healthcare, and other contexts. So my  
2 question is if you could please explain how this  
3 example evidences that the prohibition on  
4 circumventing access controls is the cause of the  
5 accessibility issues in this example.

6 MR. REID: I can take a swing at that one,  
7 Ms. Chauvet, if that's okay.

8 MS. CHAUVET: Okay, Mr. Reid. Yes, that  
9 would be great, please. If you could please just  
10 raise your hand so we can, for the court reporter and  
11 interpreters and everyone, follow along? Thank you.

12 MR. REID: Apologies for that. On the issue  
13 of accessible video conferencing, and I think, you  
14 know, we've talked about specific examples in the  
15 record both of video conferencing, video games,  
16 software of various sorts, video -- I mentioned video  
17 games -- and the various other examples that we've  
18 teed up. What we are trying not to do here is engage  
19 in the creation of 10 or 12 or 15 distinct classes of  
20 works.

21 MS. CHAUVET: No, that you, Mr. Reid.

22 MS. SMITH: I want to make sure -- okay, go  
23 ahead, Ms. Chauvet.

24 MS. CHAUVET: No, thank you. I just want to  
25 make sure that we are able to address the specific

1 examples that you provided.

2 MR. REID: Yeah.

3 MS. CHAUVET: So you mentioned Game Guard,  
4 which proponents say blocks third-party applications  
5 and hardware from accessing the video game. So,  
6 again, there wasn't really discussion about how that  
7 is evidencing the prohibition on circumventing access  
8 control as the cause of the accessibility issues. I  
9 see Mr. Richert has had his hand raised, so if he  
10 could please address that specific question, that  
11 would be great.

12 MR. RICHERT: Sure. I'd be glad to weigh in  
13 at some point. I'm not so sure that I'm best suited  
14 to that. Maybe Reid or others can come up with  
15 someone better to address that. But remember me.  
16 Thanks. Appreciate it.

17 MS. CHAUVET: So, if someone could please  
18 explain how the example of Game Guard is showing how  
19 the circumvention of access controls is relevant to  
20 that accessibility issue?

21 MR. REID: If it's okay for me to jump in on  
22 that, Ms. Chauvet, I'd be happy to. This is Blake  
23 Reid. I'm sorry, Ms. Chauvet, it looked like you were  
24 saying something, but you were on mute.

25 MS. CHAUVET: Thank you. Sure, I just want

1 to make sure, like, all the proponents are given an  
2 opportunity. So, if you could briefly explain that,  
3 that would be great, Mr. Reid. Thank you.

4 MR. REID: So I would say, with the Game  
5 Guard example, the accessibility problem is not caused  
6 by the TPM itself. The accessibility problem is with  
7 the design of the games that Game Guard or similar  
8 technologies protect. And the notion there is that if  
9 those digital rights management technologies were not  
10 in place that technologists like the folks that we  
11 discussed in our comment, or like Professor Vogler,  
12 could actually design basically retrofitted  
13 accessibility features that would come in and enable  
14 unique control schemes that would add things like  
15 closed captions or description or that might simplify  
16 language for people with intellectual disabilities or  
17 modify the game in various other ways to make it  
18 accessible.

19 And maybe it would make sense, and I know  
20 you want to dig in on video games, but this might be a  
21 good opportunity to bring Professor Vogler into the  
22 conversation.

23 MS. CHAUVET: Really quickly, I also wanted  
24 to ask since you said that, for the example of the  
25 Game Guard, that a TPM is not at issue for the

1 accessibility issues. So my other question is the  
2 example of Encrypted Media Extensions, or EME  
3 technology, which proponents say blocks any authorized  
4 alternations to videos, including color shifting to  
5 help individuals with color blindness.

6 So, again, is that an example where the TPM  
7 is the cause of the accessibility issues, or is it not  
8 the cause of the accessibility issues, similar with  
9 the Game Guard technology?

10 MR. REID: I want to clarify what I said if  
11 I could, which is not that the TPM doesn't cause an  
12 accessibility problem. Basically, the TPM prevents  
13 the interoperability of accessibility features,  
14 accessibility tools.

15 And I think, likewise, with Encrypted Media  
16 Extensions, the idea is if you might use a third-party  
17 accessibility tool to access the media that's  
18 protected by EME, that technology like EME is going to  
19 interfere with the operation of that technology.

20 So it's not that the TPM doesn't cause an  
21 accessibility problem, it's that it hinders -- I guess  
22 all I was trying to say there is it's not the TPM  
23 that's inaccessible, it's the copyrighted work that's  
24 inaccessible, and that the TPM prevents interoperation  
25 in both of these cases. And I think we can talk --

1 MS. CHAUVET: Okay. I'm so sorry to be -- I  
2 only just have a few minutes left. So I guess my  
3 question then as a follow-up, Mr. Reid, is for the  
4 circumvention of the Game Guard technology, it's not  
5 relevant to all types of copyrighted works, right?  
6 And similar with the EME technology?

7 MR. REID: Correct. We were giving those  
8 examples as -- you could certainly fit those into, in  
9 the case of video games, sort of a hybrid 102 class of  
10 works. We weren't trying to offer those examples as  
11 examples of TPMS that literally themselves cover every  
12 single category of copyrighted works. We were trying  
13 to give you a mosaic of different examples to  
14 illustrate how TPMS, like the ones in the examples,  
15 apply to copyrighted works across the spectrum of 102a  
16 classes in a way that justifies the proposed  
17 exemption, which would cut across all of those classes  
18 and all of those TPMS. Is that responsive?

19 MS. CHAUVET: Thank you, Mr. Reid.

20 Mr. Vogler, would you like to comment?

21 DR. VOGLER: Okay. I am Dr. Christian  
22 Vogler, and I actually would like to respond to a  
23 couple of your questions.

24 First of all, the gaming question, I wanted  
25 to clarify that the Game Guard prevents on-screen

1 typing of words and doesn't work, and that causes  
2 accessibility issues.

3 And, secondly, I was going to talk about  
4 audiovisual video conferencing. If the stream is  
5 encrypted, that causes issues occasionally, and I can  
6 provide some examples from real life. I am having,  
7 currently, a family emergency, and it's requiring my  
8 sister and I to communicate with each other. My  
9 sister's quite stressed because she is the person on  
10 site responsible for dealing with this family  
11 situation. And we talk, and sometimes it's quick, and  
12 the sound environment is bad, the audio is bad, the  
13 video is all bad, and it makes it very difficult for  
14 me to understand what my sister is talking about.

15 So I point this situation out because there  
16 are options as to how I can work around this. And it  
17 would be nice for consumers to have these kind of  
18 options, such as artificial intelligence. That's  
19 something that could help reduce the noise, improve  
20 the signal. Unfortunately, these applications have  
21 not been designed for the situation that I'm speaking  
22 of. I can't apply the solutions currently as the  
23 technology is designed because TPM prevents access to  
24 allow me to do so.

25 And to make a broader point, with new



1 technologies that are created, there are so many more  
2 options that will improve accessibility, and I want to  
3 emphasize this point. Accessibility is not a  
4 one-size-fits-all option. We're going to figure out  
5 how to provide accessible works that are designed for  
6 the individual. And this is a new way of looking at  
7 the issue. This means it's going to require  
8 innovation in the accessibility world from people who  
9 are designing and engineering being allowed to use the  
10 technology to provide the access necessary.

11 And if the TPM prevents this accessibility,  
12 we are blocking all these ideas that could take off  
13 because of this barrier. And this is the situation.  
14 This is the environment. We can't wait for three  
15 years so we can go through the next exemption process  
16 to be promulgated, especially now the situation with  
17 masking. There is technology that can help people  
18 communicate using masks, but we have to wait three  
19 years, and this is the kind of situation in which we  
20 cannot wait three years to have resolved. Thank you  
21 very much.

22 MS. CHAUVET: Thank you, Dr. Vogler.

23 Mr. Marks, I see you've had your hand raised  
24 for a little bit, so I wanted to ask if you had any  
25 further comment. But also, you know, how should the

1 Office consider the availability of accessible works  
2 in the market in determining whether a broad class for  
3 accessibility use is appropriate? Mr. Marks?

4 MR. MARKS: Thank you, Ms. Chauvet. If I  
5 may, before I try to answer that question, I just  
6 wanted to raise one point that Mr. Taylor touched  
7 upon, and this goes back really to the 2012 rulemaking  
8 where I first met Mr. Reid, and that was when this  
9 need was raised about potentially on audiovisual works  
10 that were on optical discs protected by CSS and a  
11 scramble system and AACS preventing certain uses to  
12 make closed captioning or other accessibility to  
13 disabled people. We encourage please come to us and  
14 work with us, we will offer a free license so that you  
15 don't even have to circumvent the TPM. You can have a  
16 license to create the sort of assisting tools to help  
17 disabled people.

18 So I do want to raise that as a point  
19 because even if a TPM exists, it doesn't always  
20 necessitate that it has to be circumvented in order to  
21 meet accessibility issues. Sometimes -- I can only  
22 speak for AACS LA and DVD Copy Control Association --  
23 the license source of the technical protection  
24 measures will be willing to work with the disability  
25 community to grant a license to be able to allow that.

1           And when it comes to the classes of work  
2           that you are asking about, Ms. Chauvet, I do think one  
3           does need to, like we were talking about in Class 3,  
4           this notion of market check of whether already is the  
5           copyrighted work available with closed captioning or  
6           with audio descriptions that will meet the needs of  
7           the disability community such that circumvention is  
8           not warranted, and I think that analysis probably  
9           needs to -- a market check needs to be more specific  
10          to the ones it supports. So I hope that answers your  
11          question. Thank you.

12                   MS. CHAUVET: Thank you, Mr. Marks.

13                   I'd like to call on Mr. Bernard next, who's  
14           had his hand raised. But also, to ask this specific  
15           question of, you know, how and to what extent should  
16           the Office think about structuring a broad  
17           accessibility exemption to encourage private efforts  
18           to increase accessibility so that the burden doesn't  
19           fall entirely on individuals with accessibility needs  
20           being forced to create them on their own? Mr.  
21           Bernard?

22                   MR. BERNARD: I mean, just to answer your  
23           question quickly, it would be great if the Copyright  
24           Office took that position. I'm not sure that's within  
25           the purview of what Congress had in mind here, but I

1 think, if the Office were to take that approach, that  
2 would be great. Probably the best way to take that  
3 approach would actually be to promulgate the kind of  
4 proposition that we've proposed here today under Class  
5 17. I think this is exactly the kind of thing that  
6 will motivate people to make their works more  
7 accessible.

8           What I wanted to say, though, is I think  
9 there's a broad misunderstanding here on lots of  
10 folks' part, which is it doesn't matter the intention  
11 of the people who have made the works available and  
12 who are the copyright holders. It doesn't matter if  
13 they intended their work to be accessible to people  
14 with disabilities or not.

15           The problem is that either they are  
16 accessible or they're not. A company that's gone out  
17 of its way to make a work accessible for large  
18 populations of people who have disabilities, it  
19 doesn't mean that they've made the work accessible for  
20 all of the people who have disabilities.

21           And it's really the people in smaller  
22 populations that you don't see in this discussion,  
23 right? The groups that are here represent the most  
24 powerful constituencies of people with disabilities in  
25 the country, and even they are struggling.

1           But the people whose disabilities exist in  
2 smaller numbers, those folks don't have solutions.  
3 You can make all the accessible game consoles you want  
4 to make, and I would encourage that, and you can make,  
5 as Mr. Marks said, come to us and we'll make it more  
6 accessible for you.

7           That's great. We should definitely be  
8 encouraging that kind of an approach. But sometimes  
9 companies can't make it more accessible or won't make  
10 it more accessible or think they have made it  
11 accessible enough or there just isn't a financial  
12 interest in doing so.

13           And so I just want to point out the  
14 intentions of the copyright holder aren't the problem  
15 here. The problem is that for a citizen, a person  
16 with a disability who's trying to get access, lawful  
17 access -- and I concede let's add that -- that the  
18 person is getting lawful access to the work.

19           But trying to have us pigeonhole each of the  
20 kinds of uses that someone is going to make, this is  
21 why the disability law is framed the way that it is.  
22 That's why there are broad, sweeping strokes in this  
23 context, and it's what distinguishes making works  
24 accessible to people with disability from the other  
25 kinds of classifications that Mr. Williams was worried

1 about.

2 So I do think it doesn't matter whether  
3 someone was trying to be helpful or not trying to be  
4 helpful. Thank you.

5 MS. CHAUVET: Thank you, Mr. Bernard.

6 Mr. Taylor, would you care to comment?

7 MR. TAYLOR: Yeah. I just would like to go  
8 back really quick to the fact of it's impossible to do  
9 a market check for what's available in the marketplace  
10 for all the potential works that would be permissible  
11 with this proposed language.

12 And I think that you have to keep in mind  
13 that, as far as individuals are concerned, as Mr. Reid  
14 says, they just get it, and whether they lawfully  
15 circumvent or unlawfully circumvent, they go ahead and  
16 they get it.

17 But for this proceeding and why this  
18 proceeding is important is because it allows the  
19 advocates, the larger groups, to come and say this is  
20 a problem or this is not a problem. For example, many  
21 of the examples that were provided here, I could not  
22 say that they were works that are truly protected by  
23 1201. It wasn't clear to me what was the TPM at play,  
24 and they certainly are not touching upon the works  
25 that we are most concerned with, which are audiovisual

1 works protected by CSS and AACSS. Thank you.

2 MS. CHAUVET: Thank you. Mr. Marks, would  
3 you like to add to that, and specifically, commenting  
4 on some of the examples that proponents have provided  
5 and building upon what Mr. Taylor's saying, is that  
6 they are not necessarily examples where TPMs are the  
7 issue for the accessibility issues?

8 MR. MARKS: Thank you, Ms. Chauvet. I  
9 didn't realize that my hand was still raised, but I  
10 think Mr. Taylor covered it, and I have nothing else  
11 to add. So thanks. I'll make sure I lower my hand.  
12 Thank you.

13 MS. CHAUVET: All right. Thank you.

14 I see Mr. Cheney has had his hand raised.  
15 Mr. Cheney, would you like to ask a question?

16 MR. CHENEY: Yes. Let me get my video on.  
17 Thank you, Ms. Chauvet. I just wanted to probe just a  
18 little bit more on this idea that we are talking about  
19 here. One of those examples that was talked about in  
20 the documents but not addressed here yet are sort of  
21 the modification of devices, I think, that were talked  
22 about, chairs and other things that may have some  
23 inability to access or modify those sort of devices.

24 Can you talk about maybe why we need that in  
25 this example and maybe give some more concrete

1 examples of that and why perhaps that doesn't fit with  
2 other sort of jailbreaking-type examples that are  
3 already in place and why it might not work to put in  
4 language for accessibility in the jailbreaking  
5 exemption or repair/modification exemptions? Can you  
6 address that?

7 MS. CHAUVET: Ms. Charlson, you haven't  
8 spoken. Would you like to respond to that question?

9 MS. CHARLSON: That isn't an area that I  
10 have any expertise in answering, but my hand is raised  
11 to be recognized at some point.

12 MS. CHAUVET: Why don't you please go ahead  
13 with your comment, and then we'll open it up for those  
14 answering Mr. Cheney's question.

15 MS. CHARLSON: Okay. All right, thank you.  
16 Oh, let me turn my video on. I apologize. Okay. So,  
17 as I stated when I introduced myself, I'm the  
18 Executive Director of the Perkins Braille and Talking  
19 Book Library, which provides accessible-format  
20 materials to approximately 25,000 people who are blind  
21 or visually impaired, have physical disabilities, or  
22 reading disabilities.

23 And the point that I really wanted to make  
24 has to deal with helping my borrowers who are trying  
25 to access a format, an accessible, usable format of



1 material, and I have a case in point that I have been  
2 trying to assist a blind attorney for the last 16  
3 months to obtain an electronic copy of a 800-page book  
4 that he wanted to read. He initially purchased the  
5 book and thought that he would have someone available  
6 to read it to him. That did not work out, and so we  
7 decided to approach the publisher to acquire files to  
8 see if that might be working. The publisher insisted  
9 that they had no obligation to provide any kind of  
10 accessible files.

11 So it took me nearly six months of back and  
12 forth arguing to then convince them to provide some  
13 kind of accessible files. So they sent image files.  
14 I'm sure all of you know image files are basically  
15 pictures of each and every page in the book that would  
16 not work with any of the assistive technology that my  
17 borrower had to use.

18 So we then again said image files will not  
19 work, we need files that are electronic that we can  
20 put into a device, use assistive technology to access.  
21 So several more months passed by, and we finally  
22 received an SD card with more files on them that were  
23 sent directly to my patron.

24 He could not access those files. I advised  
25 him to send those files to me, which he did a couple

1 weeks ago. When I received the files, I tried to  
2 access them on my PC, could not. I tried on a braille  
3 notetaker, I could not. I decided to have one of my  
4 staff give it a shot and see if they could open the  
5 files. They were able to open the files. I advised  
6 them to save it under a different name and let me try  
7 again with both of the technologies I was using -- a  
8 screen-reader and my notetaker -- and I was able to  
9 access the files.

10 So I have since sent that version of the  
11 files to the attorney to see if he can access the  
12 files that we have subsequently received. I don't  
13 know if he has yet because he hasn't received them,  
14 but my point is that it took us nearly 16 months to  
15 get those files for one person.

16 I serve thousands of people, and how in the  
17 world am I supposed to get the materials they need or  
18 want to read when it takes so long to get the  
19 available materials? Plus, no one solution meets  
20 everybody's needs. I think Professor Vogler said that  
21 as well.

22 Sometimes my clients are deaf/blind.  
23 Sometimes they have low vision. Sometimes they want  
24 audio files, and that's what works best for them. So,  
25 when I'm trying to provide accessible-format

1 materials, it is a very huge challenge for the  
2 libraries in the field trying to meet the needs of  
3 people with disabilities to provide equitable  
4 services, to provide access.

5 There's no access, there's no equitable  
6 service in what we have right now, and I hope this  
7 illustrates that we have a severe problem, and it  
8 really needs to be addressed. Those are my remarks.  
9 I hope you'll take the time to hear from Clark Rachfal  
10 and Mark Richert, who represent people who are blind  
11 and visually impaired, because they have a story to  
12 tell. Thank you.

13 MS. CHAUVET: Thank you very much. We're  
14 actually at the end of the panel, but I would like to  
15 go ahead and have Mr. Williams respond. Perhaps you  
16 can answer Mr. Cheney's question, and then I'll turn  
17 it over to Ms. Smith to conclude the panel. Thank  
18 you. Mr. Williams?

19 MR. WILLIAMS: Yeah, thank you. Quickly, I  
20 had raised my hand on your prior question about how to  
21 incentivize more accessibility in the marketplace,  
22 and, you know, I think my clients already have a lot  
23 of incentives, but one way to do it, if you're looking  
24 for ways within regulatory language, is to continue in  
25 any accessibility exemptions that you adopt to include

1 the market check requirement that folks look for a  
2 copy at a reasonable price. I think, to the extent  
3 people need incentives, that is something that might  
4 incentivize increased availability.

5 And to Mr. Cheney's question, which I  
6 believe was about accessibility of devices and  
7 interoperability with devices, I touched on that a  
8 little bit earlier. My understanding is that there  
9 are ports in personal computers and in a number of the  
10 gaming consoles that allow for third-party peripherals  
11 to be connected to the devices such that circumvention  
12 would not be required in many cases to use third-party  
13 devices that can help with accessibility issues.

14 And I think he also asked about the  
15 jailbreaking exemptions. You know, right now, those  
16 do apply to specific devices, and I think, to the  
17 extent that one of the exemptions covers an  
18 interoperability issue with a third-party device, you  
19 would need to look at the language of the exemption to  
20 determine exactly which programs need to be accessed  
21 through the circumvention and what would need to be  
22 accomplished. And I think he's right that some of  
23 that conduct would already be covered potentially.

24 MS. CHAUVET: Thank you, Mr. Williams.  
25 I'm realizing, Mr. Rachfal, you haven't

1 really had a chance to comment. Would you like to  
2 briefly have the last word, and then we'll have Ms.  
3 Smith conclude the panel?

4 MR. RACHFAL: Thank you so much. This is  
5 Clark Rachfal. Just on behalf of the American Council  
6 of the Blind, I would just like to point out there are  
7 times when ports and peripheral devices are available,  
8 and there are times when materials are configured in a  
9 way that work with those devices.

10 And, again, that's designed to meet specific  
11 needs, but it is not always the case that those  
12 specific use cases and designs meet the needs for all  
13 people with disabilities. And in the cases where  
14 accessibility does not meet the needs of the  
15 individual, that is when an exemption like this would  
16 provide value to our members at the American Council  
17 of the Blind, to the library users that Ms. Charlson  
18 spoke of, in a reasonable and timely manner.

19 If we have to play whack-a-mole with every  
20 company, copyright holder, that is not equal access.  
21 That is not meaningful access. That is a lack of  
22 integration in our community and a lack of  
23 accessibility for any of us, which equals a lack of  
24 accessibility for all of us. Thank you.

25 MS. SMITH: Thank you, Mr. Rachfal, and for

1 everyone who has participated in this class hearing  
2 today. I think that will conclude it. Again, we  
3 appreciate everyone's participation. We are going to  
4 take an 11-minute recess, and then we will convene  
5 again for Class 8, which is a specific existing  
6 exemption for literary works and accessibility. So,  
7 if you are remaining on for the next panel, just keep  
8 your video off, and we will convene again in 10  
9 minutes. And otherwise, thank you very much.

10 (Whereupon, a brief recess was taken.)

11 MS. SMITH: Hello, everybody. Welcome back.  
12 If you are a panelist for this session, which is Class  
13 8, could you please turn your video on? Okay. I  
14 think we are waiting for Mr. Rachfal. And, meanwhile,  
15 we will go ahead and introduce ourselves. And we just  
16 had him for the last panel, so I have no doubt he will  
17 be back.

18 But we will start from the government's  
19 side. So I'm Regan Smith, General Counsel at the  
20 Copyright Office. And now I will ask my colleagues --  
21 and to keep time short because we are a little  
22 pressed, we will go Ms. Chauvet, Mr. Gray, then Mr.  
23 Bartelt -- to please introduce yourself.

24 MS. CHAUVET: Hello. I'm Anna Chauvet. I  
25 serve as Associate General Counsel.

1           MR. GRAY: Hi, everyone. I'm Mark Gray.  
2 I'm an Attorney-Advisor here in the Office of General  
3 Counsel.

4           MR. BARTELT: Nick Bartelt, also an  
5 Attorney-Advisor in the Office of General Counsel.

6           MS. SMITH: Thank you. Mr. Cheney?

7           MR. CHENEY: Stacy Cheney, Senior  
8 Attorney-Advisor at NTIA.

9           MS. SMITH: Thank you. And now we will ask  
10 those who filed in support of the exemption. So,  
11 going alphabetically, Mr. Band, Mr. Lennon, and then  
12 Mr. Reid. And when Mr. Rachfal joins us, we will  
13 acknowledge him too.

14          MR. BAND: Hi, I'm Jonathan Band  
15 representing the Library Copyright Alliance.

16          MR. LENNON: Hi, my name is Gabriel Lennon.  
17 I'm a second-year law student with the CU Law  
18 Samuelson-Glushko Technology Law & Policy Clinic,  
19 working with Professor Reid.

20          MR. REID: And Blake Reid for the Clinic.  
21 We're here on behalf of ACB. Doing our best to track  
22 down where Clark went, but I think, given the issues  
23 that are at play, we can proceed. And before we do,  
24 just wanted to extend our thanks to Rachel Counts and  
25 Megan and the others in the Copyright Office and

1 Library staff for all of their help in organizing the  
2 hearings today.

3 MS. SMITH: Thank you. I should second  
4 that. I think I'm very proud of the work that Rachel  
5 and Megan and others on our team did but also our  
6 Office of Public Information and Education as well as  
7 in the broader Library. So thank you for recognizing  
8 them because there's a lot that is unseen that goes  
9 into this.

10 So, Ms. Castillo, could you please introduce  
11 yourself?

12 MS. CASTILLO: Yes. My name is Sofia  
13 Castillo, and I'm with Mitchell, Silberberg, and  
14 Knupp, and I'm here representing the Joint Creators  
15 and Copyright Owners.

16 MS. SMITH: Okay. So I think with Mr.  
17 Reid's suggestion that we'll be okay to start and, you  
18 know, this is the last hearing, so if Mr. Rachfal  
19 joins a little bit late and we have to go a little bit  
20 over, we'll be able to make sure we hear from him. We  
21 will get started. And I think it is you, Mr. Gray,  
22 with the first question?

23 MR. GRAY: Yes, that's right. So my first  
24 question is for Mr. Reid. There was some conversation  
25 in the comments about using the term "phonorecords" in



1 the text of this exemption for the modification. And  
2 the direct copyright owners comment wanted  
3 clarification about whether this would cover sound  
4 recordings of performances of musical work.

5 And our understanding from your reply is  
6 that you were just trying to track the changes to §  
7 121. So, if we at the Office, for example, thought  
8 that regulatory text actually stated, for purposes of  
9 the exemption phonorecords as a term does not include  
10 sound recordings of performances of musical works,  
11 would that be a reasonable thing to include in the  
12 regulatory text?

13 MR. REID: Thank you, Mr. Gray. If I could,  
14 I'll defer to Mr. Lennon on this one.

15 MR. LENNON: Thank you for the question. So  
16 it is our understanding that the inclusion of the term  
17 "phonorecords" in § 121 and 121a does primarily aim to  
18 clarify that audiobooks and similar oral recordings of  
19 covered literary works and musical notation can be  
20 remediated into accessible formats and distributed  
21 under § 121a and imported and exported under § 121a.

22 So, from our perspective, given that the  
23 inclusion of the term "phonorecords" is intended to  
24 reflect the Marrakesh Treaty and the driving purpose  
25 behind our interpretation of the term "phonorecords"

1 is to clarify that audiobooks and oral renderings of  
2 covered works are covered under the exemption, I  
3 believe that that would be a reasonable addition.

4 MR. GRAY: Great. And, Ms. Castillo, would  
5 that address the concerns from the Joint Copyright  
6 Owners' comment?

7 MS. CASTILLO: No. I think we are  
8 essentially in agreement, but I think that our concern  
9 is mainly that the term "phonorecords" is  
10 traditionally associated also with sound recordings of  
11 musical performances, and so the Marrakesh Treaty does  
12 not cover those works. The phonorecords that are  
13 covered by the Marrakesh Treaty are those that contain  
14 literary works and previously published musical works  
15 that have been fixed in the form of text or notation.

16 So we realize and we agree that the term  
17 "phonorecords" does appear in § 121 and 121a as a  
18 result of the Marrakesh Treaty Implementation Act, but  
19 we believe it is important to make the distinction  
20 here that phonorecords containing sound recordings of  
21 musical performances is not covered by the exemption  
22 because individual eligible persons will rely on this  
23 exemption to engage in circumvention, and those  
24 individual eligible persons may or may not be fully  
25 familiar with the scope of the Marrakesh Treaty and

1 that it's limited to literary works and musical works  
2 in the form of text or notation.

3 So that is where our concern is coming from  
4 and why we think that it is worth including that  
5 clarification in the regulatory language.

6 MR. GRAY: Okay. So --

7 MS. SMITH: Ms. Castillo?

8 MR. GRAY: -- to -- yes, sorry, Regan. You  
9 can go ahead.

10 MS. SMITH: Sorry, I just wanted to make  
11 sure because I may be less close to the record, but  
12 have you provided alternate regulatory language that  
13 you do support in your comment?

14 MS. CASTILLO: We have not specified  
15 regulatory language in our comments, but we are happy  
16 to provide it in a subsequent letter if that would be  
17 helpful.

18 MS. SMITH: Thank you. I think we will be  
19 in touch if we determine that that will be helpful.  
20 Thank you. Okay, sorry. Mr. Gray?

21 MR. GRAY: Thank you. And then, to stay  
22 with Ms. Castillo, there was a conversation in the  
23 comments about whether or not the import and export of  
24 accessible copies under § 121a is sufficiently  
25 distinct and attenuated from circumvention activity to

1       implicate § 1201? So do the Joint Creators have a  
2       position on sort of the interpretation of whether the  
3       activity from 121a specifically addresses or  
4       implicates the § 1201 right?

5               MS. CASTILLO: We do not have a position,  
6       and we are not opposing any of the other proposed  
7       changes by -- we're actually not opposing any of the  
8       changes proposed by proponents. We are only asking  
9       for the clarification about the use of the term  
10      "phonorecords" and that it doesn't apply to  
11      phonorecords of sound recordings of musical works --  
12      of musical performances, sorry.

13              MR. GRAY: Right. And so, when you say you  
14      aren't opposing any changes, does that mean you don't  
15      believe there needs to be a new showing of adverse  
16      effects for the modification here or that you don't  
17      object to the adverse effects showing in the  
18      proponents' submission?

19              MS. CASTILLO: Can you repeat the last part  
20      of your question, please?

21              MR. GRAY: So does that mean that there are  
22      no objections to the adverse effects showing and  
23      argument made in the supporting comments for this  
24      class?

25              MS. CASTILLO: Yes. Yeah, we have no

1 objections to that.

2 MR. GRAY: Okay, great. I don't see any  
3 hands raised, so I think we're still good on that.  
4 The next question is for Mr. Reid. You've proposed to  
5 update the beneficial language to just say "eligible  
6 person as defined in § 121." Could you just briefly  
7 explain on top of the written record, why this  
8 expansion is necessary and why the failure to include  
9 that in the new language would create adverse effects  
10 for non-infringing use?

11 MR. REID: I'll defer to Mr. Lennon on that  
12 one as well. I did want to just quickly respond to  
13 Ms. Castillo on the last one. We took the concern  
14 here to be that there would be circumvention of  
15 digital rights management or that an improperly broad  
16 construction of phonorecords of musical works could be  
17 read to cover audio files from streaming music  
18 services and that sort of thing.

19 And I did want to clarify I don't think  
20 that's what we were going for in asking for this  
21 exemption. However, we do want to be careful not to  
22 narrow the scope of § 121. Obviously, this exemption  
23 for the last several rulemakings has tracked closely  
24 the scope of 121.

25 Perhaps Mr. Band or others can speak to the

1 reason that phonorecords was used in § 121. We do  
2 want to be careful that, when we're thinking about the  
3 expanded scope of 121 to musical works that are in  
4 text, that there may be creative ways that folks use  
5 to make musical scores accessible that don't encompass  
6 a performance of the work that are not sort of a sound  
7 recording of a set of musicians actually performing  
8 the work but nevertheless allow a person who's blind  
9 or visually impaired -- and this sort of thing might  
10 be reading through voiceover or a similar  
11 technology -- a musical notation or a guitar tablature  
12 or something like that.

13 So we do want to make sure that the  
14 exemption doesn't carve out the ability to make  
15 accessible transformations of musical works that are  
16 reduced to text. I'm sorry, I wanted to make sure I  
17 tagged that before we moved on. I can defer to Mr.  
18 Lennon to respond to your question.

19 MR. LENNON: Thank you. So we're discussing  
20 the expansion of the term "blind or other person with  
21 a disability" to the new language in the Chafee  
22 Amendment, which is "eligible persons"?

23 So the personal use portion of the exemption  
24 currently points to a definition of who is covered in  
25 § 121a that no longer exists. With that update to

1 eligible persons, we have laid out a more expansive  
2 definition which actually covers more disabilities  
3 than were previously covered under the old  
4 pre-Marrakesh Treaty Implementation Act language.

5 So now those with disabilities who are  
6 covered are those who are blind or have visual  
7 impairments or perceptual reading disabilities as well  
8 as physical disabilities that affect the ability to  
9 manipulate a book or move or focus the eyes.

10 So we believe that this expansion is  
11 necessary to not only comply with the updated terms of  
12 the Chafee Amendment but to provide access to those  
13 who maybe previously were not qualified under the old  
14 language of the exemption.

15 MR. GRAY: Okay. And then I guess the next  
16 question we have is sort of similar. So there's also  
17 a proposal to update the non-dramatic literary works  
18 limitation to now apply to all literary works and  
19 previously published musical works fixed in the form  
20 of text or notation.

21 Can you also -- kind of the same question --  
22 explain (A) why this is necessary and then (B) why, if  
23 we didn't adopt that language, there would be adverse  
24 effects on non-infringing use?

25 MR. REID: I'll defer to Mr. Lennon on this

1 one as well. I just also wanted to add regarding the  
2 previous one that the mechanics of certification that  
3 were previously required under 121a and its  
4 interaction with the Pratt-Smoot Act are no longer  
5 operative, and we think the ability for people with  
6 disabilities to self-certify as opposed to having to  
7 go seek a formal certification from a medical provider  
8 and so forth to be eligible for that portion of the  
9 exemption is important. I'll hand it off to Mr.  
10 Lennon.

11 MR. LENNON: So, as it stands, §  
12 1201(a)(1)'s prohibition on circumvention is an  
13 impediment to access for people with print  
14 disabilities to previously unavailable copyrighted  
15 works, such as stage plays, screenplays, and notated  
16 musical works, which are now within the scope of works  
17 contemplated in the post-NTIA language of § 121.

18 So, under the changes made by the NTIA, the  
19 scope of eligible works covered under 121 has been  
20 meaningfully expanded. And thanks to the  
21 anti-circumvention provisions of 1201, it necessitates  
22 that this exemption be revised to provide eligible  
23 persons access to these new areas of permitted works.

24 And I think it's important to consider not  
25 only screenplays but, again, sheet music and music



1 fixed in the form of text or notation as not something  
2 previously covered under this exemption. And that is  
3 essentially an entirely new area of accessible works,  
4 and I think it's important to recognize that  
5 opportunity.

6 MR. GRAY: Ms. Castillo, you have your hand  
7 raised?

8 MS. CASTILLO: Yes. I would like to briefly  
9 address Mr. Reid's concern with the potential for  
10 narrowing the scope of § 121. So, during the  
11 legislative implementation process for the Marrakesh  
12 Treaty Implementation Act, back in 2016, the  
13 Department of Commerce sent a statement of purpose as  
14 part of their legislative implementation documents.

15 They sent a statement of purpose to  
16 then-Vice President Joe Biden where they explained  
17 what the changes, what the necessary changes would be  
18 to the U.S. Copyright Act in order to comply with the  
19 Marrakesh Treaty, and in that statement of purpose,  
20 they made the express distinction saying that sound  
21 recordings of musical performances were not included  
22 in the Marrakesh Treaty and were, therefore, not  
23 included in the changes made to § 121 and 121a.

24 MR. GRAY: And then, Mr. Reid, to kind of  
25 follow up on that point, you know, you were talking

1 about creative ways of creating sound recordings that  
2 might be more accessible but not quite be just a pure  
3 recording of musicians performing a work.

4 But, you know, in the context of this, we're  
5 talking about circumventing a phonorecord. And so is  
6 your concern about narrowing that there might be  
7 preexisting phonorecords that aren't quite sound  
8 recordings of performances that might need to be  
9 circumvented, or are you thinking about sort of  
10 post-circumvention accessibility, like the output of  
11 that process?

12 MR. REID: I feel like I might need to tap  
13 on Mr. Band as an older copyright hand on the  
14 distinction between reproductions, copies, and  
15 phonorecords here. I guess the concern that we have  
16 is, when we're talking about copies or phonorecords of  
17 the literary work or of a musical notation that's been  
18 reduced to text, we want to make sure that we can get  
19 access to the underlying, either text or the  
20 underlying musical work, and we want to make sure, if  
21 we cut phonorecord out of that -- I understand  
22 "phonorecord" has a quite specialized definition --  
23 but that we're not talking about cutting out the  
24 underlying work if that makes sense.

25 I don't know. Mr. Band, do you have any

1 additional thoughts on this one?

2 MR. BAND: No, it's just that, you know,  
3 "copies" by itself was not sufficient for precisely  
4 the reasons Mr. Reid indicated, that it's -- you know,  
5 the statute does talk about copies and phonorecords,  
6 and they each cover different things. And so we need  
7 to -- now, obviously, in 121, in 121a, they use  
8 "phonorecords," but it's not all phonorecords.

9 So it sounds like this is just a drafting  
10 issue that there's not -- I don't believe there's any  
11 disagreement in principle here.

12 MR. GRAY: So, based on what the proponents  
13 have put forward in terms of proposed regulatory text,  
14 we wouldn't need to do any sort of additional  
15 modifications to address the question of phonorecords  
16 beyond maybe the clarification of sound recordings of  
17 musical work performances, is that right?

18 MR. BAND: I think that's right, yeah.

19 MS. CASTILLO: Yeah, I think so too.

20 MR. REID: We, three, agree.

21 MR. GRAY: All right. Well, that's great to  
22 have agreement. If no one has any more responses on  
23 this question, I do have another. So, for Mr. Reid,  
24 you also propose replacing the language about the  
25 price of "mainstream copies" to just the market price

1 of an accessible copy.

2           You know, we understand your statement in  
3 the written comments on why that's necessary, but  
4 could you elaborate a little bit more just for the  
5 record here on this transcript about why this change  
6 is necessary as well?

7           MR. REID: Thanks, and defer to Mr. Lennon  
8 on that one.

9           MR. LENNON: Thank you. So we believe the  
10 Office should recommend the replacement of the phrase  
11 "mainstream copy" with more inclusive language, such  
12 as, as you say, "inaccessible copy." The term  
13 "mainstream copy" reflects a troubling ableist framing  
14 that sort of reinforces a damaging and, frankly,  
15 offensive conception of people with print disabilities  
16 by casting books in formats that are accessible to  
17 them as not mainstream.

18           So that an exemption from copyright law is  
19 required for people with print disabilities to legally  
20 access accessible literary material that is available  
21 to people without print disabilities is essentially a  
22 tacit recognition that people with disabilities are  
23 routinely treated as second-class citizens, to put it  
24 frankly, by the publishers of books.

25           And the text of the exemption itself

1 currently reinforces this ableist notion that people  
2 who have print disabilities are outside of the  
3 "mainstream." And if that language is not updated,  
4 the exemption itself will perpetuate harm even as it  
5 helps those with print disabilities gain access to  
6 accessible works.

7 MR. REID: I might just add if I could, Mr.  
8 Gray?

9 MR. GRAY: Sure.

10 MR. REID: I think this is an opportunity  
11 for the Office to convey a vision that indeed a  
12 mainstream copy of a work is an accessible one, not an  
13 inaccessible one. And I think that's a theme that  
14 we've underscored and that the groups that have  
15 advocated for this exemption have underscored in  
16 previous rulemakings, that the goal here is for every  
17 copy of a book, for every copy of a piece of musical  
18 notation, to be accessible and to be born accessible  
19 and that when we're talking about mainstream, we're  
20 actually talking about a version of the work that's  
21 accessible right out of the gates. Thanks.

22 MR. GRAY: Great. And so that, I think,  
23 essentially answers the questions I have. I do want  
24 to give a chance for Mr. Cheney to ask any questions  
25 he has from the NTIA side.

1           MR. CHENEY: Thank you, Mr. Gray, and I  
2 appreciate those questions. Those were great  
3 questions for today.

4           Mr. Reid, I have a question for you, and  
5 this goes to the definition of "eligible person." It  
6 looks like to me that this sets a parameter that might  
7 be not all-inclusive. I know you've expanded the  
8 definition from the last time, but can you speak to  
9 that? Can this be a floor rather than a ceiling in  
10 the definition of what you've set here? So you've set  
11 it according to 121, but can we in this proceeding  
12 expand that further, and is there room for that in  
13 what you guys talked about?

14           MR. REID: Thanks, Mr. Cheney. I'll take a  
15 quick stab at this one, and then, Mr. Lennon, if you  
16 have any additional thoughts.

17           I would say what we've tried to do with this  
18 exemption is tack pretty closely to the compromise  
19 that's been struck, and going back several  
20 rulemakings, to have this exemption tied pretty  
21 closely to the machinery of § 121 at least for the  
22 authorized entity provisions. And so the reason we  
23 scoped the request the way that we did in terms of the  
24 types of disabilities that are covered owes to the  
25 changes that the Marrakesh Treaty Implementation Act

1 brought to § 121.

2 But, to your point, obviously, as we talked  
3 about in the last hearing, there are a range of  
4 disabilities that go quite far beyond the disabilities  
5 that are teed up even in the modified version of §  
6 121. Obviously, we would think the Americans with  
7 Disabilities Act sweeps quite a bit broader than that  
8 as amended and that other disability laws sweep quite  
9 more broadly than that.

10 And the reason we brought Class 17 and that  
11 we proposed Class 17 was to encourage the Office to  
12 consider that broader range of disabilities and,  
13 frankly, the broader range of copyrighted works to  
14 which those categories of people with disabilities  
15 that are not represented in this exemption see  
16 themselves represented here.

17 To the extent that the Office sees fit to  
18 expand this class of works to accommodate some of the  
19 additional classes of disabilities, we think that  
20 would certainly be appropriate. We wouldn't have any  
21 objection to that. I would just underscore the case  
22 that we made in the last hearing, which is that we  
23 think there's a much broader class or set of  
24 copyrighted works that need to be covered beyond the  
25 rather narrow subset that's covered in this exemption.

1 MS. SMITH: Thank you, Mr. Reid. And to  
2 follow up on that and some of the questions from the  
3 last hearing, if the Office concluded that it would be  
4 less confusing or otherwise beneficial to have just  
5 one exemption for literary works for accessibility as  
6 opposed to in two places, I hear the suggestion that  
7 perhaps, instead of just tracking it to 121, either  
8 explicitly including a reference to the ADA, perhaps  
9 other state laws, if I'm going to, you know, draw some  
10 through-lines throughout the day to testimony. Are  
11 there any other specific suggestions that you would  
12 offer with respect to this exemption?

13 MR. REID: Ms. Smith, if I could ask a  
14 clarification, do you mean specific questions just on  
15 kind of where Mr. Cheney started us off on the class  
16 of people with disabilities that are covered?

17 MS. SMITH: I think it is building on what  
18 Mr. Cheney said, as well as just for uses of literary  
19 works to make them accessible generally, so that might  
20 be a little bit broader than what Mr. Cheney said.

21 MR. REID: So I will do my best to respond,  
22 and I would say I think it's actually somewhat helpful  
23 to have the exemption as we have it framed here for  
24 eBooks. It's quite specific, and it's narrow in its  
25 scope. But it does provide a fair bit of -- just as



1 121 and 121a are -- their range of specific  
2 requirements and limitations attached to it.

3 For the kinds of people with disabilities  
4 and the kinds of organizations that are included  
5 within § 121 and § 121a, having a specific  
6 exemption -- and, by the way, we should point out also  
7 that § 121 actually extends, I think, probably beyond  
8 the bounds of fair use in its allowance of the  
9 provision of works without remuneration to the  
10 rightsholder by an authorized entity. And that's  
11 obviously kind of a historical feature of the Chafee  
12 Amendment that dates back to the Pratt-Smoot Act and  
13 the American Printinghouse Act.

14 It's helpful to have that very specific  
15 exemption on which a lot of organizations rely on to  
16 sort of make clear that that's a specifically known  
17 category of acceptable both circumvention and  
18 remediation and import and export. It kind of gives a  
19 blueprint, a set of instructions for that.

20 The reason we ask for the other exemption is  
21 to extend out to the bounds of fair use. But we  
22 recognize that the bounds of fair use can be a little  
23 bit less clear and a little bit less sort of  
24 prescriptive and have fewer obvious limitations, you  
25 know, that have got to be sorted out by courts after

1 the fact.

2 So I actually think it makes sense to keep  
3 the specific exemption in place for this just because  
4 it's such a kind of known quantity for the  
5 organizations and people that operate in this space  
6 and to explore expanding beyond that with a more  
7 general exception that looks more towards fair use if  
8 that makes any sense. I don't know if Mr. Band has  
9 anything he'd add to that one?

10 MR. BAND: No, I agree. It just reflects  
11 the general attention that -- or not necessarily  
12 attention -- but that specificity is good and  
13 generality is good. So we like 108, and we like 107.  
14 And so, you know, they each have their time and place.  
15 And so, you know, assuming that there's enough pages  
16 in the C.F.R. to accommodate both specific and  
17 general, then we would welcome that.

18 MS. SMITH: Yes, well, as long as we pay for  
19 it, there are pages in the C.F.R. But I appreciate  
20 that response. I think the Copyright Office, as you  
21 know, obviously, we have supported 108 reform  
22 independent of looking at 107 and the important work  
23 that it does.

24 So I think those are all of our questions.  
25 So we are perhaps able to wrap up a couple minutes

1 early unless anyone else would like to say another  
2 comment for the record? If you do, please unmute  
3 yourself and I'll just -- yep, go ahead.

4 MR. REID: I just wanted to convey to Ms.  
5 Castillo and her colleagues our appreciation for,  
6 again, the spirit of cooperation on this exemption and  
7 for being amenable to the changes that we've proposed.  
8 Appreciate that.

9 MS. CASTILLO: Thank you, Mr. Reid. We're  
10 happy to work together wherever we can.

11 MS. SMITH: Okay. So this will conclude  
12 today's hearings. I just want to give the audience  
13 members two reminders, as well as, I guess, the  
14 panelists for one of them. There will be a different  
15 link tomorrow, which will be Class 1, which is use of  
16 audiovisual works, criticism and comment. So that is  
17 available on our website if you wish to watch the  
18 proceedings tomorrow.

19 And secondly, if anyone wishes to sign up  
20 for the audience participation session, there will be  
21 one this Thursday, as well as one April 21 at the  
22 conclusion of all of our hearings. Please go head and  
23 fill out the link which I believe has been sent in the  
24 chat. Yes, it was sent at 2:30.

25 So thank you very much, and we will convene

1 again tomorrow at 10:30 a.m. Eastern. Thank you.

2 (Whereupon, at 2:58 p.m., the hearing in the  
3 above entitled matter adjourned, to reconvene at 10:30  
4 a.m. the following day, Tuesday, April 6, 2021.)

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CERTIFICATE


CASE TITLE: Copyright Office Section 1201 Hearing

DATE: April 5, 2021

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the digital recording and notes reported by me at the meeting in the above case before the Library of Congress.

Date: April 5, 2021



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<p style="text-align: center;"><b>I</b></p> <p>// <sup>[36]</sup> <b>62</b>:11,12,13,14,15,16,17,18, 19,20,21,22,23,24,25 <b>147</b>:5,6,7,8, 9,10,11,12,13,14,15,16,17,18,19, 20,21,22,23,24,25</p> <hr/> <p style="text-align: center;"><b>1</b></p> <p><b>1</b> <sup>[1]</sup> <b>146</b>:15  <b>1,000</b> <sup>[1]</sup> <b>55</b>:21  <b>10</b> <sup>[4]</sup> <b>59</b>:7,8 <b>106</b>:19 <b>125</b>:8  <b>10:30</b> <sup>[2]</sup> <b>147</b>:1,3  <b>10:32</b> <sup>[1]</sup> <b>3</b>:2  <b>101</b> <sup>[2]</sup> <b>17</b>:24 <b>105</b>:12  <b>102</b> <sup>[6]</sup> <b>99</b>:5,24 <b>100</b>:2 <b>105</b>:7,9 <b>110</b>:9  <b>102a</b> <sup>[1]</sup> <b>110</b>:15  <b>107</b> <sup>[2]</sup> <b>145</b>:13,22  <b>108</b> <sup>[2]</sup> <b>145</b>:13,21  <b>11-minute</b> <sup>[1]</sup> <b>125</b>:4  <b>11:50</b> <sup>[1]</sup> <b>62</b>:8  <b>12</b> <sup>[10]</sup> <b>33</b>:22 <b>34</b>:19,24 <b>35</b>:11 <b>36</b>:24  <b>37</b>:18,23 <b>38</b>:20 <b>45</b>:20 <b>106</b>:19  <b>12:15</b> <sup>[2]</sup> <b>61</b>:23 <b>62</b>:6  <b>12:45</b> <sup>[2]</sup> <b>62</b>:5,10  <b>12:48</b> <sup>[1]</sup> <b>63</b>:2  <b>1201</b> <sup>[13]</sup> <b>3</b>:7 <b>4</b>:2,8 <b>63</b>:7 <b>81</b>:10 <b>90</b>:2, 3 <b>94</b>:25 <b>98</b>:14 <b>117</b>:23 <b>131</b>:1,4 <b>135</b>:21  <b>1201(a)(1)'s</b> <sup>[1]</sup> <b>135</b>:12  <b>121</b> <sup>[21]</sup> <b>128</b>:7,17 <b>129</b>:17 <b>132</b>:6,22, 24 <b>133</b>:1,3 <b>135</b>:17,19 <b>136</b>:10,23  <b>138</b>:7 <b>141</b>:11,21 <b>142</b>:1,6 <b>143</b>:7  <b>144</b>:1,5,7  <b>121a</b> <sup>[12]</sup> <b>128</b>:17,21,21 <b>129</b>:17 <b>130</b>:24  <b>131</b>:3 <b>133</b>:25 <b>135</b>:3 <b>136</b>:23  <b>138</b>:7 <b>144</b>:1,5  <b>14</b> <sup>[1]</sup> <b>60</b>:22  <b>15</b> <sup>[2]</sup> <b>52</b>:14 <b>106</b>:19  <b>16</b> <sup>[2]</sup> <b>120</b>:2 <b>121</b>:14  <b>17</b> <sup>[5]</sup> <b>61</b>:24 <b>63</b>:7 <b>115</b>:5 <b>142</b>:10,11  <b>1930s</b> <sup>[1]</sup> <b>93</b>:20  <b>1975</b> <sup>[2]</sup> <b>105</b>:5,7  <b>1976</b> <sup>[2]</sup> <b>93</b>:25 <b>94</b>:3</p>	<p style="text-align: center;"><b>4</b></p> <p><b>47</b> <sup>[1]</sup> <b>51</b>:15</p> <hr/> <p style="text-align: center;"><b>5</b></p> <p><b>5</b> <sup>[2]</sup> <b>35</b>:18 <b>62</b>:10  <b>504</b> <sup>[2]</sup> <b>22</b>:23 <b>34</b>:21  <b>55</b> <sup>[1]</sup> <b>61</b>:17  <b>593</b> <sup>[1]</sup> <b>17</b>:16</p> <hr/> <p style="text-align: center;"><b>6</b></p> <p><b>6</b> <sup>[1]</sup> <b>147</b>:4</p> <hr/> <p style="text-align: center;"><b>7</b></p> <p><b>700</b> <sup>[1]</sup> <b>31</b>:16  <b>710</b> <sup>[1]</sup> <b>94</b>:2  <b>749</b> <sup>[1]</sup> <b>17</b>:15  <b>75</b> <sup>[1]</sup> <b>17</b>:13  <b>79.1</b> <sup>[1]</sup> <b>51</b>:15</p> <hr/> <p style="text-align: center;"><b>8</b></p> <p><b>8</b> <sup>[2]</sup> <b>125</b>:5,13  <b>80</b> <sup>[1]</sup> <b>18</b>:13  <b>800-page</b> <sup>[1]</sup> <b>120</b>:3</p> <hr/> <p style="text-align: center;"><b>A</b></p> <p><b>a.m</b> <sup>[4]</sup> <b>3</b>:2 <b>62</b>:8 <b>147</b>:1,4  <b>AACS</b> <sup>[13]</sup> <b>6</b>:21 <b>7</b>:11 <b>12</b>:13,16 <b>13</b>:25  <b>37</b>:15 <b>67</b>:2,6,7 <b>98</b>:11 <b>113</b>:11, 22 <b>118</b>:1  <b>AACS1</b> <sup>[1]</sup> <b>11</b>:24  <b>AACS2</b> <sup>[8]</sup> <b>11</b>:16,19,22 <b>12</b>:11,14, 17 <b>13</b>:2 <b>15</b>:14  <b>AACS2.0</b> <sup>[1]</sup> <b>14</b>:5  <b>abide</b> <sup>[1]</sup> <b>53</b>:23  <b>ability</b> <sup>[6]</sup> <b>23</b>:11 <b>69</b>:13 <b>104</b>:15 <b>133</b>:14  <b>134</b>:8 <b>135</b>:5  <b>able</b> <sup>[31]</sup> <b>18</b>:15 <b>22</b>:20 <b>31</b>:12,17 <b>33</b>:15  <b>59</b>:24 <b>67</b>:15 <b>68</b>:24 <b>71</b>:14,14,21  <b>72</b>:22 <b>74</b>:3,7,19,21 <b>75</b>:6 <b>81</b>:8 <b>82</b>:1  <b>88</b>:14 <b>89</b>:3,7,23 <b>97</b>:23 <b>102</b>:3 <b>106</b>:25  <b>113</b>:25 <b>121</b>:5,8 <b>127</b>:20 <b>145</b>:25  <b>ableist</b> <sup>[2]</sup> <b>139</b>:13 <b>140</b>:1  <b>above</b> <sup>[1]</sup> <b>147</b>:3  <b>above-entitled</b> <sup>[1]</sup> <b>62</b>:9  <b>absolute</b> <sup>[1]</sup> <b>50</b>:1  <b>Absolutely</b> <sup>[3]</sup> <b>12</b>:6 <b>42</b>:14 <b>50</b>:7  <b>abuses</b> <sup>[1]</sup> <b>83</b>:4  <b>ACB</b> <sup>[1]</sup> <b>126</b>:21  <b>accept</b> <sup>[1]</sup> <b>12</b>:23  <b>acceptable</b> <sup>[2]</sup> <b>59</b>:1 <b>144</b>:17  <b>Access</b> <sup>[57]</sup> <b>11</b>:15 <b>28</b>:20 <b>36</b>:4,4,5  <b>66</b>:24 <b>71</b>:18,19 <b>73</b>:21 <b>74</b>:5,19 <b>76</b>:4  <b>82</b>:5,10,15,24 <b>83</b>:7 <b>89</b>:7,24 <b>90</b>:8  <b>93</b>:13,14,16 <b>94</b>:11,13,23 <b>95</b>:2 <b>96</b>:13  <b>104</b>:21 <b>105</b>:1,2 <b>106</b>:4 <b>107</b>:7,19  <b>109</b>:17 <b>111</b>:23 <b>112</b>:10 <b>116</b>:16,17, 18  <b>118</b>:23 <b>119</b>:25 <b>120</b>:20,24 <b>121</b>:2,9,11  <b>122</b>:4,5 <b>124</b>:20,21 <b>134</b>:12  <b>135</b>:13,23 <b>137</b>:19 <b>139</b>:20 <b>140</b>:5  <b>access-control</b> <sup>[1]</sup> <b>99</b>:10  <b>accessed</b> <sup>[2]</sup> <b>5</b>:3 <b>123</b>:20  <b>accessibilities</b> <sup>[1]</sup> <b>32</b>:12  <b>accessibility</b> <sup>[62]</sup> <b>18</b>:23 <b>21</b>:6 <b>24</b>:</p>	<p><b>18</b> <b>30</b>:10,19 <b>63</b>:8,25 <b>69</b>:10,19,24  <b>70</b>:22 <b>71</b>:2 <b>73</b>:5 <b>76</b>:23 <b>77</b>:8 <b>78</b>:13  <b>79</b>:15 <b>80</b>:8 <b>82</b>:17 <b>83</b>:2,14 <b>94</b>:17, 21  <b>103</b>:25 <b>105</b>:25 <b>106</b>:5 <b>107</b>:8,20  <b>108</b>:5,6,13 <b>109</b>:1,7,8,12,13,14,17, 21  <b>111</b>:2 <b>112</b>:2,3,8,11 <b>113</b>:3,12,21  <b>114</b>:17,18,19 <b>118</b>:7 <b>119</b>:4 <b>122</b>:21, 25  <b>123</b>:6,13 <b>124</b>:14,23,24 <b>125</b>:6  <b>137</b>:10 <b>143</b>:5  <b>accessible</b> <sup>[63]</sup> <b>4</b>:18 <b>8</b>:9 <b>10</b>:6,7 <b>14</b>:19  <b>16</b>:2 <b>22</b>:9 <b>25</b>:21 <b>31</b>:4,5 <b>32</b>:22  <b>34</b>:3 <b>42</b>:17 <b>44</b>:1,14,15 <b>62</b>:2 <b>67</b>:22  <b>69</b>:4 <b>71</b>:5 <b>73</b>:24,25 <b>76</b>:10 <b>77</b>:19  <b>91</b>:13,22 <b>93</b>:22 <b>96</b>:16 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