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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.

Tuesday,
 April 6, 2021

The parties met remotely, pursuant to notice, at
 10:30 a.m.

PARTICIPANTS:

Government Representatives:

REGAN SMITH, General Counsel of the U.S.
 Copyright Office
 ANNA CHAUVET, U.S. Copyright Office
 STACY CHENEY, National Telecommunications and
 Information Administration
 DAVID WELKOWITZ, U.S. Copyright Office
 JORDANA RUBEL, U.S. Copyright Office

Panelists:

MICHAEL AYERS, AACS LA
 SARA RACHEL BENSON, University of Illinois Library
 FRANCESCA COPPA, Organization for Transformative
 Works
 PETER DECHERNEY, Joint Educators
 WILLIAM J. EVJEN, Swank Motion Pictures
 PETER MIDGLEY, Brigham Young University
 RYAN MILLER, Brigham Young University
 BARBARA NELSON, Swank Motion Pictures
 RINA ELSTER PANTALONY, Columbia University & the
 Association of American Universities
 BETSY ROSENBLATT, Organization for Transformative
 Works

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Panelists: (Cont'd)

SHANE STANLEY, Filmmaker

DAVID J. TAYLOR, DVD CCA

TISHA TURK, Organization for Transformative
Works

J. MATTHEWS WILLIAMS, Joint Creators and Copyright
Owners

NATE WISE, Brigham Young University, Idaho

P R O C E E D I N G S

(10:30 a.m.)

1
2
3 MS. SMITH: Okay. I'm going to assume we
4 are either all here or very close to having a critical
5 mass. And if anyone else of the panelists has not
6 turned on their video, please do so now because that
7 is what has been making sure you're on the screen for
8 our live feed.

9 So good morning, everyone. My name is Regan
10 Smith. I am General Counsel of the Copyright Office.
11 And welcome to day two of our hearings in connection
12 with our § 1201 Rulemaking. We really appreciate
13 everyone coming today. We've got a good group, and
14 we're looking forward to a good discussion.

15 I think many of you have participated in
16 past hearings, but for those who have not, our focus
17 today is really trying to hone in on the comments.
18 We've gotten a lot of thoughtful comments, so, like,
19 please be assured that we've read them, and we're
20 trying to clarify and facilitate discussion where
21 there might be areas of disagreement or a particularly
22 patchy record. Today's session focuses on Class 1,
23 which is proposed adjustments to exemptions for the
24 circumvention of technological protection measures
25 applied to motion pictures for uses of short clips for

1 criticism and comment, including for educational,
2 documentary, and noncommercial video uses.

3 Before we dive into the substance, the Zoom
4 rules of the road, which I know we're all pretty much
5 pros with, but just to go over just in case is we will
6 be moderating this by posing questions and calling on
7 particular persons to answer. We realize it's a
8 little bit easier if you can use the "Raise Hand"
9 feature in Zoom, so you should see that up in the top
10 corner of your panel. If that's not working for you
11 for some reason, go ahead and wave in real life. But
12 I think that has become an easier way for us to
13 determine who wishes to contribute or answer to a
14 particular question.

15 As we all know, please mute yourself if
16 you're not speaking for the benefit of the court
17 reporter. And please try to speak slowly, as I need
18 constant reminders. Also, unmute yourself if you're
19 going to talk. So, if that is an issue you have too,
20 please try to keep that in mind. We ask that you
21 would limit any of your responses to no more than two
22 minutes and try to stick to the specific question
23 because we do have a lot of ground that we hope to
24 cover today.

25 We do think that everyone will get the

1 opportunity to speak to all of the issues that have
2 come up in this proposed class. If we need to go a
3 little bit over, we may do that. And if anyone has
4 any technical difficulties either as a panelist or as
5 an audience member, you can comment in the chat or the
6 Q&A and someone from the Copyright Office will assist
7 you.

8 We have also put in the chat a link to sign
9 up for an audience participation day if anyone is
10 interested. This is going to be on Thursday where
11 someone who has not signed up as a panelist can
12 contribute their thoughts to any of the proposed
13 classes at issue in the rulemaking, and we are asking
14 that any remarks be limited to about three minutes.

15 So I'm going to introduce everyone today.
16 We will start with the Government's side. So please,
17 Ms. Chauvet, Mr. Welkowitz, and then Ms. Rubel, could
18 you introduce yourselves.

19 MS. CHAUVET: Hi, good morning. I'm Anna
20 Chauvet. I serve as Associate General Counsel.

21 MR. WELKOWITZ: Hi, I'm David Welkowitz. I
22 am an Attorney-Advisor with the Office of General
23 Counsel.

24 MS. RUBEL: And good morning. I'm Jordana
25 Rubel, Assistant General Counsel.

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

2 MR. CHENEY: Hi, I'm Stacy Cheney. I'm a
3 Senior Attorney-Advisor at the Office of Chief Counsel
4 at NTIA, Department of Commerce. Thanks for having me
5 today.

6 MS. SMITH: Thank you.

7 All right. Professor Benson, are you here?

8 MS. BENSON: Hello. I'm Sara Benson. I'm
9 the copyright librarian at the University of Illinois
10 at Urbana Champagne Library.

11 MS. SMITH: Thank you. So now I think OTW,
12 we have Dr. Coppa, Professor Rosenblatt, and Professor
13 Turk. Could you please introduce yourselves?

14 DR. COPPA: Yes, hi. I'm Francesca Coppa.
15 I am Professor of English and Film Studies at
16 Muhlenberg College, and I'm one of the founders of the
17 Organization for Transformative Works.

18 MS. SMITH: Professor Rosenblatt, I think
19 you're muted.

20 MS. ROSENBLATT: I'm Betsy Rosenblatt. I'm
21 a professor at University of Tulsa Law School, and I
22 am legal chair of the Organization for Transformative
23 Works.

24 DR. TURK: I'm Dr. Tisha Turk. I'm the
25 Writing Center Director at Grinnell College, and I'm a

1 long-time member of the Organization for
2 Transformative Works.

3 MS. SMITH: Thank you. Professor Decherney.

4 MR. DECHERNEY: Hi, yes. Peter Decherney.
5 I'm a professor at the University of Pennsylvania.

6 MS. SMITH: Thank you.

7 Mr. Midgley and Mr. Miller?

8 MR. MIDGLEY: Yes. My name is Peter
9 Midgley. I'm the Director of the Copyright Licensing
10 Office at Brigham Young University.

11 MR. MILLER: Hi, I'm Ryan Miller. I'm a law
12 student, and I've been working with Peter Midgley.

13 MS. SMITH: Thank you. Professor Pantalony?

14 MS. PANTALONY: Thank you. I'm Rina Elster
15 Pantalony. I'm Director of the Copyright Advisory
16 Office at Columbia University.

17 MS. SMITH: Thank you.

18 And Mr. Stanley and Mr. Wise?

19 MR. STANLEY: Hi, good morning. Shane
20 Stanley, Filmmaker.

21 MR. WISE: I'm Nate Wise. I'm the Director
22 of the Intellectual Property Office at Brigham Young
23 University, Idaho.

24 MS. SMITH: Great. Thank you all for being
25 here.

1 So, next, I think we have Mr. Ayers?

2 MR. AYERS: Hi, good morning. Yes, I'm
3 Michael Ayers, representing Advanced Access Content
4 System Licensing Administrator, LLC, otherwise known
5 as AACS LA, and DVD Copy Control Association,
6 otherwise known as DVD CCA.

7 MS. SMITH: Thank you. So Mr. Taylor?

8 MR. TAYLOR: David Taylor. I too am
9 representing DVD CCA and AACS LA, as Mr. Ayers has
10 spelled it out.

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

12 MR. WILLIAMS: Good morning. Matthew
13 Williams from Mitchell Silberberg & Knupp. I'm
14 representing the Joint Creators and Copyright Owners.

15 MS. SMITH: Thank you. And then we have
16 Swank Motion Pictures, Mr. Evjen and Ms. Nelson.

17 MR. EVJEN: Yes, Bill Evjen, Vice President
18 and CIO at Swank Motion Pictures.

19 MS. NELSON: And Barb Nelson, Senior Vice
20 President, Swank Motion Pictures, overseeing studio
21 business relationships.

22 MS. SMITH: Okay, great. We've got a lot of
23 folks here and we're really happy to dive in, and I
24 think I will turn the questioning to start with Ms.
25 Chauvet.

1 MS. CHAUVET: Thank you, Ms. Smith.

2 The first questions that I want to focus on
3 relate to all three groups within this proposed class.
4 Opponents DVD CCA and AACS LA, they raised concerns
5 about expansion of the exemption to cover AACS2
6 technology, which the current temporary exemption does
7 not cover.

8 For BYU, Mr. Midgely and Mr. Wise, your
9 initial comments state that your proposed exemption
10 relates to Ultra HD Blu-ray discs, which are protected
11 by AACS2 technology. So my question is, do you have
12 any evidence supporting a finding that AACS2
13 technology is adversely affecting non-infringing uses
14 or that it is sufficiently similar to AACS1 technology
15 to be covered by the current exemption?

16 And if you could please use your Zoom
17 raising hands feature, that would be great. So either
18 Mr. Midgley or Mr. Wise? Mr. Midgley?

19 Oh, and I'm sorry, one other thing, please,
20 if you could just wait for me to please call on you,
21 just for purposes of the captioner and the court
22 reporter, that would be great.

23 But please, Mr. Midgley, go ahead.

24 MR. MIDGLEY: Yeah, thank you. So AACS LA2,
25 our contention is that it's very similar to AACS LA

1 and that the exemption should include media available
2 in that format as well.

3 MS. CHAUVET: Do you have any evidence
4 suggesting that it's similar to AACS1 technology?
5 Just in the last rulemaking, the register declined to
6 extend it to AACS2 technology because the record did
7 not support that finding, so I just wanted to give you
8 an opportunity to provide additional evidence if you
9 have some, Mr. Midgley.

10 MR. MIDGLEY: We didn't come today with any
11 specific evidence on AACS2, but if that's something
12 that the office would be interested in, we can
13 investigate that further and submit something in
14 post-hearing comments if you like.

15 MS. CHAUVET: Thank you, Mr. Midgley.

16 Mr. Ayers, I see you have your hand raised.

17 MR. AYERS: Yeah. Thank you very much.
18 Appreciate that. Just to clarify that AACS2 is
19 actually a separate technology from AACS. It is not
20 version one and version two. It is a separate
21 technology applied to Ultra High-Def Blu-ray discs and
22 is not backward compatible with regular Blu-ray discs.
23 And so it's actually two different products, two
24 different technologies applied to two different disc
25 formats. So, to the extent that the current exemption

1 explicitly extends to CSS and AACS, that does not
2 include AACS2, and AACS LA would argue that AACS2 is a
3 separate technology that should be subject to its own
4 evidentiary showing.

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

6 Mr. Taylor, I see you have your hand raised.

7 MR. TAYLOR: Yes, I would just comment on
8 the suggestion that they can come back with uses of
9 AACS2 or UHD Blu-ray. I mean, I think that's pretty
10 late in the process to introduce that kind of evidence
11 after the initial comments.

12 MS. CHAUVET: Thank you. Let's move on to
13 screen capture. The office noted in the previous
14 triennial rulemaking that the existing exemption
15 includes a screen capture provision to address the
16 possibility of circumvention when using such
17 technology. So, for all of the Class 1 proponents, my
18 question is why -- you all propose removing the
19 references to screen capture technology, so we're
20 wondering why you wish to eliminate essentially an
21 exemption that would permit circumvention where screen
22 capture is circumventing.

23 So do you have any evidence suggesting that
24 screen capture technology does not circumvent and thus
25 is not necessary to be referenced in the exemption?

1 Any proponents? Yes, Professor Rosenblatt?

2 MS. ROSENBLATT: To be clear, we aren't
3 requesting the removal of screen capture from the
4 exemption. We're requesting removing the requirement
5 of evaluating screen capture. In other words, to the
6 extent that there's an exemption, it would apply to
7 screen capture regardless. Right now, there's an
8 additional barrier to using other circumvention
9 technologies that requires first evaluating the
10 fitness of screen capture before embarking on the use
11 of other circumvention technologies. That's what
12 we're seeking to have clarified and removed from the
13 exemption, is that extra step.

14 MS. CHAUVET: Just to follow up, Professor
15 Rosenblatt, so the existing exemption permits
16 circumvention when the person engaging in
17 circumvention believes that non-circumventing
18 alternatives are unable to produce the required high
19 level of quality content. OTW's proposed exemption
20 removes this language and instead says where the
21 person engaging in circumvention believes and has
22 reasonable grounds for believing that circumvention is
23 necessary to fulfill the purpose of the use.

24 So is meeting the high-quality content what
25 you mean by necessary to fulfill the purpose of the

1 use?

2 MS. ROSENBLATT: Yes, that's a reasonable
3 interpretation.

4 MS. CHAUVET: So what -- okay. And so thank
5 you very much. I want to see if anybody had --

6 MS. SMITH: I'm sorry --

7 MS. CHAUVET: Go ahead.

8 MS. SMITH: -- Ms. Chauvet. Are there other
9 interpretations? Are there other changes, or is this
10 a clarification? What else would be --

11 MS. CHAUVET: This was just a clarification.

12 MS. SMITH: Is that right, Professor
13 Rosenblatt?

14 MS. ROSENBLATT: Yes, this is simply a
15 clarification, and I think the difficulty, which my
16 colleagues can speak to, is that use of screen capture
17 or considering use of screen capture doesn't really
18 fit with the way that the users of this exemption
19 would use it. Sometimes they'll use screen capture;
20 sometimes they'll use other methods. The distinction
21 between screen capture and other methods is not
22 meaningful to vidders. And there's no reason to have
23 a limitation that demands capturing the video in any
24 particular point in its travel through the system.

25 MS. SMITH: I guess I'm confused because the

1 office has said it might be meaningful depending upon
2 whether a higher resolution is necessary or not. So
3 that's why that limitation is there.

4 MS. ROSENBLATT: I'll turn it over to my
5 colleagues, particularly, I think, Dr. Turk can speak
6 to that.

7 MS. SMITH: Dr. Turk, would you like to add
8 to that?

9 DR. TURK: Sure, I can. I guess I would
10 echo what Professor Rosenblatt said, which is that for
11 vidders, the distinction between screen capture and
12 ripping is not one that makes a lot of sense. One of
13 the arguments that's been put forward in the past is
14 that screen capture is better -- from the
15 copyright-holder's point of view, it's better than
16 ripping because it's possible to capture small
17 amounts, you know, individual clips. From my point of
18 view, the problem there is a problem of process. It
19 doesn't make much sense to say that somebody making
20 something should know exactly what the materials are
21 that they need in advance.

22 I mean, it would be like, you know, saying
23 to a poet you have to choose all the words that you're
24 going to use in a poem before you start writing it.
25 So the --

1 MS. SMITH: I'm not following. Are you
2 saying you need to capture the entire work? I
3 certainly understand not knowing exactly what you
4 might use when you're making your video, but you do
5 need to select your ingredients when you make your
6 dish, right?

7 DR. TURK: You do, yeah, but when you do
8 that, right, matters. So, for vidders, often, you
9 know, copying -- I would not say the entire work
10 because often we don't capture the sound, right? You
11 know, we're adding our own soundtrack, so why would we
12 need the sound? But we capture the video or, excuse
13 me, you know, rip the video or I suppose capture the
14 video. Some people use screen capture. And then work
15 with it, you know, within the editing program that
16 we're using.

17 So quality matters definitely, and, you
18 know, screen capture sometimes provides that and
19 sometimes it doesn't, I suppose. But it's also, you
20 know, what's intuitive, to say to somebody you have to
21 use screen capture, you have to try screen capture
22 before you try other forms of circumvention is just
23 not intuitive, right? I mean, it's like saying to
24 somebody, you know, -- I'll use another analogy,
25 instead of saying, well, I'm going to send you this

1 document saying I'm going to put the document on my
2 screen and take a picture of the document and then
3 send you the picture, right? That's not how we do
4 things. That's not how people normally use files.

5 So, if I have a Blu-ray, why would I try to
6 capture it instead of just decrypting the file, right?

7 MS. CHAUVET: Well, I guess, though, there's
8 also --

9 MS. SMITH: Right. I mean -- well, let
10 me -- sorry, I'll turn it back to you, Ms.
11 Chauvet. I think, from the Copyright Office's
12 perspective, our prior record has shown that sometimes
13 you do not need to engage in circumvention, which is
14 one of the statutory reasons. So that would be the
15 why that we're trying to figure out. If it's no
16 longer the case, then we might be able to remove it.
17 But that's where we're directed at. But I will turn
18 it to you, Ms. Chauvet, and perhaps Mr. Williams, you
19 know, will be able to also explain if this is still
20 salient or not.

21 MS. CHAUVET: Thank you. Just one follow-up
22 question because your proposed language says the
23 person engaging in circumvention has reasonable
24 grounds for believing circumvention is necessary. So
25 your proposal is still having the person evaluating

1 whether or not circumvention is necessary. So how is
2 that different than the existing exemption, where
3 you're saying that the evaluation is unreasonable?

4 Professor Rosenblatt?

5 MS. ROSENBLATT: I think it comes down
6 principally to the fact that no one can say whether
7 screen capture is or is not circumvention, and so
8 there's, as it stands, an ambiguity in that. And, in
9 fact, in recent years, to the extent that anything has
10 changed about screen capture technology, one of the
11 few things that has changed is it started to look more
12 and more like circumvention because, in many
13 circumstances, programs have blocked the ability to
14 engage in screen capture, which means that screen
15 capture, even though some might say it takes advantage
16 of an analog hole, still requires circumvention to
17 accomplish in more and more circumstances. So this is
18 resolving that ambiguity in the favor of being able to
19 use the technology.

20 I want to speak to an argument that
21 opponents to this made based on the previous
22 evaluation by the office that including this provision
23 can give a user comfort that if they use screen
24 capture, that they're allowed to, that's actually
25 upside-down from the way the exemption is written,

1 right? If there's an exemption for any time you feel
2 circumvention is necessary, then you can use screen
3 capture or you can use other things. That's our
4 position.

5 MS. CHAUVET: Thank you.

6 Doctor -- sorry, Mr. Williams? I'd like to
7 give the opponents an opportunity to respond.

8 MR. WILLIAMS: Yeah, I like Dr. Williams,
9 but I don't deserve the title, but thank you for the
10 promotion. Yeah, I think Professor Turk put her
11 finger on why we prefer to keep this language in,
12 which is that it is preferable from our point of view
13 for people to be creating short clips over full-length
14 motion pictures that are in the clear and are prone to
15 leakage. And I also think it's good to keep the
16 language in for the reason that just using the word
17 "necessary" doesn't inform the reader that this is
18 another option that's out there that should be
19 considered.

20 And given that the comments frequently say
21 that the users aren't aware of the distinction here or
22 don't know that they should be considering screen
23 capture, I think it's helpful to keep that language in
24 instead of just saying "necessary." And I agree with
25 you that the word "necessary" could imply that screen

1 capture is still required, but keeping the specific
2 reference in, I think, is helpful. It's true that we
3 may not know for sure whether every technology that
4 calls itself screen capture is a circumvention
5 technology, but the way it's set up right now, it's
6 covered regardless. They're allowed to use it in
7 either event. It's just one requirement that they
8 have to consider.

9 And in terms of, you know, technologies
10 blocking the use of it, I don't recall seeing a
11 discussion of that in the record. So I haven't been
12 able to assess that, but, again, I think the way it's
13 currently set up, it's a step in the process that
14 needs to be considered. It's preferable because it
15 creates short clips usually instead of full-length
16 perfect-quality copies, and it's an alternative that
17 seems to meet the needs in many of the cases described
18 in the record.

19 MS. CHAUVET: Thank you.

20 Dr. Coppa?

21 DR. COPPA: Hi. I am not a lawyer, but I
22 want to speak just a little bit to the kind of on-the-
23 ground practice, which is to say even just as a film
24 studies professor, I find it surprising. It's not
25 intuitive to me at all that screen capture is somehow

1 preferable or less circumventing than a DVD. And
2 vidders, you know, really do often try not to be
3 pirates. And the sense that, you know, you bought the
4 DVDs and they're yours and you want to use them feels
5 more intuitive than the idea that you would then play
6 them and kind of copy a screen or copy a stream. That
7 technology is sort of new and is sort of different.
8 And just to say on the ground, there's no sense that
9 that would somehow be a kind of preferable thing.

10 And in terms of creating perfect copies, I
11 mean, there's no vidder -- I just finished a book on
12 vidding for the University of Michigan which is going
13 to come out hopefully this year. And, I mean, I don't
14 know a vidder who would rip an entire -- who would
15 literally copy an entire file because you would want
16 to -- as Dr. Turk was saying, you'd want to get rid of
17 the audio as quickly as possible just to not have to
18 deal with it.

19 So you would be dealing, first of all, with
20 images. And then really the need, in terms of a
21 high-quality image, is often that vidders and other
22 noncommercial remixers are kind of looking where
23 they're not supposed to. It's kind of inherent to the
24 art. And I just came back from the Society of Cinema
25 and Media Studies, where there was a panel on vidding

1 and videographic criticism, and a whole school of
2 visual criticism has sort of come into being in the
3 last five years that is a more formalized practice
4 but, in fact, has a lot of links with vidding, as this
5 panel was exploring.

6 Eric Faden did a piece of videographic
7 criticism focusing on the work of, like, Jacques Tati
8 and Orson Welles and these incredibly dense frames and
9 talked about how people are looking at pieces of the
10 frame that they wouldn't normally, right? And he was
11 trying to draw our attention to, you know, a random
12 object on a table, you know, where this is the sort of
13 important thing to look at. Vidders have been doing
14 this kind of practice for years.

15 And so the idea that the --

16 MS. CHAUVET: I'm sorry, Dr. Coppa, we have
17 to kind of keep responses under two minutes. Okay, go
18 ahead. Just finish up quickly, please.

19 DR. COPPA: The reason that vidders need
20 dense files is because they're often looking in the
21 wrong place, and they're going to be looking at it in
22 such a way that the thing will reduce quality at the
23 end regardless. And that's the kind of on-the-ground
24 reason for, you know, the kind of niggling over the
25 language.

1 MS. CHAUVET: Thank you.

2 Mr. Ayers, very quickly, and then we want to
3 kind of move on off of screen capture.

4 MR. AYERS: Sure, thank you. Just a quick
5 note that ripping of the disc is usually, by default,
6 involving ripping the entire work. While certainly
7 various ripping tools can focus on the various files,
8 on individual files on the disc, most of them are
9 defaulting to ripping the entire movie, whereas screen
10 capture is very often a much more precise tool in that
11 sense, where as long as the user actually has
12 possession and owns the disc that's being captured,
13 which is required for the exemption to be valid in the
14 first place, it's possible to queue up the video
15 that's desired and actually have a start and stop
16 point that allows for the short clips, the short
17 portions that are explicitly enabled in the current
18 conception.

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

20 Mr. Welkowitz, my colleague, I believe has a
21 question relating to the educational purpose
22 limitation of the existing exemption.

23 MR. WELKOWITZ: Thank you, Ms. Chauvet.

24 This question is directed primarily to BYU and the
25 joint educators. In your proposal, in your proposed

1 regulatory language, you remove the requirement that
2 the use be for educational purposes. And we'd like
3 you to explain why that limitation should be removed
4 from the existing exemption and whether it has an
5 adverse effect on non-infringing uses.

6 MS. CHAUVET: Professor Decherney or Mr.
7 Midgley, I think you raised your hand.

8 MR. WELKOWITZ: Yeah. Okay.

9 MR. MIDGLEY: Yes, I'm sorry. My
10 hand-raising feature doesn't seem to be working
11 through Zoom, so my apologies. But, yes, the language
12 of -- our proposed language removes an express
13 reference to educational purposes because it includes
14 -- those purposes are inherent given the category of
15 users to which the proposed exemption applies. It's
16 limited to circumvention undertaken by college and
17 university employees and students by limiting the
18 exemption to that category of users. And then also,
19 it's further limited by the specific statutory
20 provisions that are relevant to educational users.

21 So, you know, our belief is that the most
22 efficient way to accomplish the purposes of this
23 rulemaking is to just incorporate by reference the
24 statutory definitions of non-infringement, and to the
25 extent that the Office wants to ensure that they're

1 used for educational purposes, to do that by a
2 reference to the users who are eligible to use the
3 exemption.

4 MR. WELKOWITZ: If I could just follow up,
5 the second part of my question was whether you felt it
6 had an -- the inclusion of educational purpose had an
7 adverse effect on non-infringing uses, if you could
8 just respond a little bit more specifically to that.

9 MR. MIDGLEY: The current reference to
10 educational purposes, we think it's superfluous.
11 Sorry, I can't say that word correctly. But it's
12 unnecessary. And so the adverse impact it has is
13 caused by the ambiguity and the difficulty of people
14 trying to understand what the exemption covers. So,
15 if there is a compelling reason to include the
16 language, that's fine, but anytime we're adding
17 additional requirements that are not included in the
18 statute, we think it poses the risk of ambiguity,
19 which is an adverse impact for the intended
20 beneficiaries of the exemption.

21 MR. WELKOWITZ: Thank you.

22 MS. SMITH: Mr. Midgley, can you provide any
23 particular examples of confusion? Because I just --
24 one thing I -- it's been sort of a long-running
25 exemption. I think the Office has tried to clarify

1 that educational uses generally are permitted under
2 this exemption. So, again, if it's a problem, we're
3 happy to address it, but do you know if there's been
4 confusion at BYU or in other educational settings?

5 MR. MIDGLEY: So I would just point -- it's
6 referenced, it's Footnote 78 in our initial comments,
7 is a reference to a public statement prepared by
8 copyright officers at many universities across the
9 country in the wake of the COVID pandemic, and if you
10 read the section on circumvention, I think that that
11 statement, that public statement demonstrates the
12 confusion among me and my colleagues, who are
13 copyright officers at our universities, who are
14 presumably well-positioned to understand what the
15 exemption is, and if those of us with legal training
16 and background are having difficulty, and I think that
17 that letter is good evidence of that, then one can
18 only imagine what the non-lawyer educators trying to
19 parse the exemption, you know, what difficulties they
20 might encounter.

21 MS. CHAUVET: Professor Decherney?

22 MR. DECHERNEY: So I actually agree with you
23 that educational uses should be considered as part of
24 the language of the exemption. Our exemption is for
25 educators and preparers of educational material. So

1 those are the users who are going to be using material
2 for teaching and education on online learning
3 platforms. The real distinction between the
4 exemptions that existed before and the current one
5 we're proposing is that we want this to apply to a
6 broader range of educators who teach on online
7 learning platforms, irrespective of their for-profit
8 or nonprofit status and regardless of whether or not
9 they're accredited.

10 Right now, the musical exemption, for
11 example, for online education only applies to really
12 the most elite universities, universities that are
13 accredited, nonprofit. Education happens just in a
14 much broader context now. Students are learning
15 beyond traditional learning experiences. Especially
16 at a time like now when people are out of work and
17 want to reskill, there's much more need for access to
18 a broader range of educational activities. But,
19 certainly, it should be for educators for educational
20 purposes through educational institutions.

21 MS. CHAUVET: Thank you. Professor
22 Decherney, just since you raised the issue, I'm going
23 to ask you one question and then I'll have more
24 questions to kind of clarify the position. But §
25 110(2) can be invoked only by a governmental body or

1 an accredited nonprofit educational institution. So
2 why should the exemption extend to institutions that
3 are not permitted to be covered by § 110(2), as you
4 propose?

5 MR. DECHERNEY: I mean, for the reasons I
6 just suggested, which are that we don't want to limit
7 education only to a narrow range of educators and
8 students. As we've shown, you know, we have lots of
9 evidence of educational institutions, educators,
10 learners, who are accessing, you know, a very broad
11 range of educational opportunities, sites like
12 Osmosis, one of the members of the coalition, which
13 works with medical students and patients, medical
14 physicians, they've been very important over the last
15 year just, for example, doing podcasts and creating
16 videos about COVID which have been used very broadly
17 by a range of healthcare professionals.

18 And I don't think the exemption should be
19 limited -- should limit their ability to teach as
20 effectively as someone at, you know, an ivy league
21 institution or another accredited nonprofit
22 organization.

23 MS. CHAUVET: So thank you.

24 MR. DECHERNEY: And I'll just add -- I'll
25 add all of the existing 110(2) restrictions, we think,

1 should still apply. This should only be for
2 registered users. The learning platform should have
3 copyright policies. They should provide copyright
4 information to educators, preparers, and learners and
5 take steps to prevent further redistribution of the
6 material.

7 MS. CHAUVET: Thank you. So do you have any
8 specific examples, Professor Decherney, of educators
9 at for-profit educational institutions who want to use
10 short portions and could not because of TPMs on motion
11 pictures?

12 MR. DECHERNEY: Yeah, I do. So, in addition
13 to the members of the coalition, we've actually spoken
14 to a broad range of institutions. So one is actually
15 LinkedIn Learning, owned by Microsoft, and they told
16 us that they specifically would like to include short
17 portions of videos in their educational material,
18 which is actually licensed by thousands of
19 universities across the country. Also, Drumeo told us
20 this --

21 MS. CHAUVET: Can I -- I'm sorry.

22 MR. DECHERNEY: Yes.

23 MS. CHAUVET: So are they unable to license
24 clips? Like, why is circumvention necessary for them
25 to be able to use short portions of motion pictures in

1 an online educational course or something like
2 whatever they want to do?

3 MR. DECHERNEY: Yeah. So just for example,
4 the Joint Creators have suggested using the website
5 movieclips.com as most of the examples we've used
6 actually are from TV shows and movies that don't show
7 up on movieclips.com. And licensing generally, we
8 think, has too much of a barrier. There are, you
9 know, hundreds of thousands of creators out there. It
10 would take a tremendous amount of research to have to
11 license every clip that you'd want to use. It could
12 take years of work just to be able to obtain a license
13 to use a clip in one video. It would just be a
14 tremendous barrier, and it would take a huge number of
15 resources, money, time. And licensing, ultimately,
16 could end up as a form of censorship.

17 MS. CHAUVET: Thank you.

18 So, Mr. Williams, it would be helpful, I
19 think, if you could perhaps lay out the opponents'
20 position on educational licensing. The joint
21 educators and copyright owners identified a number of
22 institutions that license for educational purposes.
23 So do you have anything that you would like to respond
24 to Professor Decherney?

25 MR. WILLIAMS: Yes, thank you. And do you

1 specifically want me to speak to the use of clips
2 right now, or do you also want me to speak to the use
3 of full-length motion pictures?

4 MS. CHAUVET: I think both clips and motion
5 pictures or full-length motion pictures would be
6 helpful, please.

7 MR. WILLIAMS: Okay. Great. Thank you.
8 Yes. So just as has been the case during the past
9 several cycles that we've discussed this topic during
10 the studios continue to have readily accessible clip
11 licensing programs on their websites with contact
12 points that are very specific. That continues to be a
13 practice. And we've heard testimony, you know,
14 repeatedly over the years about those. And I actually
15 see links to a lot of them on library websites.
16 University of Michigan library, for example, has a
17 list of the licensing websites that the studios make
18 available.

19 So, to the extent a for-profit company wants
20 to use clips for motion pictures, that is an available
21 option. We did also point to things like Fandango and
22 YouTube, which make clips available on their websites
23 just because those can be embedded and may cut down on
24 the time issue that Mr. Decherney is talking about.
25 And so, if those websites have something that a

1 company wants to use and they're able to work it into
2 a presentation, that's why we listed those sites, but
3 they're certainly not the only option for obtaining
4 clips.

5 And then, with respect to the full-length
6 motion pictures, which, of course, you know, our legal
7 position and really policy position is that those
8 should not be covered and that 110(2) does not allow
9 for those to be covered, as the Office concluded three
10 years ago, there is a wide variety of services out
11 there that are very easy to locate that provide
12 thousands and thousands of titles, everything from the
13 biggest blockbuster you could think of, very recent
14 releases, all the way down to documentary films of a
15 more obscure nature or arthouse films, things that
16 most people would think of as more obscure at least.

17 And so I'll run through a few of them. I
18 know we have limited time and I'll refer to our
19 comments, but one important one that hasn't been
20 discussed a lot yet in the written materials is
21 Criterion On-Demand. And so we have the
22 representatives from Swank here, and I'll let them
23 talk about their service, but Criterion On-Demand, it
24 has thousands of titles in its catalog. I believe
25 about 700 of them are currently up for viewing by

1 licenses. But the entire catalog, additional titles
2 can be requested and added quickly by Criterion.

3 And they license from 20th Century Fox and
4 Searchlight, which is a Fox brand, as well as National
5 Geographic and some other smaller studios. So, to the
6 extent that Fox titles may not be available on Swank,
7 they're available through Criterion On-Demand, and
8 that's a service that's been available for a long
9 time.

10 And in addition to Swank, there's also
11 Canopy. There's Alexander Street, Passion River, Roco
12 Films, Collective Eye, and then also services that
13 cover public libraries in addition to schools, like
14 Hoopla and Overdrive. And just very quickly, I will
15 note, in BYU's reply comment, they mentioned one
16 particular motion picture, Wilderpeople, that they
17 said had left Swank's catalog and they could no longer
18 access, but it is available on Canopy as best we can
19 tell by searching that website.

20 So not each of these platforms would have
21 every title, but if you look at them in the aggregate,
22 they have a very, very large number of titles and
23 they're reasonably priced. Criterion, for example, I
24 was told the average cost is 71 cents per student per
25 year, and then they have maximum pricing too where

1 there's a cap. So, if you have a lot of students and
2 a lot of repeat viewing, they offer capped pricing so
3 that the school doesn't end up with a huge, huge bill
4 that's unexpected at the end of the year. So I'm
5 happy to answer more questions about those.

6 MS. CHAUVET: Thank you.

7 Ms. Pantalony, you've had your hand raised
8 and then I know Professor Benson also. If we could go
9 in that order, please. Ms. Pantalony, I think you're
10 still muted.

11 MS. PANTALONY: You are right, I am still
12 muted. My apologies. Thank you very much. I want to
13 circle back to the question that you asked initially
14 of Mr. Midgley from BYU concerning educational uses,
15 and then I also want to take just a couple minutes or
16 less to respond to some of the comments being made
17 about licensing.

18 It's our position that whether inherent or
19 not, this education exception should apply to
20 educational uses. The language, the semantics, the
21 way the proposed exception has been drafted takes into
22 account sort of the inherent understanding of what
23 constitutes educational use of film. And whether it's
24 inherent or not is an issue that is a drafting issue.
25 And I appreciate the questions. But, at the end of

1 the day, the uses that are perceived as currently
2 acceptable for educational purposes are the uses that
3 we're proposing for consideration in this exception.

4 The issue concerning licensing and all the
5 various licenses and distribution services that are
6 available, being Criterion On-Demand, Swank, Alexander
7 Street Press, you know, Columbia's had a very good
8 relationship with many of these distributors. We do
9 have ongoing current relationships. And yet, still,
10 only about 38 percent of our collection is, in fact,
11 covered by a streaming license.

12 So what this means is that we collect and
13 provide access to film in an educational context that
14 is fundamentally different than how a commercial
15 service may provide access and create a catalog of
16 film, and it is one of gap analysis and one arguably
17 of market failure, and it is not an issue where we
18 don't think that these services are providing a good
19 service. In fact, we think they are providing a great
20 service, but it is one where they are only able to
21 match or meet so much of the collection that we have
22 that is, in fact, necessary to teach.

23 And so, from that perspective, particularly
24 since the pandemic has placed us in a position where,
25 at best, we are in a hybrid learning environment, it

1 becomes very, very difficult to simply tell faculty
2 that, oh, you can't access this film, but try another
3 film in its stead, because that's not how you teach
4 with film, in fact. And we've had entire film lists
5 removed from curricular activity as a result of this
6 change to a hybrid learning environment that happened
7 so quickly from March 2020 to the current day.

8 MS. CHAUVET: Thank you.

9 Professor Benson?

10 MS. BENSON: Thank you. And I want to echo
11 and build on what my colleague, Professor Pantalony,
12 has said. The pandemic has really highlighted one of
13 the big issues for us at Illinois, which is that a
14 large portion of our collection really isn't available
15 streaming. I know, we all know, and I'm on a video
16 listserv where I see these concerns echoed every day,
17 where can you get this, where can you get that. And
18 I'm familiar with all the names, Roco Films and all of
19 that. But there are -- in my experience, I collected
20 data from the fall and spring from our media services,
21 25 percent of our requests were just not fulfillable
22 at all because there was no streaming license
23 available.

24 So what we have is a gap that we can't fill.
25 So, in my opinion, if something is not commercially

1 available, what harm is there to the market? What
2 harm is there if we are circumventing and using it for
3 educational purposes only in a pandemic? The harm is
4 to our students. The harm is to our faculty. The
5 harm is to our ability to educate.

6 And we need to be prepared because the
7 pandemic is not over, unfortunately. I wish it were,
8 but it's not. And so we really are still in the
9 position where it's an uncertain environment, where
10 we're teaching hybrid, we're teaching online, and we
11 have no access to essential educational materials. So
12 that's what I have to add to this hearing, and thank
13 you for hearing me out.

14 MS. SMITH: Professor Benson, can I ask a
15 follow-up, which is, if there were not a pandemic,
16 would you have considered that these works needed to
17 be licensed?

18 MS. BENSON: I think that that depends
19 because, at University of Illinois, we have quite a
20 few online educational programs. I teach in the
21 iSchool, which has what we call a LEAP program, and we
22 routinely teach online. And so, in that environment,
23 I could not reach my students with those very same
24 films. If I were teaching in person, of course, I
25 would show it in person under 110, but we have quite a

1 few online environments. And so, therefore, that same
2 § 110 exception doesn't help us.

3 MS. CHAUVET: Mr. Williams, I wanted to give
4 you an opportunity to respond about market harms that
5 were brought up.

6 MR. WILLIAMS: Yes, thank you. So, as I
7 said, much of the catalogs for the MPA members are
8 available through educational licensing services, but
9 that's not the only way, of course, that a student or
10 a faculty member can watch a motion picture. There's
11 lots of very affordable methods of doing so, all of
12 which are really facilitated by § 1201. It's caused
13 access to be dramatically increased in very affordable
14 ways. So, if there is a title that's not available
15 for educational licensing, it very well may be
16 available for a 48-hour rental at \$2.99. It may be
17 available for free if someone already subscribes to a
18 streaming service.

19 And although, ideally, everything would be
20 available through the educational licensing services,
21 there's a number of different types of classes where
22 students do have to invest something in the materials
23 that they need to for the class. And so, if there are
24 copyright owners who are not yet embracing the
25 educational licensing market, I would say that doesn't

1 mean that they haven't made their product available at
2 all in a digital format that can be easily accessed at
3 an affordable price.

4 I would also just say that as a copyright
5 policymaking matter, it may discourage further
6 development of these educational licensing models if
7 schools are able to circumvent things that are not yet
8 available on the licensing platforms. You know, I
9 think that that's going to be a robust practice going
10 forward, educational licensing, but to the extent
11 things are being done for free and people are less
12 inclined to pay for the educational licensing
13 services, that would create market harm and harm,
14 ultimately, to consumers as the services may not
15 develop over time.

16 And I think that's something you've
17 recognized in other spaces, such as space-shifting
18 more generally on a personal level. You were never
19 able to conclude that 100 percent of titles were
20 available due to disc to digital, for example. But
21 you recognized the market that existed and the
22 potential market that needed to be considered under
23 fair use. And so I think that should be taken into
24 account here as well.

25 MS. SMITH: Mr. Williams, I'd like to ask a

1 follow-up because I think your response has drawn
2 distinctions. I want to make sure I'm understanding
3 it correctly between educational licensing and sort of
4 what many of us as consumers may experience for the
5 \$2.99 rental or the streaming service. Is it your
6 client's position that if a classroom use, like a
7 virtual teaching use, needs to show something that the
8 subscription or on-demand \$2.99 rental will be
9 sufficient for that use?

10 MR. WILLIAMS: Well, so I think there's a
11 couple of things there. To the extent that the
12 classroom all just needs to watch something before
13 they arrive for the remote learning, then, of course,
14 they can use the \$2.99 model. Now streaming a \$2.99
15 rental to the entire classroom, there may be technical
16 difficulties with that and it would likely violate the
17 terms of service depending on which service you use.
18 However, the proposals here also violate the terms of
19 service. Circumvention of the digital transmissions
20 to create copies that can be streamed is also a
21 violation.

22 And so we've heard that in each cycle, that
23 people are concerned the terms of service may prohibit
24 something, but the exemption itself is prohibited by
25 the terms of service. So the circumvention I don't

1 see as any better than the other violation.

2 MS. SMITH: So let me ask it maybe a
3 different way. So Professor Benson said that in the
4 olden days, you know, she could show a movie,
5 pre-pandemic, in her room, in a classroom. And now we
6 are in a virtual situation. If you use the \$2.99
7 model, leaving aside the terms of service, do you
8 think the public performance right is more likely to
9 be implicated, or do you think, given the pandemic
10 conditions, this is seen as permissible by your
11 client?

12 MR. WILLIAMS: There is, you know, nothing
13 in 110(2) to say that the state of affairs has changed
14 in the current situation. We, of course, as everyone
15 here is, take the pandemic very seriously, of course,
16 and we understand that it's having an impact on
17 educators and students. But the exemption is not
18 limited to the pandemic scenario or to any broader
19 emergency. And our understanding is that really the
20 goal is to have this exist well beyond, and that's why
21 it was also asked for three years ago, when it was
22 denied, so --

23 MS. SMITH: Sure. But I think the question
24 is whether the pandemic has created a gap in what
25 would have normally had a functioning market. And so

1 it is, I think, a matter of what is permissible by
2 licensing, not just 110(2) but also what might be
3 granted permission for whether educators are able to
4 make use of the same materials physically as they
5 might through some virtual stream or whether you think
6 that still needs to be worked out and is not easily
7 obtainable or maybe easily is the wrong word, but
8 whether, as Professor Benson said, it is difficult to
9 get the same licenses and the virtual environment are
10 not available?

11 MR. WILLIAMS: Yes. If they owned the disc
12 and they were having in-classroom learning under
13 110.1, they could show the whole class that disc at
14 one time. I imagine that there are scenarios that
15 come up where maybe a teacher wants to use something
16 that isn't currently in their school's library and
17 where they ask students to go out and try to watch it
18 in some other fashion.

19 And so that is similar to the current
20 scenario, although, of course, there are times when
21 they own the disc and they're trying to teach remotely
22 and 110(2) would not expressly allow for the
23 full-length motion picture to be streamed. That is
24 the current state of affairs under the Copyright Act.

25 MS. SMITH: Okay. And are you aware of any

1 policies created in response to the pandemic by your
2 clients to facilitate larger uses of materials in a
3 virtual environment?

4 MR. WILLIAMS: I'm not aware of specific
5 policies. My understanding is that if educational
6 institutions come to the studios and say there's a
7 title that they haven't been able to obtain, that
8 frequently studios will work with them to provide
9 licenses, but I think a lot of the titles that we're
10 discussing here that people are saying are not
11 available through some kind of educational streaming
12 licensing model would not be the titles by the major
13 studios.

14 Most of the ones -- maybe all of the ones
15 discussed in the comments that people said they were
16 unable to locate were not major studio releases. So
17 that gap may exist less, but, yes, my understanding is
18 the studios are willing to work with educators and
19 also that people like Swank, who we have here today,
20 are able -- if a title is identified for them and it's
21 missing, they're able to contact the studios and do
22 contact the studios to try to get that title into
23 their catalog.

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

25 Mr. Wise, you've had your hand raised for a

1 short time. I would be interested to have your answer
2 to the next specific question and then you can add on
3 anything else you were planning to say. But has BYU
4 attempted to license through any of the institutions
5 that Mr. Williams and Joint Creators have identified?
6 And if so, like, what has been the experience?

7 MR. WISE: Absolutely. We've licensed
8 through most of those providers that he's mentioned
9 there. We have in our catalog over 20,000 different
10 titles that are licensed full-length videos, and we
11 leverage that. And so the idea is not to subvert the
12 existing market, but it is, at the same time, that
13 said, is we need to be good stewards and be
14 responsible with the budget that we have in our
15 institutions. We would love to have everything that's
16 available, right? But our budgets don't allow that.

17 And while we have a large collection here at
18 BYU Idaho of digital films, we still don't meet the
19 needs. There are still films that we can't access.
20 And so coming back to that kind of original question
21 of where the confusion comes in and the examples of
22 language that gets confusing is just this conversation
23 and why we can't tie these exceptions back to the
24 existing statutory language that allows for these
25 uses.

1 We've had professors that have used video in
2 the classroom for 15 years. I had a professor call me
3 the other day because his class is now remote and he
4 had been using a film and using that in class, and now
5 that film is not available. It's not on a major
6 studio, it's not on any of the streaming services.
7 And believe me, we looked and it wasn't there. I did
8 reach out and found the provider, and they were
9 willing to offer a license but at three times what the
10 original disc that they had purchased was for. And so
11 having that at a year-to-year license wasn't going to
12 be something that was going to be sustainable for this
13 class and this situation, where, under the statutory
14 language of 110(1), it was not going to be an issue.

15 And so that's kind of why we are looking to
16 tie this back to the statutory language, to allow for
17 these uses and to allow for the collections that
18 libraries have built over time to be used in the way
19 that they were intended originally and according to
20 the statute. And then that obviates the confusion in
21 the language because you can refer back to the statute
22 instead of trying to decide are they talking about
23 support portions or are they talking about the third
24 factor in fair use. So where does that confusion come
25 in is when we try to tweak those to make everybody

1 happy, where, you know, Congress has already done this
2 in the statutory language and we just need to include
3 this in that same thing.

4 MS. CHAUVET: Thank you. I do want to ask a
5 follow-up since you talked about the statutory
6 language. So, in the previous rulemaking in 2018, the
7 Register declined a similar proposed exemption by BYU
8 that would permit circumvention for nonprofit
9 educational purposes in accordance with 110(1) and
10 110(2). Specifically, the Office determined that the
11 proposed exemption implicated the rights of
12 reproduction and distribution, which are not covered
13 by 110(1) or 110(2). So if you could please identify
14 any changes in the law or facts since 2018 that would
15 allow the register to or should make the register
16 reconsider that position. Mr. Wise or Mr. Midgely?

17 MR. WISE: I would just say that, you know,
18 for me and then Peter can follow up with anything
19 there, that the idea is to be able to continue those
20 uses for those, and, yes, it would add to some of that
21 copies, but 112(f) does allow for copies to be made
22 for those uses. And --

23 MS. CHAUVET: It does, but it does not allow
24 for 110 -- it doesn't apply to 110(1); 112(f) only
25 applies for copies made under 110(2). So, when we're

1 talking about full-length motion pictures, my question
2 is, if you can't rely on 110(1) and 110(2) to show
3 full-length motion pictures through, like, distance
4 learning, like, what changes in the facts or law have
5 occurred since 2018 that would allow the Register to
6 expand the exemption as you propose?

7 MR. WISE: It's not so much in the law, I
8 guess, as it is in the environment that we're in and
9 the availability of content and being able to use some
10 of the legacy content that we have available in our
11 collections and relying on some of the other statutory
12 language to provide access to library collections.

13 MS. CHAUVET: Thank you. We haven't heard
14 from Swank, which I think it would be very interesting
15 to hear your perspective, so Mr. Evjen or Ms. Nelson,
16 would you like to respond about licensing in the
17 educational context? Ms. Nelson?

18 MS. NELSON: Sure, sure. What we do at
19 Swank, and just as a little bit of -- and Bill has a
20 demonstration too, if we would be able to show that.
21 But, at Swank -- and we started this about eight or
22 nine years ago as a result of professors coming to us
23 asking for a platform that was convenient to students
24 because they could not obtain videos or DVDs within
25 the library. So we really did this to help out our

1 university customers.

2 So, from then, we have just built an
3 infrastructure that is extremely popular with our
4 clients, and we work currently with over 1,000
5 colleges throughout the U.S. and we continue to really
6 invest in the technology to make this product more and
7 more helpful and useful for teachers across America.

8 We represent over 100 studios and
9 distributors, and we do our very best to obtain every
10 single picture that is requested. And of the pictures
11 that are requested, we have about a 1 percent decline
12 or about 1 percent of those pictures are not available
13 to our college and university customers. And, you
14 know, we do things such as genre profiles and we do
15 everything we possibly can to fit the needs of the
16 professors and the librarians that are requesting
17 content. And our price point is extremely affordable,
18 where it actually breaks down to roughly pennies per
19 student across the U.S.

20 So, you know, with that, it might make sense
21 to have Bill Evjen give a demonstration if that makes
22 sense.

23 MS. CHAUVET: Unfortunately, we had to --
24 the Office had to receive any materials that were
25 going to be shown in advance of the hearing. So,

1 unfortunately, we can't do that demonstration right
2 now, but thank you very much, Ms. Nelson.

3 MS. NELSON: Okay.

4 MS. CHAUVET: Mr. Cheney, I see you've had
5 your hand raised, I'd like to give you an opportunity
6 to ask any questions that you may have. Mr. Cheney,
7 you're muted. Mr. Cheney, you're muted.

8 MR. CHENEY: Thank you. It was my turn, I
9 guess, to do that this time. There are a number of
10 questions that I have, and this has been a robust
11 conversation, and I appreciate that. I think it's
12 been very helpful from my perspective. I think one of
13 the things that I want to really focus in on are the
14 limitations of the licenses perhaps, and some have
15 talked about terms of service and whether there are
16 some limitations there for universities and their uses
17 for educational purposes in some of those things.

18 And perhaps even Swank can speak to that as
19 to what terms of service would be there and focusing
20 on sort of the 110(2) discussion that we've been
21 having where it's been required to do face-to-face to
22 use some of these materials and if that is carried
23 over in the terms of service. And especially in light
24 of this pandemic and who knows what might be next or
25 how far this may go, if that's a continuing limitation

1 that is a concern to the universities, then I'd like
2 to hear more about that if we could. Thanks.

3 MS. CHAUVET: Ms. Pantalony, did you want to
4 respond to that? You've had your hand raised.

5 MS. PANTALONY: Yes, thank you. No, I'm not
6 muted. Thank you. I will respond, and I'll respond
7 on behalf of the Association of American Universities
8 and Columbia in this respect. This environment has
9 caused universities to lurch forward three steps and
10 then take two steps back, trying to determine how best
11 to move forward to understand, first of all,
12 aspirationally where we'd like to be in September and
13 where public health standards, the science, and the
14 data may take us in the next few years.

15 There is an aspiration at Columbia, and it
16 was voiced by the president in a public statement,
17 that it is our goal to try to return to as much a
18 normal environment as possible in September, but at
19 the same time, for the summer months, for example, our
20 dorms are only going to be 20 percent occupied, and at
21 the same time, we are banking on a good portion, if
22 not most, of our students being vaccinated before the
23 start of the fall semester.

24 And we have students that are not only
25 situated in the United States, but we have students

1 that are from all over the world and a good portion of
2 those students who are also our graduate students, and
3 it really remains to be seen how much of the Columbia
4 community and, in fact, the communities of many
5 universities and colleges can actually reenter the
6 United States and attend university in person.

7 So, you know, the model that was presented
8 to us that we have used robustly for years within the
9 confines of 110 presumed that in-person learning would
10 be the standard, and in a perfect world, boy, would we
11 like to return to that space. But, at the same time,
12 we understand that between, you know, reentry
13 regulations in a pandemic and visa requirements and
14 the whole machinery of our government to return us to
15 normal is going to take some time.

16 And so we have to figure out a way to get
17 ourselves to a point where we can teach and provide
18 core mission, meet core mission within this
19 transitional period, and this is not something that
20 we can predict with any great certainty.

21 So that is, in fact, how I respond to Mr.
22 Cheney's question. The real issue is, how do you work
23 in a classroom, a hybrid classroom environment with
24 film? It's not something that's really been explored
25 in any great detail here. You know, you can't just

1 share your screen and show a film technically. I
2 mean, forget about the terms and conditions of the
3 licenses or the contracts that may preclude you from
4 doing that. From a technical perspective, the
5 quality, the bandwidth, it just does not work.

6 So, you know, faculty have had to sort of
7 reinvent the wheel, so to speak, in developing
8 curriculum because you have to be able to have your
9 students screen. They may have to go out of a Zoom
10 room to screen, come back into a Zoom room to discuss.
11 It's a very different sort of rhythm in the teaching
12 environment. So that means two things.
13 Forty-eight-hour, 24-hour access is not going to work
14 because they need to be able to go back to that film
15 perhaps throughout the entire term as they study. The
16 other issue here, of course, is that with students
17 literally all over the world, what is provided as a
18 repertoire by, you know, streaming services is not the
19 same in every jurisdiction.

20 And I had an instance where faculty came to
21 me and said, I'm trying to teach Latin American
22 studies, I use this film every year, we can't get a
23 license for it, but I think it may be on Netflix. And
24 I said, well, tell your students, you know, it's the
25 cost of education these days that they should

1 subscribe to Netflix. And then we figured out that,
2 of course, the film was available in the United
3 States, but it was not available to certain
4 international students.

5 And the end result is that we're trying to
6 cobble together our ability to deliver on education in
7 a world that has just fundamentally changed, and we
8 need the tool sets necessary to deliver. Now a § 1201
9 exception is not going to be the panacea that delivers
10 everything, but at least it gets us to a point where
11 we can start to assess what may be possible because,
12 right now, the films that are in our collection for
13 which we do not have a streaming license are just a
14 bunch of plastic and that's it.

15 MS. CHAUVET: Thank you, Ms. Pantalony.

16 Mr. Williams, you've had your hand raised.
17 Would you like to respond?

18 MR. WILLIAMS: Thank you. And I think the
19 representatives from Swank could speak to this some
20 too, but I wanted to make sure I clarified, given Mr.
21 Cheney's question, that the terms of service I was
22 talking about earlier were with respect to kind of
23 personal acquisition of transmission or downloads or
24 subscriptions through your typical provider that you
25 and I would use. These services that I laid out

1 earlier that focus on educational licensing, the terms
2 of service do allow for streaming to the entire
3 student body or to a smaller number of students,
4 depending on the preferences of the institutions and
5 how they want to pay for the license.

6 So I didn't want to imply that the
7 educational licensing market, that it's hindered by
8 terms of service that don't allow for the needs to be
9 met. But, with respect to your average personal
10 download that you might get from Amazon or from Google
11 Play or from Apple, those terms of service usually are
12 limited to personal uses. So I was just trying to
13 address the question that educators have raised from
14 time to time that can we really use those copies or
15 those streams in an educational setting for multiple
16 users.

17 So I was just trying to explain that the
18 terms would potentially be violated by those uses but
19 that circumvention would certainly violate the terms
20 as well.

21 MS. CHAUVET: Thank you.

22 Mr. Evjen, you had your hand raised. And
23 then Mr. Taylor after you.

24 MR. EVJEN: Yeah. And this is in regards to
25 full-length motion pictures and titles. The platform

1 we have provided with the 100-plus studios that we
2 represent and their catalogs that go with those
3 respective studios is designed specifically for this
4 type of environment we're in with the typical
5 teacher-student relationship in many cases is remote
6 or hybrid. And what we're finding also is, in the
7 days of the past, they maybe put a DVD or a VHS tape
8 and consumed one or two entire classes to do that,
9 there's less need and desire to do those kinds of
10 viewings. And a lot of times, the students are
11 assigned these titles to view outside the classroom
12 and then come back in to discuss those in more detail.

13 The titles that we do make available via the
14 platform are licensed on a semester basis or a year
15 basis for the institution and allow for unlimited
16 viewings, starting and stopping at any point
17 throughout the process for all those students within
18 that institution. It includes -- importantly, it
19 maintains the studio protections for the content and
20 the digital rights management and also includes the
21 multiple audio tracks and our ADA-compliant titles
22 with closed captioning as well. And they are
23 accessible outside of the institution, even in the
24 students' homes.

25 MS. CHAUVET: Thank you, Mr. Evjen.

1 Mr. Taylor?

2 MR. TAYLOR: Yeah. I think that we need to
3 get back to what we're talking about circumventing.
4 If we're talking about circumventing DVDs and Blu-ray
5 discs that universities have, the titles that they've
6 actually proffered here, they don't seem to have much
7 of. If you look at BYU's library collection, you
8 looked for "Hunt for the Wild People," they don't have
9 that listed as available on DVD, but they do have it
10 listed on Canopy, and it takes you directly to
11 Canopy@byu. "Bread & Tulips," "Pane e tulipani," as
12 they had mentioned before, they don't have that DVD
13 available at BYU. In fact, that DVD is only available
14 in two U.S. libraries.

15 So I really see this not as an issue of
16 market failure because more streaming is coming online
17 and you see that where these obscure titles are most
18 available, you don't really find them on DVDs and
19 Blu-ray discs because those serve the popular markets,
20 but it's the streaming market where you will find
21 "Bread & Tulips" available on Canopy and the "Bicycle
22 Thief." They do, in fact, have three "Bicycle
23 Thieves." So I would just point out that to the
24 extent that there's a shortcoming, it's only because
25 the streaming market hasn't yet grown, and we should

1 not take any measures that would keep it from growing
2 by allowing a short-cut by circumventing DVDs.

3 MS. CHAUVET: Thank you.

4 Mr. Miller?

5 MR. MILLER: I'm raising my hand on behalf
6 of Peter Midgley, whose hand-raising function isn't --

7 MS. CHAUVET: Oh, I'm sorry, Mr. Midgley?

8 MR. MIDGLEY: Thank you. Yeah. So I hope
9 what's coming through and what you're hearing from
10 multiple universities, including ours, is that we have
11 no issue taking advantage of the licensing options
12 that are available to us. There is nothing about our
13 proposal that is intended to undermine or undercut.
14 We wish Swank, who is here, and all the other
15 streaming providers nothing but the best as they seek
16 to increase their catalogs and we take advantage of
17 those options.

18 But what's before the Office is what can be
19 done with the -- what circumvention activity is
20 allowed for the discs that we have collected, which
21 are significant. Those collections are large, and
22 they've been made largely for the purpose of being
23 used in an educational setting. And so the factors
24 that are outlined in evaluating whether circumvention
25 is permitted should focus on whether or not the

1 underlying use is non-infringing.

2 So you referenced earlier § 110(1) and
3 110(2), which deal mostly with the performance side,
4 but 107, which also expressly calls out teaching and
5 scholarship, you also asked if there were any changes.
6 I'm afraid I don't have anything today, but there was
7 a change yesterday when the Supreme Court handed down
8 Oracle versus Google, which specifically said, and I'm
9 quoting here, "The text of § 107 includes various
10 noncommercial uses, such as teaching and scholarship,
11 as paradigmatic examples of privileged copying."

12 So the Supreme Court yesterday reemphasized
13 the importance of teaching and scholarship as
14 examples, paradigmatic examples from the United States
15 Supreme Court of privileged copying. So, when we're
16 going through the analysis of whether or not the uses
17 we're describing are non-infringing or not, we can't
18 leave out § 107, which the Register also acknowledged
19 earlier was a critical part of distance education.

20 So the gaps that we're talking about that
21 have existed in licensing, screening licenses, have
22 been around for a long time. They've been recognized
23 for many years, but we've been able to, through
24 110(1), when we had the ability to meet in person, we
25 were able to fill in some of those gaps with discs in

1 our collection. And now what the pandemic has
2 highlighted is that either we need to take a broader
3 definition of what a classroom is, which is one
4 possible way to solve this problem, or, if we're going
5 to continue to view a classroom as the physical space
6 that seemed to be referenced back in the '70s when the
7 Act was passed, we need to think about, well, what are
8 the other ways, the non-infringing ways that we're
9 allowed to use the discs in our collection.

10 And so whatever language -- you know, as was
11 mentioned earlier, there are some drafting issues that
12 could be resolved here, but I hope we all share the
13 goal that we should be able -- educators should be
14 able to continue to use films in the way that they
15 have for decades, and if we need to work some through
16 drafting language to get us to that goal, that's
17 great. We're happy to do that. But, anyway, I just
18 think that needs to be said.

19 MS. SMITH: Mr. Midgley, can I ask, is it
20 your position that full work uses in general is a
21 paradigmatic fair use that need never be licensed in
22 educational settings? Or is it more that the pandemic
23 situation in particular has made it more likely to be
24 fair use and, thus, this exemption is needed?

25 MR. MIDGLEY: So thank you for that

1 question. What we have outlined is we should be
2 allowed to do the non-infringing uses that are defined
3 by the statute, so if copying a full work is allowed
4 by the statute under 112(f) -- and I know, Ms.
5 Chauvet, you mentioned that 112(f) applies to the
6 performance of reasonable limited portions under
7 110(2), but it doesn't reference the copy, the length
8 of the copy that you can make to facilitate that
9 110(2) performance.

10 So, again, that issue's never been
11 litigated. We could debate, but whatever copies are
12 allowed under 112(f) need to be permitted under 1201
13 and 107. So, if you look to our --

14 MS. SMITH: So hold on.

15 MR. MIDGLEY: Go ahead.

16 MS. SMITH: Can I ask you just a follow-up?
17 How does your institution conceive of what level of
18 copying is permitted under 110 or 107? Do you engage
19 in copying of full works?

20 MR. MIDGLEY: So we, to the best of our
21 ability here -- you know, universities are large
22 places. We have thousands of employees, and we can't
23 be aware of every single instance of circumvention
24 that's happening everywhere on our campus. But, to
25 the extent that we are aware, we have done our best to

1 understand the current exemptions, the ones that
2 relate -- the current exemption for educational use
3 and the one for accessibility and so on. And, you
4 know, again, we've invited the Office to clarify
5 because, in our review of the 2018 recommendation, it
6 certainly appeared that the Office believed that
7 copies under 112(f) could be full copies. That was
8 our understanding of the recommendation.

9 The language of the exemption itself was a
10 little bit more ambiguous on that point, and we think
11 some clarification there would be welcome. So anyway,
12 what I'm ultimately getting at is the case I think
13 that might be helpful for the Office to consider would
14 be the Georgia State case, which involved literary
15 works used in a course reserve context which are not
16 subject to TPMs, and if you read through that case, it
17 has a lengthy history where the court has to go work
18 by work and decide whether this particular copying and
19 distribution was covered under 107 or not.

20 And in the vast majority of the cases, the
21 answer was yes, it was covered. There were a handful
22 of cases in which the court found the copying and the
23 distribution exceeded the bounds of 107. What we have
24 in this instance -- so my point is that universities
25 are accustomed to doing this kind of analysis and

1 deciding what use they can make of the works in their
2 collection when they're not protected by TPMs, but,
3 here, because these works, unlike the literary works
4 in the Georgia State case, are protected by TPMs, we
5 have 1201 to contend with before we can even turn to
6 the 107 analysis.

7 MS. SMITH: Right, right. No, I do
8 understand that and I want to focus on the 107 or 110
9 analysis because you have said that the case law has
10 been untested in the audiovisual context for full
11 works, so I appreciate you bringing up the Georgia
12 State case. So it sounds like, is this right, it is
13 your position that in many cases, full work copying of
14 audiovisual works you believe to be fair or you are
15 engaging in, and it is just the 1201 issue that you
16 think is precluding a broader adoption? Am I
17 understanding the position right?

18 MR. MIDGLEY: What we're saying is that we
19 would have to do the analysis on a work-by-work basis
20 and just as the Supreme Court has instructed, so we
21 would have to look at it case by case. So, as an
22 example, if there's a work that was specifically
23 designed for the education market, that's going to be
24 less likely to be a fair use than a different kind of
25 work where -- maybe an orphan work where there is no

1 copyright-holder anywhere that can possibly be tracked
2 down. And so, when we're looking at the fourth
3 factor, it's much more likely that we're going to find
4 no market harm in those situations. And so we can't
5 paint with a broad brush and say all copying is either
6 going to be covered by fair use or it's not, you're
7 going to have to do it on a case-by-case basis. But
8 1201, right now, precludes that.

9 MS. SMITH: Okay. So I understand and I
10 want to open the conversation up because I think that
11 is part of what the Office is struggling with, is that
12 if we are asked to recommend a broad-based exemption
13 for something that does, through Georgia State and
14 other case law, ask you to look at a contextual I
15 think was the word in the opinion yesterday as to
16 whether something is fair use, whether we should
17 structure an exemption that says look at whether it is
18 educational or is an orphan work as opposed to across
19 the board concluding it is likely to be fair if we're
20 not seeing educational institutions taking that view
21 and we cannot touch it in court. I just want to make
22 sure the Office is keeping pace with where the law is
23 at. So perhaps Mr. Williams, then Ms. Pantalongy.

24 MR. WILLIAMS: Yes. Thank you. I haven't
25 had enough time to fully digest the Google opinion

1 from yesterday, but I certainly don't think it goes so
2 far as to say all educational uses are, by default,
3 fair use and that's been the conclusion of the Office
4 over time, that they're not, by definition, always
5 fair. And so the Georgia State case, although it has
6 a very, very long procedural history, and so I may
7 overlook something, my understanding is that it did
8 involve portions of works, not full-length novels, for
9 example. And so what we're dealing with here would be
10 distinguishable both in subject matter and in the use
11 at issue when we're talking about full-length motion
12 pictures and remote streaming.

13 And so I do think it's still appropriate to
14 start with § 110(2) because that is where Congress,
15 anticipating that there would be remote learning,
16 decided how to draw the contours of what that should
17 look like, and as the Office said three years ago, the
18 contours stopped short of allowing for full-length
19 motion pictures to be streamed remotely.

20 So then, when you go to § 107, which I would
21 argue is questionably appropriate given the clarity of
22 110(2) on this topic, you do have to look at the
23 potential market that we've been discussing and the
24 existing market, and there's clearly such a market
25 here. And the fact that a work is not currently

1 available doesn't mean that there's no streaming
2 educational market for that work. There certainly is
3 a potential market.

4 As Swank testified, they're looking to fill
5 that market gap where it exists as much as they
6 possibly can and others are as well. And just because
7 the use is educational doesn't mean it's, by
8 definition, transformative. We are talking
9 essentially about space-shifting of full copies and
10 then remote delivery of full copies. There's nothing
11 in the proposal that really defines exactly what could
12 be done or what the purpose of these full-length
13 streams would be.

14 And so I thought the analysis done three
15 years ago was done correctly. I think what we've
16 heard essentially is, in terms of change, we have the
17 pandemic, which is a terrible thing we're all living
18 through, and we do acknowledge its impact on
19 education, but with a long-term fair use analysis
20 looking forward, past this October, when you will
21 issue the regulations, you know, the fact that the
22 pandemic is not incorporated into the proposal and the
23 fact that this has longer-term consequences, I think,
24 weigh against granting the exemption.

25 MS. CHAUVET: Thank you, Mr. Williams. Ms.

1 Pantalony?

2 MS. SMITH: Do you think it might be
3 appropriate -- just a second, Ms. Chauvet -- for the
4 Office to incorporate the pandemic conditions into the
5 proposal for full-work licensing? I mean, hopefully,
6 it will abate, you know, much sooner than the three
7 years for the benefit of everybody, but that is
8 something we should look at doing?

9 MR. WILLIAMS: I would not, sitting here
10 today, endorse doing that, but I am happy if we get a
11 question after the hearing to tell you what we think
12 about that. Like I said, we do acknowledge the impact
13 of the pandemic, but there would be a number of
14 factors that would have to be considered, including
15 the availability of works on services and the other
16 contours of the exemption.

17 MS. CHAUVET: Thank you. Ms. Pantalony?

18 MS. PANTALONY: Thank you. I just want to
19 respond a bit to what was just said about sort of the
20 market harm and the purpose of our conversation today,
21 which is really to take a look at the market
22 implications for providing an exception under 1201.
23 We could sit here and argue about whether or not
24 certain hypothetical circumstances generally meet fair
25 use four-factor assessments or not. The bottom line

1 is the case law tells us very clearly that this is a
2 case-by-case analysis, and it would be very difficult
3 in the abstract to say that streaming film, once we
4 get rid of the 1201 impediment, is all going to be
5 fair use because we're educational institutions.

6 That is absolutely not where we've ever been
7 in our analysis. And, you know, the bottom line here
8 is we want access. Access is going to come to us in
9 any form, whether licensed or, in the event of a
10 license not being available, potentially in some other
11 form. And we are, as we have, you know, demonstrated
12 for some time now, been absolutely willing to sign
13 licensing agreements for streamed film. This is not
14 going to stop. And, in fact, I think my institution
15 would be upset if, all of a sudden, streaming services
16 disappeared.

17 So the real challenge before us is to craft
18 an exception that serves in filling gaps while at the
19 same time ensuring that markets are not adversely
20 affected. And the whole issue about a film not being
21 available in the marketplace now still having the
22 potential of being harmed by an exception is really
23 almost like a chicken-and-egg story because, when the
24 film becomes available in the marketplace, presumably
25 as a response to oh, my goodness, the film is going to

1 be circumvented and streamed at a university because
2 it is not currently available, you know, we may
3 actually have, like, the opposite effect taking place,
4 that as the market develops and as impetus is created
5 to get film into the streamed service, into a
6 repertoire or into a catalog, more and more film will
7 come onboard simply because this potential exception
8 exists.

9 So my attitude is let's try and grow the
10 market but, at the same time, not kill educational
11 opportunities working with our collections.

12 MS. CHAUVET: Thank you.

13 Mr. Taylor and then Professor Decherney, but
14 I ask if we could please try to be concise as we are
15 about 30 minutes left, though we might run a little
16 bit over if we need to. But we still have some areas
17 to cover. Mr. Taylor?

18 MR. TAYLOR: A very quick response to the
19 last statement, my response was that the titles that
20 have been identified in this proceeding aren't
21 available on DVD or the collections aren't there. But
22 I want to go back to the issue of 112(f). 112(f) is
23 there for the performances and the ephemeral copies
24 that go along with the transmission of the work. By
25 the fact that you have 112(f) suggests that when we

1 had the reproduction right and we're transferring it
2 from the disc to the server, there needs to be some
3 exception or you need to find that that's fair use.
4 And, quite frankly, there is no court cases that says
5 creating that server copy implicating the reproduction
6 right is indeed fair use. So, I mean, I think that to
7 justify that server copy under 112(f) is a very far
8 stretch and misinterpretation of the law.

9 MS. CHAUVET: Thank you.

10 Professor Decherney?

11 MR. DECHERNEY: So I just wanted to comment
12 on the discussion of the pandemic. And the pandemic
13 has certainly accelerated the use of online learning
14 by all educational institutions, but it certainly
15 isn't the only use of online learning. Things won't
16 disappear even two, three years down the road. Just
17 looking at my own institution where I'm the faculty
18 director for the university-wide online learning
19 initiative, we have over 200 MOOCs, Open Online
20 Courses, which have had more than 10 million
21 enrollments. We have six fully online degrees,
22 including the first ivy league BA degree.

23 And so online learning has already been an
24 important part of what happens across all universities
25 and educational institutions, and I think we're going

1 to see much, much more of that. You know, I've seen
2 efforts at Duke, for example, to say keep the
3 innovation going, thinking about how all the lessons
4 learned from the pandemic will be taken into education
5 going forward. And so this isn't just a pandemic --
6 none of these issues are just limited to the pandemic.

7 Just thinking -- going back to the question
8 about 110(2) and our request to extend the exemption
9 to unaccredited and for-profit educational online
10 learning platforms, I just wanted to remind you of a
11 quote from the legislative history that we included in
12 one of our comments, but I think it really shows that
13 trying to extend this beyond BYU or Columbia or Penn,
14 you know, really is within the mission and initial
15 vision of the TEACH Act.

16 This is from Senator Hatch, who said, "For
17 our nation to maintain its competitive edge, it will
18 need to extend education beyond children and young
19 adults to life-long learning for working adults and to
20 reach all students of all income levels in cities and
21 rural settings, in schools and on campuses, in the
22 workplace, at home, and at times selected by students
23 to meet their needs."

24 Kind of amazing that that was written
25 however many years ago, but, you know, it's never been

1 more relevant that people are just learning throughout
2 their lives, reskilling for new jobs, and that these
3 kinds of opportunities that exist for learning outside
4 of traditional institutions are being taken advantage
5 of by educators and students now really more than ever
6 as they put together lesson plans and try to learn as
7 schools' ability to teach online is limited.

8 MS. CHAUVET: Thank you.

9 MR. DECHERNEY: Yeah. So saying that the
10 pandemic is important, but it's just accelerated
11 changes that were already in place.

12 MS. CHAUVET: Thank you. I see Professor
13 Benson raised her hand, and then we would like to turn
14 to some specific questions about BYU's proposal.

15 Professor Benson?

16 MS. BENSON: Thank you. I just wanted to
17 point out further that, as noted, we do want to
18 license films. And in talking to our media
19 specialists, as I noted, there are films we just can't
20 license, so there is a gap. On top of that, it is my
21 understanding after speaking with these media
22 specialists that it is actually not cheaper for us to
23 rip a copy of a film rather than license it because we
24 also have to get closed captioning, we also have legal
25 obligations under the ADA.

1 So it's actually, I think, currently cheaper
2 for us. So why would we want to do that? We don't
3 want to, but there is a gap, and we are trying to
4 maintain our educational experiences for our students.
5 And so, therefore, I do think what Rina was pointing
6 out, what Professor Pantalony was pointing out is that
7 we're trying to increase the market by almost saying,
8 hey, let's make these films available. And they may
9 never be available because there may be some obscure
10 films that someone in, you know -- I don't want to
11 name names because who knows what department they're
12 in, right, wants to show their students, and we have a
13 DVD copy and it's just not widely accessible and no
14 one else wants to show it. But that shouldn't
15 preclude those students from getting that educational
16 opportunity.

17 The other thing I would like to point out is
18 I do think learning is transformative. In fact,
19 often, when I show a film in class or online, I stop
20 the film, talk about what just happened, have a
21 discussion, and then go back to the film. And so
22 we're not just streaming entire films all the way
23 through. And often, I think Swank would agree, their
24 service allows us to do that, and we do that often as
25 teachers and educators. So we don't want our students

1 to go to Netflix on Sunday night and watch a film.
2 That's not actually the educational experience we're
3 trying to provide. Thanks.

4 MS. CHAUVET: Thank you, Professor Benson.
5 I believe my colleague, Mr. Welkowitz, has a question
6 for BYU about the expansion to employees.

7 MR. WELKOWITZ: Thank you, Ms. Chauvet.

8 For BYU, you suggest expanding the existing
9 exemption to cover college and university employees,
10 not just college and university faculty. Could you
11 explain why that is necessary? And could you address
12 whether there would be adverse effects on non-
13 infringing uses if the change were not incorporated?

14 MS. CHAUVET: Mr. Midgley?

15 MR. MIDGLEY: Yeah, thank you. Yeah, sure.
16 So I would just note I didn't sense -- I mean, we've
17 reviewed the opponents' comments pretty carefully and
18 we didn't sense any direct opposition to that
19 proposal, so maybe they can clarify if they are
20 opposed to that proposal, but the primary purpose
21 there was just to clarify. I mean, as a practical
22 matter, what happens frequently is faculty will direct
23 other staff members, maybe librarians, other people to
24 do the actual circumvention work, and, right now, it
25 may be somewhat ambiguous whether that work that's

1 being done on behalf of a faculty member is covered by
2 the exemption.

3 So, at a minimum, we would appreciate some
4 clarification of a potential ambiguity. If the intent
5 was to cover work that was being carried out on behalf
6 of faculty members, we think the exemption should be
7 clear on that point or if, for whatever reason, it
8 meant to exclude that kind of work, then we would
9 appreciate understanding that, because I can just tell
10 you faculty members -- how do I say this politically
11 to my university colleagues? Faculty members are not
12 necessarily the most technologically sophisticated
13 users. And, anyway, we would appreciate a rule that
14 made it possible for other support staff to carry out
15 the circumventing activity.

16 MS. CHAUVET: Thank you, Mr. Midgley. We
17 didn't ask the question because there seemed to be
18 opposition but more for clarification about your
19 position and for purposes of the record.

20 Mr. Taylor, I see you have your hand raised.

21 MR. TAYLOR: Yeah. I think it's long been
22 our position that members of the community and be they
23 staff or faculty could engage in acts of
24 circumvention, and there was never an expectation that
25 the professors themselves had to do it.

1 MS. CHAUVET: Thank you, Mr. Taylor.

2 Mr. Stanley?

3 MR. STANLEY: Hi. Thank you for having me.
4 And, Mr. Taylor, thank you for that comment. I just
5 off of Peter Midgley's comment wanted to say that I am
6 a filmmaker, but I also spend a lot of time educating,
7 guest speaking, and working with the universities, and
8 I wanted to just support the position that BYU took
9 there in saying that a lot of times when we come in,
10 we're not technically an employee of a university, but
11 we need the access to these films to be able to share,
12 educate, and inspire, you know, the next generation of
13 filmmakers. So I wanted to just offer some support to
14 Mr. Midgley on that. Thank you.

15 MS. CHAUVET: Thank you.

16 Another question we had for BYU is that the
17 proposed regulatory language from your comments
18 eliminates the comment and criticism limitation. Why
19 is that necessary? And is there any adverse effects
20 on non-infringing use to retain that limitation?

21 Mr. Midgley?

22 MR. MIDGLEY: Yeah, thank you. Again, the
23 comment and criticism limitation, which is currently
24 in the exemption, we feel places an additional hurdle
25 for educational users to potentially have to overcome

1 and it's unnecessary, especially given the express
2 preference and priority that should be afforded to
3 educational uses in 1201 and really throughout the
4 copyright statute altogether. In the 2018
5 recommendation, the Register or the Acting Register
6 made it clear that there were educational uses which
7 were not necessarily comment and criticism that should
8 be included in the exemption. And we just want that
9 to be reflected in the language of the exemption
10 itself rather than being limited to the language of
11 the recommendation.

12 MS. CHAUVET: Thank you. I've got a follow-
13 up question because you also proposed eliminating the
14 teaching or scholarship limitation, which obviously is
15 broader and is not limited to just comment and
16 criticism and it was added because of the educational
17 purposes that were included in the record in 2018, so
18 why is it necessary to eliminate teaching and
19 scholarship from the existing exemption? Mr. Midgley?

20 MR. MIDGLEY: I don't know that it's --
21 again, it seems like we're -- if there is an issue
22 with a particular language that's being proposed,
23 we're certainly open to drafting recommendations or
24 proposals where we could clarify the intent. So the
25 overall goal was just to incorporate by reference the

1 statutory definitions and leave it up to those
2 statutory definitions to clarify what is and is not
3 permitted under the exemption, without trying to add
4 extraneous or additional limitations in the language
5 of the exemption itself.

6 MS. CHAUVET: And do you have any specific
7 examples where people have been confused by the
8 limitation for teaching and scholarship, which is
9 taken from the statute? Mr. Midgley?

10 MR. MIDGLEY: Yeah. Well, I mean, again, I
11 would just point to the public statement that I
12 referenced earlier where there is, I would say, just
13 general confusion. I think the very fact that in this
14 hearing, we heard a clarification, and I appreciate
15 the fact that it was clarified in this hearing who
16 were the intended beneficiaries of the exemption from
17 our friends on the other side, but, you know, many,
18 many people who rely on the exemption are not present
19 here today and don't have the advantage of hearing our
20 colleagues make that acknowledgment. So our goal
21 really is to just put as much -- to remove as much
22 possibility for ambiguity from the language of the
23 exemption and just rely on the statutory definitions.

24 MS. CHAUVET: Okay. Well, the statute does
25 include the phrase "teaching or scholarship," so how

1 is that ambiguous to include in the exemption?

2 MR. MIDGLEY: Well, again, what we're saying
3 is that the -- we have no objection. If the Office is
4 inclined to include "teaching and scholarship," I
5 think that's certainly a -- you know, if that would
6 resolve any kind of concerns, I don't think, in
7 principle, at least I for one, have any objection to
8 that. But what I would encourage the Office to
9 consider is whether or not inserting that additional
10 language helps or adds another possibility for
11 confusion and ambiguity.

12 MS. CHAUVET: Thank you.

13 Another question for BYU. Your proposed
14 exemption language eliminates the short portions
15 requirement. During the 2010 rulemaking cycle, BYU
16 submitted a comment arguing in favor of an educational
17 exemption, including the short portion limitation. So
18 what has changed now such that BYU seeks to eliminate
19 that limitation? Mr. Midgley?

20 MR. MIDGLEY: Yeah. That just gets back to
21 what we were talking about previously. To the extent
22 we believe that the gaps in current licensing markets
23 have been able to be filled in under the classroom
24 exemption, the face-to-face classroom exemption under
25 110(1), the pandemic has almost eliminated that as a

1 possibility at many universities, including ours. And
2 so we think that the exemption should no longer be
3 limited by short portions to make it clear that there
4 are uses of more than short portions which are
5 certainly non-infringing. I don't think the Office
6 has ever made an express finding that only use of
7 short portions are non-infringing.

8 And we have pointed in the record to several
9 examples where the Office, in its digital distance
10 education report, for example, issued about 20 years
11 ago, made it clear that there are, for example, fair
12 uses under 107 which are more than short portions,
13 more than reasonable limited portions, which could be
14 covered and non-infringing, and so it's those kinds of
15 uses that are not clearly unambiguously covered by the
16 current exemption that we think should be included.

17 MS. CHAUVET: Thank you, Mr. Midgley.

18 We now have some questions that are specific
19 to the joint educators' proposal. So, Professor
20 Decherney, I'd just like to confirm a few things
21 first, actually, about your proposed exemption. So
22 the proposed language includes the phrase "to allow
23 educators and preparers of online learning materials
24 to use short portions of motion pictures." What do
25 you mean by "educators"? Like, what does that term

1 mean in this context? Because, if it's K through 12
2 or college, doesn't the existing exemption already
3 extend to those beneficiaries?

4 MR. DECHERNEY: So it could be K through 12
5 or higher education educators or sometimes working
6 professionals who are teaching on online learning
7 platforms that exist outside of the current exemption,
8 so for-profit or non-accredited organizations.

9 MS. CHAUVET: So then just to clarify, when
10 you say "educator," you're talking about educators at
11 for-profit or unaccredited academic institutions? Is
12 that what I'm understanding?

13 MR. DECHERNEY: Just to go back to one of
14 the examples, so Osmosis, one of the members of the
15 coalition, has a medical education platform. Some of
16 the educators on it are universities and medical
17 schools. Others are professional healthcare providers
18 who work directly with Osmosis. They create videos
19 which can be used by accredited organizations, but,
20 also, they're mostly used by medical students and
21 healthcare professionals.

22 MS. CHAUVET: So the proposed exemption
23 language also includes the phrase "in offerings for
24 registered learners of online learning platforms." So
25 what does "online learning platform" mean and how is

1 that different from a MOOC?

2 MR. DECHERNEY: So the MOOCs are being
3 offered by universities or other accredited and
4 nonprofit institutions. So a museum could offer a
5 MOOC if it had been accredited as an educational
6 organization and it was nonprofit. But there are many
7 other platforms out there that are for-profit or
8 unaccredited, something like Khan Academy or LinkedIn
9 Learning, which we mentioned.

10 MS. CHAUVET: So where's the line then
11 between an online learning platform and an arguably
12 instructional video that anyone puts up on YouTube?
13 Like, where are the boundaries on this definition?

14 MR. DECHERNEY: So these are created by
15 educators. They're on registered platforms. They
16 would be for educational purposes. And then they
17 would have all of the various limitations, again, of
18 110(2), so, you know, registration, copyright policies
19 and education, and limitations on redistribution.

20 MS. CHAUVET: Ms. Smith, did you have any
21 questions?

22 MS. SMITH: Yeah. I just wanted to follow
23 up, the same question as you, Ms. Chauvet. I mean,
24 Mr. Decherney, if we concluded that we were still a
25 little nervous about this is educational, it is

1 teaching me how to play Minecraft, mommy, not that,
2 you know, any of us have experienced that, is there
3 anything else you can, you know, kind of help us think
4 through how we might craft the exemption that brings
5 in some of the organizations you're talking about that
6 also draws a bit of a line?

7 MR. DECHERNEY: Yeah. So, I mean, I think
8 that all that -- if you wanted to look at YouTube, it
9 doesn't have any of these kinds of protections and
10 limitations that, you know, are already in there.
11 It's truly an educational purpose. It's an educator
12 and preparers of educational material, again, being
13 used for educational purposes, short portions, comment
14 and criticism, and then all of the various limitations
15 that 110(2) already puts on other kinds of
16 organizations. The only difference is that, you know,
17 it's going to extend beyond the already granted
18 exemption for accredited and nonprofits.

19 MS. CHAUVET: Thank you, Professor
20 Decherney. Mr. Taylor, did you want to respond to
21 that?

22 MR. TAYLOR: Yes, very quickly. I'm not
23 sure what they provided to us is non-infringing in all
24 the circumstances. But even if they are
25 non-infringing, there is screen capture. We've

1 already heard from other people who have vehemently
2 over the years objected to screen capturing recognize
3 that, yes, screen capturing does work. And so I think
4 the Office can take some comfort in the fact that if
5 it's not a clear-cut -- any use that they want to make
6 could still be made with screen capture.

7 MS. CHAUVET: Thank you.

8 MR. DECHERNEY: May I respond to that?

9 MS. CHAUVET: Yes. Yes, Professor
10 Decherney, go ahead.

11 MR. DECHERNEY: So, actually, we can't find
12 any example that we've heard in which screen capture
13 would be effective. Screen capture creates an
14 imperfect copy, as we've already heard. It can
15 distort the lesson being taught. It has dropped
16 frames. Audio and video could be out of sync. DRM
17 can block it. Really, there's an equity argument. It
18 doesn't even work -- it works even worse if you're an
19 under-resourced institution with a bad computer.

20 So examples like "The King's Speech" where
21 it could be used by educators to talk about someone
22 with a speech defect, if the audio and video are out
23 of sync, you wouldn't know if it was a technical issue
24 or if it was part of the medical condition. You know,
25 we looked at the example of dwarfism being used in

1 "Game of Thrones." You know, if the audio and video
2 are out of sync, it could actually become comical and
3 completely change kind of the lesson being taught.

4 So none of the examples that we've shown do
5 we think screen capture would actually teach the same
6 thing that a perfect copy would teach.

7 MS. CHAUVET: Thank you. Just a couple
8 other clarifications. When you say "preparers of
9 online learning materials," what does "preparers"
10 mean? Are they staff of the online learning platform?
11 Like, how do you define who's preparing these
12 materials?

13 MR. DECHERNEY: So, yeah, this is exactly --
14 if we think along the lines of language that's been
15 included before -- in fact, we think this entire
16 exemption is very similar to other kinds of exemptions
17 that have been proposed, the scope is very similar to
18 1A and then the limitations are similar to 1B. As Mr.
19 Taylor was saying earlier, there hasn't been
20 opposition to having assistants helping the educators
21 make the clip, so IT staff or assist TAs or
22 assistants. So that's the same kind of distinction we
23 were trying to make exactly, kind of part of the class
24 that's been filed in the past.

25 MS. CHAUVET: Sure, though, in the past, in

1 2018, the Office rejected the proposed exemption. So
2 I think we're just trying to get some clarification.

3 MR. DECHERNEY: Yes. So, if you --

4 MS. CHAUVET: Hold on. Hold on. Because
5 you also used the phrase "online learning materials,"
6 so, like, what does that mean?

7 MR. DECHERNEY: So I believe the class was
8 rejected in 2018 mostly because of standing rather
9 than a specific critique of the language of the
10 exemption. And so we really made an effort this time
11 to bring in many more online learning platforms and
12 educators into the coalition but also have spoken to a
13 much broader range. Sorry, what was the question
14 about the language?

15 MS. CHAUVET: Well, what does "online
16 learning materials" mean? Like, that's a very broad
17 phrase.

18 MR. DECHERNEY: So we're thinking of video
19 material that includes short portions for comment and
20 criticism that's being used by educators, prepared by
21 educators and support staff. Again, very similar to
22 the kind of exemption that's been around for 15 years.

23 MS. CHAUVET: So can I ask -- so are MOOCs
24 offered by for-profit or unaccredited academic
25 institutions? And I ask because the proposed language

1 is very different than the existing exemption, so is
2 what you're really seeking just an extension of the
3 existing exemption in its current form but applying it
4 to for-profit institutions and for unaccredited
5 institutions offering MOOCs?

6 MR. DECHERNEY: So that could be one use,
7 and it could be a corporate -- a business, a
8 for-profit business that creates MOOCs, and those
9 exist on the same platform that offer MOOCs by
10 accredited nonprofits. But it could also be shorter
11 -- something shorter than a course. So going back to
12 Osmosis, they have these videos -- they have videos
13 that might be on a specific disease or surgical
14 technique, and those are often used by medical
15 students and by healthcare professionals and by
16 patients. Actually, a very common use is patients
17 trying to learn about their own conditions as
18 subscribers of Osmosis. But those wouldn't be full
19 courses, and a MOOC is -- the C is course.

20 MS. CHAUVET: Right. So I guess my other
21 questions because you talk about businesses preparing
22 online materials, so would it be reasonable to limit
23 an exemption to any academic institution? I mean,
24 you're first talking about, you know, the education
25 and academic institutions and then, on the other hand,

1 you're also talking about businesses, so I'm trying to
2 understand the scope of your proposed exemption. Is
3 it really academic institutions that we should be
4 focusing on, or are we also focusing on any business
5 that wants to offer an online educational course,
6 arguably educational course?

7 MR. DECHERNEY: Yeah, I mean, I wish there
8 was a strong line that we could draw between the two,
9 but it can be blurry. Many, many universities -- many
10 businesses, rather, have internal educational
11 platforms and operations which sometimes are for
12 educating their own employees, and that could be
13 really important, but, you know, they also sometimes
14 will make their education more broad.

15 So, you know, Google teaches MOOCs,
16 actually, on Coursera, a platform that we use as well.
17 Our courses would be exempt; theirs wouldn't. You
18 know, our courses sometimes teach similar things. We
19 have a degree, actually, on Coursera to train people
20 to be programmers, coders. Google actually offers
21 something similar, but it's at a much lower price and
22 a much smaller byte size and helps many, many people
23 enter the workforce as coders. Our courses would be
24 exempt; theirs would not.

25 MS. CHAUVET: Thank you. So the proposed

1 exemption also includes the phrase "for purpose of
2 criticism, comment, illustration and explanation."
3 What does "illustration and explanation" mean and how
4 is that different than criticism and comment?

5 MR. DECHERNEY: So especially in a teaching
6 context, we think this is something that's a kind of
7 core fair use and that's done all the time in class,
8 which is to include something as an example of an
9 argument that's being made and also something to start
10 discussion, for example.

11 MS. CHAUVET: So would it be fair to say
12 that you're talking about teaching and scholarship?
13 Is that a reasonable interpretation of what you mean?

14 MR. DECHERNEY: Yeah. No, I think teaching
15 and scholarship would cover the examples used in an
16 educational context.

17 MS. CHAUVET: Okay. Because teaching and
18 scholarship is part of the existing exemption for the
19 K through 12 and university, so I'm just trying to
20 understand why that exemption does not cover what you
21 want to do.

22 MR. DECHERNEY: Yeah. I mean, I think the
23 idea is the general category and we're trying to give
24 examples within it.

25 MS. CHAUVET: Okay. Thank you for your

1 patience, Professor Decherney. I just have a few
2 other clarifications to make, please. So your
3 proposed exemption includes the phrase "when use of
4 the film and media excerpts will continue" -- sorry,
5 "will contribute significantly to learning." What
6 does "contribute significantly to learning" mean and
7 how is this not a subjective measurement?

8 MR. DECHERNEY: I mean, again, if it's
9 teaching and scholarship, it's likely to also be
10 something that contributes to learning, but it's
11 trying to show the whole -- I guess the whole process,
12 right? When we're talking about teaching and
13 criticism and comment, scholarship, this is, you know,
14 the reception of it.

15 MS. CHAUVET: Thank you.

16 Mr. Welkowitz, we're definitely running low
17 on time, but did you want to ask a few questions about
18 "The King's Speech" and "Hidden Figures" examples?

19 MR. WELKOWITZ: Okay. Thank you, Ms.
20 Chauvet.

21 Your written comments relating to the motion
22 picture, "King's Speech," says that it shows students
23 who struggle with stammers -- it shows them
24 demonstrations and techniques displayed in the film
25 that can be used to overcome their own stammers and

1 other public speaking difficulties. Are you
2 suggesting that showing clips of "The King's Speech"
3 for such purposes constitutes fair use?

4 MR. DECHERNEY: Yes, if I can have both the
5 "Hidden Figures" example and the "King's Speech"
6 example, they are actually showing someone trying to
7 overcome a disability in one case and the importance
8 of African-American scientists in the other. And what
9 might happen in a classroom is to take them out of
10 this kind of character development narrative and then
11 put them in a larger context of disabilities, right,
12 to give that kind of context or talk about race in
13 American society or gender in the workplace, and by
14 adding this kind of additional context, then, all of a
15 sudden, we can look at the examples very differently.

16 They're no longer part of a narrative,
17 developing character in kind of the emotional way of
18 teaching something about similar issues, but can show
19 you the kind of systemic social, cultural impact that
20 it might have.

21 MR. WELKOWITZ: And you do think it is fair
22 use? I'm just making sure. I just want to clarify
23 for the record. So your position is that using those
24 clips is a fair use if I understand you correctly?

25 MR. DECHERNEY: No, sir, that's not -- I

1 don't believe that's how fair use would work, that
2 every time you use those clips it would be fair use,
3 but using them in this kind of context that would
4 also, you know, be a broader lesson, then it could be
5 fair use.

6 MR. WELKOWITZ: Okay. Do any of the
7 opponents, oppositions want to respond to that? No.

8 MS. CHAUVET: And, Professor Decherney,
9 could you also please explain why circumvention would
10 be necessary to show the clips of "The King's Speech"
11 and the "Hidden Figures"?

12 MR. DECHERNEY: Yeah. So I actually already
13 used the "King's Speech" example talking about screen
14 capture that because it's showing someone's disability
15 and it's really about the way that image and sound
16 work together and if the image and sound did not or,
17 you know, were not synchronized in the way they are in
18 the film, obviously, it would give a very different
19 kind of lesson. It wouldn't work.

20 MS. CHAUVET: All right. Thank you.

21 Mr. Taylor?

22 MR. TAYLOR: Yeah, I just wanted to respond
23 to the earlier question. I think what Mr. Decherney
24 just described is closer to fair use, but what was in
25 the initial comments where they suggested that "Hidden

1 Figures" would be inspirational to African-American
2 young girls, that in itself, that inspiration isn't
3 enough to constitute fair use.

4 MS. CHAUVET: Thank you, Mr. Taylor.

5 We're a little bit low on time, but we do
6 have some specific questions for the OTW proposal.
7 So, for OTW proponents, your comments state that the
8 proposed exemption is based on the 2010
9 recommendation. Because there have been multiple
10 changes since 2010, I just have a few clarifications,
11 please. So the proposed exemption language removes
12 the reference to the specific medium on which the
13 motion pictures would be affixed. Namely, it removes
14 the phrase "on a DVD protected by the Content Scramble
15 System, on a Blu-ray disc protected by the Advanced
16 Access Content System, or via a digital transmission
17 protected by a technical measure." Why should that
18 limitation be removed? Why is that necessary?

19 MS. ROSENBLATT: Well, it's based on --

20 MS. CHAUVET: Hold on. I'm sorry. Let me
21 just call on you for purposes of the court reporter.
22 Professor Rosenblatt, please go ahead.

23 MS. ROSENBLATT: Thank you, yes. It's based
24 on that 2010 language which had that limitation.
25 Following 2010, in 2015, those limitations were

1 removed, which is why we sort of updated the 2010
2 limitation to conform or updated the 2010 language to
3 conform to what the Register found in later
4 proceedings to be an appropriate scope. And that --

5 MS. CHAUVET: Can I ask about that? Because
6 2010, it specifically covered DVDs, and then, over the
7 years, other things were added, like the Blu-ray and
8 then the digital, so why should we remove any
9 reference to the medium on which these motion pictures
10 are affixed? Why is that necessary now?

11 MS. ROSENBLATT: So I think that we're not
12 wedded to removing any reference to medium. Our
13 concern is we want to make sure that DVD, Blu-ray, and
14 streams are included. We also know that as technology
15 changes, we want to make sure that the range of
16 materials that vidders use is available to them.

17 One of the things we're seeing now is that,
18 for example, there's a decrease in the availability of
19 things to own and an increase in the availability of
20 things to borrow. And so we want to make sure, for
21 example, that this exemption applies to lawfully
22 obtained materials, not necessarily lawfully owned
23 materials for that reason. And so I think that's the
24 sort of concern that we're expressing there.
25 Essentially, our goal is to make this as

1 comprehensible as possible for people whose intuitions
2 are they want to do the moral thing, whatever the
3 moral thing is. This is our sort of overarching thing
4 that we're hearing from I think most of the proponents
5 today, is that people want to do the moral thing.
6 They want to pay. What they want to do then is not
7 get caught out in something that's hypertechnical
8 after they've paid.

9 MS. CHAUVET: Okay. Thank you. Then that
10 actually leads to my next question because your
11 proposed language excludes the limitation of lawfully
12 made and acquired. That limitation was in 2010, 2012,
13 and the 2015 and '18 exemptions. So why is it
14 necessary to remove that limitation now?

15 MS. ROSENBLATT: Here, too, lawfully made,
16 we know that there's a lot of debate over lawfully
17 made in the Kirtsaeng context, right? We think that
18 that might be an overcomplication. Lawfully acquired
19 is, again, a reasonable limitation as long as it
20 encompasses all different sorts of acquisition,
21 including borrowing and ownership.

22 MS. CHAUVET: Mr. Ayers, did you want to
23 respond to that and then Mr. Taylor?

24 MR. AYERS: Yes, thank you. Actually,
25 specifically on that point, I think we'd be concerned

1 about the expansion of the concept of "legally
2 acquired" to include what could essentially enable a
3 rent, rip, and return scenario, where content is
4 borrowed or rented, is then copied, the copy is
5 retained, the borrowed or rented copy is returned or
6 no longer accessible, and now there are two copies
7 when only one was paid for.

8 So we just want to make sure that we're not
9 enabling through this process a rent, rip, and return
10 model. And also noting that this entire process is
11 about trying to create rules. And, certainly, we all
12 want to do the moral thing, we all want to do the
13 thing that is helpful for educational purposes, but we
14 also want to make sure that the rules are clear so
15 that those who are engaging in these activities,
16 including noncommercial videos, have some guidelines
17 to follow that are clear, and regardless of whether
18 they prefer to not be aware of the law or find the law
19 inconvenient or distasteful or unpleasant, it's still
20 appropriate to have these rules to make sure everybody
21 has a clear understanding of what's expected.

22 MS. CHAUVET: Thank you. Mr. Taylor and
23 then I see Mr. Cheney, or at least you had your hand
24 raised before. So Mr. Taylor?

25 MR. TAYLOR: Yes. I agree with Mr. Ayers on

1 much of what he said. I think the biggest problem is
2 that this is a rulemaking where the proponents have to
3 provide evidence. And leaving it so wide open, you
4 really are abandoning the requirement that proponents
5 come forward with evidence of harm for their
6 particular use. And, most specifically, I think, you
7 know, the way they have phrased it, you could easily
8 just as well include UHD Blu-ray, which they have not
9 provided the evidence for.

10 MS. CHAUVET: Thank you.

11 Mr. Cheney, did you want to go ahead and ask
12 your question?

13 MS. ROSENBLATT: I also have a response.

14 MS. CHAUVET: I'm sorry. Mr. Cheney was
15 going to ask a question very quickly, Professor
16 Rosenblatt. We'll get to you.

17 MR. CHENEY: Yeah. No, thank you. And I
18 was going to turn back to something that we had talked
19 to a few minutes ago if that's okay, and we had talked
20 about it earlier as well in some of this context and
21 that's back on this screen capture idea, I wanted to
22 go back and ask more questions about something that
23 was talked about here and really highlight something.

24 There was two things talked about that
25 indicated that some devices or other things block

1 certain screen capture technology, and I want to get
2 more on the record on that. The other thing that was
3 interesting to me that was talked about is in several
4 of these contexts but especially in what we're talking
5 about right now, screen capture didn't allow and when
6 you pulled that screen capture, it didn't allow you to
7 separate the audio track from the others when you're
8 making some of these vids, right?

9 So I want to get more information on that
10 concept and idea because I don't think we've talked
11 about that near enough and put enough on the record
12 here on that idea. Thank you.

13 MS. CHAUVET: Professor Rosenblatt, would
14 you like to respond to that?

15 MS. ROSENBLATT: Yes, and I will also --
16 I'll also point to my colleagues, but, first, in
17 response to the points made about -- in response to
18 the prior question, there's two points here or three
19 points.

20 One is that we should emphasize that in this
21 proceeding and in previous proceedings, opponents to
22 these exemptions have never identified and have, in
23 fact, acknowledged that there is no known connection
24 between the sort of ripping and the events of ripping
25 that vidders, noncommercial remix makers use, no

1 connection at all between that and piracy or leaking.
2 So the idea that this is creating copies that are
3 floating out there in the sort of rip-and-return
4 context is just an illusory concern.

5 We should also point out that when vidders
6 and noncommercial remix makers rip things, they
7 typically rip chapters, not entire films, and so
8 that's again quite distinct from the rip-and-return
9 model.

10 And, finally, I would point out that a great
11 many sources that vidders and other noncommercial
12 remix makers use simply aren't available to own
13 anymore. They're available on streaming services.
14 And you just can't buy them. You can't own them
15 because of cases like Autodesk that have encouraged
16 copyright owners to make things available on a license
17 basis rather than an ownership basis.

18 So, given that shift, that's something that
19 as technology shifts, we would want this exemption to
20 shift along with it to the extent that any shift is
21 necessary. The current language speaks about lawfully
22 obtained and makes no reference to ownership, so we
23 actually don't think that any change is necessary
24 there.

25 To respond to Mr. Cheney's question, thank

1 you very much. In our submission here, we have a
2 footnote, Footnote 5, that talks about the way
3 screenshots are blocked on Android and iOS when
4 DRM-protected video is playing, Netflix being the best
5 example. There's just a big block on screenshots. So
6 there are a number of examples there in our submission
7 that we would point you to of that, and we're happy to
8 generate more if that would be helpful.

9 For your last question, if you could repeat
10 it, I think it's probably best answered by my
11 colleague, Dr. Turk, but I want to make sure that we
12 remember it.

13 MR. CHENEY: Sure. Just a reminder if
14 that's okay. The reminder is that it was mentioned
15 earlier that when you screen capture something, it
16 doesn't allow you to separate the audio and the video
17 portions of the video, where ripping the chapters, as
18 you mentioned, gives you that option to separate the
19 tracks. This screen capture does not. So I want to
20 get more information on how that works.

21 MS. ROSENBLATT: Yeah. Actually, both Dr.
22 Turk and Dr. Coppa can respond to that, I think,
23 probably helpfully. And I will mute myself.

24 MS. CHAUVET: Okay. Professor Turk, would
25 you like to respond first and then Dr. Coppa?

1 DR. TURK: Sure. So I admit that I don't
2 use screen capture very much, and so I can't speak to
3 whether there are particular difficulties separating
4 the audio and the video when getting a copy via screen
5 capture. Typically, when ripping, it is possible to
6 rip without the audio, which makes the entire process
7 both simpler for the person who's doing the copy in
8 order to, you know, create something that's a fair use
9 of the copied content but also means that the copy is
10 not, in fact, a perfect copy, right?

11 I mean, nobody is going to watch "Lovecraft
12 Country" or "The Good Place" or whatever without the
13 dialogue and the soundtrack. So that's a way in which
14 ripping both produces a better visual and also a less
15 complete copy in terms of, you know, piratable copy.

16 Professor Coppa may be able to speak more to
17 the screen capture audio issue.

18 MS. CHAUVET: Dr. Coppa?

19 DR. COPPA: Yeah. I just wanted to add
20 that, in fact, vidders watch all the time without the
21 audio. And this idea -- there is no -- it's a
22 non-case that a vidder would rent a thing once and
23 copy it and return it because the level of obsessive
24 rewatching and, in fact, often without sound that you
25 need to do to actually make a vid, you're looking for

1 kind of visual patterns and footage that normal people
2 wouldn't do. So, in fact, what you want is a very,
3 very, high-quality visual file. And, in fact, you
4 also want to get rid of the audio because you don't
5 want to use that space on audio, and, in fact, what
6 you want is the visuals to be very, very big because
7 you're going to start, you know, looking for shapes in
8 them. And you want to get rid of that extra ballast
9 of the audio as quickly as possible. And all of that
10 is sort of -- it's just a practice that is very, very
11 different from piracy and, in fact, results in footage
12 that is not really watchable in the way that normal
13 people watch TV or movies.

14 MS. CHAUVET: Thank you, Dr. Coppa.

15 I'm going to call on a few people, but I
16 first wanted to note that the existing temporary
17 exemption permits, you know, circumvention for the
18 creation of noncommercial videos. It was not
19 meaningfully opposed. So I want to think about, you
20 know, why the existing exemption is not fulfilling
21 your needs as a vidder community, so that's something
22 to think about. But, first, I'd like to call on Mr.
23 Williams and then Mr. Miller, who might be raising his
24 hand for Mr. Midgley. Mr. Williams?

25 MR. WILLIAMS: Thank you. Yeah, just very

1 briefly. The point about there being no evidence of
2 piracy, it's just not possible for us to collect that
3 kind of evidence. People wouldn't go online and say
4 here's my name and I used this exemption and copied
5 this and now I'm going to put it on a peer-to-peer
6 network. So the idea that we could collect that kind
7 of evidence in any meaningful way has always perplexed
8 me. And I say this spiel every three years, but I'll
9 say it again, that would be very hard for us to find
10 that kind of evidence.

11 With respect to screen capture technology,
12 and Mr. Taylor may be able to correct me if I'm wrong,
13 but my understanding of how it works is it literally
14 captures the input that you're viewing on your screen.
15 So there's no reason that it would have to capture any
16 audio to my understanding, so there wouldn't be a need
17 to separate the audio from the video the way there
18 would be with a ripped copy.

19 MS. CHAUVET: Thank you.

20 Mr. Midgley and then Mr. Taylor.

21 MR. MIDGLEY: Thank you. Yeah. With
22 respect to Mr. Cheney's question about screen capture,
23 we just wanted to clarify that the earlier
24 conversation about screen capture -- the emphasis in
25 the current exemption on the quality overlooks other

1 reasons why educational users in particular may want
2 to use -- why screen capture is not an adequate
3 alternative to circumvention. So three years ago, we
4 provided, for example, the foreign language
5 instruction example where it has less to do with the
6 quality and much more to do with the fact that with
7 circumvention an educational user can capture multiple
8 languages simultaneously and accessibility information
9 and a lot of other information which is on a DVD or
10 Blu-ray disc which, because of what Mr. Williams was
11 just describing, when all you're doing is recording
12 what's happening on the screen, if you want to capture
13 a movie in both French and English, let's say you have
14 to watch it twice, record it twice, and, of course,
15 the quality is much lower. If you're going to be
16 making use of more than short portions, which is what
17 we've been advocating in the educational context,
18 screen capture is just not a viable alternative to
19 circumvention, and it doesn't necessarily -- the focus
20 on quality is not helpful to understanding why it may
21 or may not be sufficient.

22 MS. CHAUVET: Thank you. Mr. Taylor?

23 MR. TAYLOR: Yeah, I just want to follow up
24 with that, is that I don't think we are here talking
25 about whether or not most of these groups can make use

1 of Blu-ray disc or DV disc or high-definition streams.
2 I think we've already resolved that issue and they are
3 able to do that. I think the only group where this is
4 an issue for is with the joint educators online
5 learning platform.

6 But putting that aside, to answer Mr.
7 Cheney's question, we've dealt with this issue. In
8 2015, we dealt extensively with whether or not vidders
9 could make use of screen capture on the Mac Apple
10 system because of the square or gray square. In 2018,
11 when we came back to this issue, Mac and Apple did not
12 have those things, so we didn't really address it
13 extensively.

14 But, if you go back to it today, you will
15 see, in fact, there are measures put in place, and
16 Google has just recently announced some measures to
17 block screen capturing. That doesn't mean that you
18 can't do it. The circumvention that's required that
19 Ms. Rosenblatt had suggested earlier isn't the
20 circumvention of the Blu-ray disc or DVD. What I
21 think she was referring to, that kind of circumvention
22 is the workaround that you have to do to get around
23 the Apple box. And as we established in 2015, if you
24 wanted parallels and used a PC system or if you used
25 Boot Camp, you could get around the temporary block.

1 Netflix, I just tried it in October to
2 record DVDs -- to record Netflix with a player, and it
3 recorded perfectly for me, so I don't --

4 MS. CHAUVET: Thank you, Mr. Taylor. Sorry,
5 we're already over time and I feel like we've talked a
6 lot about screen capture, so I just want to move on to
7 some more OTW-specific questions. So I just want to
8 reiterate that the existing temporary exemption
9 permits circumvention for the creation of
10 non-commercial videos. So my question is, are there
11 examples where vidders who want to circumvent for
12 purposes of comment and criticism for use in
13 noncommercial videos but are not able to do so because
14 of the existing exemption? Like, why does the
15 existing exemption -- why is it not enough and why
16 does it need to change?

17 Proponents? Professor Rosenblatt?

18 MS. ROSENBLATT: So the existing exemption
19 is enough in the sense that it provides an exemption
20 for what vidders do. The way it's not enough is that
21 it requires vidders to make an evaluation of the
22 fitness of one potential circumvention technique
23 before engaging in the circumvention technique that
24 makes more sense.

25 MS. CHAUVET: So may I please ask a follow-

1 up about that specifically then, please, Professor
2 Rosenblatt? Because we talked a little bit about this
3 before because your proposed language also includes an
4 evaluation where the person engaging in circumvention
5 believes and has reasonable grounds for believing that
6 circumvention is necessary to fulfill the purpose of
7 the use. So, again, why is that evaluation that you
8 proposed reasonable, but the evaluation that's in the
9 existing exemption, why is that unreasonable?

10 MS. ROSENBLATT: So the evaluation that
11 they're doing for the one that we've proposed is an
12 evaluation based principally on quality and
13 availability, which is relatively easily done and is
14 intuitively done by vidders.

15 MS. CHAUVET: But isn't the existing
16 exemption asking for the same type of evaluation,
17 whether or not the high-quality content is necessary,
18 and if it is, then they can circumvent? Like, it's
19 the same evaluation, so I'm trying to understand why
20 the change is necessary.

21 MS. ROSENBLATT: This is something that my
22 colleagues actually may be able to speak even more
23 about, but it is, as we see it, a different evaluation
24 because it's an evaluation that requires using
25 different technologies, and that's an extra step that

1 stands in the way of making an expression, rather than
2 an evaluation that simply requires knowing how high
3 quality you need. But I would turn it to my
4 colleagues because I think they can probably speak to
5 this better than I can.

6 MS. CHAUVET: Okay. I'll call on Dr. Coppa
7 in a minute, but you testified before that when you
8 say something is necessary to fulfill the purpose of
9 the use, you are talking about the necessary is the
10 high-quality content. So, to me, the evaluations
11 appear to be the same. Professor -- or, sorry, Dr.
12 Coppa, if you could please speak to that.

13 DR. COPPA: Right. Just the necessary --
14 so, for me, again, not as a lawyer, it seems the fair
15 use piece of it, I mean, people sort of understanding
16 that they're making a noncommercial thing for comment,
17 people understand that. And the evaluation in terms
18 of how high a quality you need really has to do with
19 your own artistic plans for what transformations
20 you're going to make, which is the kind of thing that
21 Dr. Turk could speak to.

22 If you know that you're actually going to be
23 focusing on a character who only takes up a portion of
24 the frame and then, consequently, you're going to need
25 to crop the whole thing, you're already evaluating

1 that you need very high-quality footage and you're
2 thinking about what you need to do to make the thing
3 you want to make to focus on the thing you want to
4 focus on, which is a kind of artistic choice.

5 You probably -- the question of how you're
6 circumventing when vidders know they need to get
7 source, they, you know -- and just to say, vidders are
8 mostly, you know, pink-collar workers. They're
9 working on home equipment. They're not working on,
10 you know, stations at school. Many of them are
11 teenagers. So, in fact, you know, they probably have
12 a process and they're trying to say a thing.

13 And so the evaluation they're making, the
14 closer it is to fair use and the closer it is for
15 people to be able to make a kind of moral choice of,
16 like, I paid my subscription and it really is going to
17 be for the year, I mean, nobody's going to work on a
18 \$2.99 overnight because you have to watch it 10,000
19 times, but, you know, I bought Netflix or I bought my
20 DVDs and now I need to figure out how to make this
21 footage big enough that I can stick it into my editing
22 software. And that's where I would defer to Dr. Turk.

23 MS. CHAUVET: Very quickly, though, but a
24 follow-up is because the existing exemption states
25 that the person can circumvent if he or she believes

1 that non-circumventing alternatives are unable to
2 produce the required level of high-quality content, so
3 that seems to be the exact same thing that you're
4 asking for, so why is it necessary to change the
5 existing language?

6 Professor Turk, did you want to respond to
7 that, or Dr. Coppa or Professor Rosenblatt?

8 DR. TURK: I can.

9 MS. CHAUVET: Thank you, Dr. Turk, go ahead.

10 DR. TURK: The existing language can be read
11 to suggest that people have to screen capture before
12 they can rip, and that seems silly and unnecessarily
13 ambiguous. I'll stop there, and I can say more if you
14 want me to.

15 MS. CHAUVET: Thank you.

16 Dr. Coppa or Professor Rosenblatt, would you
17 like to add to that?

18 DR. COPPA: I mean, you know, again, vidders
19 have a practice and they're going to get source in the
20 way, A, that's available. In some cases, there may
21 not be choice. You know, if there is an opportunity
22 to buy DVDs, people will normally take that. But to
23 actually suggest that we tell everyone to get screen
24 capture software, which they may not have already
25 installed, and that they learn how to use that and

1 that they need to try that before they follow what has
2 been, you know, at least since 2005, a pretty standard
3 practice of, you know, buying DVDs and working with
4 digital files, educationally, as somebody who's been
5 involved in trying to kind of disseminate ideas
6 through the OTW about best practices, that seems kind
7 of counterintuitive, especially that, you know,
8 certainly would -- and, again, screen capture may be,
9 in fact, the best thing for something that doesn't
10 exist in a fixed form in a DVD or Blu-ray.

11 But, if it does, the idea that we would tell
12 them to use screen capture first is very
13 counterintuitive and isn't the same sort of fair use
14 argument as, you know, it should be noncommercial, you
15 should have bought your footage, like sort of the kind
16 of norms that really normal people and normal people I
17 should just say worldwide. I mean, vidding is
18 continuing to go, is international, and it is well
19 past the place where, you know, you can get any kind
20 of coherent message out to people who do this all
21 around the world. So the closer it tracks to fair
22 use, the better.

23 MS. CHAUVET: Okay. Because the Office has,
24 in the past, Register recommendations stated that it
25 is not necessary to attempt screen capture before

1 circumventing, so are you asking now for the Office
2 just to reiterate that so that when you're trying to
3 educate your members you have something newer to point
4 to? Again, like, I'm just trying to understand why
5 it's necessary to change the language if the Office
6 has already given you what it seems that you need and
7 what you want to do. Professor Turk -- yes, Professor
8 Rosenblatt, go ahead.

9 MS. ROSENBLATT: That is exactly the sort of
10 clarification that we're looking for. It would be
11 preferable for obvious reasons to have it in the
12 statute. Having it in associated recommendations
13 would be better than not having it in associated
14 recommendations.

15 I also want to just add to that that to the
16 extent we're thinking about what screen capture is
17 good for and what ripping is good for, one of the
18 great ironies of this is because of the high quality
19 that's typically needed, and we talk about this sort
20 of evaluation that people do for their art, right?
21 They know they're going to need a big file to make a
22 vid. One of the great ironies of this debate is
23 always that screen capture is probably sufficient for
24 the sorts of consumptive uses that piracy would
25 involve but not typically going to be sufficient for

1 the sorts of big file uses that non-commercial
2 remixers make. So that's something that I think we've
3 probably said before, but it's worth pointing out.

4 MS. SMITH: Okay. Thank you, Professor
5 Rosenblatt. I think it's helpful to understand why
6 you're requesting this clarification because I think
7 we will look at -- it does seem like some of it may
8 already be permitted, and we'll try to make sure that
9 it is understood.

10 We are certainly over time. Does anyone
11 have -- last call for anything else they would like to
12 contribute to the discussion. If you could just wave
13 virtually or in real life. Going once, going twice.

14 (No response.)

15 MS. SMITH: Okay. Well, thank you very
16 much. I think that concludes today's hearings. We
17 are going to convene again tomorrow at 10:30 Eastern,
18 which is going to be Class 16, Open Source Software
19 License Investigation. And, again, thank you for your
20 time, and we will be in touch if the Office seeks any
21 further information in connection with this proposed
22 exemption. Thank you.

23 (Whereupon, at 1:00 p.m., the hearing in the
24 above-entitled matter adjourned, to reconvene at 10:30
25 a.m. the following day, Wednesday, April 7, 2021.)

REPORTER'S CERTIFICATE

CASE TITLE: Copyright Office Section 1201 Hearing

HEARING DATE: April 6, 2021

LOCATION: Washington, D.C.

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

Date: April 6, 2021



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