

LIBRARY OF CONGRESS

IN THE MATTER OF:)
)
SECTION 1201)
RULEMAKING HEARING)

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Remote Roundtable
Suite 206
Heritage Reporting
Corporation
1220 L Street, N.W.
Washington, D.C.

Monday,
April 19, 2021

The parties met remotely, pursuant to notice,
at 10:31 a.m.

PARTICIPANTS:

Government Representatives:

KEVIN AMER, U.S. Copyright Office
JOHN RILEY, U.S. Copyright Office
JORDANA RUBEL, U.S. Copyright Office
LUIS ZAMBRANO RAMOS, National Telecommunications
and Information Administration

Panelists:

KENDRA ALBERT, Harvard Law School Cyberlaw
Clinic
JONATHAN BAND, Library Copyright Alliance
STEVE ENGLUND, Jenner and Block, on behalf of
the Entertainment Software Association
WILLIAM J. EVJEN, Swank Motion Pictures
HENRY LOWOOD, Stanford University
DEAN MARKS, AACSLA
SARAH McCLESKEY, Hofstra University, Resource and
Collection Services in the University Library

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Panelists: (Cont'd)

BARBARA NELSON, Swank Motion Pictures

BO RUBERG, University of California, Irvine

JAMES STEFFEN, Emory University

GISELE TANASSE, University of California, Berkeley

DAVID J. TAYLOR, DVD CCA

MAYZE TEITLER, Harvard Law School Cyberlaw
Clinic

J. MATTHEW WILLIAMS, Joint Creators and
Copyright Owners

MADLINE WOODALL, Harvard Law School Cyberlaw
Clinic

P R O C E E D I N G S

(10:31 a.m.)

1
2
3 MR. AMER: Good morning, everyone. My
4 name's Kevin Amer. I'm the Deputy General Counsel at
5 the Copyright Office, and we'd like to welcome you to
6 the second week of hearings in the Section 1201
7 rulemaking.

8 Before we begin Class 5, I'd just like to go
9 over a few logistical items. These should be familiar
10 to many of you. So, those of us on the government
11 side will pose questions, and we will call on
12 participants to respond. We found it works pretty
13 well for people to use the "raise hand" feature on
14 Zoom to indicate that they'd like to speak, but if
15 that's not working for you for whatever reason, feel
16 free to just raise your hand, and we can call on you
17 after that, as well.

18 We have a lot of topics to cover, as you may
19 expect. So we would ask that you please try to focus
20 your responses to the particular question asked, and
21 we ask that you keep your comments relatively brief.
22 We'll provide a sort of, short roadmap at the
23 beginning of this session to just give you an idea of
24 what topics we're planning to cover.

25 In addition, today's event is being

1 live-streamed, and it's being recorded and transcribed
2 by a court reporter. The video and transcript will be
3 posted on the Copyright Office website. And so, we
4 would ask that everyone please try to speak clearly
5 and to mute your audio when you're not speaking, to
6 assist with the recording and the transcription.

7 Finally, on Wednesday afternoon, we're going
8 to be holding an audience participation session. For
9 those watching on the public link, you can sign-up to
10 participate in Wednesday's session using the
11 SurveyMonkey link we're going to provide in the
12 chatbox. And then, on Wednesday afternoon, those who
13 have signed up can join the audience participation
14 session using the same link they would use to view the
15 sessions for that day.

16 Okay. So, today's first hearing is on Class
17 5, preservation of audio-visual works. Before we
18 begin, I would like to invite, first, my Copyright
19 Office colleagues to introduce themselves. So, Ms.
20 Rubel and Mr. Riley?

21 MS. RUBEL: Good morning, everybody.
22 Jordana Rubel, Assistant General Counsel.

23 MR. RILEY: Good morning, everyone. John
24 Riley, Assistant General Counsel.

25 MR. AMER: And Mr. Zambrano Ramos?

1 MR. ZAMBRANO-RAMOS: Thank you, Mr. Amer.
2 Good morning, everyone. This is Luis Zambrano Ramos.
3 I'm a Policy Analyst at NTIA.

4 MR. AMER: And now I would like to invite
5 the participants to introduce themselves. Let's
6 please start with the proponents of the proposed
7 exemption. So, Mr. Band?

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

10 MR. AMER: Ms. McCleskey?

11 MS. McCLESKEY: Sarah McCleskey, Hofstra
12 University, Head of Resource and Collection Services
13 in the University Library.

14 MR. AMER: Dr. Steffen?

15 MR. STEFFEN: Yes, my name is James Steffen.
16 I'm from Emory University in Atlanta, and I am the
17 Film and Media Studies Librarian and the Head of the
18 Humanities Team.

19 MR. AMER: And Ms. Tanasse?

20 MS. TANASSE: I'm Gisele Tanasse. I'm the
21 Film and Media Services Librarian at the University of
22 California at Berkeley.

23 MR. AMER: And let's turn, please, to those
24 opposing the proposed exemption. So, we have Mr.
25 Evjen? I'm not sure if I'm saying that right. If

1 not, I apologize.

2 MR. EVJEN: Oh, perfectly.

3 MR. AMER: And Ms. Nelson from Swank.

4 MR. EVJEN: Bill Evjen, Vice President, CIO
5 at Swank Motion Pictures, and Swank Motion Pictures
6 represents the major studios -- 100 plus studios -- in
7 the non-theatrical space, which libraries are part of.

8 MR. AMER: And Ms. Nelson? Oh, I think
9 you're on mute.

10 MS. NELSON: There we go. Good morning.
11 Barbara Nelson, Swank Motion Pictures. I am Senior
12 Vice President overseeing the studio relations of the
13 100 studios and distributors that Mr. Evjen mentioned
14 previously.

15 MR. AMER: And Mr. Marks and Mr. Taylor?

16 MR. MARKS: Morning. Dean Marks. I'm
17 Outside Counsel to Advanced Access Content System, LLC
18 -- AACCS, LLC -- and the DVD Copy Control Association.
19 Thanks.

20 MR. TAYLOR: Good morning. This is David
21 Taylor. I'm Outside Counsel to DVD Copy Control
22 Association and to the Advanced Access Content System
23 Licensing Administrator.

24 MR. AMER: And Mr. Williams?

25 MR. WILLIAMS: Good morning. Matt Williams

1 for Mitchell Silberberg & Knupp. I'm representing the
2 Joint Creators and Copyright Owners.

3 MR. AMER: Great, thank you. And so, to
4 start off with the questions for Class 5, I'd like to
5 turn it over to my colleague, Jordana Rubel.

6 MS. RUBEL: Good morning again, everybody.
7 I want to walk us quickly through a number of topics
8 that we plan to cover this morning. I'm anticipating
9 an interesting and lively discussion. So please do
10 your parts to make it so. I'll give you a quick
11 outline of the topics, so you know what to expect.
12 And we'll ask you to please reserve your comments on a
13 particular topic for the questions that specifically
14 address that topic.

15 The first topic that we're going to discuss,
16 we're going to talk about the problems librarians are
17 seeing with damaged and deteriorating DVDs and Blu-Ray
18 discs. We'll talk about when CSS is used on DVDs and
19 whether it is really necessary to shift content that
20 is currently stored on DVDs and Blu-ray discs to
21 non-disc format, for the purpose of preservation.

22 Second, I want to talk about Section 108 and
23 whether that is sufficient to address preservation
24 concerns, and also, how the issue of what we've called
25 "preemptive" preservation plays into that analysis.

1 Third, I want to talk about the market check
2 requirement and whether motion pictures that are
3 available through streaming services should be
4 considered viable alternatives.

5 Fourth, I'd like to talk about the
6 off-premises use and any other limitations on use.
7 And finally, I want to discuss the licensing market
8 for motion pictures and how the proposed exemption
9 would affect that market.

10 And, in connection with that last topic I
11 described, we have two short presentations that
12 panelists are going to make. So, let's go ahead and
13 get started.

14 Please rest assured that we have read and
15 have carefully considered, and will continue to
16 carefully consider, the written comments that were
17 provided. But I do want to start off by giving the
18 librarians who are panelists on this morning's call, a
19 chance to describe, in their own words, what some of
20 the issues they're seeing with deterioration and
21 degradation of Blu-Ray discs or DVDs.

22 So, anyone who's interested in speaking to
23 that point, go ahead and use your "raise hand"
24 function, or you can even just raise your hand up,
25 like that, so I'll know to call on you. Dr. Steffen,

1 you want to start us off?

2 MR. STEFFEN: Yes. Is it okay if I present
3 some slides in addition to my verbal comments? If
4 not, I can just speak.

5 MS. RUBEL: Yeah, it would be better if you
6 just spoke. We asked for participants to submit
7 things in advance, so we'd have a chance to take a
8 look at them.

9 MR. STEFFEN: Okay.

10 MS. RUBEL: So, if you could just give us
11 your oral comments, that would be great.

12 MR. STEFFEN: Yeah, that's fine. Okay. So,
13 over the past few years, I've become aware of
14 increasing problems with disc rot affecting a number
15 of commercially-pressed DVDs. This includes from a
16 wide range of producers such as the Criterion
17 Collection, producers overseas.

18 One of the ones which I found the most
19 discussion about was Warner DVDs produced between 2006
20 and 2009 at the Cinram plant in Pennsylvania, which
21 included, like, BBC, some independent producers, and,
22 of course, Warner Brothers. So, I started my own
23 investigation of our collection, and we have, like,
24 some 750 or so discs that were produced during this
25 period.

1 I've started investigating them, and of
2 those, about 198 were out-of-print. And in my
3 inspection of those, about 50 percent of those -- 52,
4 so far -- display signs of disc rot -- like
5 discoloration. And of the ones that I physically
6 inspected also, 14 were no longer playable.

7 And to give you one example, we have a DVD
8 of Heartbreak House which is part of the Shaw
9 collection that was released by the BBC, and that one
10 is no longer playable, and there are no real viable
11 replacement options. So, the disc is out of print.

12 There were never any subsequent pressings
13 made. The title is also not available for streaming
14 for academic purposes, but it's also not available for
15 streaming for individual purposes. I think there's a
16 high likelihood, because it was part of this bad
17 pressing, that all or almost all of the copies
18 available in libraries will be completely deteriorated
19 in a matter of time.

20 And there may be no way, in the future, for
21 the public to access and study this particular film.
22 And it's also the only adaptation of this particular
23 play, Heartbreak House by Shaw, that was commercially
24 released on DVD. So, it really leaves people with no
25 options for access and study.

1 MS. RUBEL: Ms. Tanasse?

2 MS. TANASSE: Thank you. I wanted to speak
3 briefly to some of the deterioration that we see in
4 our collection because of use. And our collection is
5 used exclusively by our students and instructors --
6 so, UC Berkeley users, as well as some researchers who
7 come to use content within our building.

8 We do not allow any researchers or authors
9 to take content out of our space. We are very
10 controlled with our physical lending. So, what we
11 have typically seen over the past years is a
12 wearing-away at the spindle of the core of the disc.
13 The plastic will start to chip with normal
14 wear-and-tear to the point where it can become -- you
15 can try to sand a few times, but it does, eventually,
16 become unplayable.

17 We also see separation of the polycarbonate
18 protective layer from the data layer. This happens
19 also with normal wear-and-tear, removing the disc from
20 a case, for example. Or, if there is some kind of
21 oxidation or moisture, whether that happened when the
22 disc was being produced, or in our case, we had a
23 devastating flood in 2018, and we are anticipating,
24 you know -- this isn't something we've seen yet -- but
25 there could be some separation that results from that.

1 So some of the degradation is both from the
2 normal wear-and-tear on the disc but also what James
3 spoke to very eloquently, earlier.

4 MS. RUBEL: And Ms. McCleskey?

5 MS. McCLESKEY: Good morning. I'd just like
6 to speak briefly to the wear-and-tear issue in terms
7 of players. So, our discs also only circulate to
8 Hofstra faculty for use in the classroom, and students
9 and outsiders can use them in the library only.

10 And we find that the discs, now that people
11 are mainly playing them on an external DVD drive or on
12 a laptop-type drive, is much more destructive -- much
13 more likely to damage the discs, and when we had DVD
14 players in all the classrooms with the specific tray
15 for loading the disc to play.

16 Also, just the packaging that discs come in
17 makes them prone to damage. I think we've probably
18 all broken one just trying to get it out of the
19 package -- the little pop-out. So, it's a fragile
20 medium, and I think that's our, sort of, our main
21 concern with that.

22 MS. RUBEL: Just sticking with the
23 librarians for another minute, were any of these
24 issues that cause degradation or damage surprising to
25 you, or were those concerns that you might've had at

1 the time when you decided to purchase the content in
2 that format? Ms. Tanasse?

3 MS. TANASSE: I've been very surprised with
4 discs that have worked well for us in the past that we
5 have demonstrated circulated statistics on,
6 specifically with the separation of the polycarbonate
7 protective later from the data layer. So, that's not
8 something that seems to be associated with the
9 removal, necessarily. It's not like somebody tugged
10 it too hard but would seem to be something that
11 happened over time that I did not expect and did not
12 receive as part of my audio-visual training.

13 And I was not, kind of, forewarned that this
14 is something that we expect to see happen. I would
15 say that's also the case with some of the spindles.
16 Some are made better than others. And so, the center
17 core of the discs, some are -- I don't know, really,
18 the technical term because I was not trained on this.
19 It is a surprise.

20 Some have, like, a gap in the middle of the
21 clear plastic, and some are solid plastic through and
22 through. And what I have noticed, just, kind of, in
23 handling many, many discs -- we have a 25,000-disc
24 collection -- is that those that have, you know --
25 those that are hollow in the center are more prone to

1 this kind of cracking.

2 MS. RUBEL: Mr. Marks? I'm assuming you'd
3 like to respond to a point that somebody's already
4 made.

5 MR. MARKS: Thank you so much. It was just
6 one point on the Warner Brothers disc rot. I think
7 the primary problem from the problems with the
8 manufacturing were with HD-DVDs, which was an initial
9 format that was competitive with Blu-ray discs. I
10 would say the format may even be considered obsolete
11 today, just like Beta versus VHS.

12 That was and looking in the Wikipedia -- an
13 entry -- and checking with some Warner Brothers DVD
14 entry, libraries (Technical Interference) a problem
15 (Technical Interference) DVDs (Technical Interference)
16 format. I'm not saying that there's never been any
17 problems with individual DVDs, but I just wanted to
18 make that (Technical Interference) that that problem
19 with lots of titles seem to have been more on the
20 (Technical Interference) DVD format in 2006 and eight,
21 so.

22 MS. RUBEL: Mr. Marks, I was able to
23 understand most of what you said, but your audio is
24 coming in just a little bit choppy. It might --

25 MR. MARKS: Oh, I'm so sorry. Is this any

1 better?

2 MS. RUBEL: I think so, actually. But I do
3 believe the Court Reporter was able to pick up what
4 you said. But for future comments, that sounds much
5 better.

6 MR. MARKS: Thank you so much. And I will
7 just summarize one sentence that I think that primary
8 problem from 2006 to 2008 of Warner Brother discs was
9 the HD-DVD format. I'm not aware of any titles that
10 were put out in the HD-DVD format that weren't also
11 put out in the standard DVD format.

12 MS. RUBEL: Dr. Steffen?

13 MR. STEFFEN: Yes, thank you. I just wanted
14 to clarify. I am talking about DVDs, which, of
15 course, I physically inspected myself. The reason why
16 I became aware of the issues is when I started
17 researching the Criterion Collection Blu-rays which
18 were suffering from bronzing.

19 It was a limited number of titles. I came
20 across comments in the home theatre forum -- it's a
21 public fan forum, basically, where many people were
22 reporting on this issue. They were inspecting their
23 own collection. And so, these are DVDs in private
24 collections, and my findings match what the private
25 collectors are reporting, in terms of the high

1 percentage of discs failing.

2 But, I guess, the point I just wanted to
3 emphasize is that it's not just the Warner Brothers.
4 There's other discs that are suffering from
5 accelerated disc rot. We don't know the full extent
6 of it, which is what's concerning, I think.

7 MS. RUBEL: Mr. Taylor?

8 MR. TAYLOR: Yes, thank you. I did want to
9 address the Criterion example. I mean, the Criterion
10 Blu-ray did have a problem, and Criterion put in a
11 replacement program for those titles that needed to be
12 replaced back in 2014. So, I mean, the fact of the
13 matter is is that disc rot can occur because of either
14 manufacturing problems or storage problems.

15 And just like anything else that has a
16 manufacturing problem, it will happen. So, I mean, it
17 shouldn't be of surprise that things are sometimes
18 imperfect, but they are, indeed, replaceable. And as
19 far as Heartbreak Hotel, I think it's a far stretch to
20 suggest that anything that's in digital format will be
21 forever lost in this time and era that, if you look
22 hard enough, you can find almost anything in the
23 internet age.

24 So, I don't think that's quite exactly a
25 statement. And as far as things going out of print,

1 things may go out of print, but they do, in fact, come
2 back, whether it be an anniversary set, a new format
3 -- anything that people enjoy, people figure out --
4 particularly the copyright owners -- how to make more
5 money off it by redistributing it.

6 MS. RUBEL: We're just going to take a
7 couple more comments on this point because we've got a
8 lot of other things to cover, as well. Ms. Tanasse,
9 you've been waiting for a little while. Oh, you're
10 still on mute.

11 MS. TANASSE: I think I may have jumped-line
12 ahead of Sarah because I've already made some
13 comments. No? Okay. I did want to speak to some of
14 the production issues when we're looking at a set of
15 DVDs. So, we've had several television series where
16 some of the discs may be fine, and one of the discs in
17 particular does not work.

18 And you can buy a couple different copies of
19 that set and find one that does. So, there's this,
20 kind of, unpredictability of these forums and these
21 lists where we might be able to go back and check and
22 see there's been issues reported with this certain
23 disc. There is just variation with that, that I've
24 seen, kind of, on the micro level with particular
25 titles.

1 MS. RUBEL: Ms. McCleskey?

2 MS. McCLESKEY: I'd just like to address
3 your question of whether we expected deterioration,
4 and I would say that, as Librarians, we are very
5 familiar with format upgrade, format replacement. We
6 have gone from film to U-matic, to VHS, to DVD, to
7 Blu-ray, to streaming, and we have purchased content
8 multiple times -- the same thing -- and we have no
9 problem with that. That is to be expected. Our
10 problem is when we cannot replace, so.

11 MS. RUBEL: And Mr. Williams, I'm going to
12 give you the last word on this one. But, trust me,
13 Mr. Band, we will have plenty of time to come to you.

14 MR. WILLIAMS: Yeah, thank you very much.
15 Just quickly, we had some comments in footnotes 32 and
16 33 of our filing about the availability of some of
17 these titles. And with respect to the Warner Brothers
18 catalog, some of those titles in the footnotes we
19 reference are available for manufacturer on-demand.

20 So, if there is an issue with disc rot on
21 those titles, they can, essentially, be purchased
22 through Amazon and printed in an individualized basis.
23 Not saying that would cover every single title we've
24 heard about today, but with respect to Warner
25 Brothers, there is a lot of availability out there.

1 So, that's the only point I wanted to make on that.

2 MS. RUBEL: Mr. Zambrano Ramos?

3 MR. ZAMBRANO-RAMOS: Thank you, Ms. Rubel.

4 This question is for the proponents. Once you acquire
5 a DVD or a Blu-ray, can you talk about the conditions
6 that these DVDs or Blu-rays are kept inside the
7 libraries? Thank you.

8 MS. RUBEL: Ms. Tanasse?

9 MS. TANASSE: In our facility, temperature
10 is relatively controlled, and we track humidity. I
11 mentioned before, we had a devastating flood, and
12 floods are not a rare occurrence in libraries. I
13 would also say that most libraries don't necessarily
14 have the capacity to temperature control or to check
15 for humidity. We're an R1, so we're a large
16 institution. We have a Preservation Department that
17 advises us on climatic issues.

18 The other issue is that when we circulate to
19 our instructors, they may be held in unideal
20 conditions. They might be in a kitchen while
21 someone's boiling pasta. So, while we have some
22 control in our facility, we have a great amount of
23 control in that we don't circulate for students to
24 take home.

25 So, there's less use outside of our

1 controlled environment, but going out to the
2 classroom, you know, things can be left in cars, for
3 example. But that's not so much the case for us.

4 MS. RUBEL: All right. We're going to
5 change gears a little bit. This is a more overarching
6 question. The opponents have argued here that the
7 proposed exemption seeks to take an existing exemption
8 for out-of-date software and apply it in the context
9 of motion pictures that may no longer be sold on discs
10 but that those two are completely different animals.

11 What are the differences between out-of-date
12 software and motion pictures that are relevant to the
13 Office's analysis? And I'm not sure, Mr. Williams, if
14 your raised hand is a hold-over, or if you had
15 something to respond to that question.

16 MR. WILLIAMS: It was a hold-over, but I can
17 respond quickly to that, as well. I think with
18 software, take your word processing software, for
19 example, the average consumer isn't looking to use a
20 ten-year-old version of their word processing software
21 if they can get the most up-to-date version.

22 And that's just not true of motion pictures.
23 I mean, a movie was made when it's made, and people
24 still want to watch it and enjoy it and love it today.
25 Not that people can't enjoy older versions of software

1 programs, but it's just not an equivalency when it
2 comes to demand.

3 And so, especially with respect to
4 off-premises uses, motion pictures are quite, quite
5 different, I would say, from normal computer software
6 programs. So, that was the main point we wanted to
7 make there.

8 MS. RUBEL: And Mr. Taylor?

9 MR. TAYLOR: Yeah, I mean, I would just
10 point out what we had written in our comments that the
11 distribution of movies is a far more dynamic creature.
12 It's windowed. It has multiple layers. I've already
13 said that when a movie is released one time, it may be
14 remastered and reissued again. You just don't see
15 that kind of robustness, dynamic marketplace, with
16 computer software.

17 And you don't see computer software,
18 necessarily, the creators going back three or four
19 times trying to put it into a new marketplace.

20 MS. RUBEL: Mr. Band?

21 MR. BAND: I would certainly agree that, for
22 many titles, and many movie titles, sort of, don't go
23 out-of-date, that there is a continuing market. It
24 might be a dwindling market, but that the market does
25 continue in a more robust way than it does for

1 software.

2 But there's a lot of titles out there.
3 There's a lot of video of one sort or another, and for
4 a substantial chunk, the market does disappear. And
5 those aren't coming back. They're not going to be re-
6 released, and for -- but those titles, even though
7 they have virtually no enduring entertainment value,
8 they do have enduring cultural and research value.

9 And it's that subset that we're interested
10 in. We're not -- obviously the Disney films are going
11 to be re-released over, and over, and over again, and
12 we're not concerned about the windowing and how Disney
13 tries to maximize its revenue by creating artificial
14 scarcity. We're not talking about that.

15 We're talking about niche films, foreign
16 films, you know, T.V. programs that that are dated,
17 that no one is really going to ever release again but
18 that do have research value. And that's the focus of
19 this petition.

20 MS. RUBEL: Related to that point, there was
21 a factual issue raised in the written comments about
22 when CSS is actually used on a DVD. And as I
23 understood it, the assertion was that CSS isn't
24 typically used unless they expected to sell at least
25 5,000 copies of the disc.

1 So, I'm curious to hear more about that
2 assertion and also whether there's some similar
3 limitation on the use of AACS? Mr. Taylor?

4 MR. TAYLOR: I'm so sorry. Yes, the issue
5 of when CSS is applied and not applied, it is
6 multifaceted. So, the one issue which we identified
7 was that when it was going to be what, at the time,
8 would be a minimum print of 5,000 copies, then we saw
9 that creators were more likely to insist on CSS being
10 applied.

11 CSS is typically applied, as far as I
12 understand it, at the replicator level. The titles
13 that were identified in the comments, they were not
14 ever released in massive numbers, probably not even
15 above the 500 level.

16 And so, it would be difficult to imagine
17 that a creator who probably was just trying to get
18 something out into the marketplace would pay the
19 additional fees for the CSS licensing.

20 As far as AACS, all AACS Blu-rays -- all
21 Blu-rays contain AACS. That is no longer an option,
22 and we've, kind of, cleaned that up so that the
23 marketplace is more consistent.

24 MS. RUBEL: Can you point us to any written
25 source that discusses the procedure for determining

1 whether CSS will be used in a DVD?

2 MR. TAYLOR: I would have to get back to
3 you. I had to do a substantial amount of research --
4 of searches and, kind of, like, cobble this together.
5 And I'm happy to provide that to the Office, later.

6 MS. RUBEL: Thank you. Another overarching
7 question, and then we'll move on to discussing Section
8 108. The proposed exemption would allow, essentially,
9 something that you could describe as space-shifting --
10 converting from the disc into a digital copy.

11 Why is that necessary for preservation? Why
12 couldn't you copy the content from a damaged DVD onto
13 another DVD, which would at least provide some
14 additional time that the content could be viewed? Mr.
15 Band?

16 MR. BAND: Right. So, I was talking to Mr.
17 Marks and Mr. Williams about this the other day and
18 here I have one hand, and basically what you would be
19 suggesting is this is like preservation with one hand
20 tied behind your back.

21 Like, why would you want to do that? Why
22 would you want to make a preservation copy that within
23 20 years, you'd have to make another preservation
24 copy? You know, the whole point is to preserve the
25 work for future generations, not to try to make it as

1 infeasible as possible.

2 So, we want to encourage preservation, not
3 discourage preservation. And so, to say, well, you
4 need to make it -- copy it onto another disc where you
5 know there's going to be more disc rot as opposed to
6 making a server copy where you're going to have --
7 there will certainly be maintenance, but in the long
8 run, less maintenance, and more security. It just, in
9 terms of what the whole point of the exercise is, it
10 makes no sense.

11 MS. RUBEL: Ms. McCleskey?

12 MS. McCLESKEY: I agree with what Mr. Band
13 said, but I would say that a copy onto a different DVD
14 is, obviously, a possibility and something that we
15 would be very happy to do. And I think that -- I'd
16 just like to say that, yes, windowing, we recognize
17 all those things.

18 And I have yet to meet a librarian who would
19 say I would rather use my crummy preservation copy
20 than buy a new, remastered, wonderful edition of this
21 thing. Like, that just doesn't -- that doesn't
22 happen. So, we are not trying to avoid purchase of
23 the new, latest edition.

24 We are trying to preserve content that we
25 cannot -- it doesn't have a latest edition. And if

1 doing that onto a second DVD is what we do, then
2 that's okay. It's not ideal, but it's okay.

3 MS. RUBEL: Ms. Tanasse?

4 MS. TANASSE: I would agree with Sarah that
5 it is okay to transfer to a DVD. That would be a
6 stop-gap that would be appealing to us. We have had
7 issues, having extensive experience with preservation
8 copies of VHS tape to DVD, where the blank DVDs that
9 are available to us, they also degrade over time.

10 We've had issues with the opaque layer not
11 being opaque enough to have reliable playback, even on
12 our internal DVD players, which tend to be of good
13 quality. So, the blank discs have all of the same
14 issues, if not more, that we've discussed about
15 commercially-produced DVDs.

16 MS. RUBEL: Dr. Steffen?

17 MR. STEFFEN: Yes. And the other -- so, we
18 would be interested in having physical preservation
19 copies to circulate for on-premises use, but even so,
20 I don't think it's ultimately adequate because discs
21 are also easily damaged during use, especially now
22 that so much playback has shifted towards computer
23 drives.

24 It's surprisingly easy for the hub to become
25 cracked. In fact, even though I'm very careful, that

1 happened to me recently with a Blu-ray, and it happens
2 to other users all the time. So, if we have a copy
3 that somebody needs to use, there's always some risk
4 that that copy is going to get damaged during use.

5 And if our one surviving preservation copy
6 is damaged, then that, again, leaves us without any
7 options. So, that's why having a backup copy of the
8 disc image would be really helpful, at least for
9 long-term preservation.

10 MS. RUBEL: Mr. Williams?

11 MR. WILLIAMS: Yes, thank you. Just a
12 couple of points. As Jonathan said, we have been
13 having conversations and trying to narrow
14 disagreements and collaborate, and I appreciate his
15 time on that and everyone's comments today. That's
16 always preferable to the alternative.

17 And I like what he said, of course, about
18 we're not looking to include Disney titles that are
19 likely to be reissued in this class, and things of
20 that nature. And that's very helpful.

21 I think if you go back to the 108 study
22 group consensus recommendations from a decade or so
23 ago, there were some ways to address this issue of
24 when something's available in the marketplace that go
25 just beyond whether it's available on discs.

1 They talk about whether it's available
2 through a license model or a download model, for
3 example, and also whether it's just a reusable copy
4 that's available as opposed to a brand-new copy -- an
5 unused copy.

6 And so, those are things that I think, if
7 anything's considered in this space, which we're not
8 endorsing, it would be helpful to look at that.
9 There's also the security issues involved here and the
10 specificity that might be required related to how
11 these copies would be secured.

12 And the 108-study group had some much more
13 specific proposals involved there, as well. So I
14 think while this proposal is focused just on discs --
15 what's available on discs -- and I think that's a
16 pretty robust market, our point of view is we should
17 look beyond just discs because everything is available
18 at the major studio level, for the most part, in some
19 form or another, so researchers are not being
20 prevented access.

21 And so, we would suggest it goes beyond just
22 discs. But if we are going to focus on discs, I think
23 the 108 study proposals also said that the replacement
24 copies should be on a physical disc, not on a server.
25 And so, I would say, if we're going anywhere with this

1 one, that does make a lot of sense.

2 MS. RUBEL: Mr. Marks?

3 MR. MARKS: Thank you. Just, also, to
4 follow-up with what Mr. Williams said, understanding
5 everything and appreciating what the librarians said
6 about the advantage of a server copy versus disc copy.

7 I think one of the advantages of the disc
8 copy in the Section 108 is that then that replacement
9 disc copy can clearly be used only on-premises use. I
10 think that's a little less clear, with respect to a
11 server copy, given that it would involve reproduction
12 and potential performance.

13 And then, those security issues about if you
14 have lots and lots of in-the-clear copies on a server
15 and the server's hacked -- the market harm that it
16 could cause. So it's just a matter of balancing these
17 various issues, and I wanted to bring those up. Thank
18 you so much.

19 MS. RUBEL: Mr. Taylor?

20 MR. TAYLOR: Yes, thank you. Real quick,
21 just to go back to this point that every 20 years you
22 need to have another DVD copy, I don't think that's
23 exactly accurate. I think that DVDs have been around
24 now for 20 years or so, and most people -- 99.9
25 percent of users -- are not finding that they need to

1 replace their DVDs.

2 And if you're going to copy the work onto
3 another DVD, you're obviously going to take the time
4 to choose a better DVD than probably it was originally
5 issued on. There are different forms of DVDs. The
6 Library of Congress has an extensive report and study
7 -- ongoing study -- that for archival preservation
8 purposes, you'd use a DVD Gold (phonetic), which, that
9 disc itself is inherently superior to even the ones
10 that are distributed in the commercial marketplace.

11 Finally, as far as how many discs you should
12 get, I mean, this is a quintessential question of
13 Section 108. I mean, if you get to copy three copies
14 for a replacement copy and your replacement copy goes
15 bad, well, there is a certain limitation on how many
16 copies you get.

17 MS. RUBEL: Mr. Zambrano Ramos?

18 MR. ZAMBRANO-RAMOS: Thank you, Ms. Rubel.
19 This question is for proponents and opponents if you'd
20 like to chime-in. I was just curious if you could
21 talk about the availability of DVD players to play
22 copies of those DVD and how that availability will
23 look moving forward, say, in the next 5 to 10 years
24 and even upwards of 20 years?

25 MS. RUBEL: Ms. Tanasse?

1 MS. TANASSE: The manufacturing data that
2 we're seeing for DVD playback equipment is very
3 similar to what we saw at the end of VHS. So, these
4 playback decks are really not being produced at a
5 level that suggests they will be readily available to
6 us for a long time to come.

7 I would also say that the quality of the
8 decks that you can get today is much lower than we saw
9 in the past, especially in the mid-00s to late-00s.
10 They just will not play many of these burned discs
11 reliably.

12 MS. RUBEL: I want to move us along a little
13 bit just because we have a lot of other topic that I'd
14 like to cover. So, if we have time, we can come back
15 and discuss these issues at the end.

16 The Office has previously stated that
17 Section 108's three-copy limit doesn't adequately
18 accommodate the requirements of modern digital
19 preservation practices. Does anybody disagree with
20 that statement, or do we all agree that, for digital
21 preservation, more than three copies would be
22 necessary? Mr. Band?

23 MR. BAND: Yes, I would agree with the
24 Office's statement. I think it's spot-on that digital
25 preservation does require more than three, especially

1 if you're including intermediate and temporary copies.
2 And this really goes back to the previous question
3 about, you know, we're looking forward to the 21st
4 century and, sort of, forcing people to use obsolete
5 storage mediums. Really, it just makes no sense.

6 You should use the best technology,
7 especially since we're trying to do a preservation of
8 cultural heritage, which benefits all of us. It's not
9 something that benefits libraries, right? This
10 benefits society at-large, and therefore we should be
11 able to use the best forms of preservation, which
12 would be digital preservation, in other words, the
13 server copies.

14 MS. RUBEL: Mr. Williams?

15 MR. WILLIAMS: Thank you. Yes, I think
16 we're allowing preservation and replacement copies to
17 overlap a lot, which they do not, in Section 108. And
18 our position is that, for now, Section 108's the law,
19 and that's really what the Copyright Office should be
20 looking at. Although I understand that there are
21 recommendations out there about how to revise Section
22 108 and also views on what Section 107 covers.

23 In terms of discs being obsolete, I don't
24 think that's accurate. And if you look at footnote 35
25 from our filing, we actually have a citation to LCA's

1 website citing a story from April of last year talking
2 about DVD and Blu-ray player sales jumping
3 significantly during 2020.

4 So, as far as I'm aware, those players are
5 going to be available in the marketplace for the
6 foreseeable future. When it comes to the multi-copy
7 issue for preservation or replacement copies, I think
8 there are scenarios where you may need to make more
9 than three copies to get to the end result of one copy
10 that you can either use for preservation or for
11 replacement purposes.

12 But I think the 108 study documents, over
13 time, essentially said the point of those changes
14 would not be so that you can end up with a bunch of
15 different copies. It would be so that you can end up
16 with one copy for the point of either preservation or
17 replacement, and that the other copies should go away.

18 And so, that's, essentially, I think where
19 we're coming from on this is that even if you do want
20 to go beyond current Section 108 and allow for more
21 than the three copies, ultimately the goal, if you're
22 going to go there, should be one copy for the given
23 purpose at-issue instead of several different copies.

24 So, it's a matter of addressing them, as
25 Jonathan said, the temporary copies and things of that

1 nature that require the steps along the path to get to
2 one copy. It's not a matter of having six copies at
3 the end of the day.

4 MS. RUBEL: And for the proponents, are you
5 proposing a limit on the number of digital or server
6 copies that could be made? Mr. Band?

7 MR. BAND: Not specifically. I mean, we
8 don't -- we're basing the language of this exemption
9 on the language of the software exemption. Certainly
10 it's not our contemplation that there would be
11 proliferation, right?

12 I mean, the idea is if you have one copy in
13 your collection, that you would end up with one copy
14 in your collection and that only one copy could be
15 used at a time, right?

16 I mean, that's -- no one's envisioning that
17 this should lead to a proliferation of copies. We're
18 -- the goal here is to maintain the status quo.

19 MS. RUBEL: Mr. Taylor?

20 MR. TAYLOR: Yeah, I just wanted to
21 illuminate this one point on players. And we work
22 with a lot of manufacturers. We're the people that
23 license them the technology. We have no sense that
24 players are going to disappear. And whenever a new
25 player, a new format, comes out, it is always

1 backward-compatible.

2 Well, at least so far, they've always been
3 backwards-compatible. So, you have a Blu-ray player
4 that will play a DVD.

5 MS. RUBEL: I want to talk next about
6 preemptive or preventative preservation. And I
7 understand that the main argument from proponents is
8 that preservation is better achieved if it occurs
9 before there's any damage or deterioration to the
10 disc. So, how do you respond to that, opponents? Mr.
11 Williams?

12 MR. WILLIAMS: Yeah, thank you. I'll get
13 the hang of this "lower hand" and "raise hand" thing,
14 eventually. Sorry. I have to keep remembering to go
15 up-and-down on that. So, I understand where the
16 proponents are coming from on this issue, and I don't
17 want to pretend like I don't.

18 On the other hand, I think, if you go back
19 to the 108 study group recommendations and to what the
20 Copyright Office did with those in 2017, there was an
21 issue of fragility as opposed to something becoming
22 obsolete or damaged before copies could be made by
23 libraries.

24 And that proposal, for better or for worse,
25 has not gone anywhere, legislatively. And so, you

1 know, I think if there had been some cooperation,
2 legislatively, at that level, perhaps we would have a
3 Section 108 that already refers to fragile copies,
4 meaning copies that are likely, or may go bad, in the
5 near future, instead of already-deteriorating copies.

6 But we're not there legislatively, right
7 now. It's not in the statute. And so, you know, our
8 position is that, really, 108 should be the bellwether
9 that you look at in this proceeding. And if you
10 consider fragility as opposed to what's already in the
11 statute, you know, I think it would need to be defined
12 pretty well in the case of discs.

13 And I think that proposal in the studies and
14 recommendations I mentioned was part of a package,
15 right? So, it was grouped along with the need to look
16 not only to unused copies for replacements but to
17 usable copies. It was packaged with a proposal not
18 only to look for physical discs but for licensed
19 streams or downloadable copies that are described as
20 licensed, in many instances.

21 So, that was part of a, kind of, package
22 agreement or consensus, I think. And if you're going
23 in that direct here, I think you'd want to look at
24 that whole package.

25 MS. RUBEL: Yeah, and we will touch a little

1 bit more on streaming in just a moment. I will make
2 the point, real briefly, that obviously Section 108 is
3 not the only exception, and the Office has considered
4 fair use in the past in similar contexts. Mr. Band,
5 were you raising your hand, as well?

6 MR. BAND: Yeah. Well, I was just going to
7 make the point, as you just did, that, you know, 108
8 is not the be-all and end-all that's applicable. You
9 know, the Office has already determined that Section
10 107 is relevant in this context.

11 And also, I just wanted to reiterate the
12 point that, you know, these materials, you know -- the
13 track record has shown that they are inherently
14 fragile, certainly, relative to books. And, you know,
15 a book, you know, well-preserved, can last 100 years,
16 go through numerous readings, whereas, you know, it
17 seems that most DVDs, simply, that's not the case.

18 And so, you know, the ability to -- a DVD
19 seems to start deteriorating as soon as you get it, or
20 if not right away, then very soon after that. So
21 this, to some extent, is a bit of an academic
22 discussion. These are fragile materials and need to
23 be preserved.

24 MS. RUBEL: I think the counter-argument
25 that I saw in the comments was that, you know, we have

1 to consider what was the benefit of the bargain when
2 the disc was originally purchased. And the copyright
3 owners sold the content on these discs for a
4 relatively low price with the understanding that
5 people would be using them, generally, for individual
6 or family use, and that there wouldn't be further
7 reproduction or distribution.

8 So, I want to give the proponents a chance
9 to respond to that argument that I saw in the
10 comments, especially as it relates to the idea of
11 preemptive preservation. And Mr. Taylor and Mr.
12 Marks, I will come to you after I give them a chance
13 to respond. Mr. Band?

14 MR. BAND: Well, the benefit of the bargain,
15 I mean, the libraries have invested millions of
16 dollars buying DVDs. And again, they're not doing it
17 for their own edification, right? It's so that it's
18 for the use by students and researchers.

19 And so -- and again, as referred from the
20 librarians here from Ms. McCleskey and others,
21 librarians are perfectly happy to buy newer formats
22 when they become available, if they're available. The
23 point here is that a lot of this material simply does
24 not appear to be available in any other format. And
25 so, again, it's to all of our benefit to make sure

1 that the investment that the libraries made in buying
2 these DVDs is preserved.

3 I mean, you know, it's not like we're asking
4 for the studios to subsidize the making of the
5 preservation copies. I mean, the libraries are going
6 to spend their own money to make the preservation
7 copies. But that, you know, it's because they're just
8 not available anywhere else.

9 And if they were available, believe me, the
10 libraries would prefer to buy that rather than make,
11 you know, these preservation copies. But when they're
12 not available anywhere else, they want the ability to
13 make these preservation copies.

14 And again, it just doesn't -- there is no
15 harm to any market because they're not on the market.

16 MS. RUBEL: Ms. Tanasse?

17 MS. TANASSE: I just want to emphasize that
18 at the University of California, Berkeley, we spend
19 more than a quarter of a million dollars annually on
20 licensing media content for our users -- for our
21 students, faculty, and staff. So, \$237,000 is spent
22 licensing media. We're not seeking to not pay to use
23 content.

24 Much of this home video content, however, at
25 this lower price point, it's not so much the full film

1 that's being used, but rather, clips or portions that
2 are being written about in scholarship. They may be
3 published in academic articles. They may be looked at
4 critically by students in their papers.

5 It's not so much the use of the full film
6 but what we might typically consider a fair use of a
7 feature film. So, our highest users of our home video
8 collections -- of Disney content and other content --
9 are actually ethnic studies classes where students and
10 scholars are looking at the representation of people
11 in film.

12 MS. RUBEL: Dr. Steffen?

13 MR. STEFFEN: Yes, with regard to the
14 question of preemptive preservation, to get back to
15 the concrete example that I gave of the Warner
16 Brothers DVDs -- so, I mentioned that 198 of the 767
17 titles are out-of-print. In many cases, or most
18 cases, they were only issued in that original edition
19 from 2006 to 2009.

20 They were never reissued. And I'm
21 including, you know, the Warner archive
22 manufacture-on-demand as a reissue. So, those things
23 I would consider in-print because you can purchase a
24 new copy. So, the thing is with these discs is that
25 we can't predict when they will go bad, and there

1 isn't a clear correlation between whether a disc will
2 be playable and whether there's clear signs of
3 deterioration.

4 I had discs with really patchy, visible
5 deterioration on them that still played okay and then
6 other discs that looked basically normal that would
7 not play all the way through, at all.

8 So, like, I think, in that case where we had
9 clear evidence that there were faulty pressings and
10 the discs were no longer available, and then you can
11 identify the plant that they were manufactured on by
12 the code on the hub of the disc.

13 Then, I think it would make sense for us to
14 make preemptive preservation copies of those
15 out-of-print discs to ensure that the content would
16 continue to be available for access.

17 MS. RUBEL: Mr. Taylor?

18 MR. TAYLOR: Yeah, I would just like to go
19 to that point right there that Dr. Steffan had used is
20 that, when you have disc rot, he said correctly that
21 you sometimes can, indeed, play something that looks
22 like it has visible disc rot. And disc rot, it can be
23 from the holes -- it looks like little termite holes,
24 or it can be the colorization on the bands, or it can
25 even be the disc peel.

1 Just because you see that doesn't mean you
2 can't play it, but it is a clear sign that, maybe, you
3 should take some action. Now, as far as the printing,
4 if it's a manufacturer-caused disc rot, generally
5 speaking, then that, you know relatively soon as soon
6 as you play it that there is a print error and that
7 was manufactured incorrectly.

8 So, you still have time in the marketplace
9 to go out and find a replacement copy, or send it
10 back, or participate in any of the other programs when
11 there's a manufacturing problem.

12 MR. AMER: Can I just follow-up on that?
13 And Mr. Marks, you can address this, too, if you'd
14 like. So, I mean, to the opponents, I take it that
15 your view is that it would be -- I'm trying to
16 understand what the parameters are of your objection.

17 So, would you agree that it's a
18 non-infringing use to the extent that this activity is
19 consistent with 108c? So, under 108c, it says you
20 have to -- the preservation right only applies if the
21 copy is damaged, deteriorating, lost, or stolen.

22 So, what does that mean in practice? I
23 mean, you know, how do you respond to Dr. Steffan's
24 point that, you know, it may not always be quickly,
25 you know -- it may not always be clear whether a copy

1 is deteriorating?

2 I guess, I'm trying to understand what
3 you're suggesting that any exemptions should say and
4 what should be required of libraries. Should they
5 have to make a case-by-case analysis to determine
6 whether each disc is, in fact, deteriorating, under
7 your view?

8 MR. TAYLOR: Under -- yes. I think,
9 absolutely, it should be on a case-by-case basis.
10 And, as I said earlier, there are two causes for disc
11 rot, manufacturer error and storage error. So, if
12 we're talking about disc rot from storage error,
13 meaning that you can see, visibly, that something's
14 going on here, then that's an opportunity for you to
15 say, okay, can we still play this, and can we still
16 preserve it?

17 Now, if it's the other kind of disc rot that
18 is a misprint where the adhesives aren't sticking
19 together or is not playing all the way through, you
20 know that usually when you start playing it.

21 And finally, I would just like to say that,
22 you know, DVD has been the most successful product --
23 home video product -- there has ever been, and we
24 don't see this marketplace crying out that they have
25 all these DVDs that aren't working. 99.9 percent of

1 DVDs, when they're kept right, stored correctly, not
2 left in a car, not left in an attic, not left in
3 humidity, they're going to work perfectly fine.

4 And we've seen this now for 20 years. So,
5 there's no reason not to expect them to continue to
6 work.

7 MR. AMER: Mr. Marks?

8 MR. MARKS: Thank you so much. I just
9 wanted to -- I think there's been a little bit of
10 back-and-forth about the preservation under Section
11 108 and its existing preservation which we're not
12 opposing. Obviously, that's the law, but that goes to
13 the disc copy. When we talk about, well, there's more
14 than 108 at-issue, there's also Section 107 in fair
15 use, I think our issue there is that, you know, in the
16 existing case law, space shifting of entire copies is
17 not found to be fair use.

18 That is our problem with the server copy,
19 and it's not just a matter of standing on that legal
20 principle, it's the notion that if you're proactively
21 preserving thousands of titles onto a server, you
22 know, that does cause a certain amount of threat if
23 the server is hacked.

24 MR. AMER: And so, could I just follow-up on
25 that? So, 108 doesn't say anything about the format

1 needing to stay the same. So, if we were, just in 108
2 land, libraries would already, I think -- tell me if
3 you disagree -- be entitled to make server copies as
4 long as it's only three copies.

5 Do you agree with that? I mean, is your
6 objection to the idea that there could be more than
7 three copies involved?

8 MR. MARKS: Well, I think -- and maybe Mr.
9 Williams can help me out here, or Mr. Taylor -- I had,
10 frankly, read 108 that the referencing physical copies
11 rather than server copies. But you folks are much
12 more the experts than I am, in the Copyright Office.
13 So, I could've been misreading that.

14 MR. AMER: Mr. Williams?

15 MR. WILLIAMS: Thank you. So, 108 as it
16 exists now has the preservation provision and a
17 replacement provision, and the preservation provision
18 is about unpublished materials, which is not what
19 we're discussing here today. And the replacement
20 provision only applies to copies that are already
21 damaged or deteriorating, which is also more limited
22 than what we're talking about here today.

23 I would agree with Dean Marks that, I think,
24 as 108 was written, it intended for a replacement copy
25 to actually be a replacement in a similar medium. I

1 think there is room for debate on that question. If
2 you go to the 108 study group's recommendations, for
3 example, they do focus on keeping it in the same
4 medium, keeping a physical copy a physical copy.

5 And I think that was a consensus position
6 amongst not just copyright owners but, you know, the
7 whole 108 study group. So, that's where I would come
8 out on it. I would also just like to say that, in
9 terms of this question of, you know, what does 108
10 allow now, we do think that should be the focus that
11 you guys have.

12 But this proceeding requires more than just
13 establishing a lawful use, right? So, there's
14 multiple steps in the process. You get a lawful use,
15 you have to look at available alternatives, and you
16 have to look at the 1201 factors.

17 And so, I would say even if you can
18 establish a lawful use under 108, which, as I
19 mentioned, does not go as far as they would like to,
20 as, I think, they can see. You'd have to look at
21 those other alternatives, which we think would include
22 downloads, streams, et cetera.

23 And then, just finally, because I think what
24 Mr. Steffan said was impactful, I wanted to try to
25 address it. I don't remember the exact numbers that

1 he gave, but he said, basically, a very large
2 percentage of his collection of Warner Brothers titles
3 he could not get in any format through
4 manufacturer-on-demand or otherwise, and I -- unless
5 I'm missing something, I don't think the entirety of
6 that collection is set forth in the comments.

7 But of the ones that we were given in their
8 comments that we looked at, we could find a lot of
9 them on new discs. And 32 -- footnote 32 -- of our
10 comments points to the ways you can get Joan Crawford
11 Collection, Volume 2, on new discs, as well as other
12 titles.

13 And so, I'm not questioning his good faith
14 search, but if we had the complete list of titles, we
15 might find more of them are actually available. So,
16 that's all I wanted to say.

17 MS. RUBEL: I want to move us along, just
18 for the sake of time, to talking about the marketplace
19 check that's included in the proposed exemption. And
20 I'll just cut to the chase. I want to give both sides
21 a chance to talk about why streaming services either
22 should or should not be considered as viable
23 replacement copies.

24 And, a related point, in the Library
25 Copyright Alliance's reply, it made a textual

1 argument about Section 108 C1 that the term "unused
2 replacement" refers to a material object. I would
3 like some further explanation of that, just to make
4 sure I understand the argument. Why don't we start
5 with Mr. Band?

6 MR. BAND: Sure. So, at the highest level,
7 many of the streaming services simply aren't available
8 to libraries. So, Netflix, Amazon, and so forth,
9 they, you know -- they do not -- their streaming
10 services are not available to libraries. They're only
11 for, you know -- for personal use, and, you know,
12 library can't do that. So, libraries can't access
13 that.

14 So, a huge tranche of the videos that might
15 be out there, simply are not accessible to libraries.
16 Swank, of course, does make some available, but the
17 titles it has are more limited. And, you know -- and
18 the other problem with any kind of service is that the
19 titles change over time. It just depends on what
20 titles are available at that service at that time.

21 And, you know, licensing arrangements are
22 changing all the time, and the market demand changes.
23 And, you know, we all have this frustration, right,
24 that there's a film we wanted to watch on Netflix, and
25 we put it on our list, and then, lo and behold, when

1 we finally got around to it, it was gone, right?

2 I mean, we all experience that, and so, this
3 is -- you know, there's nothing surprising about that.
4 And so, for that reason, you know, these streaming
5 services just can't be considered reliable for the
6 purpose of making sure that material is available in
7 five years, ten years, fifty years, for serious
8 academic research.

9 With respect to 108, it says, you know -- it
10 does talk about copies, and copies seems, to me, to
11 mean physical copy. I mean, that's the definition of
12 copies. And so, a stream is not a copy. You know,
13 it's a performance.

14 And so, it seems that that's certainly
15 what's contemplated. But even if it wasn't what's
16 contemplated, certainly in terms of what is practical
17 here, you know, again, given what the goal is of
18 preservation.

19 And then, let me just add the final point
20 is, again, as we've been saying, if it is available in
21 the market in a usable format, the library's going to
22 do that. That's what they're going to -- they're
23 going to always prefer that. And so, there's really
24 not going to be any meaningful harm to any market
25 because we're only talking about things that are

1 pretty much out of commerce.

2 MS. RUBEL: Ms. McCleskey?

3 MS. McCLESKEY: Streaming is in no way an
4 adequate replacement for a physical ownership of a DVD
5 or a copy. One of the problems is that if we license
6 something from Swank, for example, a student cannot
7 make a clip of that content and download it and
8 include it in a presentation with fair use for some
9 sort of comment or criticism.

10 And the same with the other educational
11 streaming services, which are wonderful services.
12 And, you know, I would say that my library, we are a
13 mid-sized, private, tuition-driven institution. We
14 spend, in a normal year, over \$60,000 on acquiring
15 licensed video content.

16 The vast majority of that is through
17 streaming platforms, and in the pandemic year, we
18 spent an additional \$20,000, a large chunk of which
19 went to Swank, a large chunk to Kanopy, a large chunk
20 to Criterion Pictures.

21 So, this is not us trying to avoid spending
22 money. We are attempting to preserve content. And
23 the other point I wanted to make was that we are very
24 used to doing this on a case-by-case, title-by-title
25 basis. We are very comfortable looking at the disc,

1 and not just the disc and its condition, but the
2 content of the disc and what it's offering to the
3 users.

4 And whether that's the extra content,
5 whether it's the commentary in the booklet that came
6 with it, it's the whole package. And so, streaming is
7 wonderful for many, many things. And we certainly
8 don't frown upon it, and it, in fact, at Hofstra it's
9 the preferred format for us even for acquisition.

10 I will buy a "life of file" license for
11 five, or six, or seven-hundred dollars for a title
12 rather than licensing it temporarily or buying a DVD.
13 But when it comes to actually physical ownership,
14 being able to use the thing as a physical object,
15 streaming is not a replacement. Thanks.

16 MS. RUBEL: Dr. Steffen?

17 MR. STEFFEN: Yes, I just wanted to
18 underscore the unpredictability of the marketplace
19 with titles. So, yes, if you're talking about
20 something, you know, that's, like, part of the major
21 catalog of a studio, it's likely it's going to be
22 available through Swank for a long time. So, you can
23 license it, you know, on a semester basis or year-long
24 basis, if you wish.

25 But titles do become no longer available.

1 In fact, I just had an example this spring where
2 someone wanted to use the film "The Graduate" by Mike
3 Nichols, in a course. And that film is complicated
4 because the rights, as far as I understand, are
5 jointly owned by MGM and Studio Canal, and it was
6 released on DVD and Blu-ray by the Criterion
7 collection.

8 And there is individual streaming on, say,
9 Amazon Prime that's through Lionsgate, but when I
10 approached Swank, assuming that, since it's Lionsgate
11 and Swank works with them, I'd be able to get it, they
12 came back to me, and they said, no, they lost the
13 rights to that sometime back.

14 So, we couldn't even license it for the
15 semester to make available for a class, much less, you
16 know, a long-term streaming access for the collection.
17 And that's all just because the film has been acquired
18 by different studios over the years, and the current
19 configuration doesn't make it amenable for academic or
20 library streaming.

21 MS. RUBEL: One last point I wanted to make
22 about the market check, it did seem to me like there
23 was some tension between the idea of preemptive
24 preservation, on the one hand, or the need for
25 preemptive preservation on the one hand, and also the

1 idea that you're doing a market check to see if there
2 are any replacement copies available.

3 I'm not sure this is really a question, but
4 if anyone wants to speak to that, it seems like
5 there's some tension between those two ideas. Ms.
6 Tanasse?

7 MS. TANASSE: I would say that our priority,
8 in searching, is always the goal of licensing and
9 acquiring a new copy. That is how I approach all my
10 curatorial work, is to make content accessible. And
11 the first choice is always to license and purchase.

12 And we have documented approaches to -- we
13 have the Mellon funded project that showed where do
14 you look to try to find where things are sourced. We
15 have communities of practice that support librarians
16 in finding out how to acquire films. So, our goal is
17 always to acquire a new, legal copy to license, when
18 possible.

19 It's only when you can't find something,
20 that you begin to think of preservation copy.

21 MS. RUBEL: Mr. Band?

22 MR. BAND: Yeah, if I just might add, I
23 understand your point about the tension, but the point
24 is is that a library isn't going to just say, okay,
25 we're now going to be preserving all of our

1 collection. I mean, that's just not realistic.

2 That's not how it's going to go about things.

3 It's going to go, say, well, you know, here
4 are some films. Maybe it's, you know, this film isn't
5 in great condition. Is it, you know, if we're using
6 the terminology of 108, I mean, is it damaged,
7 deteriorating, lost, or stolen? Well, it's not lost
8 or stolen, hopefully.

9 You know, how damaged is damaged? How
10 deteriorated is deteriorated, right? So, it might be
11 a little deteriorating, a little damaged, but that
12 might be enough to say, you know what, this is
13 something we want to make sure we have in the future.
14 Let's do a market check.

15 And then they do a market check and say, no,
16 we can't. There's nothing in the market. And then
17 they might say, okay, let's preserve it, meaning it is
18 going to be on a case-by-case basis. And, you know,
19 because these terms are not completely
20 black-and-white, you know, is it damaged enough to
21 meet 108 -- you know, the 108 standard, but maybe it
22 isn't damaged enough to meet the 108 standard.

23 But that's why we would want the flexibility
24 to say, well, it should be preventative, meaning if
25 it's a little damaged but not unreadable, right? You

1 know, again, because it's -- so much of 108 is based
2 on books, right? And with a book, even if a book is
3 in pretty bad condition, or you can still read it,
4 right? Or you can, sort of, assemble different
5 chapters from different books and put it together.

6 You can't do that with a DVD, right? If
7 parts of it are deteriorated, it's gone. It's
8 useless. And so, a little bit of deterioration is
9 very problematic with a DVD in a way that it isn't
10 with a book. And so, to some extent, the issue with
11 preventative preservation really does to that, that
12 we're not -- you know, they're not completely
13 analogous.

14 MS. RUBEL: I want to thank Mr. Evjen and
15 Ms. Nelson for their patience. We are finally getting
16 to you. We're going to talk a little more about the
17 current marketplace for licensing. So, why don't we
18 start with Swank? And Mr. Evjen, I'm going to allow
19 you to share your screen so that you can talk through
20 some slides that you prepared.

21 MR. EVJEN: Yeah, and Barb, why don't you
22 kick us off? I'll share this screen, Barb.

23 MS. NELSON: Sure. Thank you. I think it's
24 important to note that Swank has been providing this
25 service that Mr. Evjen is about to show, for just over

1 nine years. And although we are probably most known
2 for the Hollywood content, we also have agreements
3 with distributors that are very niche, several
4 American independent, foreign distributors, and our
5 collection actually is just under 40,000.

6 So -- and when we are working with our
7 clients, currently we're in over 1,000 colleges and
8 universities throughout the U.S., it is very rare that
9 we are asked for a picture that we do not represent.
10 I know it was mentioned earlier about The Graduate --
11 yes, of course, from time to time, there are some very
12 tricky ones, The Graduate being one of those.

13 But that is very rare, and it generally is
14 about 1 percent of the time where we are unable to
15 provide a piece of content that has been requested by
16 a client. So, with that, Bill, would you like to,
17 kind of, get into the details of how the service
18 works?

19 MR. EVJEN: Thank you, Barb, I will. The
20 main thing here is this is in regards -- the product
21 is called Swank Digital Campus, and this is something
22 we use and work with from a librarian standpoint. So,
23 we engage the institution, the university, the school,
24 for content that is going to be used for academic
25 purposes.

1 You know, in the past -- it was mentioned
2 beforehand -- things were used like movie reels, then
3 VHS, then DVDs and Blu-rays. A lot of problems with
4 these physical forms is you have to consume an entire
5 class to view that content with the students there.

6 The world, and generally what we do now, is
7 a digital world where the content is licensed for
8 academic purposes, and the studios make available
9 their catalogs for us to use, whether it's on DVD or
10 not. We can have access to their full catalogs of
11 content, and we work with the librarians on a set list
12 of content that they have worked with their
13 instructors to bring onto the site.

14 And then, we make this available. And when
15 it's in a digital form like this from us working with
16 the studios, we're able to maintain the studio content
17 protections, the encryptions, or the DRM that is
18 required, and it allows a lot of other niceties in
19 that we're able to provide a number of languages,
20 ADA-compliant content as well, with closed captioning.

21 So, this is a view that the instructors or
22 the librarians would see of the content that was
23 chosen by that institution for that semester or that
24 year, and the instructors are then able to view the
25 titles that are available to them for their classes,

1 and they are also able to see some details about that.

2 And then, they are also able to view this
3 themselves. Viewing includes, again, different
4 languages, closed captioning, abilities to you know,
5 cast to a television, like a Chromecast, further
6 details about the title, and they can stop, start,
7 play this as many times as they want.

8 A professor or an instructor is then able to
9 share this with their students, either by a direct
10 link, or a link that goes into their learning
11 management system which a lot of them use, whether
12 it's K-12 or whether it's, you know, more academic
13 institutions.

14 They make that content available. The
15 student then, in turn, is able to view this title as
16 many times as they want during the semester, during
17 the school year, and more importantly, different than,
18 let's say, a DVD or a Blu-ray in the class and the
19 student needing to be there, a student can view this
20 and consume this content on their personal device
21 outside of the classroom and still have those, you
22 know -- none of those restrictions on number of plays,
23 and they can jump to any point in the film as they
24 wish.

25 From there, let's say a professor or an

1 instructor has a title the librarian has not procured.
2 In that case, we expose out our entire catalog of
3 content -- those titles, you know, 40,000 plus titles
4 that are mentioned -- and they can find a title, see
5 the details about it, and you'll see that blue request
6 button there on the bottom, make a request for that
7 title.

8 That request then gets sent as an email to
9 the librarian of the institution. You know, it's
10 their job to procure these digital assets, and they
11 can approve or not approve that, and then that title
12 will then be fulfilled by Swank and made available.
13 It is also possible for the librarians or the admins
14 of this at this institution to completely customize
15 this.

16 They can put it in their own categories of
17 content. They can also get full reports on the usage,
18 how those titles are used, how often, and when. And
19 then, they can customize this and brand it completely
20 as their own look and feel, their own logo, so it
21 appears like any other application within their
22 institution.

23 So, this is a very high-level, three-minute
24 view of the solution. It's actually very deep and
25 something that is constantly in continuous

1 development, also along with the studios in making
2 sure that the security, the protections, the
3 encryptions, the digital rights management, is to the
4 latest and always protecting the content. That's the
5 most important. Thank you. I'll stop sharing.

6 MS. RUBEL: Thank you very much. And I know
7 Mr. Taylor also had a short presentation about Hoopla
8 and Kanopy.

9 MR. TAYLOR: All right. Before I share my
10 screen, I may lose my sound, and hopefully you guys
11 will continue with sound. So, somebody raise their
12 hand and let me know that sound's not working if
13 that's the case.

14 (Prerecorded presentation begins.)

15 Hi, everyone. This is Donna, Technology and
16 Media Librarian for Arlington Public Library. In this
17 video, I'll show you how you can connect your Hoopla
18 and Kanopy accounts to your streaming media device so
19 that you can stream free movies and television shows
20 from your TV rather than using your phone or your
21 tablet.

22 Hoopla and Kanopy are two of the free
23 services that are available to you with your Upper
24 Arlington Public Library card. Hoopla has movies and
25 television episodes that you can stream, while Kanopy

1 has thousands of independent films and documentaries
2 also available for you to stream.

3 Hoopla, overall, will offer you access to
4 both music and audiobooks as well as movies and TV,
5 but only movies and television will be available to
6 stream from your TV. So, in this case, I'm going to
7 go to the search, and I'm going to search for one of
8 my favorite romantic comedies, which is also my
9 favorite genre of movie, and that is "Amelie".

10 Now, once you find a movie that you like,
11 you search for it, you see it in your results, you're
12 just going to click on it to select it. You're going
13 to see the title details for that movie, and then when
14 you're ready to check it out -- and this includes
15 movies or television episodes -- you'll click "borrow"
16 and then "play", and it'll start streaming.

17 You can borrow up to ten items total on your
18 UAPL Hoopla account every month. So, that would
19 include movies, television episodes, and it would also
20 include any audiobooks or eBooks, or comics, or music
21 albums that you decide to check out as well. And your
22 borrows will reboot every calendar month.

23 Adding Kanopy to your Roku or to your other
24 streaming device will be the same process. You'll
25 return to your Roku home screen and open the Kanopy

1 app. So, then when you return to the Kanopy app on
2 your Roku, you can start browsing to see what movies
3 are available. Now, unlike Hoopla, Kanopy is
4 exclusively movies, and that includes more than 20,000
5 feature films and documentaries.

6 It also includes unlimited access to the
7 Great Courses education series, and a selection just
8 for kids, on Kanopy. Like Hoopla, you can borrow ten
9 movies per month on your account, using your Upper
10 Arlington Public Library card, and you can browse
11 through the selection. You can browse for different
12 subject matters.

13 You can browse for different categories.
14 You can see some of the carousels that they have
15 preselected for you, and of course, you can click on
16 the magnifying glass to search for a movie by name
17 directly.

18 Once you find a movie that you'd like to
19 borrow, click on it, and then you'll see that there's
20 a description of it. You can add it to your watch
21 list. You can also click to see a much more expanded
22 description, but all you'd need to do to officially
23 borrow it is press the play button, and then it'll
24 begin streaming on your device.

25 And, of course, you can go back and see what

1 else is available on your watch list. That's sort of,
2 like, don't forget about these movies, or a "save for
3 later" list. And you can also go back and see what
4 you're currently watching.

5 So, that's it. That's how you can enjoy
6 Hoopla and Kanopy on a streaming media device for your
7 television.

8 (End of prerecorded presentation.)

9 MR. TAYLOR: All right. I would just like
10 to point out the distinction of those services versus
11 Netflix. These services are a pay-per-use service,
12 and Netflix and Prime Amazon, they're subscription
13 services. So, you don't necessarily see the same
14 phenomena with these services that you do with Netflix
15 and Prime because they have an all access, and those
16 movies are only available for a certain time period,
17 and that's why they disappear.

18 When you're using another business model
19 such as pay-per-use, it's less likely that those
20 movies and titles are going to disappear.

21 MS. RUBEL: So, I see we have a couple folks
22 who wanted to comment. Let me just pose a specific
23 question to you. I'm interested in hearing what kind
24 of uses by the university community are not provided
25 for through these services that we just saw

1 presentations about? And why don't we start with Ms.
2 McCleskey?

3 MS. McCLESKEY: Sure, thanks. And I will
4 start by saying that Hofstra is a pretty robust
5 customer of both Swank Digital Campus and Kanopy.
6 Hoopla, of course, is mainly private libraries.
7 Kanopy's in both. Also, I'm on the Digital Campus
8 Streaming Service Advisory Committee as well as the
9 Kanopy Content Advisory Board.

10 So, I have some relative degree of
11 familiarity with these services, and they're great.
12 But they don't have everything, and I think for Swank
13 to assert that they can fulfill 99 percent of requests
14 is really disingenuous because Swank doesn't own 99
15 percent of the content, or license 99 percent of the
16 content.

17 Kanopy has the Criterion Collection.
18 Criterion Pictures, USA has 20th Century Fox. And all
19 of these things, to some extent, titles move around
20 from service to service as rights are sold. But
21 there's no platform that has everything. That's why
22 we have Kanopy, and we have Swank, and we have
23 Alexander Street Press, and we have Films on Demand
24 and other platforms.

25 So, the point is, no one has everything, and

1 a lot of content, no one has it, period. So, there
2 are things I just can't get on the streaming services
3 that are taught. And that's where we, sort of, fall
4 down in trying to say, well, streaming is an adequate
5 substitution for our entire DVD collection because
6 that's just not the case.

7 MS. RUBEL: Ms. Tanasse?

8 MS. TANASSE: I agree that these are
9 fabulous platforms that we rely on to provide
10 day-to-day access to our students, researchers, and
11 instructors. I have a mug here that I'm not showing
12 on screen because it is from one of these providers.

13 I am also on the Kanopy Content Advisory
14 Board. For me, a robust, healthy, video marketplace
15 -- an educational video marketplace -- is incredibly
16 important because that is the content that we are able
17 to provide to our users, and we put a lot of money
18 into it.

19 But even with the video of the Kanopy
20 platform that is focused on public libraries, there is
21 content that is available to public libraries through
22 Kanopy that is not available to academic institutions.
23 So, I saw titles on there that are not available to me
24 for licensing on UC-Berkeley's Kanopy platform.

25 And the reality is that these platforms tend

1 to not own the copyright on their films. So, they are
2 using licensing agreements to make them available.
3 Titles that I had licensed from Kanopy last year are
4 no longer available to me to license this year. So,
5 the content does out-of-print, and my preference is
6 always for that highest-quality video stream to make
7 available to our highest number of users.

8 I see this on-site preservation access
9 simply as a stop-gap, one that is not ideal.

10 MS. RUBEL: Dr. Steffen?

11 MR. STEFFEN: Yeah, to speak to this issue
12 of streaming video availability, one of the areas
13 where I've been seeing a lot of challenges is actually
14 PBS educational documentaries because they're produced
15 by -- they're sometimes independently produced.
16 There's limited licensing agreements which enable for
17 PBS broadcast and home video releases.

18 So, we do buy the physical item on DVD, and
19 as you may know, they often have special licenses that
20 allow for public performance rights on campus as well.
21 But when we try to license the videos for streaming,
22 we're often finding that when we reach out to the
23 individual studio, they can't license it to us because
24 of some underlying rights issues.

25 And the availability of the content has also

1 shifted a lot over the last several years. Like,
2 there was a large collection on Kanopy. That went
3 away. There was a good number of titles on Alexander
4 Street Press. I believe there's some titles on Films
5 Media Group as well, but the available is spotty, and
6 the track record for licensing individual titles for
7 streaming is not great.

8 So, we don't have a high success rate for
9 things that are not already available on one of those
10 platforms.

11 MS. RUBEL: Mr. Band?

12 MR. BAND: Yes, I just wanted to add -- this
13 is a point that some of the librarians made before,
14 but -- whereas these platforms are great for in
15 classroom use to allow students in classes to see
16 videos, it's not great for research purposes,
17 especially if you want to make clips for inclusion in
18 scholarship because my understanding is those rights
19 aren't included.

20 And so, you know -- so, if you're a scholar,
21 and you want to make a clip, you really can't use
22 these services.

23 MS. RUBEL: Mr. Taylor?

24 MR. TAYLOR: Yes, I find that point very
25 interesting because we have an entire 1201 proceeding

1 that says they can, indeed, make clips from those
2 services. So, you know, I'm baffled by that. But I
3 would also point to the fact that these services, they
4 are young. I mean, DVDs have been around for twenty
5 years. These services are five, six-years-old. I
6 think you have to keep that in mind.

7 You asked earlier, is it fair to do a market
8 check and say if the videos are available on streaming
9 services, should that count? And the history of this
10 proceeding has always been yes. If it's available in
11 another format to the user, we spent the first two or
12 three proceedings considering whether or not titles on
13 DVDs were still available on VHS. So, I see it
14 completely analogous and consistent to say that if it
15 is available on the streaming service, then that
16 should count.

17 MS. RUBEL: Mr. Williams?

18 MR. WILLIAMS: Yes, thank you. Just quickly
19 on a few topics. We were discussing "The Graduate"
20 and whether it was available on Swank or not. As best
21 I can tell from a quick search, it's available new on
22 discs. So, at least for purposes of this exemption
23 proposal, we wouldn't even need to get to whether it's
24 available on a streaming services because you can
25 still buy the Blu-ray and DVD copies of "The Graduate"

1 brand new on Amazon.

2 So the market check would result in people
3 being able to acquire that. I agree with Mr. Taylor
4 that, when it comes to clips, we do have separate
5 exemptions that deal with that issue that cover both
6 discs and online transmissions. So I think clips are
7 already addressed through those other exemptions.

8 With respect to the issue that, you know,
9 not any given streaming service or download service
10 has access to every title, that's true, and I can see
11 why it's frustrating and can be somewhat time
12 consuming. But to me, that is evidence of a market
13 that is working properly. The fact that not every
14 title from every copyright owner is available on only
15 one service means there's competition.

16 There are multiple services developing.
17 They are trying to win the market competition and
18 prove that they're the best service. And so, there's
19 a healthy market there that we need to continue to
20 allow to develop.

21 And then, just a couple of final points on,
22 kind of, the scope of what's been proposed in the
23 exemption. You know, we've expressed opposition to it
24 generally today, but I do think a couple of things
25 came through in the testimony and the comments that if

1 you were inclined to consider it, would be important
2 for you to think about.

3 One is we've heard a number of times that
4 really what the focus of this proposal is, is research
5 uses by academics in university settings. And so, any
6 exemption that's considered, I think you'd want to
7 consider limiting it in some fashion to those types of
8 uses and defining research in some way that is
9 meaningful so that you're not dealing with just
10 entertainment uses of motion pictures, et cetera.

11 And then, we have good representatives from
12 university libraries here today, and they've given
13 compelling testimony, but we don't have, really
14 examples of the need for this throughout all
15 libraries, archives, and museums. And so, I think
16 those are two limitations worth considering.

17 Finally, the fact that Netflix is offered to
18 consumers is true. It's a personal use subscription
19 model, but as I've mentioned in other panels,
20 circumventing things is not allowed by the terms of
21 use either. So when we hear, you know, terms of
22 service as a limitation, it doesn't necessarily compel
23 me because, one way or another, somebody's hacking
24 something they're not supposed to hack here, or using
25 something in a way they're not supposed to use it.

1 So, that would be my last thought on that.

2 MS. RUBEL: Right, we're going to give Ms.
3 Tanasse and then Mr. Band the last word.

4 MS. TANASSE: I wanted to speak to that
5 question of the ability to make clips on platforms.
6 That is an option to authenticated users at
7 institutions that have those platforms, but if we're
8 talking about scholars publishing articles and the
9 questions of screenshots, while copyright is at play,
10 university libraries enter into licensing terms with
11 each of these platforms that prevent clipping that is
12 outside of the platform.

13 So, the viewing must be done by
14 authenticated users within the platform, and the
15 question of taking screenshots, from my awareness of
16 all of our licenses and purchase agreements, is not an
17 option on any of these platforms. So, that streaming
18 surrogate is not a good option for these regular
19 elements of the scholarly conversation and scholarly
20 publishing.

21 MS. RUBEL: Mr. Band?

22 MR. BAND: Yes, if I could just respond to
23 another aspect of the existing exemption for clips.
24 Yes, you can circumvent CSS for the purpose of getting
25 a clip, but this is -- here, the problem is that the

1 content might have disappeared, might no longer be
2 available by the time you need to make that clip,
3 right?

4 Because it needs to be preserved before you
5 can make a use of it. So the existing clip
6 compilation -- existing exemption for purposes of
7 making clips doesn't address the problem here because
8 the content might not be around in order to make that
9 clip in the first place.

10 MS. RUBEL: Before I pass it over to Mr.
11 Amer, I just want to thank everybody very much for
12 their participation. You definitely kept it lively
13 and interesting, at least from my perspective. So,
14 thank you very much, and I'll pass it to Mr. Amer.

15 MR. AMER: Yes, thank you all very much for
16 participating. I agree. It was a very helpful
17 discussion, from our perspective. We are going to
18 adjourn for now, and we will be back at 1 o'clock to
19 talk about Class 14. Thanks very much.

20 (Whereupon, at 12:19 p.m., a lunch break was
21 taken, to reconvene at 1:00 p.m. later that same day.)

22 //

23 //

24 //

25 //

1 posted on the Copyright Office website (Technical
2 Interference).

3 THE COURT REPORTER: Hello, this is the
4 Court Reporter. Mr. Amer, we seem to be losing you.

5 MR. AMER: Oh.

6 THE COURT REPORTER: You're okay now, but we
7 lost the past, maybe, 10, 15 seconds.

8 MR. AMER: Okay. Does this sound okay?

9 THE COURT REPORTER: Yeah. I think you're
10 good now. It was, maybe, just a momentary slowdown.

11 MR. AMER: Okay. Finally, as we've
12 indicated, on Wednesday afternoon, we're going to be
13 having what we're calling an audience participation
14 session. For those who would like to join that
15 session, you can sign up using the link that is now
16 provided in the chat, and on Wednesday afternoon you
17 can join that session using the same day's link that
18 will be available for the hearings on Wednesday.

19 So as I said, this hearing is on Class 14.
20 I would like to first invite those of us on the
21 Government side to introduce themselves. So, could we
22 start with Ms. Rubel and Mr. Riley?

23 MS. RUBEL: Good afternoon. Jordana Rubel,
24 Assistant General Counsel.

25 MR. RILEY: John Riley, Assistant General

1 Counsel.

2 MR. AMER: And Mr. Zambrano?

3 MR. ZAMBRANO-RAMOS: Thank you, Mr. Amer.

4 This is Luis Zambrano-Ramos. I'm a Policy Analyst in
5 NTIA's Office of Policy Analysis and Development.

6 MR. AMER: Great. And now, I would like to
7 invite the participants to introduce themselves. So,
8 let's start with the proponents. So, Mx. Albert, Mx.
9 Teitler -- I hope I'm saying that correctly -- and Ms.
10 Woodall?

11 MX. ALBERT: Sure. Kendra Albert. I'm an
12 attorney with the Cyber Law Clinic representing the
13 Software Preservation Network.

14 MX. TEITLER: Maisie Teitler. I'm a
15 Teaching Fellow in the Cyberlaw Clinic representing
16 the Software Preservation Network.

17 MS. WOODALL: Madeline Woodall. I'm a
18 Student Attorney at the Cyberlaw Clinic representing
19 the Software Preservation Network. Thank you.

20 MR. AMER: And Mr. Band?

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

23 MR. AMER: Dr. Ruberg?

24 DR. RUBERG: I'm Dr. Bo Ruberg. I teach
25 digital media at the University of California-Irvine.

1 MR. AMER: And Dr. Lowood?

2 DR. LOWOOD: Hello. I'm the Harold C.
3 Hohbach curator at Stanford University. I'm
4 responsible for the film and media collections and the
5 history of science and technology collections.

6 MR. AMER: Great. And now I would invite
7 the opponents to introduce themselves. Let's start
8 with Mr. Englund.

9 MR. ENGLUND: Hi, this is Steve Englund of
10 Jenner and Block. I'm here for the Entertainment
11 Software Association.

12 MR. AMER: And Mr. Williams?

13 MR. WILLIAMS: Yes, Matt Williams of
14 Mitchell Silberberg and Knupp for the Joint Creators
15 and Copyright Owners.

16 MR. AMER: Great. Thank you all for
17 participating. So, to start off, I would like to talk
18 about some of the scope of offsite access that's being
19 requested here because there seems to have been some
20 dispute in the comments about what actually is being
21 contemplated. So, I'd like to start, if I could, with
22 the proponents.

23 I'm hoping that you could provide just a
24 general overview of what sorts of offsite access is
25 being contemplated by your request. In particular,

1 are you talking about providing individual copies of
2 programs, streaming, and any sort of limitations that
3 you're envisioning with this petition? Mx. Teitler?

4 MX. TEITLER: Yes, I'm happy to answer this
5 question. So, we believe that there are a number of
6 non-infringing uses that could be contemplated under
7 this exemption. For instance, controlled emulation
8 for researchers and scholars to interact with, and
9 research, obsolete games. Also controlled
10 screensharing of materials for remote learning classes
11 -- a number of uses that would be lawful under both
12 107 and the Teach Act that could be carried out under
13 this exemption.

14 MR. AMER: Yes, Mx. ALBERT?

15 Mx. ALBERT: Just to second what Mx. Teitler
16 said, we didn't lay out a clear, sort of, list of what
17 our potential authorized offsite methods of access
18 because we believe that libraries and archival
19 institutions need the flexibility to determine what is
20 the best, sort of, non-infringing use for the
21 particular work and for the particular circumstances.

22 You know, that might include, in certain
23 cases, making an emulated version available. It
24 might, in certain cases, including loaning out a work.
25 You know, they ultimately, you know, video games and

1 software more generally, is a sort of, very -- it's a
2 broad category. There's a lot of different potential,
3 sort of, uses and types of works.

4 And so, we don't believe that writing in
5 particular restrictions into the exemption would be an
6 effective way of resolving the, sort of, individual
7 needs of archival institutions.

8 MR. AMER: Now, as you know, one of the
9 concerns, obviously, that we've heard -- and I'm,
10 obviously, going to give the opponents a chance to
11 address this -- but one of the concerns that we've
12 heard is that, you know, as drafted, your proposal
13 does not include any of the limitations in terms of
14 number of copies that can be distributed.

15 It seems to me that one analog to your
16 proposal is 108(e) which provides some opportunity to
17 provide individual copies. But it's limited to single
18 copies, and there's language in the statute about
19 preventing systematic reproduction and distribution.

20 So, I'm wondering what your response is to
21 that concern. Yes, Mx. Teitler?

22 MX. TEITLER: So, I think 108(e) is a
23 helpful analog here. 108(e) does have a user-end
24 number limitation, but it doesn't actually impose the
25 same numerical limit on the library end. And so, if

1 we were to have analogous restrictions here, which,
2 again, might be appropriate in some instances but, in
3 other instances, fair use and the Teach Act might
4 cover additional copies, that restriction would be
5 applied on the user end rather than the library end.

6 MR. AMER: Yes, so, Dr. Ruberg?

7 DR. RUBERG: I just wanted to speak briefly
8 from the academic perspective. So, in terms of number
9 of copies, to give some context, I often teach video
10 games in quite large classes. So, when we're talking
11 about undergraduate students, I teach a class on
12 digital media and society at UC-Irvine that is
13 350-students large.

14 So, it's just to give you a sense that
15 often, for really core educational classes that teach
16 literacy in digital media, we actually need quite
17 large numbers of, again authenticated and official
18 students accessing the material.

19 MR. AMER: Okay. So, I wanted to follow up
20 on one point that was made, which is this idea that
21 this single copy limitation applies to the end-users
22 but not, in your view, necessarily, to, I guess, the
23 preservation copies. Is that what you're saying?

24 So just so I understand, so when you talk
25 about making copies available offsite, are you talking

1 about end users who -- students, researchers, et
2 cetera -- or are you talking about people who would be
3 doing some of the preservation work, or both? Yes,
4 Ms. Teitler?

5 MX. TEITLER: I think we're primarily
6 talking about users. So, with 108(d) and 108(e),
7 those copies are meant to preserve the traditional
8 scholarly right to conduct research at home with one's
9 scholarly materials that has been enjoyed by libraries
10 and their patrons for centuries, with traditional
11 materials.

12 While there might be some cases where
13 archivists could conduct work offsite remotely that
14 would be fair, I don't think that 108(d) and 108(e)
15 specifically would encompass those uses. Does that
16 answer your question?

17 MR. AMER: Partly. So, in terms of what
18 your proposal is trying to get at, you're trying to
19 implement something analogous to 108(d) and (e) that
20 would provide for, you know, the equivalent of what's
21 provided for in those exemptions?

22 MX. TEITLER: Our view is that there are a
23 number of uses that are legally permissible that are
24 not currently allowed because of the on-site
25 limitation that was put in the previous rulemaking.

1 That includes uses such as analogs to 108(d) and
2 108(e) but might also include some additional uses
3 that would be fair under a case-by-case fair use
4 analysis, which, again, is very fact-specific and very
5 individual and is the reason that we believe that this
6 broader language that would allow libraries, which are
7 very risk-averse institutions that are accustomed to
8 making these kinds of decisions about their
9 traditional materials, to analyze and decide on an
10 individual, case-by-case basis, what would be
11 appropriate.

12 MR. AMER: Mx. Albert?

13 MX. ALBERT: Just to second what Mx. Teitler
14 said. So, I think that, yes, we -- like, I could
15 imagine certain circumstances where 108(d) or 108(e)
16 style, that, sort of, loaning out, sending a copy
17 would be appropriate, but for lots of video game uses,
18 that's just not going to be a useful idea.

19 Like, let's say, "oh, great, like, you get
20 this floppy of this 1980s game." I will send it to
21 you, right, this individual copy. Well, if I'm a
22 scholar or researcher, like, great. I now have this
23 copy I can't use. So, there may be circumstances in
24 which something like, sort of, emulation as a service
25 or other types of access are just going to be more

1 appropriate to the particular work.

2 So, we didn't want to limit it to the kinds
3 of restrictions that are in 108(d) and (e) because we
4 don't think that's necessarily consistent with the
5 different ways in which folks need to use these works,
6 including what Dr. Ruberg talked about, about, sort
7 of, access for teaching.

8 MR. AMER: Okay. So, to follow up on that,
9 I think one of the -- and I want to bring in the
10 opponents, too -- but one of the concerns or, maybe,
11 points of confusion seems to be that the current
12 language talks about preservation, right? You know,
13 and so, the current language, in some respects, tracks
14 Section 108(c), although not entirely.

15 So, I think there is some question about if
16 you're asking an exemption that covers these
17 additional activities -- teaching and scholarship and
18 so forth -- whether that would need to be spelled out
19 more clearly in the language of the exemption because
20 those things aren't necessarily limited to
21 preservation. I wonder if you could -- yes, Dr.
22 Lowood?

23 DR. LOWOOD: Yeah, maybe it would help if I
24 said a few words about why libraries engage in
25 preservation in the first place. Surely, there's many

1 benefits to that, many cultural heritage reasons for
2 doing it and so on and so forth, but in terms of our
3 core mission as university-based libraries and
4 archives, we support instruction, and we support
5 research.

6 So, the preservation activity should not
7 really be thought of as separate from provision of
8 access. It's really the reason that we expend
9 resources in these expensive projects to preserve
10 software, various kinds. We do it in order that
11 classes like Professor Ruberg's can be conducted and
12 that researchers who come to us for access to
13 historical materials can be served.

14 MR. AMER: I wonder if either Mr. Englund or
15 Mr. Williams, you wanted to speak to the concern you
16 raised in your comments about this apparent lack of
17 restrictions on the parameters of the offsite access?

18 MR. ENGLUND: Sure, I'll take a stab at it,
19 and Mr. Williams may want too as well. But, first, I
20 want to be clear that video game companies support
21 legitimate preservation by responsible preservation
22 organizations. But, like you, Mr. Amer, I've, kind
23 of, struggled to figure out exactly what it is that's
24 being proposed here. The original proposal regulation
25 didn't have hardly any limitations at all on the use

1 beyond they'd have to be a library and archive's
2 preservation.

3 And the reply comments suggest some
4 limitations that possibly the proponents would be
5 willing to accept, but they aren't very limiting at
6 all. This may not be the time to get into that, but
7 I'm happy to do so.

8 But then, today, at the panel, we've been
9 talking about distribution of copies, and I didn't
10 understand, from the comments that were filed in
11 writing, that distribution of copies was even in the
12 cards here and it was not obvious to me that that
13 really works because video games and video game
14 consoles tend to have interoperable technological
15 protection measures. So, simply passing out copies of
16 games doesn't necessarily mean that they will be
17 playable on consoles unless this is also about
18 allowing all of the students in a class to hack
19 consoles.

20 If this is focused on emulation and it's
21 focused on scholarly purposes, I think the regulation
22 doesn't do it. And it's also, kind of, confusing what
23 the proposed regulation says because the initial
24 comments from the proponents marked up clause 12(2) of
25 the regulations while the reply comments marked up

1 12(1)(b) of the regulations. It was two different
2 paragraphs of proposed regs.

3 But, either way, there aren't a lot of
4 limitations here. And so, I think the Office's task
5 is to analyze the full possible scope of what is
6 permitted under any particular regulations under
7 consideration. And I think, based on what we're
8 hearing so far, it's one that would allow any public
9 library in America to engage in circumvention of TPMs
10 without a limitation to university libraries or
11 research purposes, or much of anything else.

12 And if you then apply your fair use analysis
13 to that, I think you conclude that there are lots of
14 uses that aren't the kinds of uses that the proponents
15 are talking about.

16 MR. RILEY: I'd like to jump in, and maybe
17 it would be a good point here to talk a little bit
18 more about the concept of controlled emulation and
19 what is actually happening there. I think that the
20 record can, kind of, use a little more discussion on
21 that point because it doesn't look like the exception
22 is looking for emulation or a controlled screensharing
23 language in the exemption itself.

24 So, if someone would talk about where copies
25 are made and what other 106 rights are implicated by

1 that, that would be helpful. Mx. Albert, I see your
2 hand is still up. Would you like to address that?

3 MX. ALBERT: Sure. I think I can understand
4 that there might be some lack of clarity on what we're
5 proposing. That's merely because we're trying to
6 accommodate the wishes of the Entertainment Software
7 Association and the Joint Creators. In terms of
8 adding additional restrictions to the exemption that
9 we think will do their best to minimize the harm onto
10 preservation institutions while preserving the
11 interests of video game makers and to harmonize the
12 eligibility restrictions across the two software
13 preservation exemptions -- or, two of the three
14 software preservations exemptions, which we know is a
15 subject of much confusion.

16 In terms of the controlled emulation or the
17 108 copies, like, the purpose is to allow archival
18 institutions in the way that meet the eligibility
19 criteria proposed by the Copyright Office in 2017 as
20 part of the discussion document, to do what they do
21 with all of their collections, which is make a
22 determination about what an appropriate use is, given
23 the rights of the copyright holder, and then engage in
24 those uses.

25 So, some circumstances, those might be

1 controlled emulation uses. And I think Dr. Lowood can
2 talk a little bit more about how exactly that works.
3 But the point is that the specific restrictions
4 around, like, you -- it's only good for this thing, is
5 totally inconsistent with how archivists and
6 preservationists actually preserve video game works.

7 And the core problem here is not that the
8 works aren't being preserved because there's actually
9 no ability, and there's no ability for scholars to
10 access. So, I think that, you know, if the Copyright
11 Office thinks it's appropriate to include those sort
12 of -- I think it's 108(d) -- style language around
13 notice of access to the work -- or, notice that access
14 to the work is for no purpose other than private
15 study, scholarship, or research, in order to offset
16 some of the concerns about, sort of, general online
17 access to arcades, I think that we, as proponents
18 would be okay with that.

19 And we, obviously, are suggesting importing
20 the eligibility requirements that were part of Class
21 14a, the video game Class, to 14b. But I'll let Dr.
22 Lowood talk a little bit about the controlled digital
23 emulation space because I think he's better equipped
24 to talk about the realities of that.

25 DR. LOWOOD: Yeah, I'll go ahead and do that

1 now, if that's okay. First, I should say, controlled
2 emulation is something that's being tested now. There
3 aren't a lot of actual services that have been stood
4 up. In the academic library and archives world, the
5 idea behind controlled emulation is that collections
6 available at one institution could be made available
7 to authenticated researchers or to students at a home
8 institution, or possibly at other institutions as
9 well.

10 Again, these would be authenticated users.
11 It's an online system that allows for that. The
12 situation with rights for access is a bit of a
13 stumbling block right now. We, under the current
14 regulations, we feel like it's going to be very
15 difficult to do that. But, you know, Stanford, any
16 major library that is involved in creating a service
17 like this is going to be very attentive to the
18 rightsholders and their interests.

19 We're not going to be putting anything up on
20 the open web. This will be a closed system with
21 authenticated users, and pretty much restricted to the
22 researchers and students or other groups that we've
23 mentioned earlier.

24 MR. RILEY: Can you explain a little bit
25 more about, you know, where the copies are in

1 emulation? Because I'm not entirely sure I follow,
2 you know, is the operating system being emulated? How
3 does that work with the game, for example? I just
4 think you need to walk us through it a little more
5 slowly.

6 DR. LOWOOD: Yeah, so, you know, we have a
7 software collection at Stanford. Say, we pick a title
8 from our collection to make available through
9 emulation. At Stanford, you know, at the holding
10 institution, someone will put together a kind of, a
11 package which involves the environment that's needed
12 to run that software.

13 So, if it's software that uses an earlier
14 version of DOS, for example, that will have to be
15 accessible to that system, and that will run at
16 Stanford. A user at UC-Irvine, where Professor Ruberg
17 is, would make a request to us. It would be
18 authenticated and would, essentially, have that
19 available through the browser in, kind of, a streaming
20 fashion, to them.

21 MR. AMER: Let's go to Mr. Zambrano, who I
22 think has a question, and then I'd like to move onto
23 talk about Section 108 in a little more detail.

24 MR. ZAMBRANO-RAMOS: Sure, thank you, Mr.
25 Amer, and this is for proponents, and maybe this is

1 for you, Dr. Lowood. Could you elaborate a little bit
2 more on the security parameters that are used when
3 you're sharing some of this information off-premises?
4 You mentioned a closed system, authenticated access,
5 but I was wondering if you could talk a little bit
6 more about that.

7 Are there any kind of -- anything that
8 guides you to develop that security, maybe from the
9 software development world? Is there anything out
10 there that could explain how this security process
11 works? Thank you.

12 DR. LOWOOD: Should I just answer that? I
13 will do that. So, first of all, let me clarify. I'm
14 not part of our IT team in the library. I'm not the
15 person who's going to be designing this system, but
16 the way it's going so far with our testing and with
17 our projects to develop this, is this probably would
18 be a single sign-on like you would have at any
19 university, where you would use your university
20 credentials to sign into the system to gain access to
21 the node at your university. And that would be the
22 way it would be delivered.

23 So, I expect that we would require
24 authentication -- something like that. I can't say
25 that, you know, now that it's going to be the usual,

1 sort of, single sign-on. So, single sign-on would be,
2 basically, your university username and password would
3 get you into that system.

4 MR. AMER: Mr. Englund, did you want to
5 respond quickly? And then, I did want to move onto
6 the next topic.

7 MR. ENGLUND: Just a couple brief points
8 before we move onto the next topic. I mean, first,
9 the discussion of controlled emulation is interesting,
10 and to a certain extent, perhaps even comforting. But
11 none of it's in the regulations. So, there's no
12 limitation to universities or researchers or students
13 or authenticated users, or anything like that.

14 That is a very different proposal from the
15 proposal that is on the record. Second, simply should
16 observe that college students are important consumers
17 of video games. And so, merely saying that somebody
18 is a student at a university who has been identified
19 as being enrolled at the university ought to be able
20 to access emulation is not a comforting message.

21 I think if the proposal is that these are
22 authenticated students that are doing a project on a
23 particular game, that's a different proposition. You
24 can, if you wrote a regulation to that effect, you
25 could analyze it. But again, merely saying that

1 somebody is a university student ought to be able to
2 play games through an emulator is not something that
3 sounds like it would be a fair use.

4 MR. AMER: Okay. So, I see some hands up,
5 but I do want to ask another question. I think it
6 might be helpful for us to sort of understand what
7 your views are in terms of what Section 108 currently
8 allows and does not allow, and to what extent fair use
9 or something else may need to come into play to fill
10 in any gaps.

11 So, I mean, I'm looking at Section 108, and
12 as we've talked about, there is Section 108(e), which
13 does provide an exception for libraries to provide
14 individual copies that become the property of the
15 requester if a market check is performed, and a copy
16 is not otherwise available.

17 Now, 108(i) excludes audiovisual works. So,
18 it seems to me that, if we're just looking at 108 and
19 we're talking about making individual copies for users
20 following a market check, you would need to look to
21 some other -- you would need to look to fair use or
22 something else to cover video games. But I'd like,
23 actually, both sides to address that and see if they
24 agree. Mx. Teitler?

25 MX. TEITLER: Yes, I'm happy to speak on

1 this. So, to your point, 108(i) does exempt
2 audio-visual works from a number of the 108 provisions
3 including 108(d) and (e). As I mentioned earlier, the
4 spirit of 108(d) and (e) absolutely encompasses the
5 uses we're talking about here, that traditional right
6 to scholarly research done at home.

7 Moreover, in the 108 Report that the
8 Copyright Office put out a few years ago, the Office
9 clearly indicated that the requirement of operating
10 from a physical premises for 108(b) and 108(c) is no
11 longer functional for audiovisual materials, and we
12 believe that that is absolutely applicable here.

13 I'll also add that a number of the
14 synchronous and asynchronous online courses that we
15 might talk about that would happen under this
16 exemption would be encompassed by the Teach Act if
17 people were engaging with portions of material, and I
18 will, maybe, suggest that my colleague, Ms. Woodall,
19 can speak further to the applicability of fair use
20 here.

21 MR. AMER: Yes, Ms. Woodall?

22 MS. WOODALL: Absolutely. So, while 107 --
23 so, 107 can fill the gaps left by 108 here for uses
24 including research and teaching, which would not be
25 included under 108 currently. Our argument laid out

1 in both our long comment and our reply that these are
2 transformative fair uses, still holds and has actually
3 been strengthened since the Google decision made
4 earlier this month that recognized teaching and
5 research as transformative paradigm purposes that
6 fulfill fair use.

7 MR. AMER: I understand that. I'm sorry to
8 interrupt, but we're going to certainly get into fair
9 use. But I just want to, kind of, start from -- I
10 want to put fair use to the side for just one second
11 and see if we can, sort of, reach agreement on what
12 may or may not be permitted under Section 108. So,
13 Mr. Williams, could I bring you into this discussion?

14 Do you agree that if a library has a
15 collection that includes software other than computer
16 games, they have some right under Section 108(e),
17 provided a market check is completed, to make and
18 distribute individual copies of those works to users?

19 MR. WILLIAMS: Thank you. So just to make
20 sure I understand your question, you're asking about
21 software other than video games that would not
22 simultaneously be an audiovisual work?

23 MR. AMER: Right.

24 MR. WILLIAMS: Right. So, on 108(d) and
25 (e), my understanding of 108(d) is that it only

1 applies to portions of specific types of works and
2 that that probably is not the space in which we're
3 living, for this discussion.

4 With 108(e), I think it applies to instances
5 where there's an actual request by a researcher, not a
6 proactive policy that's put in place to try to create
7 replacement copies or preservation copies of the
8 computer programs.

9 So, as I've understood the proposal, and my
10 understanding was consistent with Mr. Englund's that
11 they weren't really looking to distribute copies of
12 programs, so much, you'd be living within the 108(b)
13 for unpublished materials and 108(c) for published
14 materials, and that's limited to on-premises access.

15 So, I guess that's a long way of saying I
16 think the answer to your question, under 108(e) for a
17 computer program that is not also an audiovisual work,
18 would be that, in some instances, they could
19 distribute a copy on a request from a researcher.

20 MR. AMER: Okay, thank you. Dr. Ruberg?

21 DR. RUBERG: So, I just wanted to bring up
22 what looks, to me, like an equity issue, which is
23 about differences across different areas of media,
24 different things that we might study. So, I'm a
25 scholar, originally, in literature. My PhD is in

1 Comparative Literature, and I have colleagues who
2 still teach in literature who have access to these
3 materials that they need for their scholarship, for
4 their teaching.

5 You can reach out to a library, to an
6 archive, ask for something obscure, get a copy of it,
7 whereas for us teaching video games, it's really just
8 completely night and day. So, we don't have access to
9 things to study. We don't have access to things to
10 teach, and video games, really, are just as crucial as
11 forms of culture, as forms of art, as something like
12 literature.

13 And I also want to clarify, just to very
14 quickly to respond to Mr. Englund's question about
15 students going on, playing video games for fun. The
16 types of games that we are talking about, the types of
17 games that I'm talking about, are not, primarily,
18 contemporary, big games that our undergraduates are
19 playing for recreation.

20 These are artistic games, historical games,
21 small, experimental games. These are the things that
22 our students and our scholars need access to.

23 MR. AMER: Thank you. Mx. Albert?

24 MX. ALBERT: Well, I just wanted to take a
25 second to point out that the 108 -- I believe 108(b)

1 and (c) -- although it says "premises", it doesn't
2 specify physical premises in the way that the
3 exemption -- the current rounds of the exemption do.
4 And, you know, I think there are certainly
5 institutions that understand that as premises being
6 the sort of, broader authenticated space in which
7 users can work in.

8 So, I think even if you were putting the
9 non-video game software under 108(b) and (c), I don't
10 think that that necessarily support a restriction
11 around physical premises.

12 MR. AMER: Okay. I wanted to ask one other
13 question about 108. So, in our 2018 recommendation in
14 recommending the exemption for preservation of
15 computer programs other than video games, we did focus
16 on 108(c) and, kind of highlighted the fact that it
17 expressly prohibits the distribution of digital copies
18 outside the premises of the institution. And, as you
19 note, Mr. Albert, the exemption refers to physical
20 premises. The statute just talks about premises.

21 What should we do with that? I mean, you
22 know, I take the point that the current exemption
23 doesn't exactly track 108. It allows -- it's not
24 limited to three copies. It includes museums and so
25 forth, but what do we -- if we have a sort of,

1 expressed prohibition in 108(c), I wonder what your
2 view is as to how we should address that. Yes, Mx.
3 Albert?

4 MX. ALBERT: So, I think that it goes back
5 to the reasons why the Copyright Office didn't accept
6 some of the other limitations that are present in
7 108(c), right? Not restricting the exemption to --
8 what is it -- damaged, deteriorated, lost, stolen, or
9 format obsolescence. And our, you know, in 2018, we
10 discussed extensively why format obsolescence is not
11 the right framework here.

12 And I think this speaks to the need to, sort
13 of, that the Copyright Office has written about in its
14 Discussion Document to, sort of, update -- to move
15 beyond the sort of, textural context of 108(c) to,
16 sort of accommodate the realities of the needs of
17 scholars and institutions.

18 And, you know, I don't mean to belabor it,
19 but clearly, the COVID pandemic has accentuated the
20 need to have no longer be required to have off -- to
21 no longer be restricted to particular physical on-site
22 premises access.

23 So, I think that, you know, whatever the
24 reasons why we chose not focus on Section 108 in this
25 current round of rulemaking is we think that, you

1 know, fair use provides a much more robust, broad way
2 to accommodate the types of uses that archival
3 institutions have to make of these words in order to
4 actually serve their users in the way that is
5 equitable in the ways that Dr. Ruberg was talking
6 about.

7 MR. AMER: So, I mean, I'm trying to address
8 the concerns about unlimited copies and so forth. So,
9 from your perspective, is it appropriate for us to
10 consider a framework similar to -- if we're talking
11 about any offsite access, is it appropriate for us to
12 look to 108(e), which is a much more, sort of,
13 confined exception?

14 It does allow for offsite copies upon the
15 request of users after a market check has been
16 performed. Is that something that, kind of, moves the
17 ball towards facilitating the types of uses that
18 you're interested in?

19 MX. ALBERT: I'm assuming that's for me.
20 Yes. I mean, that's why we, you know, in our, sort
21 of, the language we incorporated in order to address
22 the ESA's and the Joint Creators' concerns,
23 incorporated some of the 108(e) language, right? You
24 know, the notice that access to the work would be used
25 for any purpose other than private study, scholarship,

1 or research.

2 You know, what I would want to caution the
3 Copyright Office against is limiting the sort of, uses
4 to those present in 108(e). We think that the
5 108(e)-style restrictions are totally reasonable, and
6 that's indeed why we said we'd be willing to submit to
7 them if the Copyright Office thinks it's appropriate.

8 MR. AMER: Okay. Yes, Mr. Williams?

9 MR. WILLIAMS: Just to say quickly that, you
10 know, as you mentioned, 108(e) does not apply to video
11 games, does not apply to audiovisual works. And so,
12 you'd be going outside of 108. And the other thing
13 that I have an issue with, with using the language
14 that the petitioners proposed, although I do
15 appreciate them putting it in, and I understand that
16 it comes from the statute, is the security language
17 about just not having notice that someone,
18 essentially, is going to misuse these copies.

19 It doesn't go far enough, for my liking.
20 It, basically, unless you proactively go out and try
21 to ask someone to admit that they're going to do
22 something other than research, the language doesn't
23 have much teeth. So it's hard to imagine a situation
24 where someone who's a beneficiary of the exemption
25 wouldn't be able to qualify under that language.

1 Someone would need to, you know, show up
2 wearing a t-shirt that says, "I want to do something
3 more than research," or something like that,
4 potentially. So, I think much stronger language would
5 be needed there.

6 MR. AMER: Okay. I'm going to give the
7 folks with their hands up a chance to respond, and
8 then we're going to, I think, move to the next topic.
9 So, let's go, first, to Mx. Teitler.

10 MX. TEITLER: Yes, so, I'd just like to
11 raise the point here that these types of limitations
12 have worked perfectly well in other rightsholder
13 contexts. I mean, books, all traditional publishing
14 materials have been able to be subject to these types
15 of limitations without bringing about the downfall of
16 an industry.

17 I also think it's appropriate to add that
18 libraries make these kinds of decisions constantly.
19 They are attuned to what scholars are coming in to
20 study. They are aware of the types of decisions they
21 have to make to comply with copyright law. We're not
22 talking about people who are particularly not
23 risk-conscious.

24 Libraries are very conservative institutions
25 that care about compliance, and I really think it's

1 unrealistic to suggest that a library would go out
2 here and make copies available where there might be
3 bad actors who would take advantage of them. It
4 really flies in the face of what they do already,
5 every day, to make traditional works available in this
6 way.

7 MR. AMER: Mr. Englund?

8 MR. ENGLUND: I agree with everything Mr.
9 Williams said a few minutes ago, and I would just like
10 to put a little bit more gloss on it, that the
11 proponents here have chosen one of the weakest parts
12 of Section 108(e) as their offered compromise here
13 that there's no notice. But the concept of notice
14 isn't very meaningful if a public library chooses to
15 put emulated games up online for a public audience, as
16 the proposed regulations would seem to permit.

17 At that point, nobody's going to provide
18 notice when they go online to the library's website to
19 play the game, and they have omitted from their
20 proposal the limitation that someone mentioned a few
21 moments ago -- the requesting language. That was
22 language crafted back in the '60s for a very
23 traditional, interlibrary loan model where a
24 researcher would manifest himself to a librarian, and
25 I'd like to get this book -- a copy of this book --

1 for an inter-library loan.

2 And, you know, in that case, perhaps the
3 absence of notice coupled with that human interaction
4 of the request is, perhaps, a reasonable limitation in
5 the statutory language. But here, we don't have that
6 limitation. So, the proposal would permit a library
7 to make a game available for the public. And, with
8 that, the notice limitation is not meaningful.

9 MR. AMER: Mx. Albert?

10 MX. ALBERT: So, I want to note that I think
11 that -- I'm not sure, and maybe this is my mistake --
12 but Mr. Englund and Mr. Williams have overlooked the
13 fact that there are requirements built into the
14 eligibility criteria of using reasonable digital
15 security measures.

16 You know, that's the thing we think that it
17 makes sense to take from 14(a) to 14(e). So, you
18 know, it's written into the definition of an eligible
19 institution that that eligible institution has to
20 include appropriate digital security measures for the
21 particular works at issue.

22 And this is building on, again, the
23 Copyright Office's Discussion Document on Section 108
24 where the Copyright Office specifically says, hey, it
25 doesn't make sense to require particular, specific

1 security measures. It, in fact, is -- we want -- that
2 would be an overly burdensome requirement, but what we
3 want is for libraries, archives, museums, to be able
4 to make the appropriate decision about the types of
5 security restrictions.

6 So, I think that, you know, if an eligible
7 institution has to use reasonable digital security
8 measures, right? So, that already says that Mr.
9 Englund and Mr. Williams' parade of parables where the
10 public library is, sort of, making these games
11 available for free, well, unless we think that that is
12 a reasonable digital security measure, and I think
13 it's clear that Mr. Englund and Mr. Williams don't,
14 right, then that's not an eligible institution under
15 the exemption.

16 So, I hear -- I want to be really sensitive
17 to the concerns that the Joint Creators and the ESA
18 have. I understand that this is a space where there
19 are a lot of competing, difficult decisions to be
20 made.

21 But I think it's, kind of, like, you know --
22 as my colleague Mx. Teitler said, libraries make these
23 decisions all the time, right? And part of what we're
24 doing is just trying to preserve the same flexibility
25 that the Copyright Office mentioned in the Section 108

1 context, in order to allow them to do so. But Dr.
2 Lowood is much better positioned to speak to that than
3 I am.

4 MR. AMER: Thank you. Yes, Dr. Lowood, and
5 then I'd like to ask another question.

6 DR. LOWOOD: Yeah, just a little bit of
7 context, maybe information to support what Mx. Albert
8 just said. You know, my experience is that academic
9 libraries are pretty conservative in this regard,
10 quite risk-averse. If you look at our catalog,
11 there's very little from our collection that is
12 available in the open web to anyone, in other words,
13 without restriction, without authentication.

14 And in every case, those items are available
15 because we have explicit permission from the
16 rightsholders. We're involved in a project right now
17 regarding thousands of digital objects that we created
18 as preservation measures to contact rightsholders and
19 see if we can secure their permission to make things
20 available in the open web, and if not, only research
21 access will be provided in those cases.

22 So, I just, sort of, want to temper the idea
23 that, you know, our goal in this is to provide, you
24 know, unrestricted access to everyone. That's not the
25 case at all.

1 MR. AMER: Thank you. So, my question
2 before was just limited to 108. So, I would like to
3 now, sort of, turn to fair use. So, it seems to me
4 that if you're going to include video games, some
5 degree of offsite access to video games, you would
6 need something other than 108 as a basis for doing so,
7 given 108(i), which excludes audiovisual works from
8 the exception under 108(e).

9 So, for proponents, you know, and Ms.
10 Woodall, I apologize. I cut you off before. I don't
11 know if you wanted to jump back in here, but I'd like
12 to hear your, sort of, best case for the proposition
13 that fair use, under current law, might extend to some
14 level of offsite access for video games. Yes, Ms.
15 Woodall?

16 MS. WOODALL: Yes, of course. So, fair use,
17 under current law, which is currently developing, and
18 we've actually seen the most recent Supreme Court
19 decision on transformative uses of software earlier
20 this month, I think the same logic can be transposed
21 over to video games where, although we are using --
22 or, although a researcher, preservationist, or
23 educator might be using the video game or software for
24 its exact same use as designed, as long as it's being
25 used for an overarching, transformative purpose, it

1 can be -- the purpose sways in-favor of fair use, as
2 it did in the Google v. Oracle decision.

3 Breyer specially noted that teaching and
4 research are paradigm transformative uses, even if the
5 software is being used for a similar use or a similar
6 context, so long as that overall use is
7 transformative. Teaching, research, and scholarship,
8 add comment and critique, which are fundamentally
9 transformative.

10 Our brief goes into much greater detail
11 about other aspects of history and research that are
12 transformative, but effectively, these uses we're
13 seeking to allow are all transformative and have very
14 minimal to no market harm, as these are out of
15 commerce works we're talking about.

16 MR. AMER: Thank you. Mr. Band?

17 MR. BAND: So, it seems to me that the only
18 issue here, really, is, I guess, the fourth factor,
19 right? I mean because we already have an exemption
20 that allows on-premises access. And so, what we're
21 trying to do is get off-premises access. And so, the
22 only difference, really, between on-premises and
23 off-premises, conceivably, is some potential harm to
24 the market.

25 But, otherwise, it's all the same. And so,

1 that's really the issue. The only issue to really
2 focus on is, is there somehow a much greater threat to
3 the market of the rightsholders by virtue of
4 off-premises access? And the answer here is, plainly,
5 no.

6 I mean, part of it is because the nature of
7 the works we're talking about, we're already talking
8 about out of commerce works. So, that already
9 diminishes, significantly, the risk. But also, you
10 know, let's be real. You know, if I can go into the
11 library with my laptop and have access to the video
12 game on my laptop in the library, how much less of a
13 risk is that than if I could do the same thing from my
14 apartment or my dorm room?

15 I mean, either way, there's going to be --
16 either there's going to be adequate authentication and
17 security, or there isn't. And we've already heard
18 that that's a requirement that there is now. There's
19 been absolutely no showing that somehow this has been
20 abused, that this has let open some floodgates.

21 And so, given that, there really is no
22 difference. And so, we're, you know, this is, to some
23 extent, a little bit of, you know, how many angels can
24 dance on the head of a pin. You know, there's really
25 not going to be any appreciable difference to the

1 market. Either our security measures work, or they
2 don't.

3 And if they do, then it doesn't matter
4 whether it's in the library or outside the library.
5 Either way, it's the same.

6 MR. AMER: So, the current exemption says
7 video games -- applies to video games solely for the
8 purpose of preservation of the game in a playable
9 format by an eligible institution, and one of the
10 conditions is that the video game is not distributed
11 or made available outside of the premises of the
12 eligible library.

13 So, I think a question is, and I take your
14 point about, you know, already -- the exemption
15 already providing for some degree of on-premises
16 access, I think a question is, how is this proposed
17 exemption related to preservation, which is,
18 obviously, the focus of the current exemption?

19 MR. BAND: Well, I mean, preservation is the
20 reason we wanted circumventing, right? I mean, you
21 need to -- you're circumventing in order to preserve
22 the work. And then, the question is, okay, now having
23 preserved the work, what kind of access is
24 permissible?

25 And is it only on the premises? Is it only

1 researchers on the premises, or can a researcher from,
2 you know, from an apartment down the road, can that
3 researcher also have the same access? But the
4 underlying purpose of the initial circumvention is the
5 same. I mean, it's for purposes of preserving the
6 work.

7 MR. AMER: Dr. Ruberg, I think, maybe, you
8 had your hand up first. If not, I apologize.

9 DR. RUBERG: Thanks. So, I just wanted to
10 provide an example that speaks to Ms. Woodall's point
11 about transformative use -- fair use, transformative
12 works, and also this question of preservation and
13 access.

14 So, to give you a sense, so, a lot of the
15 work I do is on diversity and LGBT issues in video
16 games. And what I do, as a scholar, is I'm actually
17 looking back at games across history to find the
18 things about them that are related to LGBT issues and
19 to inclusion that may not be immediately obvious.

20 So, I'm not necessarily just looking at
21 games that have, you know, LGBT people in them. I'm
22 trying to unearth, you know, who has worked on these?
23 What messages are in them? So, there's a deeply
24 transformative purpose to this kind of cultural work
25 on games that actually shifts what we think we know

1 about them -- shifts the conversations around them.

2 And, for example, I was working on a project
3 where I really needed access to materials that were at
4 -- there's a Museum of Play in Rochester, New York,
5 which, I'm in Southern California. That is not an
6 easy trip to make.

7 And if I had been able to have remote access
8 to those materials during my process, I could have
9 done that transformative work because they would have
10 been preserved. So I just want to second this idea
11 that the preservation and the access, for me as a
12 scholar, are inherently linked.

13 MR. AMER: Mx. Albert?

14 MX. ALBERT: Sure. I had two quick points I
15 wanted to make, one is just to build on Ms. Woodall's
16 point about Oracle v. Google, and I think that the
17 other piece of language that came out in that decision
18 was after our filings that I really want to emphasize
19 is Justice Breyer's discussion of the public benefit
20 and the fourth factor, which, I think, goes to Mr.
21 Band's point about, sort of, like, what is the debate
22 about here.

23 And even if there is some sort of market
24 harm, right, which I don't -- there is no evidence in
25 the record that, you know, the preservation by the

1 types of eligible institutions we're talking about
2 here is causing any kind of market harm.

3 But I will say is that, you know, he --
4 Justice Breyer very explicitly talks about weighing
5 the importance of public benefit and the importance as
6 part of thinking about the fourth factor. And I think
7 that's worth emphasizing here, as Dr. Ruberg talked
8 about that important public benefit.

9 The other thing I wanted to flag was I think
10 that, you know, Dr. Ruberg and Dr. Lowood can talk
11 extensively about the relationship between
12 preservation and access, but I wanted to point the
13 Copyright Office back towards part of our original
14 briefing where we actually talked about how, in order
15 to sometimes get funding for the kinds of preservation
16 -- the expensive kinds of preservation -- that we're
17 talking about there, institutions have to make these
18 kinds of works accessible to outside researchers,
19 right, or to, sort of, populations who are affected by
20 them.

21 And we actually heard stories since we
22 submitted our original testimony that, you know, there
23 are certain grant committees that will look at a grant
24 that doesn't allow for, sort of, access to the
25 relevant researchers, not by going to the site, but

1 sort of, more generally, and won't give you money.

2 So, if software preservation is inherently
3 tied to these, sort of, on-site premises restrictions,
4 this work isn't going to be preserved. The way this
5 has to do with preservation is because the limiting of
6 the access to these -- limiting access to these works
7 limits the types of works and the works that are
8 getting preserved.

9 MR. AMER: Mr. Williams?

10 MR. WILLIAMS: Thank you. On Oracle v.
11 Google, we had some discussion of this last week, and
12 at least my reading of it is it's much narrower than
13 the space we're discussing during this particular
14 hearing. It was dealing with, you know, uses of
15 functional API software, nothing close to the video
16 game and audiovisual work.

17 And I think Mr. Band agreed with that last
18 week, although maybe I'm overstating what he said.
19 But I don't think it's fair to say that that decision
20 stands for the proposition that all educational or all
21 research uses are fair or lawful, and I think it's
22 also about a very narrow type of software and a very
23 specific set of circumstances.

24 On the issue of no evidence of harm, you
25 know, I would say the current exemption is limited to

1 on-premises use. So, for us to have the evidence of
2 harm caused by off-premises use, we would necessarily
3 have to be pointing to people who are not covered by
4 the existing exemption.

5 It's also quite difficult to build a record
6 of who believes they're using an exemption and who's
7 engaged in infringement. So, collecting that kind of
8 evidence, for us, is always difficult. On the
9 question about fair use versus Section 108, I would
10 just say that our view is that, at least until the
11 Section 108 Discussion Document gets traction and is
12 passed by Congress, that the Copyright Office should
13 be very hesitant to go beyond the current parameters
14 of the statutory Section 108.

15 And some of what's being discussed today is
16 covered by the recommendations in the Discussion
17 Document. Some of it, I think, goes beyond what's
18 covered by the Discussion Document. But that
19 document's been out there for several years. It's not
20 yet been adopted by Congress.

21 So, I think it's not necessarily safe to
22 assume that everything covered in that document is
23 covered by Section 107, and that would include
24 covering public performances, which what primarily
25 seems to be at issue here, rather than distributions

1 at the request of individual researchers who make
2 requests.

3 As Mr. Englund reiterated earlier, the
4 current 108(e) is about user requests, not about
5 proactive projects by universities. So, thank you.

6 MR. AMER: Thank you. Dr. Lowood?

7 DR. LOWOOD: Yeah, I just wanted to add a
8 little bit to the comments regarding access in
9 relationship to preservation. Yeah, they're
10 inextricably connected. Indeed, when we apply for
11 grant funding, there is usually a question or two
12 about the provisions of access that we'll provide.

13 And I'd like to add to that that, with
14 internal funding, it's the same thing. Within the
15 library, if an internal project is to be considered,
16 we'll have to say something about access. If access
17 is, you know, not available to materials that we
18 preserve, it's going to have a chilling effect on
19 those preservation activities.

20 MR. AMER: Thank you. Mr. Englund, and then
21 I'm going to have one very quick follow-up, and then
22 I'm going to turn it over to my colleague, Mr. Riley,
23 for the next topic.

24 MR. ENGLUND: I'd like to just expand a
25 little bit on Mr. Williams' comments, with which I

1 agree. As the Office goes through its use analysis
2 here, it needs to focus on the broadest possible scope
3 of activity permitted on whatever regulation it's
4 thinking of adopting.

5 And right here, this proceeding, in this
6 class now, that is not one that is very limited, as we
7 explored earlier in the panel. And we shouldn't focus
8 on the things that are already permitted by the
9 current exemptions. Focusing on the broadest reaches
10 of the new activity that's authorized, what we're
11 talking about is public performance without much in
12 the way of meaningful restrictions.

13 Charitably, for the convenience of
14 researchers, when the audience is researchers, but,
15 potentially, in the case of public libraries,
16 providing access to their patrons because that's
17 permitted, for recreational gameplay. And, you know,
18 the Office has said, in 2015 and 2018, that public
19 recreational gameplay is not a transformative use --
20 not a fair use.

21 And, I think, there's a tendency by the
22 proponents here to talk about downstream uses like
23 scholarship that could be created if there were more
24 convenient access to preserved materials. But that's
25 really indirect. I think the focus here needs to be

1 on the public performance for convenience.

2 That's not transformative, and to the extent
3 that we're talking about recreational play by patrons
4 of public libraries, the potential for market harm is
5 very obvious. And, you know, with respect to Google
6 Books, I think the Supreme Court's decision could not
7 have been clearer that it was animated by the nature
8 of API declaring code, which at least some Justices
9 appeared to think wasn't protected by copyright at
10 all, and it was within that very specific and narrow
11 framework that reached the fair use decision they did.

12 I think you could not extrapolate that to
13 all access-enhancing uses of public performances of
14 copyrighted works, creative works. That's just an
15 over-reading of Google against Oracle.

16 MR. AMER: Okay. I want to be mindful of
17 time, here. Mr. Zambrano, did you have a question?

18 MR. ZAMBRANO-RAMOS: Yes, thank you so much
19 Mr. Amer, and this question is for proponents. I'm
20 just curious, in the purposes for off-premises access,
21 we're talking a lot about research and scholarship.
22 Does that include research and scholarship on the
23 preservation methods themselves, or just on the
24 material that is preserved? Thank you.

25 MR. AMER: Dr. Lowood?

1 DR. LOWOOD: I'll try to answer that. Let
2 me know if I'm not answering the question that you're
3 asking. Yeah, well, we do publish on our preservation
4 methods. In fact, the work we've been talking the
5 last few days about, the work that we're doing with
6 regard to emulation as a service and some of the
7 things that we've learned, including some of the
8 things that we've learned about our contacts with
9 rightsholders and our efforts to gain permission for
10 world access and things like that.

11 So, yes, we do engage in research and
12 publish about the preservation methods themselves.
13 Did that answer what you were after? Okay.

14 MR. ZAMBRANO-RAMOS: Yes, thank you.

15 MR. AMER: Ms. Woodall?

16 MS. WOODALL: I believe that we're also
17 talking about research on the actual works themselves
18 as a downstream use. I, as we've discussed, those are
19 treated in-practice as the same thing, a lot of the
20 time, that preservation access for research and
21 teaching.

22 And I'd also like to just add an additional
23 note on the Google decision. I'm not making the point
24 that all teaching and research uses of software or
25 video games are permissible. However, Breyer does

1 list teaching and research as paradigm, transformative
2 uses of software.

3 That same principle, that software can only
4 be used -- the code can only execute so many functions
5 -- does apply to video games. This research and
6 teaching is not changing the actual code structure of
7 the video games. We're talking about transforming
8 them for access, critique, comment, that kind of
9 thing.

10 MR. AMER: Thank you. So, in the interest
11 of time, I'd like to now turn it over to my colleague,
12 Mr. Riley, who has some questions.

13 MR. RILEY: Thank you. I think we've
14 touched on these a little bit, but I want to
15 hammer-down on a couple of topics here. For the
16 proponents, I wanted to offer the ability to explain a
17 little bit more and ask whether the adverse effects
18 are clearly attributable to the implementation of a
19 TPM, or are the adverse effects due to changes in the
20 roles of libraries, archives, and museums.

21 And specifically, I know we've made
22 reference to the ability to raise funds and, for
23 example, the difficulties going to different locations
24 to complete research. Long and short, is this the
25 kind of harm that's related to the TPM? Mx. Teitler?

1 MX. TEITLER: Yeah, so, I want to be crystal
2 clear that the adverse effects here arise directly
3 from the outcome of the 2018 rulemaking. So, the net
4 effect of the exemption in 2018 was to allow
5 permissible uses, but only to allow them on site.

6 That barrier is really significant in
7 preventing a lot of other lawful uses for scholarship
8 and teaching that could be carried out but for that
9 language in the existing exemption.

10 If exemption language doesn't count as an
11 adverse effect of the TPM that should be addressed in
12 this rulemaking, then it's not clear to me where you
13 could ever address adverse effect of the language
14 itself because those harms that are preventing these
15 lawful uses came about directly because of that
16 language that was put in three years ago.

17 MR. RILEY: Mr. Band?

18 MR. BAND: I think the example that Dr.
19 Ruberg gave is a perfect example of exactly how it is
20 the TPM that's the problem. You know, it's the TPM
21 that is preventing, or the narrowness of the exemption
22 that has been granted to circumvent the TPM, that is
23 preventing the Museum of Play from making access to
24 that game available off-premises.

25 And so, you know, that is a perfect example,

1 a clear example, of how the TPM is having an adverse
2 effect on research activity.

3 MR. RILEY: So, let me ask this in a
4 different way. Are there any games that cannot be
5 preserved under the current exemption?

6 MR. BAND: I think, again, they can be
7 preserved, but the utility of the preservation is not
8 as robust as it could be, and that, ultimately, has
9 negative societal effects.

10 MR. RILEY: Mx. Albert?

11 MX. ALBERT: Yeah, to second what Mr. Band
12 and Mx. Teitler said, right, like, the reason we're
13 talking about funding for this kind of work and that
14 being tied to access is to illustrate exactly that
15 connection, right, between the limited, sort of,
16 outcomes of any circumvention, and thus, the
17 preservation to on-site use and the inability to be
18 able to, kind of, view this work more generally.

19 And I will also say, you know, that it's --
20 the goal of the 1201 exemption process, as outlined by
21 the statutory factors, has to do with the idea of
22 making them available for teaching, scholarship, et
23 cetera, right?

24 Like, you know, it's not just like, oh, you
25 know, preservation, although that's what we're focused

1 on here. So, my point -- I think the point I just
2 want to make is the reason we're talking about, sort
3 of, access to grant funding, et cetera, is to say that
4 the limits to on-site use as limiting the works to
5 only be available for on-site use, results in them not
6 getting preserved.

7 And that's the sort of, problem that we're,
8 sort of, aiming squarely at with this round.

9 MR. RILEY: Dr. Ruberg?

10 DR. RUBERG: Hi. So, I just wanted to speak
11 a little bit to scale. So, I think this relates to
12 your question, Mr. Riley, and also to go back to
13 something that Mr. Englund said. So, Mr. Englund said
14 that when we talk about scholarship, that that's
15 actually focusing, in some ways, on the wrong thing
16 because it is a down-the-line concern.

17 And I just wanted to clarify that that's
18 actually really not true. So, I'm here today
19 representing a very large field. There are hundreds
20 of people like me who hold PhDs who study video games
21 professionally. There are thousands upon thousands of
22 students learning about this right now.

23 This is, arguably, the growing area for the
24 study of art and media today. There are whole new
25 college programs that are starting up. There are --

1 you know, I can't even count the number of books and
2 articles coming out every month.

3 So, just to clarify, this is not a vision
4 that I'm talking about for down-the-line. This is the
5 reality that we live in. This is already vibrant, and
6 there is a serious restriction on that public benefit
7 when we cannot access the materials that we need.

8 So, just, I think, Mr. Riley, just to put
9 that in context, right, of the scale of the kind of
10 thing that we're talking about.

11 MR. RILEY: Dr. Lowood?

12 DR. LOWOOD: Yeah, your question, Mr. Riley,
13 about whether there are restrictions on getting
14 preservation done made me think a little bit there.
15 And it's kind of interesting, actually, there are some
16 potential issues.

17 And I can speak to some projects that are
18 underway right now involving these very complex
19 objects that digital games and other kinds of
20 interactive media represent, especially when you're
21 talking about titles from the 1980s or the 1990s
22 where, you know, people don't exactly remember how
23 everything was put together, and it becomes very
24 complicated.

25 I'm thinking of one project where we've had

1 to draw in people who were involved in the original
2 project, located in other places, to, you know, where
3 we really would benefit from having them take a look
4 at what we're doing, help us figure out how to put
5 together the environment in an emulation situation,
6 you know, those kinds of things, to get the
7 preservation done.

8 So, I think that, actually, there could be
9 situations where preservation would be impacted by not
10 being able to have remote access to the materials.

11 MR. RILEY: So, in 2018, the Office did not
12 propose extending an affiliate archivist exemption.
13 But I think it was our understanding, and maybe can
14 you confirm or if you want to add a little more, that
15 that was not a part of this exemption request.

16 DR. LOWOOD: Yeah, I was only answering the
17 question from a practical point of view. Don't ask me
18 to say anything about the legal situation because
19 you're not going to get a correct answer. But, I
20 mean, I'm just saying, as a practical matter, there
21 are situations where, you know, we're starting to
22 encounter them now as we dig into some of our
23 collections, where we need collaboration from people
24 who were historically involved in the creation and
25 development of this software to help us, to guide us,

1 in putting together the pieces that will make it
2 possible to run the software again.

3 It's not something that I came prepared to
4 talk about. It was entirely prompted by your
5 question.

6 MR. RILEY: I completely understand. I know
7 we're, kind of, running short on time, so I want to go
8 relatively quickly. Mx. Teitler, and then Mx. Albert.

9 MX. TEITLER: Sure. I'll keep it short. I
10 wanted to highlight two other factual -- well, really,
11 first highlight a factual consideration, second, touch
12 on the affiliate archivist point. So, first, under
13 the existing regime, the methods of preservation that
14 are acceptable tend to narrow to the benefit of very,
15 very popular works.

16 So, the works that are harder to preserve
17 that are created by studios that would not have the
18 funds to preserve them themselves, games that
19 typically relate to marginalized identity, for
20 instance, I know we mention in our filings, but the
21 first video game to feature a black character,
22 Heavyweight Champion, which there are no existing
23 copies of, is the type of work we're talking about
24 there.

25 And those works cannot, and will not, be

1 preserved unless libraries and public interest
2 organizations step in to save them because they are
3 fundamentally unpopular, and the industry has no
4 interest in preserving them because they weren't very
5 good from a play perspective. But they are very
6 interesting from a historical perspective.

7 MR. RILEY: I actually have a question about
8 that particular game because you had mentioned that in
9 your filing, and I was a little confused because I was
10 under the impression that that game is lost to time,
11 now, and also that it needs specific, specialized
12 interfaces to have the game work.

13 So, maybe -- is that -- that is not a
14 typical game that you're -- that might be a type of
15 game, but that game, specifically, you're not looking
16 to preserve, or --

17 MX. TEITLER: That game, specifically,
18 unfortunately, to your point, is impossible to
19 preserve now because all of the copies of it appear to
20 have been destroyed. But there are many, many
21 analogous games that have to do with marginalized
22 identity such as Caper and the Castro, and I'm sure
23 Dr. Ruberg could speak more on this, that are really,
24 really important when we think about how marginalized
25 people are portrayed in media and what that media says

1 about existing culture -- scholarly, rich games that
2 were not popular at the time of their creation,
3 haven't been preserved, and there are only a few
4 copies left.

5 Those are the types of works that are really
6 valuable to scholars, that we've heard across the
7 scholars we've talked to, that are interested in
8 reaching on, that they can't right now because there
9 might be one copy in one library somewhere, and they
10 can't get the funding to go and see it, or the library
11 doesn't have the funding to preserve it because they
12 can't make it available. So, that's a huge problem.

13 Secondly, to touch on your question of
14 affiliate archivists, this exemption does not
15 encompass affiliate archivists. That was meant to
16 change who would do the circumvention and where. The
17 circumvention here would be occurring on site with the
18 same people who are eligible to circumvent under the
19 existing exemption.

20 MR. AMER: Dr. Ruberg, did you have
21 something to add?

22 DR. RUBERG: Yes, just a quick follow-up to
23 Mx. Teitler's point. So, it is absolutely the case
24 that there are games that are of great cultural
25 importance that may seem to be lost but, in fact,

1 often, there are individual copies in peoples' private
2 collection.

3 So, video games, because, you know, people
4 are fans of them, they will often, in their garage,
5 have collections of them. We have an example of this,
6 a kind of personal, informal archive at UC-Irvine
7 where I work, where someone came to us and said, hey,
8 I've been storing this in my garage in Las Vegas for
9 the last 20 years -- this amazing array of things that
10 are important for marginalized folks that are not
11 represented in other collections.

12 But we have very little we can do with them.
13 They're now in a storage closet, this amazing
14 resource, because they take specific tech to run, and
15 because we don't have the support to be able to share
16 them more widely. So, even things that seems obscure,
17 even things that seem lost, there is still the
18 possibility for them to be re-found and to be shared
19 and studied through this kind of work.

20 MR. RILEY: Mr. Williams, were you going to
21 respond?

22 MR. WILLIAMS: Yeah, thank you. So, there
23 are titles that are not commercially available that
24 may never become commercially available again, and, to
25 some degree, those titles are already covered by the

1 existing exemption if you're dealing with
2 preservation-related issues.

3 There are many more titles that I think
4 would also be covered by the proposal here, that could
5 very well become available again, even if they are not
6 available today. And we tried, in our comments, and
7 ESA set forth a number of examples in their individual
8 comments, to show how common that is becoming.

9 And so, to revisit the fourth factor
10 analysis under fair use that people focused on
11 earlier, there is certainly a potential market for
12 games that are currently not commercially available.
13 And in many cases, there's an existing market for
14 those games, even if it's not being filled at the
15 moment.

16 A copyright owner may decide to fill it any
17 day. So, trying to draw that line, I think, is quite
18 difficult, between the games that, perhaps, are not
19 going to be available and that researchers want to get
20 access to or want to preserve, and games that are
21 still in the marketplace, viable properties, that are
22 still under copyright.

23 And so, when you include the remote access
24 on top of the existing exemptions, that marketplace
25 damage, or potential damage, becomes a lot clearer

1 than if you retain them in their current form.

2 MR. RILEY: So, if I can follow up on that,
3 as we were discussing earlier today, there were two
4 examples of what a user might do with a preserved
5 work, in terms of how it would be performed or
6 transmitted. And one was emulation, but the other one
7 was controlled screensharing.

8 I'm wondering if the opponents have less of
9 a concern related to controlled screensharing and,
10 maybe, with respect to the market or other factors?
11 I'm going to hit Mr. Englund first, and then Mr.
12 Williams, if you still want to respond to that, leave
13 your hand up.

14 MR. ENGLUND: So, I think we haven't
15 actually heard a lot of exactly what the proponents
16 have in mind by controlled screensharing. I guess, to
17 the extent that it implies that a preservation
18 organization knows personally who its audience is, and
19 so, is rendering a public performance, but to a known,
20 well-defined constituency that it's clear to the
21 preservation organization that they are actually bona
22 fide scholars as opposed to people interested in
23 playing games for recreational purpose, I think that
24 is a different fair use analysis than the one I think
25 the Office would need to engage in given the current

1 regulatory language.

2 So, I think, if you were to write a rule
3 that talked about controlled screensharing under the
4 circumstance I just described, I think the fair use
5 analysis would look different.

6 But you know, I think, from my perspective,
7 the most important point here, and I want to make sure
8 it doesn't get lost. Earlier, Mr. Riley, his
9 questioning of Mr. Band, I think I heard Mr. Band say
10 that there's no preservation that can't happen today
11 under the current exemption, or something to that
12 effect.

13 It really reinforces the point that we
14 aren't talking about a preservation exemption, as the
15 Office has always understood that. This is about
16 convenience of access. And I think that's just a very
17 different thing for the Office to analyze from a fair
18 use perspective than traditional preservation.

19 MR. RILEY: Let's see. Ms. Woodall, and
20 then Mx. Albert.

21 MS. WOODALL: So, to that point, I believe
22 the example of controlled screensharing was provided
23 in the context of education. So, that doesn't really
24 solve the problem for research or other scholarship
25 access issues. And it is different than traditional

1 preservation.

2 And, additionally, to the market point that
3 Mr. Williams made a moment ago, while rights-holders
4 do have an ability to reissue their work back into the
5 market -- into the commercial market -- the case law
6 cited in the ESA's argument, or briefing -- I'm
7 looking at footnote 54 -- every single one of these
8 cases is dealing with a non-transformative work. So,
9 it doesn't necessarily apply.

10 Transformative works, clearly, as we've
11 discussed in our briefings, don't have the same type
12 of market effect that non-transformative uses do.
13 We're talking about research uses, teaching uses that
14 will not supplant the market.

15 Additionally, their cited point about having
16 the exclusive right to determine when to re-release
17 into new markets has since been overruled, as of this
18 month. So, while rightsholders so have some control
19 of when they can re-release into the market, that
20 market share is not absolute.

21 And as the Google court discussed in its
22 opinion earlier this month, these rights are limited.
23 Congress, when contemplating inserting software and
24 audiovisual works into the Copyright Act, understood
25 that they would be limited by fair use and other

1 restrictions within the Copyright Act. Thanks.

2 MR. RILEY: Well, I want to turn it over to
3 Mx. Albert. I want to add, you know, if Mx. Albert or
4 anyone else wants to address this, you know, we made
5 some mentions of the Teach Act, and the Teach Act has
6 some other restrictions in its language, including
7 language that requires mediated instructional
8 activity, an "accredited" quote-unquote non-profit
9 institutions.

10 Are there any restrictions in the Teach Act
11 that might be appropriate for this exemption? And
12 we'll go to Mx. Albert first.

13 MX. ALBERT: I think I'll let Mx. Teitler
14 take the Teach Act question. I wanted to talk a
15 little bit about the reissue market discussion. So, I
16 think, as we address in our briefing, just to
17 reiterate, you know, reissues of video games, re-
18 releases, may be all very well and good for certain
19 players, but they really actually don't solve the
20 problem for research use.

21 I think the most evocative example we found
22 was the Baldur's Gate Enhanced Edition which actually
23 changed two of the characters' sexualities between the
24 original release and the re-release. So, I,
25 colloquially, have been calling this the Han shot

1 first problem, but that, maybe, reveals my media
2 consumption habits.

3 So, I think that, to the point about, sort
4 of, stuff getting re-released on the market, how to
5 draw that line, I think that, you know, the line that
6 the Copyright Office has taken in previous versions of
7 this rulemaking works perfectly well here, in terms
8 of, if it's not available on the first party market,
9 then it's out of commerce.

10 And I think that the reality is, and Dr.
11 Lowood and Dr. Ruberg can talk more about this if they
12 need to, but, you know, most -- library-style access
13 or archival institution access to video games is
14 always going to pale in comparison for a re-release
15 for folks who are interested in play.

16 You know, I don't, like, there has not been
17 -- I don't think there's evidence on the record, and I
18 haven't seen any evidence suggesting that users will
19 line up outside their local archive rather than
20 downloading something to their Switch.

21 And I think that that just isn't something
22 that's well -- even in the context of having access
23 offsite, you know, the reality is that, you know, I
24 might be able to access certain other kinds of
25 copyrighted materials -- novels -- through my research

1 institution, but I still buy the physical ones because
2 I actually want to read the physical copy, and/or
3 that, you know, it's just not in the same market.

4 So, I think that I don't -- I want to make
5 sure that we don't create a line around the reissues
6 that doesn't actually serve the needs of the scholars
7 we're working with, or sort of, creates some weird,
8 sort of, after-the-fact change to what is
9 fundamentally preservation and a fair use. And I'll
10 let Mx. Teitler take the Teach Act stuff.

11 MR. AMER: Mx. Teitler?

12 MX. TEITLER: Yes, so, I think what I'd like
13 to highlight here is that it's pretty clear that the
14 highly specific standards in the Teach Act limit
15 usability in a degree that's just far too great and
16 ends up chilling a lot of otherwise fair and
17 permissible uses.

18 The Teach Act, unfortunately, is widely
19 regarded as a legislative failure. Professor William
20 Fisher in his Copyright X course describes it that
21 way, and I'm sure Dr. Lowood could elaborate further
22 that because of the very, very specific limitations in
23 place in the law there, people don't rely on it, and
24 don't use it, even where there might be permissible
25 sharing of materials.

1 So, because, as I said earlier, libraries
2 are such risk-averse institutions that are accustomed
3 to copyright compliance regardless, they are
4 well-positioned to determine which uses might be
5 permissible here without importing those traditional,
6 specific limitations of the Teach Act.

7 And, in fact, if we did import them, because
8 libraries are so risk averse, they probably, as school
9 have, in the Teach Act, would shy away from using the
10 exemption at all, and end up, you know, choosing not
11 to engage in activities that might be fair. So, I
12 think we have to be really sensitive to the
13 organizations we're talking about here and what their
14 behavior's like in the real world.

15 MR. RILEY: Dr. Lowood?

16 DR. LOWOOD: Okay, just a couple of things.
17 First, just about commercial reuse, I just wanted to
18 say that the very popular titles that are more likely
19 to be commercially viable, you know, they represent,
20 in terms of the percentage of titles, actually a
21 relatively small percentage of the collection.

22 Many, many more titles are more like what
23 Professor Ruberg described. You know, things from 30
24 years ago that have virtually disappeared. And the
25 point to keep in mind, then, is it's very unlikely

1 that a title like that is going to be held by more one
2 or two libraries, maybe, which means that remote
3 access for scholars who are not fortunate enough to be
4 at one of those institutions, is very, very important.

5 And again, it's very unlikely that those
6 titles are going to be the kinds of things that, you
7 know, a big publisher's going to pick up for a major
8 re-release. And in those cases, they'll be accessible
9 some other way for students and researchers.

10 About the Teach Act, well, of course, under
11 COVID, we spent a lot of time thinking about the Teach
12 Act and what it allowed us to do, and it is the case
13 it wasn't particularly helpful in coming up with clear
14 guidelines about the kinds of questions we were
15 getting as instructors were frantically moving from
16 all face-to-face teaching to all-online teaching and
17 trying to figure out how they could do the equivalent
18 of a screening in a course, you know, showing a film
19 or showing a game to a group of students in real time.

20 And we had to make up a lot of stuff as we
21 went along, to be honest. So, I don't know that the
22 Teach Act would be particularly helpful in this
23 regard, either.

24 MR. RILEY: Mr. Englund, I'm going to call
25 on you next, but as you reply, I'm going to ask

1 another question. There was this assertion by
2 proponents that there's no evidence of "arcades"
3 claiming archival library status under the existing
4 exemption.

5 And I'm wondering if you have any evidence
6 of that sort of circumstance, in addition to whatever
7 you would like to offer on the current topic.

8 MR. ENGLUND: So, several quick points, and
9 then I will respond to that question last. First, I
10 think it should give the Office pause that the
11 proponents, throughout this hearing, have run away
12 from the expressed specific purpose statutory
13 exemptions.

14 They, at the beginning of this panel, were
15 talking about Section 108. They've just now done it
16 about Teach Act. Congress has gone through a process
17 and spoken on the propriety of those uses. And, you
18 know, the desire on the part of the proponents here
19 seems to be everything's fair use; we don't have to
20 worry about those.

21 But, in trying to apply its fair use
22 analysis, I think the Office has to be hesitant to go
23 too far beyond the bounds of what Congress has said --
24 just say, "hey, everything's transformative." So, I
25 think it's destructive and problematic that, you know,

1 the proponents really can't point to anything other
2 than fair use that they think might authorize the
3 kinds of uses they're talking about.

4 Second, I think Mr. Lowood just mentioned --
5 or Dr. Lowood just mentioned -- that the kinds of
6 titles being preserved are likely to be more obscure
7 titles, not the most prominent or popular games. And
8 I've heard similar themes throughout the panel.

9 Unfortunately, the regulation doesn't say
10 that, and at the risk of repeating myself, the
11 Office's analysis needs to look at the broadest
12 aspects of the activities permitted here. So, you've
13 got to assume that the games that we're talking about
14 providing access to are the most popular titles of
15 three years ago that may be part of a franchise that
16 has a current edition out in the market now and,
17 through that lens, apply fair use analysis.

18 And next point, I think I heard Mx. Teitler
19 say a few minutes ago that the exclusive right of the
20 copyright owner to control reissues was recently
21 repealed. That came as news to me. I think that was
22 a reference to the Google against Oracle decision.
23 And again, the court, in that decision, obviously,
24 struggled with the perennial question of how to
25 recognize actual versus potential markets and

1 ultimately credited a jury verdict about the
2 possibility of Oracle's being able to successfully
3 enter the smartphone market.

4 I don't think that tells you very much at
5 all, if anything, about the ability of video game
6 publishers to re-release titles. It's very clear that
7 they can. They do. It's very popular.

8 Next, Dr. Lowood mentioned COVID, and
9 several panelists during the course today have done
10 COVID. And I'm not the one to predict what the path
11 of the global pandemic will be, but, you know, we all
12 read the newspaper, hear about escalating vaccination
13 rates and so forth.

14 I think it is at least safe to assume that
15 when these regulations go into effect at the end of
16 October and that three years from then when those
17 regulations finally run their course that the COVID
18 situation's going to look a lot different.

19 And as colleges and universities talk about
20 reopening their campuses in the fall and in
21 anticipation of October 28th, the Office should be
22 hesitant to attach much weight to COVID.

23 Finally, the question you just asked about
24 -- unfortunately, I can't decipher my note. What was
25 the question you just asked?

1 MR. RILEY: It was about evidence of any --

2 MR. ENGLUND: Oh, arcades, yes. So, I think
3 the best example I would provide is an organization
4 called The Internet Archive. And we could, perhaps,
5 debate whether it meets the definition of libraries or
6 archives that the proponents have originally suggested
7 they might be willing to incorporate here.

8 But it has long provided something called
9 the internet arcade. You can Google internet arcade;
10 you'll find it. It has a collection of older arcade
11 games that are being run on an emulator and available
12 to a public audience.

13 And so, it is mostly not console games -- I
14 mean, not all console games, but I think it's a good
15 illustration of the kind of thing that someone who
16 calls themselves an "archive" could provide to a
17 public audience if you wrote a regulation that says
18 it's okay to provide emulated games to a public
19 audience.

20 MR. RILEY: I know we're running low on
21 time. Mr. Amer, did we want to follow up our --

22 MR. AMER: Yeah, let me just -- we're over
23 time. So, I think I had just one, sort of, follow-up
24 question, and it's primarily for the proponents, and
25 you may want to respond to -- I think it's related to

1 some points Mr. Englund made. So, you can incorporate
2 those.

3 I mean, so, it's true that any, sort of,
4 statement by the Office about what fair use may or may
5 not cover involves some element of prediction because
6 every case is different, and fair use is very fact
7 specific.

8 But I'm wondering if you can give us a case
9 or cases that you think are the most factually similar
10 that do the most to bolster your contention that the
11 type of offsite uses you're requesting is covered by
12 fair use.

13 I mean, I understand, and I know you've
14 cited cases in your papers, and I know you've
15 mentioned Google versus Oracle today, but to the
16 extent there is a case that is factually similar to
17 what you're describing here, I think that would be
18 helpful for us. Mx. Albert?

19 MX. ALBERT: Sure. So, I think I actually
20 may defer to Ms. Woodall on the fair use point, but
21 there were a couple of points Mr. Englund raised that
22 I wanted to flag. First, I think that it's unkind to
23 say that we grudgingly accepted these restrictions
24 because the eligibility restrictions actually come
25 from our 2018 software exemption, and I'm not sure the

1 ESA actually even pointed out that there weren't
2 present in the video game exemption.

3 So, we were just trying to make sure that
4 the exemptions were harmonized and that appropriate
5 institutions were taking things on. With regards to
6 the Internet Archive, I see no evidence -- the ESA has
7 produced none, nor, I think, is there any evidence --
8 that the existence of the Internet Archives games
9 online has anything to do with the 1201 exemption
10 process.

11 I actually don't even know if any of those
12 games involve DRM in the first place, right? So,
13 claiming that that is an example of the type of thing
14 that might be allowed by a sort of, broader offsite
15 access strikes me as entirely a red herring because a)
16 it already exists; they didn't need this exemption, b)
17 we don't even know if they're covered by this
18 exemption, and c) I think the point to make is that
19 the actual types of institutions that are looking to
20 these exemptions for guidance often are very cautious,
21 as we stressed over, and over again.

22 Finally, I just wanted to respond to the
23 COVID point. I think, as Dr. Lowood, sort of, has
24 pointed out generally, and I think pointed out to us
25 specifically, the reality is that the creation of

1 offline access mechanisms during COVID is not going
2 away.

3 Although COVID may go away, the expectation
4 is that these offline access mechanisms are going to
5 continue to exist. Scholars have become accustomed to
6 the understanding that like, hey, you could reach out
7 to a librarian and maybe get access to a type of
8 software.

9 And I think this just goes back to Dr.
10 Ruberg's point earlier, which is, like, there's an
11 equity issue here where we're, sort of -- scholars who
12 study video games are actually not able to access
13 works in the same ways that scholars who study other
14 literature.

15 And then, I think that, you know, I'll let
16 Ms. Woodall take the fair use question.

17 MR. AMER: Ms. Woodall?

18 MS. WOODALL: So, two points. One, first
19 I'd like to respond to Mr. Englund's earlier point.
20 It was actually me that was discussing the withdrawal
21 and re-release in the market. I was referring to,
22 yes, Oracle and all of the other case law is
23 non-transformative and doesn't necessarily apply to
24 this case.

25 I'm not suggesting that transformative as it

1 applies to all uses of software. However, in cases
2 where research or teaching reached that level of
3 comment or critique, they can weigh in favor of that.

4 In response to -- oh, and then, one last
5 point on that. Congress has also said, in addition to
6 providing rightsholders with expansive rights, and
7 Judges have concurred with this, that the purpose of
8 fair use is to be flexible and to adapt to new and
9 unanticipated uses.

10 And the provisions here that are at issue
11 are 30-years plus old. So, fair use is flexible and
12 exactly designed for this kind of analysis. As far as
13 a case that's closely analogous, three come to mind.
14 Corellium, and pardon if you can hear the sirens going
15 by my window, but in Corellium, Corellium developed a
16 product using the iOS -- Apple's iOS technology -- to
17 create online environments for facilitating technology
18 security research.

19 This allows them to access the iOS in order
20 to fulfil these research ends. Additionally, White
21 (phonetic) is very analogous, that online access to
22 lawyers' legal briefings and additional pleadings,
23 that provides access, but it does so with a
24 transformative end by adding value for viewing,
25 selecting, converting, identifying materials to make

1 them available.

2 Research and teaching do very similar things
3 with the available works. They review, select,
4 comment, critique, do very analogous things to that.
5 The last example I can provide, just off the top,
6 Sindermann v. CJ Society.

7 Here, we had a critical review of an
8 unpublished novel. That was a fair use because it was
9 using the book for scholarship purposes and as a means
10 of preserving. I believe that fully answered your
11 question, but I am happy to answer a follow-up.

12 MR. AMER: Great, thank you very much. Mx.
13 Albert, I think you'll be the last word.

14 MX. ALBERT: I will try to be brief. I know
15 we're over time. So, I think that the one thing that
16 I wanted to say to complement Ms. Woodall's points
17 with regards to the fair use is that, like, yes,
18 there's not a case that says directly something about
19 remote access because the sort of, distinction between
20 on-site and offsite access is a process of this
21 procedure.

22 And so, the uses in question are fair, and
23 the question goes to the -- as Mr. Band said earlier
24 -- the question about market harm. We believe that
25 the reasonable security measures that libraries or

1 archival institutions are required to implement in
2 order to be eligible for this exemption would more
3 than cover the types of concerns raised by the
4 opponents.

5 And so, I think that, you know, the
6 question, then, is like, we've shown the harm of not
7 allowing offsite access to these works. It both harms
8 the preservation and also harms the development of
9 scholarship in this field, you know.

10 And I think it's up to the Copyright Office
11 to make sure that, you know, that the rules that are
12 supposed to exist for the purpose of actually
13 allowing, you know, people to use copyrighted works in
14 ways that are consistent with the public benefit and
15 consistent with fair use, do that. So, I'll end
16 there. Thank you.

17 MR. AMER: Thank you very much and thank you
18 all very much. I think this was a really helpful
19 discussion. And so, we will adjourn for today, and we
20 will, maybe, see some of you tomorrow at 10:30.
21 Thanks very much.

22 (Whereupon, at 2:44 p.m., the meeting was
23 adjourned, to reconvene at 10:30 a.m. on April 20,
24 2021, the following day.)

25 //

CERTIFICATE

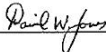
CASE TITLE: Unclaimed Royalties Study Roundtable

DATE: March 26, 2021

LOCATION: Washington, D.C.

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

Date: March 26, 2021

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\$237,000 [1] 620:21	2008 [1] 596:8	accelerated [1] 597:5	adapt [1] 726:8
\$60,000 [1] 631:14	2009 [2] 590:20 621:19	accentuated [1] 679:19	adaptation [1] 591:22
/	2014 [1] 597:12	accept [2] 665:5 679:5	add [13] 630:19 634:22 643:20 648:12 674:13 682:17 688:8 696:7,13 699:22 705:14 708:21 714:3
// [5] 653:22,23,24,25 728:25	2015 [1] 697:18	acceptable [1] 706:14	Adding [3] 642:23 667:8 726:24
1	2017 [2] 616:20 667:19	accepted [1] 723:23	addition [4] 584:25 590:3 719:6 726:5
1 [2] 637:14 653:18	2018 [8] 592:23 678:13 679:9 697:18 701:3,4 705:11 723:25	Access [94] 587:17,22 591:21,25 609:20 622:16 629:12 633:16 638:10 642:3 643:6 644:15 646:10 647:8 650:10 657:18,24 658:17 662:25 663:7 664:8,12,17 668:10,13,13,17 669:12 671:4,20 672:20 676:14 677:2,8,9,22 679:22 680:11,24 686:21,24 687:5,14 688:20,21 689:4,11 690:16,23 691:3,13 692:3,7,11 693:12,24 694:6,6 696:8,12,16,16 697:16,24 698:20 699:10,20 700:8 701:23 702:14 703:3 704:7 705:10 710:20,23 712:16,25 715:12,13,22,24 718:3 720:14 724:15 725:1,4,7,12 726:19,21,23 727:19,20 728:7	additional [9] 604:19 605:14 631:18 660:4 662:2 663:17 667:8 699:22 726:22
1,000 [1] 637:7	2020 [1] 614:3	3	address [17] 588:14,23 597:9 599:2 608:23 623:13 627:25 653:7 659:11 667:2 673:23 679:2 680:7,21 701:13 714:4,16
1:00 [2] 653:21 654:2	2021 [1] 728:24	30 [1] 717:23	addressed [2] 650:7 701:11
10 [2] 611:23 655:7	20th [1] 645:18	30-years [1] 726:11	addressing [1] 614:24
10:30 [2] 728:20,23	21st [1] 613:3	32 [3] 599:15 628:9,9	adequate [4] 607:20 631:4 646:4 689:16
10:31 [1] 584:2	25,000-disc [1] 594:23	33 [1] 599:16	adequately [1] 612:17
100 [3] 587:6,13 618:15	28th [1] 721:21	35 [1] 613:24	adhesives [1] 624:18
106 [1] 666:25	3	350-students [1] 660:13	adjourn [2] 653:18 728:19
107 [7] 613:22 618:10 625:14 658:12 674:22,23 695:23	4	4	adjourned [1] 728:23
108 [56] 588:22 605:8 608:21 609:23 610:8 611:13 613:17,22 614:12,20 616:19 617:3,8 618:2,7 625:11,14,25 626:1,10,15,24 627:2,7,9,18 629:1 630:9 635:6,21,21,22 636:1 667:17 670:23 673:7,11,18 674:2,7,23,25 675:12 677:25 678:13,23 679:24 681:12 684:23 685:25 687:2,6 695:9,11,14 719:15	5	40,000 [2] 637:5 640:3	Administrator [1] 587:23
108's [2] 612:17 613:18	5 [4] 584:8 585:17 588:4 611:23	5,000 [2] 603:25 604:8	admins [1] 640:13
108(b) [4] 674:10 676:12 677:25 678:9	50 [1] 591:3	50 [1] 591:3	admit [1] 681:21
108(c) [7] 663:14 674:10 676:13 678:16 679:1,7,15	500 [1] 604:15	52 [1] 591:3	adopted [1] 695:20
108(d) [11] 661:6,14,19 662:1,15 663:3 668:12 674:3,4 675:24,25	54 [1] 713:7	54 [1] 713:7	adopting [1] 697:4
108(e) [18] 659:16,22,23 661:6,14 662:2,15 673:12 675:16 676:4,16 680:12,23 681:4,10 683:12 687:8 696:4	6	6	advance [1] 590:7
108(e)-style [1] 681:5	60s [1] 683:22	60s [1] 683:22	Advanced [2] 587:17,22
108(i) [3] 673:17 674:1 687:7	7	7	advantage [2] 610:6 683:3
108-study [1] 609:12	750 [1] 590:24	750 [1] 590:24	advantages [1] 610:7
108c [2] 623:19,19	767 [1] 621:16	767 [1] 621:16	adverse [6] 700:17,19 701:2,11,13 702:1
12(1)(b) [1] 666:1	9	9	advises [1] 600:17
12(2) [1] 665:24	99 [3] 645:13,14,15	99 [3] 645:13,14,15	Advisory [3] 645:8,9 646:13
12:19 [1] 653:20	99.9 [2] 610:24 624:25	99.9 [2] 610:24 624:25	affect [1] 589:9
1201 [5] 584:6 627:16 648:25 702:20 724:9	A	A	affected [1] 693:19
14 [4] 591:6 653:19 654:8 655:19	a.m [2] 584:2 728:23	a.m [2] 584:2 728:23	affecting [1] 590:14
14(a) [1] 684:17	AACS [5] 587:18 604:3,20,20,21	AACS [5] 587:18 604:3,20,20,21	affiliate [4] 705:12 706:12 708:14,15
14(e) [1] 684:17	abilities [1] 639:4	abilities [1] 639:4	after-the-fact [1] 716:8
14a [1] 668:21	ability [9] 618:18 620:12 652:5 668:9,9 700:16,22 713:4 721:5	ability [9] 618:18 620:12 652:5 668:9,9 700:16,22 713:4 721:5	afternoon [5] 585:7,12 655:12,16,23
14b [1] 668:21	able [27] 595:22 596:3 598:21 613:11 632:14 633:11 638:16,19,24 639:1,2,8,15 646:16 650:3 672:19 673:1 681:25 682:14 685:3 692:7 702:18 705:10 709:15 715:24 721:2 725:12	able [27] 595:22 596:3 598:21 613:11 632:14 633:11 638:16,19,24 639:1,2,8,15 646:16 650:3 672:19 673:1 681:25 682:14 685:3 692:7 702:18 705:10 709:15 715:24 721:2 725:12	age [1] 597:23
15 [1] 655:7	above [1] 604:15	above [1] 604:15	ago [9] 608:23 674:8 683:9,21 701:16 713:3 717:24 720:15,19
198 [2] 591:2 621:16	absence [1] 684:3	absence [1] 684:3	agree [15] 602:21 606:12 607:4 612:20,23 623:17 626:5,23 646:8 650:3 653:16 673:24 675:14 683:8 697:1
1980s [2] 662:20 704:21	absolute [1] 713:20	absolute [1] 713:20	agreed [1] 694:17
1990s [1] 704:21	absolutely [6] 624:9 674:4,12,22 689:19 708:23	absolutely [6] 624:9 674:4,12,22 689:19 708:23	agreement [2] 617:22 675:11
2	abused [1] 689:20	abused [1] 689:20	agreements [4] 637:2 647:2,16 652:16
2 [1] 628:11			ahead [4] 589:12,23 598:12 668:25
2:44 [1] 728:22			aiming [1] 703:8
20 [7] 605:23 610:21,24 611:24 625:4 709:9 728:23			

<p>Albert [32] 656:8,11,11 658:14,15 662:12,13 667:1,3 677:23,24 678:19 679:3,4 680:19 684:9,10 686:7 692:13,14 702:10,11 706:8 712:20 714:3,3,12,13 723:18,19 727:13,14</p> <p>albums [1] 642:21</p> <p>Alexander [2] 645:23 648:3</p> <p>all-online [1] 718:16</p> <p>Alliance [2] 586:9 656:22</p> <p>Alliance's [1] 628:25</p> <p>allow [18] 592:8 605:8 614:20 627:10 636:18 647:20 648:15 650:20 662:6 666:8 667:17 673:8 680:14 686:1 688:13 693:24 701:4,5</p> <p>allowed [4] 651:20 661:24 718:12 724:14</p> <p>allowing [4] 613:16 665:18 728:7,13</p> <p>allows [6] 638:18 669:11 673:8 678:23 688:20 726:19</p> <p>almost [2] 591:17 597:22</p> <p>already [22] 595:3 598:12 602:12 617:3,10 618:9 626:2,20 648:9 650:7 683:4 685:8 688:19 689:7,8,17 690:14,15 697:8 704:5 709:25 724:16</p> <p>already-deteriorating [1] 617:5</p> <p>alternative [1] 608:16</p> <p>alternatives [3] 589:4 627:15,21</p> <p>Although [10] 613:20 637:1 663:14 678:1 681:14 687:21,22 694:18 702:25 725:3</p> <p>amazing [2] 709:9,13</p> <p>Amazon [5] 599:22 629:8 633:9 644:12 650:1</p> <p>Amelie [1] 642:9</p> <p>amenable [1] 633:19</p> <p>AMER [81] 584:3,4 585:25 586:1,4,10,14,19,23 587:3,8,15,24 588:3 623:12 625:7,24 626:14 653:11,14,15 654:3,10 655:4,5,8,11 656:2,3,6,20,23 657:1,6,12,16 658:14 659:8 660:6,19 661:17 662:12 663:8 664:14,22 670:21,25 672:4 673:4 674:21 675:7,23 676:20 677:23 678:12 680:7 681:8 682:6 683:7 684:9 686:4 687:1 688:16 690:6 691:7 692:13 694:9 696:6,20 698:16,19,25 699:15 700:10 708:20 716:11 722:21,22 725:17 727:12 728:17</p> <p>America [1] 666:9</p> <p>American [1] 637:4</p> <p>amongst [1] 627:6</p> <p>amount [3] 600:22 605:3 625:22</p> <p>analog [2] 659:15,23</p> <p>analogous [8] 636:13 649:14 660:1 661:19 707:21 726:13,21 727:4</p> <p>analog's [1] 662:1</p> <p>analysis [14] 588:25 601:13 624:5 656:5 662:4 666:12 697:1 710:10</p>	<p>711:24 712:5 719:22 720:11,17 726:12</p> <p>Analyst [2] 586:3 656:4</p> <p>analyze [4] 662:9 666:5 672:25 712:17</p> <p>and/or [1] 716:2</p> <p>angels [1] 689:23</p> <p>animals [1] 601:10</p> <p>animated [1] 698:7</p> <p>anniversary [1] 598:2</p> <p>annually [1] 620:19</p> <p>another [16] 593:23 603:3 605:6,13,23 606:4 609:19 610:22 611:3 644:18 649:11 651:23 652:23 673:5 686:5 719:1</p> <p>answer [10] 654:14 658:4 661:16 671:12 676:16 689:4 699:1,13 705:19 727:11</p> <p>answered [1] 727:10</p> <p>answering [2] 699:2 705:16</p> <p>anticipating [2] 588:8 592:23</p> <p>anticipation [1] 721:21</p> <p>anybody [1] 612:19</p> <p>anything's [1] 609:7</p> <p>apartment [2] 689:14 691:2</p> <p>API [2] 694:15 698:8</p> <p>apologize [3] 587:1 687:10 691:8</p> <p>app [2] 643:1,1</p> <p>apparent [1] 664:16</p> <p>appealing [1] 607:6</p> <p>appear [2] 619:24 707:19</p> <p>appeared [1] 698:9</p> <p>appears [1] 640:21</p> <p>Apple's [1] 726:16</p> <p>applicability [1] 674:19</p> <p>applicable [2] 618:8 674:12</p> <p>application [1] 640:21</p> <p>applied [5] 604:5,5,10,11 660:5</p> <p>applies [7] 623:20 626:20 660:21 676:1,4 690:7 726:1</p> <p>apply [10] 601:8 666:12 681:10,11 696:10 700:5 713:9 719:21 720:17 725:23</p> <p>appreciable [1] 689:25</p> <p>appreciate [2] 608:14 681:15</p> <p>appreciating [1] 610:5</p> <p>approach [1] 634:9</p> <p>approached [1] 633:10</p> <p>approaches [1] 634:12</p> <p>appropriate [14] 660:2 662:11,17 663:1 667:22 668:11 680:9,11 681:7 682:17 684:20 685:4 714:11 724:4</p> <p>approve [2] 640:11,11</p> <p>April [2] 614:1 728:23</p> <p>arcade [3] 722:9,9,10</p> <p>arcades [3] 668:17 719:2 722:2</p> <p>archival [8] 611:7 658:18 659:7 667:17 680:2 715:13 719:3 728:1</p> <p>archive [7] 621:21 677:6 709:6 715:19 722:4,16 724:6</p> <p>archive's [1] 665:1</p>	<p>archives [7] 651:15 664:4 669:4 685:3 700:20 722:6 724:8</p> <p>archivist [2] 705:12 706:12</p> <p>archivists [4] 661:13 668:5 708:14,15</p> <p>area [1] 703:23</p> <p>areas [2] 647:12 676:23</p> <p>aren't [12] 603:5 624:18,25 629:7 648:19 663:20 665:5 666:3,14 668:8 669:3 712:14</p> <p>arguably [1] 703:23</p> <p>argued [1] 601:6</p> <p>argument [6] 616:7 619:9 629:1,4 674:25 713:6</p> <p>arise [1] 701:2</p> <p>Arlington [3] 641:16,24 643:10</p> <p>around [10] 610:23 630:1 645:19 649:4 653:8 668:4,12 678:11 692:1 716:5</p> <p>arrangements [1] 629:21</p> <p>array [1] 709:9</p> <p>art [2] 677:11 703:24</p> <p>articles [3] 621:3 652:8 704:2</p> <p>artificial [1] 603:13</p> <p>artistic [1] 677:20</p> <p>aspect [1] 652:23</p> <p>aspects [2] 688:11 720:12</p> <p>assemble [1] 636:4</p> <p>assert [1] 645:13</p> <p>assertion [3] 603:23 604:2 719:1</p> <p>assets [1] 640:10</p> <p>assist [1] 585:6</p> <p>Assistant [4] 585:22,24 655:24,25</p> <p>associated [1] 594:8</p> <p>Association [4] 587:18,22 657:11 667:7</p> <p>assume [3] 695:22 720:13 721:14</p> <p>assuming [3] 595:2 633:10 680:19</p> <p>assured [1] 589:14</p> <p>asynchronous [1] 674:14</p> <p>at-issue [2] 614:23 625:14</p> <p>at-large [1] 613:10</p> <p>Atlanta [1] 586:16</p> <p>attach [1] 721:22</p> <p>attempting [1] 631:22</p> <p>attentive [1] 669:17</p> <p>attic [1] 625:2</p> <p>attorney [2] 656:12,18</p> <p>attributable [1] 700:18</p> <p>attuned [1] 682:19</p> <p>audience [9] 585:8,13 655:13 683:15 697:14 711:18 722:12,17,19</p> <p>audio [2] 585:5 595:23</p> <p>audio-visual [3] 585:17 594:12 674:2</p> <p>audiobooks [2] 642:4,20</p> <p>audiovisual [8] 673:17 674:11 675:22 676:17 681:11 687:7 694:16 713:24</p> <p>authenticated [11] 652:6,14 660:17 669:7,10,21 670:18 671:4 672:</p>	<p>13,22 678:6</p> <p>authentication [3] 671:24 686:13 689:16</p> <p>authorize [1] 720:2</p> <p>authorized [2] 658:17 697:10</p> <p>authors [1] 592:8</p> <p>availability [6] 599:16,25 611:21,22 647:12,25</p> <p>available [93] 589:3 591:13,14,17 599:19 607:9 608:24,25 609:1,4,15,17 612:5 614:5 619:22,22,24 620:8,9,12 622:10,16 627:15 628:15 629:7,10,16,20 630:6,20 632:22,25 633:15 634:2 638:8,14,25 639:14 640:12 641:23 642:2,5 643:3 644:1,16 646:21,22,23 647:2,4,7 648:5,9 649:8,10,13,15,20,21,24 650:14 653:2 655:18 658:23 660:25 669:6,6 670:8,19 673:16 683:2,5 684:7 685:11 686:12,14,20 690:11 696:17 701:24 702:22 703:5 708:12 709:23,24 710:5,6,12,19 715:8 722:11 727:1,3</p> <p>average [1] 601:19</p> <p>averse [1] 717:8</p> <p>avoid [2] 606:22 631:21</p> <p>aware [5] 590:13 596:9,16 614:4 682:20</p> <p>awareness [1] 652:15</p> <p>away [7] 614:17 618:20 648:3 717:9 719:11 725:2,3</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>back [27] 597:12 598:2,21 602:18 603:5 605:2,20 608:21 610:21 612:14 613:2 616:18 621:14 623:10 633:12,13 643:25 644:3 653:18 679:4 683:22 687:11 691:17 693:13 703:12 713:4 725:9</p> <p>back-and-forth [1] 625:10</p> <p>backup [1] 608:7</p> <p>backward-compatible [1] 616:1</p> <p>backwards-compatible [1] 616:3</p> <p>bad [6] 591:16 611:15 617:4 621:25 636:3 683:3</p> <p>baffled [1] 649:2</p> <p>balancing [1] 610:16</p> <p>Baldur's [1] 714:22</p> <p>ball [1] 680:17</p> <p>Band [40] 586:7,8,8 599:13 602:20,21 605:15,16 606:12 612:22,23 615:6,7 618:4,6 619:13,14 629:5,6 634:21,22 648:11,12 652:3,21,22 656:20,21,21 688:16,17 690:19 694:17 701:17,18 702:6,11 712:9,9 727:23</p> <p>Band's [1] 692:21</p> <p>bands [1] 622:24</p> <p>Barb [3] 636:21,22 637:19</p> <p>Barbara [1] 587:11</p> <p>bargain [2] 619:1,14</p> <p>barrier [1] 701:6</p>
--	--	--	--

<p>based [2] 636:1 666:7 basically [6] 596:21 605:18 622:6 628:1 672:2 681:20 basing [1] 615:8 basis [8] 599:22 624:9 631:25 632:23,24 635:18 662:10 687:6 BBC [2] 590:21 591:9 be-all [1] 618:8 became [1] 596:16 become [10] 590:13 592:14,16 607:24 619:22 632:25 673:14 709:24 710:5 725:5 becomes [2] 704:23 710:25 becoming [2] 616:21 710:8 beforehand [1] 638:2 begin [4] 584:8 585:18 634:20 643:24 beginning [2] 584:23 719:14 begins [1] 641:14 behavior's [1] 717:14 behind [2] 605:20 669:5 behold [1] 629:25 belabor [1] 679:18 believe [13] 596:3 620:9 648:4 658:5,18 659:4 662:5 674:12 677:25 699:16 712:21 727:10,24 believes [1] 695:6 bellwether [1] 617:8 beneficiary [1] 681:24 benefit [10] 619:1,14,25 692:19 693:5,8 704:6 705:3 706:14 728:14 benefits [4] 613:8,9,10 664:1 Berkeley [3] 586:22 592:6 620:18 best [8] 613:6,11 649:20 650:18 658:20 667:9 687:12 722:3 Beta [1] 595:11 better [9] 590:5 594:16 596:1,5 611:4 616:8,24 668:23 686:2 between [11] 590:19 601:11 622:1 633:23 634:5 688:22 693:11 702:15 710:18 714:23 727:19 beyond [9] 608:25 609:17,21 614:20 665:1 679:15 695:13,17 719:23 big [2] 677:18 718:7 Bill [2] 587:4 637:16 bit [24] 595:24 601:5 612:13 618:1,21 625:9 636:8 666:17 668:2,22 669:12,24 671:1,5 683:10 686:6 689:23 696:8,25 700:14,17 703:11 704:14 714:15 black [1] 706:21 black-and-white [1] 635:20 blank [2] 607:8,13 Block [2] 657:10 669:13 Blu-Ray [13] 588:17,20 589:21 595:9 597:10 599:7 600:5 608:1 614:2 616:3 633:6 639:18 649:25 Blu-rays [5] 596:17 600:6 604:20,21 638:3 blue [1] 640:5</p>	<p>Bo [1] 656:24 Board [2] 645:9 646:14 boiling [1] 600:21 bolster [1] 723:10 bona [1] 711:21 book [7] 618:15 636:2,2,10 683:25,25 727:9 booklet [1] 632:5 books [6] 618:14 636:2,5 682:13 698:6 704:1 borrow [5] 642:15,17 643:8,19,23 borrows [1] 642:22 both [11] 593:1 628:20 642:4 645:5,7 650:5 658:11 661:3 673:23 675:1 728:7 bottom [1] 640:6 bounds [1] 719:23 brand [2] 640:19 650:1 brand-new [1] 609:4 break [1] 653:20 Breyer [3] 688:3 693:4 699:25 Breyer's [1] 692:19 brief [5] 584:21 654:22 672:7 688:10 727:14 briefing [3] 693:14 713:6 714:16 briefings [2] 713:11 726:22 briefly [4] 592:3 593:6 618:2 660:7 bring [5] 610:17 638:13 663:9 675:13 676:21 bringing [1] 682:15 broad [2] 659:2 680:1 broadcast [1] 647:17 broader [3] 662:6 678:6 724:14 broadest [3] 697:2,9 720:11 broken [1] 593:18 bronzing [1] 596:18 Brother [1] 596:8 Brothers [8] 590:22 595:6,13 597:3 599:17,25 621:16 628:2 browse [3] 643:10,11,13 browser [1] 670:19 browsing [1] 643:2 build [2] 692:15 695:5 building [2] 592:7 684:22 built [1] 684:13 bunch [1] 614:14 burdensome [1] 685:2 burned [1] 612:10 business [1] 644:18 button [2] 640:6 643:23 buy [8] 598:18 606:20 619:21 620:10 632:10 647:18 649:25 716:1 buying [3] 619:16 620:1 632:12</p>	<p>calling [2] 655:13 714:25 calls [1] 722:16 came [9] 596:19 632:5 633:12 650:25 692:17 701:15 706:3 709:7 720:21 Campus [4] 637:21 645:5,7 647:20 campuses [1] 721:20 Canal [1] 633:5 cannot [6] 599:10 606:25 631:6 702:4 704:7 706:25 capacity [1] 600:14 Caper [1] 707:22 captioning [2] 638:20 639:4 car [1] 625:2 card [2] 641:24 643:10 cards [1] 665:12 care [1] 682:25 careful [1] 607:25 carefully [2] 589:15,16 carousels [1] 643:14 carried [2] 658:12 701:8 cars [1] 601:2 case [27] 592:20,22 594:15 601:3 617:12 618:17 622:8 625:16 640:2 641:13 642:6 646:6 684:2 686:14,25 687:12 697:15 708:23 713:5 718:12 723:6,8,16 725:22,24 726:13 727:18 case-by-case [6] 624:5,9 631:24 635:18 662:3,10 cases [12] 621:17,18 658:23,24 661:12 686:21 710:13 713:8 718:8 723:9,14 726:1 cast [1] 639:5 Castro [1] 707:22 catalog [4] 599:18 632:21 640:2 686:10 catalogs [2] 638:9,10 categories [2] 640:16 643:13 category [1] 659:2 cause [3] 593:24 610:16 625:22 caused [1] 695:2 causes [1] 624:10 causing [1] 693:2 caution [1] 681:2 cautious [1] 724:20 center [2] 594:16,25 centuries [1] 661:10 century [2] 613:4 645:18 certain [11] 598:22 611:15 625:22 644:16 658:22,24 662:15 672:10 693:23 714:18 715:24 certainly [10] 602:21 606:7 615:9 618:14 630:14,16 632:7 675:8 678:4 710:11 cetera [5] 627:22 651:10 661:2 702:23 703:3 challenges [1] 647:13 Champion [1] 706:22 chance [7] 589:19 590:7 619:8,12 628:21 659:10 682:7</p>	<p>change [4] 601:5 629:19 708:16 716:8 changed [1] 714:23 changes [3] 614:13 629:22 700:19 changing [2] 629:22 700:6 chapters [1] 636:5 character [1] 706:21 characters' [1] 714:23 Charitably [1] 697:13 chase [1] 628:20 chat [1] 655:16 chatbox [1] 585:12 check [16] 589:1 598:21 600:14 628:19 633:22 634:1 635:14,15 642:14,21 649:8 650:2 673:15,20 675:17 680:15 checking [1] 595:13 chilling [2] 696:18 716:16 chime-in [1] 611:20 chip [1] 592:13 choice [1] 634:11 choose [1] 611:4 chooses [1] 683:14 choosing [1] 717:10 choppy [1] 595:24 chose [1] 679:24 chosen [2] 638:23 683:11 Chromecast [1] 639:5 chunk [4] 603:4 631:18,19,19 Cinram [1] 590:20 CIO [1] 587:4 circulate [4] 593:7 600:18,23 607:19 circulated [1] 594:5 circumstance [2] 712:4 719:6 circumstances [5] 658:21 662:15,23 667:25 694:23 circumvent [3] 652:24 701:22 708:18 circumventing [3] 651:20 690:20,21 circumvention [5] 666:9 691:4 702:16 708:16,17 citation [1] 613:25 cited [3] 713:6,15 723:14 citing [1] 614:1 CJ [1] 727:6 claiming [2] 719:3 724:13 clarify [5] 596:14 671:13 677:13 703:17 704:3 clarity [1] 667:4 Class [15] 584:8 585:16 588:4 608:19 633:15 638:5 639:18 653:19 654:8 655:19 660:11 665:18 668:20,21 697:6 classes [7] 621:9 638:25 648:15 658:10 660:10,15 664:11 classroom [4] 593:8 601:2 639:21 648:15 classrooms [1] 593:14 clause [1] 665:24 cleaned [1] 604:22</p>
C			
<p>C1 [1] 629:1 calendar [1] 642:22 California [3] 586:22 620:18 692:5 California-Irvine [1] 656:25 call [8] 584:11,16 589:18,25 654:14,16,18 718:24 called [4] 588:24 637:21 722:4,8</p>			

<p>clear ^[17] 594:21 610:10 622:1,2,9 623:2,25 658:16 664:20 685:13 701:2,12 702:1 711:20 716:13 718:13 721:6</p> <p>clearer ^[2] 698:7 710:25</p> <p>clearly ^[7] 585:4 610:9 663:19 674:9 679:19 700:18 713:10</p> <p>click ^[5] 642:12,15 643:15,19,21</p> <p>client ^[1] 637:16</p> <p>clients ^[1] 637:7</p> <p>climatic ^[1] 600:17</p> <p>Clinic ^[3] 656:12,15,18</p> <p>clip ^[6] 631:7 648:21 652:25 653:2,5,9</p> <p>clipping ^[1] 652:11</p> <p>clips ^[8] 621:1 648:17 649:1 650:4,6 652:5,23 653:7</p> <p>close ^[1] 694:15</p> <p>closed ^[4] 638:20 639:4 669:20 671:4</p> <p>closely ^[1] 726:13</p> <p>closet ^[1] 709:13</p> <p>cobble ^[1] 605:4</p> <p>code ^[4] 622:12 698:8 700:4,6</p> <p>collaborate ^[1] 608:14</p> <p>collaboration ^[1] 705:23</p> <p>colleague ^[5] 588:5 674:18 685:22 696:22 700:11</p> <p>colleagues ^[2] 585:19 677:1</p> <p>collecting ^[1] 695:7</p> <p>Collection ^[28] 586:12 590:17,23 591:9 592:4,4 594:24 596:17,23 615:13,14 628:2,6,11 633:7,16 635:1 637:5 645:17 646:5 648:2 670:7,8 675:15 686:11 709:2 717:21 722:10</p> <p>collections ^[9] 596:24 621:8 657:4,5 667:21 669:5 705:23 709:5,11</p> <p>collectors ^[1] 596:25</p> <p>college ^[2] 672:16 703:25</p> <p>colleges ^[2] 637:7 721:19</p> <p>colloquially ^[1] 714:25</p> <p>colorization ^[1] 622:24</p> <p>come ^[12] 592:7 593:16 598:1 599:13 612:6,14 619:12 627:7 664:12 673:9 723:24 726:13</p> <p>comedies ^[1] 642:8</p> <p>comes ^[6] 602:2 614:6 615:25 632:13 650:4 681:16</p> <p>comfortable ^[1] 631:25</p> <p>comforting ^[2] 672:10,20</p> <p>comics ^[1] 642:20</p> <p>coming ^[7] 595:24 603:5 614:19 616:16 682:19 704:2 718:13</p> <p>comment ^[7] 631:9 644:22 675:1 688:8 700:8 726:3 727:4</p> <p>commentary ^[1] 632:5</p> <p>comments ^[31] 584:21 588:12 589:16 590:3,11 596:4,20 598:7,13 599:15 602:10 603:21 604:13 608:15 618:25 619:10 628:6,8,10 650:25 654:22 657:20 664:16 665:</p>	<p>3,10,24,25 696:8,25 710:6,8</p> <p>commerce ^[4] 631:1 688:15 689:8 715:9</p> <p>commercial ^[3] 611:10 713:5 717:17</p> <p>commercially ^[5] 591:23 709:23,24 710:12 717:19</p> <p>commercially-pressed ^[1] 590:15</p> <p>commercially-produced ^[1] 607:15</p> <p>Committee ^[1] 645:8</p> <p>committees ^[1] 693:23</p> <p>common ^[1] 710:8</p> <p>communities ^[1] 634:15</p> <p>community ^[1] 644:24</p> <p>companies ^[1] 664:20</p> <p>Comparative ^[1] 677:1</p> <p>comparison ^[1] 715:14</p> <p>compel ^[1] 651:22</p> <p>compelling ^[1] 651:13</p> <p>competing ^[1] 685:19</p> <p>competition ^[2] 650:15,17</p> <p>competitive ^[1] 595:9</p> <p>compilation ^[1] 653:6</p> <p>complement ^[1] 727:16</p> <p>complete ^[2] 628:14 700:24</p> <p>completed ^[1] 675:17</p> <p>completely ^[9] 591:18 601:10 635:19 636:12 640:14,19 649:14 677:8 706:6</p> <p>complex ^[1] 704:18</p> <p>compliance ^[2] 682:25 717:3</p> <p>complicated ^[2] 633:3 704:24</p> <p>comply ^[1] 682:21</p> <p>compromise ^[1] 683:12</p> <p>computer ^[9] 602:5,16,17 607:22 654:9 675:15 676:8,17 678:15</p> <p>conceivably ^[1] 688:23</p> <p>concept ^[2] 666:18 683:13</p> <p>concern ^[5] 593:21 659:21 664:15 703:16 711:9</p> <p>concerned ^[1] 603:12</p> <p>concerning ^[1] 597:6</p> <p>concerns ^[10] 588:24 593:25 659:9,11 663:10 668:16 680:8,22 685:17 728:3</p> <p>conclude ^[1] 666:13</p> <p>concrete ^[1] 621:15</p> <p>concurred ^[1] 726:7</p> <p>condition ^[3] 632:1 635:5 636:3</p> <p>conditions ^[3] 600:5,20 690:10</p> <p>conduct ^[2] 661:8,13</p> <p>conducted ^[1] 664:11</p> <p>configuration ^[1] 633:19</p> <p>confined ^[1] 680:13</p> <p>confirm ^[1] 705:14</p> <p>confused ^[1] 707:9</p> <p>confusing ^[1] 665:22</p> <p>confusion ^[2] 663:11 667:15</p> <p>Congress ^[7] 611:6 695:12,20 713:23 719:16,23 726:5</p>	<p>connect ^[1] 641:17</p> <p>connected ^[1] 696:10</p> <p>connection ^[2] 589:10 702:15</p> <p>consensus ^[3] 608:22 617:22 627:5</p> <p>conservative ^[2] 682:24 686:9</p> <p>consider ^[8] 589:16 617:10 619:1 621:6,23 651:1,7 680:10</p> <p>consideration ^[2] 666:7 706:11</p> <p>considered ^[9] 589:4,15 595:10 609:7 618:3 628:22 630:5 651:6 696:15</p> <p>considering ^[2] 649:12 651:16</p> <p>consistent ^[7] 604:23 623:19 649:14 663:4 676:10 728:14,15</p> <p>console ^[2] 722:13,14</p> <p>consoles ^[3] 665:14,17,19</p> <p>constantly ^[2] 640:25 682:18</p> <p>constituency ^[1] 711:20</p> <p>consume ^[2] 638:4 639:20</p> <p>consumer ^[1] 601:19</p> <p>consumers ^[2] 651:18 672:16</p> <p>consuming ^[1] 650:12</p> <p>consumption ^[1] 715:2</p> <p>contact ^[1] 686:18</p> <p>contacts ^[1] 699:8</p> <p>contain ^[1] 604:21</p> <p>contemplated ^[5] 630:15,16 657:21,25 658:6</p> <p>contemplating ^[1] 713:23</p> <p>contemplation ^[1] 615:10</p> <p>contemporary ^[1] 677:18</p> <p>Content ^[49] 587:17,22 588:19 592:7,9 594:1 599:7 605:12,14 606:24 619:3 620:20,23,24 621:8,8 622:15 631:7,15,22 632:2,4 634:10 637:2,15,24 638:5,7,11,12,16,20,22 639:14,20 640:3,17 641:4 645:9,15,16 646:1,13,16,21 647:5,25 653:1,8</p> <p>contention ^[1] 723:10</p> <p>context ^[10] 601:8 618:10 660:9 679:15 686:1,7 688:6 704:9 712:23 715:22</p> <p>contexts ^[2] 618:4 682:13</p> <p>continue ^[7] 589:15 602:25 622:16 625:5 641:11 650:19 725:5</p> <p>continuing ^[1] 602:23</p> <p>continuous ^[1] 640:25</p> <p>Control ^[7] 587:18,21 600:14,22,23 713:18 720:20</p> <p>controlled ^[18] 592:10 600:10 601:1 658:7,9 666:18,22 667:16 668:1,22 669:1,5 672:9 711:7,9,16 712:3,22</p> <p>convenience ^[3] 697:13 698:1 712:16</p> <p>convenient ^[1] 697:24</p> <p>conversation ^[1] 652:19</p> <p>conversations ^[2] 608:13 692:1</p> <p>converting ^[2] 605:10 726:25</p> <p>cooperation ^[1] 617:1</p>	<p>copies ^[82] 591:17 598:18 603:25 604:8 607:8,19 609:11,24 610:14 611:13,16,22 612:21 613:1,13,16 614:7,9,15,17,21,23,25 615:2,6,17 616:22 617:3,4,5,16,17,19 620:5,7,11,13 622:14 625:16 626:3,4,7,10,11,20 628:23 630:10,10,12 634:2 649:25 658:1 659:14,17,18 660:4,9,23,25 661:7 665:9,11,15 666:24 667:17 669:25 673:14,19 675:18 676:7,7,11 678:17,24 680:8,14 681:18 683:2 706:23 707:19 708:4 709:1</p> <p>Copy ^[59] 587:18,21 605:10,12,22,24 606:4,6,13,19 608:2,4,5,7 609:3,4,5 610:6,6,8,9,11,22 611:2,13,14,14 614:9,16,22 615:2,12,13,14 621:24 623:9,21,25 625:13,18 626:24 627:4,4 630:11,12 631:5 634:9,17,20 660:21 662:16,21,23 673:15 676:19 677:6 683:25 708:9 716:2</p> <p>Copyright ^[43] 584:5 585:3,18 586:9 588:2 598:4 613:19 616:20 619:2 626:12 627:6 628:25 647:1 650:14 652:9 654:11 655:1 656:22 657:15 667:19,23 668:10 674:8 679:5,13 681:3,7 682:21 684:23,24 685:25 693:13 695:12 698:9 710:16,22 713:24 714:1 715:6 716:20 717:3 720:20 728:10</p> <p>copyrighted ^[3] 698:14 715:25 728:13</p> <p>core ^[5] 592:12 594:17 660:15 664:3 668:7</p> <p>Corellium ^[3] 726:14,15,15</p> <p>correct ^[1] 705:19</p> <p>correctly ^[3] 622:20 625:1 656:9</p> <p>correlation ^[1] 622:1</p> <p>could've ^[1] 626:13</p> <p>couldn't ^[2] 605:12 633:14</p> <p>Counsel ^[8] 584:4 585:22,24 587:17,21 654:11 655:24 656:1</p> <p>count ^[4] 649:9,16 701:10 704:1</p> <p>counter-argument ^[1] 618:24</p> <p>couple ^[10] 598:7,18 608:12 644:21 650:21,24 672:7 700:15 717:16 723:21</p> <p>coupled ^[1] 684:3</p> <p>course ^[15] 590:22 596:15 608:17 629:16 633:3 637:11 643:15,25 645:6 687:16 716:20 718:10,18 721:9,17</p> <p>Courses ^[2] 643:7 674:14</p> <p>court ^[10] 585:2 596:3 654:25 655:3,4,6,9 687:18 713:21 720:23</p> <p>Court's ^[1] 698:6</p> <p>cover ^[12] 584:18,24 588:8 598:8 599:23 612:14 650:5 654:19 660:4 673:22 723:5 728:3</p> <p>covered ^[9] 695:3,16,18,22,23 709:25 710:4 723:11 724:17</p>
--	--	--	--

<p>covering [1] 695:24 covers [2] 613:22 663:16 COVID [9] 679:19 718:11 721:8,10, 17,22 724:23 725:1,3 cracked [1] 607:25 cracking [1] 595:1 crafted [1] 683:22 Crawford [1] 628:10 create [3] 676:6 716:5 726:17 created [3] 686:17 697:23 706:17 creates [1] 716:7 creating [2] 603:13 669:16 creation [3] 705:24 708:2 724:25 creative [1] 698:14 creator [1] 604:17 Creators [6] 588:2 602:18 604:9 657:14 667:7 685:17 Creators' [1] 680:22 creature [1] 602:11 credentials [1] 671:20 credited [1] 721:1 criteria [2] 667:19 684:14 Criterion [9] 590:16 596:17 597:9, 9,10 631:20 633:6 645:17,18 critical [1] 727:7 critically [1] 621:4 criticism [1] 631:9 critique [4] 688:8 700:8 726:3 727:4 crucial [1] 677:10 crummy [1] 606:19 crying [1] 624:24 crystal [1] 701:1 CSS [9] 588:18 603:22,23 604:5,9, 11,19 605:1 652:24 cultural [5] 603:8 613:8 664:1 691:24 708:24 culture [2] 677:11 708:1 curator [1] 657:3 curatorial [1] 634:10 curious [3] 604:1 611:20 698:20 current [23] 614:20 633:18 636:17 663:11,13 669:13 678:3,22 679:25 687:13,17 690:6,18 694:25 695:13 696:4 697:9 702:5 711:1, 25 712:11 719:7 720:16 currently [8] 588:20 637:7 644:4 661:24 673:7 674:25 687:17 710:12 customer [1] 645:5 customize [2] 640:14,19 cut [2] 628:20 687:10 Cyber [1] 656:12 Cyberlaw [2] 656:15,18</p>	<p>dated [1] 603:16 David [1] 587:20 day [8] 585:15 605:17 615:3 653:21 677:8 683:5 710:17 728:24 day's [1] 655:17 day-to-day [1] 646:10 days [1] 699:5 deal [1] 650:5 dealing [4] 651:9 694:14 710:1 713:8 Dean [2] 587:16 626:23 debate [3] 627:1 692:21 722:5 decade [1] 608:22 decide [3] 642:21 662:9 710:16 decided [1] 594:1 decipher [1] 721:24 decision [11] 675:3 685:4 687:19 688:2 692:17 694:19 698:6,11 699:23 720:22,23 decisions [5] 662:8 682:18,20 685:19,23 decks [2] 612:4,8 declaring [1] 698:8 deep [1] 640:24 deeply [1] 691:23 defer [1] 723:20 defined [1] 617:11 defining [1] 651:8 definitely [1] 653:12 definition [3] 630:11 684:18 722:5 degradation [3] 589:21 593:1,24 degrade [1] 607:9 degree [5] 645:10 687:5 690:15 709:25 716:15 delivered [1] 671:22 demand [3] 602:2 629:22 645:23 demonstrated [1] 594:5 Department [1] 600:16 depends [1] 629:19 Deputy [2] 584:4 654:11 describe [2] 589:19 605:9 described [4] 589:11 617:19 712:4 717:23 describes [1] 716:20 describing [1] 723:17 description [2] 643:20,22 designed [2] 687:24 726:12 designing [1] 671:15 desire [1] 719:18 destroyed [1] 707:20 destructive [2] 593:12 719:25 detail [2] 670:23 688:10 details [5] 637:17 639:1,6 640:5 642:13 deteriorated [5] 591:18 635:10,10 636:7 679:8 deteriorating [8] 588:17 618:19 623:21 624:1,6 626:21 635:7,11 deterioration [7] 589:20 592:3 599:3 616:9 622:3,5 636:8 determination [1] 667:22 determine [4] 624:5 658:19 713:</p>	<p>16 717:4 determined [1] 618:9 determining [1] 604:25 devastating [2] 592:23 600:11 develop [3] 650:20 671:8,17 developed [1] 726:15 developing [2] 650:16 687:17 development [5] 641:1 656:5 671:9 705:25 728:8 device [5] 639:20 641:18 642:24 643:24 644:6 difference [3] 688:22 689:22,25 differences [2] 601:11 676:23 different [29] 598:18 601:10 602:5 606:13 611:5 614:15,23 633:18 636:4,5 639:3,17 643:11,13 659:2 663:5 666:1 672:14,23 676:23,24 700:23 702:4 711:24 712:5,17,25 721:18 723:6 difficult [6] 604:16 669:15 685:19 695:5,8 710:18 difficulties [1] 700:23 dig [1] 705:22 digital [25] 597:20 605:10 612:18, 20,24 613:12 615:5 637:21 638:7, 15 640:10 641:3 645:5,7 656:25 660:12,16 668:22 678:17 684:14, 20 685:7,12 686:17 704:19 diminishes [1] 689:9 direct [2] 617:23 639:9 directly [4] 643:17 701:2,15 727:18 disagree [2] 612:19 626:3 disagreements [1] 608:14 disappear [4] 603:4 615:24 644:17,20 disappeared [2] 653:1 717:24 disc [40] 590:14 591:4,11 592:12, 19,22 593:2,15 595:6 597:5,13 598:23 599:20 603:25 605:10 606:4,5 608:8 609:24 610:6,7,9 611:9 616:10 619:2 622:1,12,20,22,22, 25 623:4 624:6,10,12,17 625:13 631:25 632:1,2 discoloration [1] 591:5 discourage [1] 606:3 discs [41] 588:18,20 589:21 590:24 593:7,10,13,16 594:4,17,23 595:9 596:8 597:1,4 598:16,16 601:9 607:13,20 608:25 609:14, 15,17,22,22 611:11 612:10 613:23 617:12,18 619:3 621:24 622:4,6, 10,15 628:9,11 649:22 650:6 discuss [3] 588:15 589:7 612:15 discussed [6] 607:14 679:10 695:15 699:18 713:11,21 discusses [1] 604:25 discussing [6] 605:7 626:19 649:19 694:13 711:3 725:20 discussion [18] 588:9 590:19 618:22 653:17 666:20 667:20 672:9 675:13 676:3 679:14 684:23 692:</p>	<p>19 694:11 695:11,16,18 714:15 728:19 disingenuous [1] 645:14 Disney [4] 603:10,12 608:18 621:8 display [1] 591:4 dispute [1] 657:20 distinction [2] 644:10 727:19 distribute [3] 675:18 676:11,19 distributed [3] 611:10 659:14 690:10 distribution [6] 602:11 619:7 659:19 665:9,11 678:17 distributions [1] 695:25 distributors [3] 587:13 637:3,4 diversity [1] 691:15 document [7] 667:20 679:14 684:23 695:11,17,18,22 document's [1] 695:19 documentaries [3] 642:1 643:5 647:14 documented [1] 634:12 documents [1] 614:12 doing [11] 607:1 619:16 631:24 634:1 661:3 664:2 672:22 685:24 687:6 699:5 705:4 dollars [3] 619:16 620:19 632:11 done [7] 652:13 674:6 692:9 704:14 705:7 719:15 721:9 Donna [1] 641:15 dorm [1] 689:14 DOS [1] 670:14 down [2] 646:4 691:2 down-the-line [2] 703:16 704:4 downfall [1] 682:15 download [3] 609:2 631:7 650:9 downloadable [1] 617:19 downloading [1] 715:20 downloads [1] 627:22 downstream [2] 697:22 699:18 drafted [1] 659:12 draw [3] 705:1 710:17 715:5 drive [2] 593:11,12 drives [1] 607:23 DRM [2] 638:17 724:12 due [1] 700:19 during [10] 590:24 607:21 608:4 614:3 639:16,16 692:8 694:13 721:9 725:1 DVD [41] 587:18,21 591:7,24 593:11,13 595:13,20 596:11 599:6 600:5 603:22 605:1,12,13 606:13 607:1,5,8,12 610:22 611:3,4,8,21, 22 612:2 614:2 616:4 618:18 624:22 631:4 632:12 633:6 636:6,9 638:9 639:18 646:5 647:18 649:25 DVDs [26] 588:17,18,20 589:21 590:15,19 595:15,17 596:14,23 598:15 600:6 607:8,15 610:23 611:1,5 618:17 619:16 620:2 621:16 624:25 625:1 638:3 649:4,13 dwindling [1] 602:24</p>
D			
<p>damage [6] 593:13,17,24 616:9 710:25,25 damaged [16] 588:17 605:12 607:21 608:4,6 616:22 623:21 626:21 635:6,9,9,11,20,22,25 679:8 dance [1] 689:24 data [3] 592:18 594:7 612:1</p>			

<p>dynamic [2] 602:11,15</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>each [2] 624:6 652:11</p> <p>earlier [19] 593:3 624:10 637:10 649:7 669:23 670:13 674:3 675:4 687:19 696:3 697:7 710:11 711:3 712:8 713:22 717:1 725:10,19 727:23</p> <p>easily [1] 607:21</p> <p>easy [2] 607:24 692:6</p> <p>eBooks [1] 642:20</p> <p>edification [1] 619:17</p> <p>edition [6] 606:20,23,25 621:18 714:22 720:16</p> <p>education [2] 643:7 712:23</p> <p>educational [5] 631:10 646:15 647:14 660:15 694:20</p> <p>educator [1] 687:23</p> <p>effect [9] 672:24 696:18 701:4,11, 13 702:2 712:12 713:12 721:15</p> <p>effective [1] 659:6</p> <p>effectively [1] 688:12</p> <p>effects [4] 700:17,19 701:2 702:9</p> <p>efforts [1] 699:9</p> <p>eight [1] 595:20</p> <p>either [13] 597:13 614:10,16 628:21 639:9 651:21 664:14 666:3 689:15,16 690:1,5 718:23</p> <p>elaborate [2] 671:1 716:21</p> <p>element [1] 723:5</p> <p>elements [1] 652:19</p> <p>eligibility [5] 667:12,18 668:20 684:14 723:24</p> <p>eligible [9] 684:18,19 685:6,14 690:9,12 693:1 708:18 728:2</p> <p>eloquently [1] 593:3</p> <p>email [1] 640:8</p> <p>Emory [1] 586:16</p> <p>emphasize [3] 597:3 620:17 692:18</p> <p>emphasizing [1] 693:7</p> <p>emulated [4] 658:23 670:2 683:15 722:18</p> <p>emulation [17] 658:7 662:24 665:20 666:18,22 667:16 668:1,23 669:2,5 670:1,9 672:9,20 699:6 705:5 711:6</p> <p>emulator [2] 673:2 722:11</p> <p>enable [1] 647:16</p> <p>encompass [2] 661:15 708:15</p> <p>encompassed [1] 674:16</p> <p>encompasses [1] 674:4</p> <p>encounter [1] 705:22</p> <p>encourage [1] 606:2</p> <p>encryptions [2] 638:17 641:3</p> <p>end [16] 612:3,15 614:9,14,15 615:3,13 644:8 659:25 660:5,5 661:1 717:10 721:15 726:24 728:15</p> <p>end-all [1] 618:8</p> <p>end-users [1] 660:21</p> <p>endorsing [1] 609:8</p> <p>ends [2] 716:16 726:20</p>	<p>enduring [2] 603:7,8</p> <p>engage [7] 637:23 663:24 666:9 667:23 699:11 711:25 717:11</p> <p>engaged [1] 695:7</p> <p>engaging [1] 674:17</p> <p>Englund [24] 657:8,9,9 664:14,18 672:4,7 683:7,8 684:12 685:9,13 696:3,20,24 703:13,13 711:11,14 718:24 719:8 722:2 723:1,21</p> <p>Englund's [3] 676:10 677:14 725:19</p> <p>Enhanced [1] 714:22</p> <p>enjoy [4] 598:3 601:24,25 644:5</p> <p>enjoyed [1] 661:9</p> <p>enough [7] 597:22 607:11 635:12, 20,22 681:19 718:3</p> <p>enrolled [1] 672:19</p> <p>ensure [1] 622:15</p> <p>enter [2] 652:10 721:3</p> <p>entertainment [4] 603:7 651:10 657:10 667:6</p> <p>entire [5] 625:16 638:4 640:2 646:5 648:25</p> <p>entirely [4] 663:14 670:1 706:4 724:15</p> <p>entirety [1] 628:5</p> <p>entitled [1] 626:3</p> <p>entry [2] 595:13,14</p> <p>environment [3] 601:1 670:11 705:5</p> <p>environments [1] 726:17</p> <p>envisioning [2] 615:16 658:3</p> <p>episodes [3] 641:25 642:15,19</p> <p>equipment [1] 612:2</p> <p>equipped [1] 668:23</p> <p>equitable [1] 680:5</p> <p>equity [2] 676:22 725:11</p> <p>equivalency [1] 602:1</p> <p>equivalent [2] 661:20 718:17</p> <p>era [1] 597:21</p> <p>error [4] 623:6 624:11,11,12</p> <p>ESA [4] 685:17 710:7 724:1,6</p> <p>ESA's [2] 680:22 713:6</p> <p>escalating [1] 721:12</p> <p>especially [8] 602:3 607:21 612:9, 25 613:7 619:10 648:17 704:20</p> <p>essentially [6] 599:21 605:8 614:13,18 670:18 681:18</p> <p>establish [1] 627:18</p> <p>establishing [1] 627:13</p> <p>et [5] 627:22 651:10 661:1 702:22 703:3</p> <p>ethnic [1] 621:9</p> <p>even [33] 589:24 595:10 603:6 604:14 607:11,19,25 611:9,24 614:19 622:25 627:17 630:15 632:9 633:14 636:2 646:19 649:23 665:11 672:10 678:8 688:4 692:23 704:1 709:16,17 710:5,14 715:22 716:24 724:1,11,17</p> <p>event [2] 584:25 654:23</p> <p>eventually [2] 592:15 616:14</p>	<p>everybody [3] 585:21 588:6 653:11</p> <p>everyone [7] 584:3 585:4,23 586:2 641:15 654:7 686:24</p> <p>everyone's [1] 608:15</p> <p>everything [8] 609:17 610:5 645:12,21,25 683:8 695:22 704:23</p> <p>everything's [2] 719:19,24</p> <p>evidence [13] 622:9 650:12 692:24 694:24 695:1,8 715:17,18 719:2,5 722:1 724:6,7</p> <p>Evjen [10] 586:25 587:2,4,4,13 636:14,18,21,25 637:19</p> <p>evocative [1] 714:21</p> <p>exact [2] 627:25 687:24</p> <p>exactly [10] 597:24 610:23 664:23 668:2 678:23 701:19 702:14 704:22 711:15 726:12</p> <p>example [25] 591:7 592:20 597:9 601:3,19 609:3 621:15 627:3 631:6 633:1 670:3,14 691:10 692:2 700:23 701:18,19,25 702:1 709:5 712:22 714:21 722:3 724:13 727:5</p> <p>examples [3] 651:14 710:7 711:4</p> <p>exception [5] 618:3 666:21 673:13 680:13 687:8</p> <p>excludes [2] 673:17 687:7</p> <p>exclusive [2] 713:16 720:19</p> <p>exclusively [2] 592:5 643:4</p> <p>execute [1] 700:4</p> <p>exempt [1] 674:1</p> <p>exemption [60] 586:7,24 589:8 601:7,7 605:8 615:8,9 628:19 649:22 650:23 651:6 652:23 653:6 658:7,13 659:5 663:16,19 666:23 667:8 674:16 678:3,3,14,19,22 679:7 681:24 685:15 688:19 690:6,14,17,18 694:25 695:4,6 701:4,9, 10,21 702:5,20 705:12,15 708:14, 19 710:1 712:11,14 714:11 717:10 719:4 723:25 724:2,9,16,18 728:2</p> <p>exemptions [11] 624:3 650:5,7 661:21 667:13,14 697:9 710:24 719:13 724:4,20</p> <p>exercise [1] 606:9</p> <p>exist [2] 725:5 728:12</p> <p>existence [1] 724:8</p> <p>existing [16] 601:7 625:11,16 652:23 653:5,6 695:4 701:9 706:13,22 708:1,19 710:1,13,24 719:3</p> <p>exists [2] 626:16 724:16</p> <p>expand [1] 696:24</p> <p>expanded [1] 643:21</p> <p>expansive [1] 726:6</p> <p>expect [6] 584:19 588:11 594:11, 14 625:5 671:23</p> <p>expectation [1] 725:3</p> <p>expected [3] 599:3,9 603:24</p> <p>expend [1] 664:8</p> <p>expensive [2] 664:9 693:16</p>	<p>experience [3] 607:7 630:2 686:8</p> <p>experimental [1] 677:21</p> <p>experts [1] 626:12</p> <p>explain [3] 669:24 671:10 700:16</p> <p>explanation [1] 629:3</p> <p>explicit [1] 686:15</p> <p>explicitly [1] 693:4</p> <p>explored [1] 697:7</p> <p>expose [1] 640:2</p> <p>expressed [3] 650:23 679:1 719:12</p> <p>expressly [1] 678:17</p> <p>extend [1] 687:13</p> <p>extending [1] 705:12</p> <p>extensive [2] 607:7 611:6</p> <p>extensively [2] 679:10 693:11</p> <p>extent [11] 597:5 618:21 623:18 636:10 645:19 672:10 673:8 689:23 698:2 711:17 723:16</p> <p>external [1] 593:11</p> <p>extra [1] 632:4</p> <p>extrapolate [1] 698:12</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>fabulous [1] 646:9</p> <p>face [1] 683:4</p> <p>face-to-face [1] 718:16</p> <p>facilitating [2] 680:17 726:17</p> <p>facility [2] 600:9,22</p> <p>fact [16] 597:12 598:1 607:25 624:6 632:8 633:1 649:3 650:13 651:17 678:16 684:13 685:1 699:4 708:25 717:7 723:6</p> <p>fact-specific [1] 662:4</p> <p>factor [4] 688:18 692:20 693:6 710:9</p> <p>factors [3] 627:16 702:21 711:10</p> <p>factual [3] 603:21 706:10,11</p> <p>factually [2] 723:9,16</p> <p>faculty [2] 593:8 620:21</p> <p>failing [1] 597:1</p> <p>failure [1] 716:19</p> <p>fair [53] 618:4 621:6 625:14,17 631:8 649:7 660:3 661:14 662:3,3 666:12 673:3,8,21 674:19 675:2,6,8,10 680:1 687:3,13,16 688:1 691:11 694:19,21 695:9 697:20 698:11 710:10 711:24 712:4,17 713:25 716:9,16 717:11 719:19,21 720:2, 17 723:4,6,12,20 725:16 726:8,11 727:8,17,22 728:15</p> <p>faith [1] 628:13</p> <p>fall [2] 646:3 721:20</p> <p>familiar [2] 584:9 599:5</p> <p>familiarity [1] 645:11</p> <p>family [1] 619:6</p> <p>fan [1] 596:21</p> <p>fans [1] 709:4</p> <p>far [19] 591:4 597:19,19,25 602:11 604:11,20 611:11 614:4 616:2 623:3 627:19 633:4 666:8 671:16 681:19 716:15 719:23 726:12</p> <p>fashion [2] 651:7 670:20</p>
--	---	---	--

<p>faulty ^[1] 622:9</p> <p>favor ^[1] 726:3</p> <p>favorite ^[2] 642:8,9</p> <p>feature ^[5] 584:13 621:7 643:5 654:16 706:21</p> <p>feel ^[4] 584:15 640:20 654:17 669:14</p> <p>fees ^[1] 604:19</p> <p>Fellow ^[1] 656:15</p> <p>few ^[11] 584:9 590:13 592:15 649:19 663:24 674:8 683:9,20 699:5 708:3 720:19</p> <p>fide ^[1] 711:22</p> <p>field ^[2] 703:19 728:9</p> <p>fifty ^[1] 630:7</p> <p>figure ^[4] 598:3 664:23 705:4 718:17</p> <p>file ^[1] 632:10</p> <p>filed ^[1] 665:10</p> <p>filing ^[3] 599:16 613:25 707:9</p> <p>filings ^[2] 692:18 706:20</p> <p>fill ^[3] 673:9 674:23 710:16</p> <p>filled ^[1] 710:14</p> <p>Film ^[16] 586:17,21 591:21 599:6 620:25 621:5,7,11 629:24 633:2,3,17 635:4 639:23 657:4 718:18</p> <p>films ^[10] 603:10,15,16 634:16 635:4 642:1 643:5 645:23 647:1 648:4</p> <p>final ^[2] 630:19 650:21</p> <p>Finally ^[12] 585:7 589:7 611:11 624:21 627:23 630:1 636:15 651:17 655:11 721:17,23 724:22</p> <p>find ^[14] 593:10 597:22 598:19 623:9 628:8,15 634:14,19 640:4 642:10 643:18 648:24 691:17 722:10</p> <p>finding ^[3] 610:25 634:16 647:22</p> <p>findings ^[1] 596:24</p> <p>fine ^[3] 590:12 598:16 625:3</p> <p>first ^[26] 585:16,18 588:15 634:11 649:11 653:9 655:20 663:25 664:19 669:1 671:13 672:8 682:9 691:8 706:11,12,21 711:11 714:12 715:1,8 717:17 719:9 723:22 724:12 725:18</p> <p>Fisher ^[1] 716:20</p> <p>five ^[3] 630:7 632:11 649:5</p> <p>flag ^[2] 693:9 723:22</p> <p>flexibility ^[3] 635:23 658:19 685:24</p> <p>flexible ^[2] 726:8,11</p> <p>flies ^[1] 683:4</p> <p>flood ^[2] 592:23 600:11</p> <p>floodgates ^[1] 689:20</p> <p>floods ^[1] 600:12</p> <p>floppy ^[1] 662:20</p> <p>focus ^[13] 584:19 603:18 609:22 627:3,10 651:4 678:15 679:24 689:2 690:18 697:2,7,25</p> <p>focused ^[6] 609:14 646:20 665:20,21 702:25 710:10</p> <p>Focusing ^[2] 697:9 703:15</p> <p>folks ^[6] 626:11 644:21 663:5 682:</p>	<p>7 709:10 715:15</p> <p>follow ^[5] 660:19 663:8 670:1 711:2 722:21</p> <p>follow-up ^[7] 610:4 623:12 625:24 696:21 708:22 722:23 727:11</p> <p>following ^[2] 673:20 728:24</p> <p>footnote ^[3] 613:24 628:9 713:7</p> <p>footnotes ^[2] 599:15,18</p> <p>forcing ^[1] 613:4</p> <p>foreign ^[2] 603:15 637:4</p> <p>foreseeable ^[1] 614:6</p> <p>forever ^[1] 597:21</p> <p>forewarned ^[1] 594:13</p> <p>forget ^[1] 644:2</p> <p>form ^[3] 609:19 638:15 711:1</p> <p>format ^[23] 588:21 594:2 595:9,10,16,20 596:9,10,11 597:20 598:2 599:5,5 615:25 619:24 625:25 628:3 630:21 632:9 649:11 679:9,10 690:9</p> <p>formats ^[1] 619:21</p> <p>forms ^[5] 611:5 613:11 638:4 677:11,11</p> <p>forth ^[8] 628:6 629:8 663:18 664:2 678:25 680:8 710:7 721:13</p> <p>fortunate ^[1] 718:3</p> <p>forum ^[2] 596:20,21</p> <p>forums ^[1] 598:20</p> <p>forward ^[2] 611:23 613:3</p> <p>found ^[4] 584:12 590:18 625:17 714:21</p> <p>four ^[1] 602:18</p> <p>Fourth ^[5] 589:5 688:18 692:20 693:6 710:9</p> <p>Fox ^[1] 645:18</p> <p>fragile ^[4] 593:19 617:3 618:14,22</p> <p>fragility ^[2] 616:21 617:10</p> <p>framework ^[3] 679:11 680:10 698:11</p> <p>franchise ^[1] 720:15</p> <p>frankly ^[1] 626:10</p> <p>frantically ^[1] 718:15</p> <p>free ^[5] 584:16 641:19,22 654:17 685:11</p> <p>frown ^[1] 632:8</p> <p>frustrating ^[1] 650:11</p> <p>frustration ^[1] 629:23</p> <p>fulfil ^[1] 726:20</p> <p>fulfill ^[2] 645:13 675:6</p> <p>fulfilled ^[1] 640:12</p> <p>full ^[6] 597:5 620:25 621:5 638:10 640:17 666:5</p> <p>fully ^[1] 727:10</p> <p>fun ^[1] 677:15</p> <p>function ^[1] 589:24</p> <p>functional ^[2] 674:11 694:15</p> <p>functions ^[1] 700:4</p> <p>fundamentally ^[3] 688:8 707:3 716:9</p> <p>funded ^[1] 634:13</p> <p>funding ^[7] 693:15 696:11,14 702:13 703:3 708:10,11</p>	<p>funds ^[2] 700:22 706:18</p> <p>further ^[5] 619:6 629:3 639:5 674:19 716:21</p> <p>future ^[6] 591:20 596:4 605:25 614:6 617:5 635:13</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>gain ^[2] 671:20 699:9</p> <p>game ^[29] 662:17,20 664:20 665:13 667:11 668:6,21 670:3 672:23 678:9 683:19 684:7 687:23 689:12 690:8,10 694:16 701:24 706:21 707:8,10,12,14,15,17 718:19 721:5 724:2</p> <p>gameplay ^[2] 697:17,19</p> <p>games ^[61] 654:10 658:9,25 660:10 665:13,16 672:17 673:2,22 675:16,21 677:7,10,15,16,17,18,20,20,21 678:15 681:11 683:15 685:10 687:4,5,14,21 690:7,7 691:16,17,21,25 699:25 700:5,7 702:4 703:20 704:19 706:18 707:21 708:1,24 709:3 710:12,14,18,20 711:23 714:17 715:13 720:7,13 722:11,13,14,18 724:8,12 725:12</p> <p>gap ^[1] 594:20</p> <p>gaps ^[2] 673:10 674:23</p> <p>garage ^[2] 709:4,8</p> <p>Gate ^[1] 714:22</p> <p>gave ^[3] 621:15 628:1 701:19</p> <p>gears ^[1] 601:5</p> <p>General ^[8] 584:4 585:22,24 654:11 655:24,25 657:24 668:16</p> <p>generally ^[9] 619:5 623:4 637:13 638:6 650:24 659:1 694:1 702:18 724:24</p> <p>generations ^[1] 605:25</p> <p>genre ^[1] 642:9</p> <p>gets ^[2] 640:8 695:11</p> <p>getting ^[7] 636:15 652:24 694:8 703:6 704:13 715:4 718:15</p> <p>Gisele ^[1] 586:20</p> <p>give ^[17] 584:23 588:10 590:10 591:7 599:12 619:8,12 628:20 652:2 659:10 660:9,14 682:6 691:14 694:1 719:10 723:8</p> <p>given ^[10] 610:11 614:22 628:7 630:17 650:9 651:12 667:22 687:7 689:21 711:25</p> <p>giving ^[1] 589:17</p> <p>glass ^[1] 643:16</p> <p>global ^[1] 721:11</p> <p>gloss ^[1] 683:10</p> <p>goal ^[7] 614:21 615:18 630:17 634:8,16 686:23 702:20</p> <p>Gold ^[1] 611:8</p> <p>Google ^[11] 675:3 688:2 692:16 694:11 698:5,15 699:23 713:21 720:22 722:9 723:15</p> <p>got ^[3] 598:7 630:1 720:13</p> <p>government ^[3] 584:10 654:13 655:21</p> <p>Graduate ^[5] 633:2 637:10,12 649:</p>	<p>19,25</p> <p>grant ^[4] 693:23,23 696:11 703:3</p> <p>granted ^[1] 701:22</p> <p>Great ^[18] 588:3 590:11 600:22 635:5 643:7 645:11 648:7,14,16 654:7 656:6 657:6,16 662:19,22 708:24 716:15 727:12</p> <p>greater ^[2] 688:10 689:2</p> <p>group ^[6] 608:22 609:12 616:19 627:7 648:5 718:19</p> <p>group's ^[1] 627:2</p> <p>grouped ^[1] 617:15</p> <p>groups ^[1] 669:22</p> <p>growing ^[1] 703:23</p> <p>grudgingly ^[1] 723:23</p> <p>guess ^[6] 597:2 624:2 660:22 676:15 688:18 711:16</p> <p>guidance ^[1] 724:20</p> <p>guide ^[1] 705:25</p> <p>guidelines ^[1] 718:14</p> <p>guides ^[1] 671:8</p> <p>guys ^[2] 627:11 641:10</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>habits ^[1] 715:2</p> <p>hack ^[2] 651:24 665:18</p> <p>hacked ^[2] 610:15 625:23</p> <p>hacking ^[1] 651:23</p> <p>hammer-down ^[1] 700:15</p> <p>Han ^[1] 714:25</p> <p>hand ^[19] 584:13,16 589:23,24 601:14 605:18,19 616:13,13,18 618:5 633:24,25 641:12 654:16,18 667:2 691:8 711:13</p> <p>handling ^[1] 594:23</p> <p>hands ^[2] 673:4 682:7</p> <p>hang ^[1] 616:13</p> <p>happen ^[5] 594:14 597:16 606:22 674:15 712:10</p> <p>happened ^[3] 592:21 594:11 608:1</p> <p>happening ^[1] 666:19</p> <p>happens ^[2] 592:18 608:1</p> <p>happy ^[7] 605:5 606:15 619:21 658:4 665:7 673:25 727:11</p> <p>hard ^[3] 594:10 597:22 681:23</p> <p>harder ^[1] 706:16</p> <p>hardly ^[1] 664:25</p> <p>harm ^[14] 610:15 620:15 630:24 667:9 688:14,23 692:24 693:2 694:24 695:2 698:4 700:25 727:24 728:6</p> <p>harmonize ^[1] 667:11</p> <p>harmonized ^[1] 724:4</p> <p>harms ^[3] 701:14 728:7,8</p> <p>Harold ^[1] 657:2</p> <p>HD-DVD ^[2] 596:9,10</p> <p>HD-DVDs ^[1] 595:8</p> <p>Head ^[3] 586:12,17 689:24</p> <p>healthy ^[2] 646:14 650:19</p> <p>hear ^[6] 604:1 651:21 685:16 687:12 721:12 726:14</p> <p>heard ^[11] 599:24 651:3 659:9,12</p>
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<p>689:17 693:21 708:6 711:15 712:9 720:8,18 hearing [7] 585:16 644:23 654:8 655:19 666:8 694:14 719:11 hearings [2] 584:6 655:18 Heartbreak [3] 591:8,23 597:19 Heavyweight [1] 706:22 held [2] 600:19 718:1 Hello [2] 655:3 657:2 help [4] 626:9 663:23 705:4,25 helpful [11] 608:8,20 609:8 653:16 659:23 667:1 673:6 718:13,22 723:18 728:18 heritage [2] 613:8 664:1 herring [1] 724:15 hesitant [3] 695:13 719:22 721:22 Hi [5] 586:8 641:15 656:21 657:9 703:10 high [3] 591:15 596:25 648:8 high-level [1] 640:23 highest [3] 621:7 629:6 647:7 highest-quality [1] 647:6 highlight [3] 706:10,11 716:13 highlighted [1] 678:16 highly [1] 716:14 himself [1] 683:24 historical [3] 664:13 677:20 707:6 historically [1] 705:24 history [4] 649:9 657:5 688:11 691:17 hit [1] 711:11 Hofstra [4] 586:11 593:8 632:8 645:4 Hohbach [1] 657:3 hold [1] 703:20 hold-over [2] 601:14,16 holder [1] 667:23 holding [2] 585:8 670:9 holds [1] 675:2 holes [2] 622:23,23 hollow [1] 594:25 Hollywood [1] 637:2 home [10] 596:20 600:24 620:24 621:7 624:23 642:25 647:17 661:8 669:7 674:6 honest [1] 718:21 Hoopla [10] 641:7,17,22,24 642:3,18 643:3,8 644:6 645:6 hope [1] 656:9 hopefully [2] 635:8 641:10 hoping [1] 657:23 Hotel [1] 597:19 House [2] 591:8,23 however [3] 620:24 699:25 726:1 hub [2] 607:24 622:12 huge [2] 629:14 708:12 human [1] 684:3 Humanities [1] 586:18 humidity [3] 600:10,15 625:3 hundreds [1] 703:19</p> <hr/> <p>I</p> <p>idea [12] 584:23 615:12 619:10</p>	<p>626:6 633:23 634:1 660:20 662:18 669:5 686:22 692:10 702:21 ideal [2] 607:2 647:9 ideas [1] 634:5 identified [3] 604:6,13 672:18 identify [1] 622:11 identifying [1] 726:25 illuminate [1] 706:19 707:22 illuminate [1] 615:21 illustrate [1] 702:14 illustration [1] 722:15 image [1] 608:8 imagine [3] 604:16 662:15 681:23 immediately [1] 691:19 impacted [1] 705:9 impactful [1] 627:24 imperfect [1] 597:18 implement [2] 661:19 728:1 implementation [1] 700:18 implicated [1] 666:25 implies [1] 711:17 import [1] 717:7 importance [3] 693:5,5 708:25 important [10] 636:24 641:5 646:16 651:1 672:16 693:8 707:24 709:10 712:7 718:4 importantly [1] 639:17 importing [2] 668:19 717:5 impose [1] 659:24 impossible [1] 707:18 impression [1] 707:10 in-favor [1] 688:1 in-practice [1] 699:19 in-print [1] 621:23 in-the-clear [1] 610:14 inability [1] 702:17 inclined [1] 651:1 include [14] 608:18 627:21 631:8 642:19,20 658:22 659:13 662:2 668:11 684:20 687:4 695:23 698:22 710:23 included [4] 590:21 628:19 648:19 674:25 includes [8] 590:15 639:3 642:14 643:4,6 662:1 675:15 678:24 including [9] 613:1 621:21 654:10 658:24 663:6 674:3,24 699:7 714:6 inclusion [2] 648:17 691:19 inconsistent [1] 668:5 incorporate [2] 722:7 723:1 incorporated [2] 680:21,23 incorrectly [1] 623:7 increasing [1] 590:14 incredibly [1] 646:15 indeed [5] 597:18 622:21 649:1 681:6 696:10 independent [3] 590:21 637:4 642:1 independently [1] 647:15 indicate [1] 584:14 indicated [2] 655:12 674:9</p>	<p>indirect [1] 697:25 individual [18] 591:15 595:17 619:5 633:8 647:23 648:6 658:1 659:6,17 662:5,10,21 673:14,19 675:18 696:1 709:1 710:7 individualized [1] 599:22 industry [2] 682:16 707:3 inextricably [1] 696:10 infeasible [1] 606:1 informal [1] 709:6 information [2] 671:3 686:7 infringement [1] 695:7 inherently [4] 611:9 618:13 692:12 694:2 initial [3] 595:8 665:23 691:4 inserting [1] 713:23 inside [1] 600:6 insist [1] 604:9 inspected [2] 591:6 596:15 inspecting [1] 596:22 inspection [1] 591:3 instance [2] 658:7 706:20 instances [5] 617:20 660:2,3 676:4,18 instead [2] 614:23 617:5 institution [18] 600:16 631:13 637:23 638:23 640:9,14,22 669:6,8 670:10 678:18 684:19,19 685:7,14 690:9 715:13 716:1 institutions [21] 639:13 646:22 652:7 658:19 659:7 662:7 667:10,18 669:8 678:5 679:17 680:3 682:24 693:1,17 714:9 717:2 718:4 724:5,19 728:1 instruction [1] 664:4 instructional [1] 714:7 instructor [2] 639:8 640:1 instructors [7] 592:5 600:19 638:13,21,24 646:11 718:15 intended [1] 626:24 inter-library [1] 684:1 interact [1] 658:8 interaction [1] 684:3 interactive [1] 704:20 interest [3] 700:10 707:1,4 interested [8] 589:22 603:9 607:18 644:23 680:18 708:7 711:22 715:15 interesting [6] 588:9 648:25 653:13 672:9 704:15 707:6 interests [2] 667:11 669:18 interfaces [1] 707:12 Interference [6] 595:14,15,15,18,20 655:2 interlibrary [1] 683:23 intermediate [1] 613:1 internal [3] 607:12 696:14,15 internet [6] 597:23 722:4,9,9 724:6,8 interoperable [1] 665:14 interrupt [1] 675:8 introduce [5] 585:19 586:5 655:21</p>	<p>656:7 657:7 invested [1] 619:15 investigating [1] 591:1 investigation [1] 590:23 investment [1] 620:1 invite [5] 585:18 586:4 655:20 656:7 657:6 involve [2] 610:11 724:12 involved [7] 609:9,13 626:7 669:16 686:16 705:1,24 involves [3] 654:9 670:11 723:5 involving [1] 704:18 iOS [3] 726:16,16,19 isn't [13] 592:24 601:19 603:23 622:1 634:24 635:4,22 636:9 654:17 683:14 689:17 694:4 715:21 issue [27] 588:24 593:6 596:22 599:20 600:18 603:21 604:4,6 608:23 614:7 616:16,21 625:15 636:10 647:11 650:5,8 676:22 681:13 684:21 688:18 689:1,1 694:24 695:25 725:11 726:10 issued [2] 611:5 621:18 issues [19] 589:20 593:24 596:16 598:14,22 600:17 607:7,10,14 609:9 610:13,17 612:15 647:24 691:15,18 704:16 710:2 712:25 it'll [2] 642:16 643:23 item [1] 647:18 items [4] 584:9 642:17 654:12 686:14 itself [3] 611:9 666:23 701:14</p> <hr/> <p>J</p> <p>James [2] 586:15 593:2 Jenner [1] 657:10 Joan [1] 628:10 job [1] 640:10 John [2] 585:23 655:25 join [3] 585:13 655:14,17 joining [1] 654:8 Joint [5] 588:2 657:14 667:7 680:22 685:17 jointly [1] 633:5 Jonathan [4] 586:8 608:12 614:25 656:21 Jordana [3] 585:22 588:5 655:23 Judges [1] 726:7 jump [3] 639:23 666:16 687:11 jumped-line [1] 598:11 jumping [1] 614:2 jury [1] 721:1 Justice [2] 692:19 693:4 Justices [1] 698:8</p> <hr/> <p>K</p> <p>K-12 [1] 639:12 Kanopy [21] 631:19 641:8,18,22,25 642:23,25 643:1,3,8 644:6 645:5,9,17,22 646:13,19,22,24 647:3 648:2 Kanopy's [1] 645:7 keep [6] 584:21 616:14 649:6 654:</p>
--	--	--	--

<p>22 706:9 717:25 keeping [2] 627:3,4 Kendra [1] 656:11 kept [3] 600:6 625:1 653:12 Kevin [2] 584:4 654:10 kick [1] 636:22 kids [1] 643:8 kind [40] 592:20 594:13,22 595:1 598:20,24 602:15 604:22 605:4 617:21 624:17 629:18 637:17 644: 23 650:22 664:22 665:22 666:20 670:10,19 671:7 675:9 678:16 680:16 685:21 690:23 691:24 693: 2 695:7 700:8,25 702:13,18 704:9, 15 706:7 709:6,19 722:15 726:12 kinds [15] 662:8 663:2 664:10 666: 14 682:18 693:15,16,18 704:19 705:6 715:24 718:6,14 720:3,5 kitchen [1] 600:20 known [2] 637:1 711:19 knows [1] 711:18 Knupp [2] 588:1 657:14</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>lack [2] 664:16 667:4 laid [1] 674:25 land [1] 626:2 language [27] 615:8,9 659:18 662: 6 663:12,13,19 666:23 668:12 680:21,23 681:13,16,22,25 682:4 683:21,22 684:5 692:17 701:9,10, 13,16 712:1 714:6,7 languages [2] 638:19 639:4 laptop [2] 689:11,12 laptop-type [1] 593:12 large [10] 600:15 628:1 631:18,19, 19 648:2 660:10,13,17 703:19 Las [1] 709:8 last [17] 589:10 599:12 614:1 618: 15 633:21 647:3 648:1 652:1,3 694:11,17 699:5 709:9 719:9 726: 4 727:5,13 late-00s [1] 612:9 later [4] 594:7 605:5 644:3 653:21 latest [3] 606:23,25 641:4 law [10] 613:18 625:12,16 656:12 682:21 687:13,17 713:5 716:23 725:22 lawful [7] 627:13,14,18 658:11 694:21 701:7,15 lawyers' [1] 726:22 lay [1] 658:16 layer [4] 592:18,18 594:7 607:10 layers [1] 602:12 LCA's [1] 613:25 lead [1] 615:17 learned [2] 699:7,8 learning [3] 639:10 658:10 703:22 least [10] 603:24 605:13 608:8 616: 2 649:22 653:13 694:12 695:10 698:8 721:14 leave [1] 711:12 leaves [2] 591:24 608:6</p>	<p>left [6] 601:2 625:2,2,2 674:23 708: 4 legal [4] 625:19 634:17 705:18 726: 22 legally [1] 661:23 legislative [1] 716:19 legislatively [3] 616:25 617:2,6 legitimate [1] 664:21 lending [1] 592:10 lens [1] 720:17 less [7] 600:25 606:8 610:10 633: 15 644:19 689:12 711:8 level [9] 598:24 604:12,15 609:18 612:5 617:2 629:6 687:14 726:2 LGBT [3] 691:15,18,21 Librarian [9] 586:17,21 606:18 637:22 640:1,9 641:16 683:24 725:7 librarians [12] 588:16 589:18 593: 23 599:4 610:5 619:20,21 634:15 638:11,22 640:13 648:13 libraries [45] 587:7 591:18 595:14 600:7,12,13 613:9 616:23 619:15 620:1,5,10 624:4 626:2 629:8,10, 12,15 645:6 646:20,21 651:12,15 652:10 658:18 661:9 662:6 663: 24 664:3 666:10 673:13 682:18, 24 685:3,22 686:9 697:15 698:4 700:20 707:1 717:1,8 718:2 722:5 727:25 Library [35] 586:9,13 593:9 611:6 628:24 629:12 631:12 633:20 634: 24 641:16,24 643:10 656:22 659: 25 660:5 665:1 666:9 669:4,16 671:14 675:14 677:5 683:1,14 684:6 685:10 689:11,12 690:4,4, 12 696:15 708:9,10 719:3 library's [2] 630:21 683:18 library-style [1] 715:12 license [12] 609:2 615:23 631:5 632:10,23 633:14 634:11,17 645: 15 647:4,21,23 licensed [5] 617:18,20 631:15 638: 7 647:3 licenses [2] 647:19 652:16 Licensing [14] 587:23 589:7 604: 19 620:20,22 629:21 632:12 634: 8 636:17 646:24 647:2,16 648:6 652:10 life [1] 632:10 likelihood [1] 591:16 likely [8] 593:13 604:9 608:19 617: 4 632:21 644:19 717:18 720:6 liking [1] 681:19 limit [6] 612:17 615:5 654:20 659: 25 663:2 716:14 limitation [12] 604:3 611:15 651: 22 659:24 660:21 661:25 666:10 672:12 683:20 684:4,6,8 limitations [12] 589:6 651:16 658: 2 659:13 664:25 665:4 666:4 679: 6 682:11,15 716:22 717:6</p>	<p>limited [14] 596:19 626:21 629:17 647:16 659:17 663:20 676:14 678: 24 687:2 694:25 697:6 702:15 713:22,25 limiting [6] 651:7 665:5 681:3 694: 5,6 703:4 limits [2] 694:7 703:4 line [5] 710:17 715:5,5,19 716:5 link [7] 585:9,11,14 639:10,10 655: 15,17 linked [1] 692:12 Lionsgate [2] 633:9,10 list [8] 628:14 629:25 638:11 643: 21 644:1,3 658:16 700:1 lists [1] 598:21 literacy [1] 660:16 literature [5] 676:25 677:1,2,12 725:14 little [37] 593:19 595:24 598:9 601: 5 610:10 612:12 617:25 622:23 625:9 635:11,11,25 636:8,16 666: 17,20 668:2,22 669:24 670:4,23 671:1,5 683:10 686:6,11 689:23 696:8,25 700:14,17 703:11 704: 14 705:14 707:9 709:12 714:15 live [1] 704:5 live-streamed [1] 585:1 lively [2] 588:9 653:12 livestreamed [1] 654:24 living [2] 676:3,12 LLC [2] 587:17,18 lo [1] 629:25 loading [1] 593:15 loan [2] 683:23 684:1 loaning [2] 658:24 662:16 local [1] 715:19 located [1] 705:2 locations [1] 700:23 logic [1] 687:20 logistical [2] 584:9 654:12 logo [1] 640:20 long [10] 606:7 612:6 626:4 632:22 675:1 676:15 687:24 688:6 700: 24 722:8 long-term [2] 608:9 633:16 longer [11] 591:6,10 601:9 604:21 622:10 632:25 647:4 653:1 674: 11 679:20,21 look [25] 590:8 597:21 609:8,17 611:23 613:24 617:9,15,18,23 627:15,16,20 634:14 640:20 666: 21 673:20,21 680:12 686:10 693: 23 705:3 712:5 720:11 721:18 looked [3] 621:3 622:6 628:8 looking [17] 595:12 598:14 601:19 608:18 613:3,20 621:10 631:25 666:22 673:11,18 676:11 691:17, 20 707:15 713:7 724:19 looks [3] 622:21,23 676:22 lose [1] 641:10 losing [1] 655:4 lost [11] 597:21 623:21 633:12 635:</p>	<p>7,7 655:7 679:8 707:10 708:25 709:17 712:8 lot [32] 584:18 598:8 599:25 603:2, 3 610:1 612:13 613:17 615:22 619:23 628:8 638:3,18 639:11 646:1,17 647:13 648:1 659:2 666: 3 669:3 685:19 691:14 698:21 699:19 701:7 710:25 711:15 716: 16 718:11,20 721:18 lots [5] 595:19 610:14,14 662:17 666:13 love [1] 601:24 low [2] 619:4 722:20 lower [3] 612:8 616:13 620:25 Lowood [29] 657:1,2 663:22,23 668:1,22,25 670:6 671:1,12 686:2, 4,6 693:10 696:6,7 698:25 699:1 704:11,12 705:16 715:11 716:21 717:15,16 720:4,5 721:8 724:23 Luis [2] 586:2 656:4 lunch [1] 653:20</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>made [23] 591:12 594:16 595:4 598:12 601:23,23 615:6 616:22 620:1 628:25 640:12 648:13 660: 20 666:25 669:6 675:3 685:20 690:11 700:21 704:14 713:3 714: 4 723:1 Madeline [1] 656:17 magnifying [1] 643:16 main [4] 593:20 602:6 616:7 637: 20 mainly [2] 593:11 645:6 maintain [2] 615:18 638:16 maintenance [2] 606:7,8 Maisie [1] 656:14 major [5] 587:6 609:18 632:20 669: 16 718:7 majority [1] 631:16 makers [1] 667:11 management [2] 639:11 641:3 manifest [1] 683:24 manufacture-on-demand [1] 621:22 manufactured [2] 622:11 623:7 manufacturer [2] 599:19 624:11 manufacturer-caused [1] 623:4 manufacturer-on-demand [1] 628:4 manufacturers [1] 615:22 manufacturing [5] 595:8 597:14, 16 612:1 623:11 many [26] 584:10 594:23,23 596: 21 602:22,22 611:11,15 612:10 617:20 621:17 629:7 632:7,7 639: 7,16 663:25 664:1 689:23 700:4 707:20,20 710:3,13 717:22,22 marginalized [4] 706:19 707:21, 24 709:10 marked [2] 665:24,25 market [53] 589:1,7,9 602:23,24, 24 603:4 609:16 610:15 620:15,</p>
--	---	--	--

<p>15 629:22 630:21,24 633:22 634:1 635:14,15,16 649:7 650:2,12,17,19 673:15,20 675:17 680:15 688:14,24 689:3 690:1 692:23 693:2 698:4 710:11,13 711:10 713:2,5,5,12,14,19,20 714:15 715:4,8 716:3 720:16 721:3 725:21 727:24</p> <p>marketplace ^[16] 602:15,19 604:18,23 608:24 611:10 614:5 623:8 624:24 628:18 632:18 636:17 646:14,15 710:21,24</p> <p>markets ^[2] 713:17 720:25</p> <p>Marks ^[17] 587:15,16,16 595:2,5,22,25 596:6 605:17 610:2,3 619:12 623:13 625:7,8 626:8,23</p> <p>massive ^[1] 604:14</p> <p>match ^[1] 596:24</p> <p>material ^[6] 619:23 629:2 630:6 660:18 674:17 698:24</p> <p>materials ^[22] 618:12,22 626:18 658:10 661:9,11 662:9 664:13 674:11 676:13,14 677:3 682:14 692:3,8 696:17 697:24 704:7 705:10 715:25 716:25 726:25</p> <p>Matt ^[2] 587:25 657:13</p> <p>matter ^[8] 591:18 597:13 610:16 614:24 615:2 625:19 690:3 705:20</p> <p>matters ^[1] 643:12</p> <p>maximize ^[1] 603:13</p> <p>McCleskey ^[14] 586:10,11,11 593:4,5 599:1,2 606:11,12 619:20 631:2,3 645:2,3</p> <p>mean ^[42] 597:9,12,16 601:23 602:9 611:12,13 615:7,12,16 619:15 620:3,5 623:1,14,22,23 626:5 630:2,11,11 635:1,6 649:4 665:16 672:8 673:11 678:21 679:18 680:7,20 682:13 688:19 689:6,15 690:19,20 691:5 705:20 722:14 723:3,13</p> <p>meaning ^[4] 617:4 624:13 635:17,24</p> <p>meaningful ^[5] 630:24 651:9 683:14 684:8 697:12</p> <p>means ^[3] 650:15 718:2 727:9</p> <p>meant ^[2] 661:7 708:15</p> <p>measure ^[1] 685:12</p> <p>measures ^[8] 665:15 684:15,20 685:1,8 686:18 690:1 727:25</p> <p>mechanisms ^[2] 725:1,4</p> <p>Media ^[18] 586:17,21 620:20,22 641:16,18 644:6 648:5 656:25 657:4 660:12,16 676:23 703:24 704:20 707:25,25 715:1</p> <p>mediated ^[1] 714:7</p> <p>medium ^[3] 593:20 626:25 627:4</p> <p>mediums ^[1] 613:5</p> <p>meet ^[4] 606:18 635:21,22 667:18</p> <p>meeting ^[1] 728:22</p> <p>meets ^[1] 722:5</p> <p>Mellon ^[1] 634:13</p> <p>mention ^[1] 706:20</p>	<p>mentioned ^[20] 587:13 600:11 617:14 621:16 627:19 637:10 638:1 640:4 651:19 669:23 671:4 674:3 681:10 683:20 685:25 707:8 720:4,5 721:8 723:15</p> <p>mentions ^[1] 714:5</p> <p>merely ^[3] 667:5 672:17,25</p> <p>message ^[1] 672:20</p> <p>messages ^[1] 691:23</p> <p>methods ^[5] 658:17 698:23 699:4,12 706:13</p> <p>MGM ^[1] 633:5</p> <p>micro ^[1] 598:24</p> <p>mid-00s ^[1] 612:9</p> <p>mid-sized ^[1] 631:13</p> <p>middle ^[1] 594:20</p> <p>might ^[40] 595:24 598:21 600:20 602:24 609:10 621:6 628:15 629:14 634:22 635:10,12,17 653:1,1,8 658:22,24 660:2,3 661:12 662:2 667:4,25 673:6 674:15 676:24 683:2 687:13,23 707:14 708:9 711:4 714:11 715:24 716:24 717:4,11 720:2 722:7 724:14</p> <p>might've ^[1] 593:25</p> <p>Mike ^[1] 633:2</p> <p>million ^[1] 620:19</p> <p>millions ^[1] 619:15</p> <p>mind ^[4] 649:6 711:16 717:25 726:13</p> <p>mindful ^[1] 698:16</p> <p>minimal ^[1] 688:14</p> <p>minimize ^[1] 667:9</p> <p>minimum ^[1] 604:8</p> <p>minute ^[1] 593:23</p> <p>minutes ^[2] 683:9 720:19</p> <p>misprint ^[1] 624:18</p> <p>misreading ^[1] 626:13</p> <p>missing ^[1] 628:5</p> <p>mission ^[1] 664:3</p> <p>mistake ^[1] 684:11</p> <p>misuse ^[1] 681:18</p> <p>Mitchell ^[2] 588:1 657:14</p> <p>model ^[5] 609:2,2 644:18 651:19 683:23</p> <p>modern ^[1] 612:18</p> <p>moisture ^[1] 592:21</p> <p>moment ^[3] 618:1 710:15 713:3</p> <p>momentary ^[1] 655:10</p> <p>moments ^[1] 683:21</p> <p>money ^[5] 598:5 620:6 631:22 646:17 694:1</p> <p>month ^[8] 642:18,22 643:9 675:4 687:20 704:2 713:18,22</p> <p>Moreover ^[1] 674:7</p> <p>morning ^[11] 584:3 585:21,23 586:2 587:10,16,20,25 588:6,8 593:5</p> <p>morning's ^[1] 589:18</p> <p>most ^[19] 590:18 595:23 600:13 601:21 609:18 610:24 618:17 621:17 624:22 637:1 641:5 687:18 712:7 714:21 715:12 720:7,14</p>	<p>723:9,10</p> <p>mostly ^[1] 722:13</p> <p>Motion ^[10] 587:5,5,11 589:2,8 601:9,12,22 602:4 651:10</p> <p>move ^[9] 605:7 612:12 628:17 645:19 670:22 672:5,8 679:14 682:8</p> <p>moves ^[1] 680:16</p> <p>movie ^[9] 601:23 602:13,22 638:2 642:9,10,13 643:16,18</p> <p>movies ^[13] 602:11 641:19,24 642:4,5,15,19 643:2,4,9 644:2,16,20</p> <p>moving ^[2] 611:23 718:15</p> <p>Ms ^[122] 585:19,21 586:10,11,19,20 587:3,8,10 588:6 590:5,10 592:1,1,2 593:4,4,5,22 594:2,3 595:2,22 596:2,12 597:7 598:6,8,11 599:1,1,2,11 600:2,3,8,8,9 601:4 602:8,20 603:20 604:24 605:6 606:11,11,12 607:3,3,4,16 608:10 610:2,19 611:17,18,25,25 612:1,12 613:14 615:4,19 616:5 617:25 618:24 619:20 620:16,16,17 621:12 622:17 628:17 631:2,2,3 632:16 633:21 634:5,7,21 636:14,15,23 641:6 644:21 645:1,3 646:7,7,8 647:10 648:11,23 649:17 652:2,2,4,21 653:10 655:22,23 656:9,17 661:4 674:18,21,22 687:9,14,16 691:10 692:15 699:15,16 712:19,21 723:20 725:16,17,18 727:16</p> <p>much ^[46] 593:12,12 595:5 596:4,6 599:14 601:3 607:22 609:12 610:18 612:8 620:24,25 621:5 625:8 626:11 631:1 633:15 636:1 641:6 643:21 653:11,14,15,19 666:11 667:15 669:21 676:12 680:1,12 681:23 682:4 686:2 688:10 689:2,12 694:12 697:11 698:18 721:4,22 727:12 728:17,18,21</p> <p>mug ^[1] 646:11</p> <p>multi-copy ^[1] 614:6</p> <p>multifaceted ^[1] 604:6</p> <p>multiple ^[4] 599:8 602:12 627:14 650:16</p> <p>Museum ^[2] 692:4 701:23</p> <p>museums ^[4] 651:15 678:24 685:3 700:20</p> <p>music ^[2] 642:4,20</p> <p>must ^[1] 652:13</p> <p>mute ^[3] 585:5 587:9 598:10</p> <p>Mx ^[58] 656:8,8,11,14 658:3,4,14,15,15 659:21,22 661:5,22 662:12,13,13 667:1,3 673:24,25 677:23,24 678:19 679:2,4 680:19 682:9,10 684:9,10 685:22 686:7 692:13,14 700:25 701:1 702:10,11,12 706:8,8,9 707:17 708:23 712:20 714:3,3,12,13,13 716:10,11,12 720:18 723:18,19 727:12,14</p> <p>myself ^[2] 596:15 720:10</p>	<p>name's ^[2] 584:4 654:10</p> <p>narrow ^[4] 608:13 694:22 698:10 706:14</p> <p>narrower ^[1] 694:12</p> <p>narrowness ^[1] 701:21</p> <p>nature ^[4] 608:20 615:1 689:6 698:7</p> <p>near ^[1] 617:5</p> <p>necessarily ^[15] 594:9 600:13 602:18 644:13 651:22 660:22 663:4,20 665:16 678:10 691:20 695:2,21 713:9 725:23</p> <p>necessary ^[3] 588:19 605:11 612:22</p> <p>need ^[33] 606:4 610:22,25 614:8 617:11,15 618:22 633:24 643:22 649:23 650:19 651:14 653:2 658:19 660:16 663:5,18 670:4 673:9,20,21 677:3,22 679:12,20 682:1 687:6 690:21 704:7 705:23 711:25 715:12 724:16</p> <p>needed ^[4] 597:11 670:11 682:5 692:3</p> <p>needing ^[2] 626:1 639:19</p> <p>needs ^[9] 608:3 653:4 659:7 679:16 697:2,25 707:11 716:6 720:11</p> <p>negative ^[1] 702:9</p> <p>Nelson ^[6] 587:3,8,10,11 636:15,23</p> <p>net ^[1] 701:3</p> <p>Netflix ^[6] 629:8,24 644:11,12,14 651:17</p> <p>Network ^[3] 656:13,16,19</p> <p>never ^[4] 591:12 595:16 621:20 709:24</p> <p>new ^[18] 598:2 602:19 606:20,23 615:24,25 621:24 628:9,11 634:9,17 649:21 650:1 692:4 697:10 703:24 713:17 726:8</p> <p>newer ^[1] 619:21</p> <p>news ^[1] 720:21</p> <p>newspaper ^[1] 721:12</p> <p>next ^[9] 611:23 616:5 672:6,8 682:8 696:23 718:25 720:18 721:8</p> <p>niceties ^[1] 638:18</p> <p>niche ^[2] 603:15 637:3</p> <p>Nichols ^[1] 633:3</p> <p>night ^[1] 677:8</p> <p>nine ^[1] 637:1</p> <p>nobody's ^[1] 683:17</p> <p>node ^[1] 671:21</p> <p>non-disc ^[1] 588:21</p> <p>non-infringing ^[3] 623:18 658:6,20</p> <p>non-profit ^[1] 714:8</p> <p>non-theatrical ^[1] 587:7</p> <p>non-transformative ^[3] 713:8,12 725:23</p> <p>non-video ^[1] 678:9</p> <p>none ^[3] 639:22 672:11 724:7</p> <p>nor ^[1] 724:7</p> <p>normal ^[6] 592:13,19 593:2 602:5</p>
---	--	---	---

N

name ^[2] 586:15 643:16

<p>622:6 631:14 note [5] 636:24 678:19 684:10 699:23 721:24 noted [1] 688:3 nothing [3] 630:3 635:16 694:15 notice [9] 668:13,13 680:24 681:17 683:13,13,18 684:3,8 noticed [1] 594:22 notion [1] 625:20 novel [1] 727:8 novels [1] 715:25 NTIA [1] 586:3 NTIA's [1] 656:5 number [20] 588:7 590:14 596:19 615:5 638:19 639:22 647:7 648:3 651:3 654:19 658:5,11 659:14,24 660:8 661:23 674:2,13 704:1 710:7 numbers [3] 604:14 627:25 660:17 numerical [1] 659:25 numerous [1] 618:16</p> <hr/> <p style="text-align: center;">O</p> <p>o'clock [1] 653:18 object [2] 629:2 632:14 objection [2] 623:16 626:6 objects [2] 686:17 704:19 obscure [3] 677:6 709:16 720:6 observe [1] 672:16 obsolescence [2] 679:9,10 obsolete [5] 595:10 613:4,23 616:22 658:9 obvious [3] 665:12 691:19 698:5 obviously [10] 603:10 606:14 611:3 618:2 625:12 659:9,10 668:19 690:18 720:23 occur [1] 597:13 occurrence [1] 600:12 occurring [1] 708:17 occurs [1] 616:8 October [2] 721:16,21 off-premises [9] 589:6 602:4 671:3 688:21,23 689:4 695:2 698:20 701:24 offer [3] 642:3 700:16 719:7 offered [2] 651:17 683:12 offering [1] 632:2 Office [37] 584:5 585:3,19 605:5 612:16 613:19 616:20 618:3,9 626:12 654:11 655:1 656:5 667:19 668:11 674:8,8 679:5,13 681:3,7 684:24 685:25 693:13 695:12 697:1,18 705:11 711:25 712:15,17 715:6 719:10,22 721:21 723:4 728:10 Office's [5] 601:13 612:24 666:4 684:23 720:11 official [1] 660:17 officially [1] 643:22 offline [2] 725:1,4 offset [1] 668:15 offsite [15] 657:18,24 658:17 660:</p>	<p>25 661:13 664:17 680:11,14 687:5,14 715:23 723:11 724:14 727:20 728:7 often [8] 640:18 647:19,22 660:9,15 709:1,4 724:20 Okay [30] 585:16 590:2,9,12 598:13 607:2,2,5 622:5 624:15 634:24 635:17 655:6,8,8,11 660:19 663:8 668:18 669:1 673:4 676:20 678:12 681:8 682:6 690:22 698:16 699:13 717:16 722:18 old [1] 726:11 older [2] 601:25 722:10 omitted [1] 683:19 on-demand [1] 599:19 on-premises [7] 607:19 610:9 676:14 688:20,22 690:15 695:1 on-site [8] 647:8 661:24 679:21 694:3 702:17 703:4,5 727:20 Once [3] 600:4 642:10 643:18 One [70] 590:18 591:7,9 593:18 595:6 596:7 598:16,19 599:12 602:13 603:3,17 604:6 605:18,19 608:5 610:1,7 614:9,16,22 615:2,12,13,14,21 631:5 633:21,24,25 637:12 642:7 645:25 646:1,12 647:9,12 648:9 650:15 651:3,23 659:8,11,15 660:20 663:9,10 666:8 669:6 675:10 678:12 683:11 690:9 692:15 696:21 697:6 704:25 708:9,9 711:6,6,24 713:7 718:1,4 721:10 722:23 725:18 726:4 727:15 one's [2] 615:16 661:8 ones [6] 590:18 591:5 611:9 628:7 637:12 716:1 ongoing [1] 611:7 online [9] 650:6 668:16 669:11 674:14 683:15,18 724:9 726:17,21 only [33] 591:22 593:7,9 600:1 610:9 615:14 617:16,18 618:3 621:18 623:20 626:4,20 629:10 630:25 634:19 642:5 644:16 650:14 668:4 675:25 686:20 688:17,22 689:1 690:25,25 700:3,4 701:5 703:5 705:16 708:3 opaque [2] 607:10,11 open [5] 642:25 669:20 686:12,20 689:20 operating [2] 670:2 674:9 opinion [1] 713:22 opponents [9] 601:6 611:19 616:10 623:14 657:7 659:10 663:10 711:8 728:4 opportunity [2] 624:14 659:16 opposed [5] 606:5 609:4 616:21 617:10 711:22 opposing [2] 586:24 625:12 opposition [1] 650:23 option [4] 604:21 652:6,17,18 options [3] 591:11,25 608:7</p>	<p>Oracle [7] 688:2 692:16 694:10 698:15 720:22 723:15 725:22 Oracle's [1] 721:2 oral [1] 590:11 order [10] 653:8 664:10 668:15 680:3,21 686:1 690:21 693:14 726:19 728:2 organization [3] 711:18,21 722:3 organizations [3] 664:22 707:2 717:13 original [6] 621:18 664:24 693:13,22 705:1 714:24 originally [4] 611:4 619:2 676:25 722:6 other [63] 589:6 597:4 598:8 600:18 605:17 607:17 608:2 612:13 613:12 614:17 616:18 619:24 621:8 622:6 623:10 624:17 627:21 628:11 629:18 631:10,23 638:18 640:21 642:23 645:24 650:7 651:19 660:3 662:25 666:25 668:14 669:8,22 673:21 675:15,21 678:12,15 679:6 680:25 681:12,22 682:12 686:12 687:6 688:11 692:17 693:9 701:7 704:19 705:2 706:10 709:11 711:6,10 712:24 713:25 714:6 715:24 718:9 720:1 725:13,22 others [2] 594:16 619:20 otherwise [4] 628:4 673:16 688:25 716:16 ought [2] 672:19 673:1 out [55] 591:11 592:9 593:18 596:10,11 597:25 598:1,3 599:25 601:1 602:10 603:2 604:18 613:21 615:25 623:9 624:24 626:9 627:8 629:15 631:1 634:16 640:2 642:14,21 644:10 647:22 658:12,16,24 662:16 663:18 664:23 665:15 671:9 674:8,25 677:5,25 681:20 683:1 688:14 689:8 692:17 695:19 701:8 704:2 705:4 715:9 718:17 720:16 724:1,24,24 725:6 out-of-date [3] 601:8,11 602:23 out-of-print [4] 591:2 621:17 622:15 647:5 outcome [1] 701:3 outcomes [1] 702:16 outline [1] 588:11 outlined [1] 702:20 Outside [11] 587:17,21 600:25 639:21 652:12 678:18 681:12 690:4,11 693:18 715:19 outsiders [1] 593:9 over [26] 584:9 588:5 590:13 592:11 594:11 603:11,11,11 607:9 614:12 629:19 631:14 633:18 636:25 637:7 648:1 653:10 654:12 687:21 696:22 700:11 714:2 722:22 724:21,21 727:15 over-reading [1] 698:15 overall [2] 642:3 688:6</p>	<p>overarching [3] 601:5 605:6 687:25 overlap [1] 613:17 overlooked [1] 684:12 overly [1] 685:2 overruled [1] 713:17 overseas [1] 590:17 overseeing [1] 587:12 overstating [1] 694:18 overview [1] 657:24 own [10] 589:19 590:22 596:23 619:17 620:6 640:16,20,20 645:14 647:1 owned [1] 633:5 owner [3] 650:14 710:16 720:20 Owners [5] 588:2 598:4 619:3 627:6 657:15 ownership [2] 631:4 632:13 oxidation [1] 592:21</p> <hr/> <p style="text-align: center;">P</p> <p>p.m. [4] 653:20,21 654:2 728:22 package [6] 593:19 617:14,21,24 632:6 670:11 packaged [1] 617:17 packaging [1] 593:16 pale [1] 715:14 pandemic [3] 631:17 679:19 721:11 panel [4] 665:8 697:7 719:14 720:8 panelists [3] 589:12,18 721:9 panels [1] 651:19 papers [2] 621:4 723:14 parables [1] 685:9 parade [1] 685:9 paradigm [3] 675:5 688:4 700:1 paragraphs [1] 666:2 parameters [4] 623:16 664:17 671:2 695:13 pardon [1] 726:14 part [18] 587:7 591:8,16 594:12 609:18 617:14,21 632:20 667:20 668:20 671:14 685:23 689:6 693:6,13 705:15 719:18 720:15 participants [6] 584:12 586:5 590:6 654:4,14 656:7 participate [2] 585:10 623:10 participating [2] 653:16 657:17 participation [4] 585:8,13 653:12 655:13 particular [18] 584:20 588:13 591:21,22 598:17,24 657:25 658:21,21 659:5 663:1 666:6 672:23 679:21 684:21,25 694:13 707:8 particularly [4] 598:4 682:22 718:13,22 Partly [1] 661:17 parts [3] 588:10 636:7 683:11 party [1] 715:8 pass [2] 653:10,14 passed [1] 695:12 passing [1] 665:15</p>
--	--	--	---

<p>password ^[1] 672:2</p> <p>past ^[7] 590:13 592:11 594:4 612:9 618:4 638:1 655:7</p> <p>pasta ^[1] 600:21</p> <p>patchy ^[1] 622:4</p> <p>path ^[2] 615:1 721:10</p> <p>patience ^[1] 636:15</p> <p>patrons ^[3] 661:10 697:16 698:3</p> <p>Pause ^[2] 654:6 719:10</p> <p>pay ^[2] 604:18 620:22</p> <p>pay-per-use ^[2] 644:11,19</p> <p>PBS ^[2] 647:14,17</p> <p>peel ^[1] 622:25</p> <p>Pennsylvania ^[1] 590:20</p> <p>people ^[30] 584:13 591:24 593:10 596:21 598:3,3 601:23,25 610:24 613:4 615:22 619:5 621:10 650:2 661:2 674:17 682:22 691:21 695:3 703:20 704:22 705:1,23 707:25 708:18 709:3 710:10 711:22 716:23 728:13</p> <p>peoples' ^[1] 709:1</p> <p>per ^[1] 643:9</p> <p>percent ^[7] 591:3 610:25 624:25 637:14 645:13,15,15</p> <p>percentage ^[4] 597:1 628:2 717:20,21</p> <p>perennial ^[1] 720:24</p> <p>perfect ^[2] 701:19,25</p> <p>perfectly ^[5] 587:2 619:21 625:3 682:12 715:7</p> <p>performance ^[6] 610:12 630:13 647:20 697:11 698:1 711:19</p> <p>performances ^[2] 695:24 698:13</p> <p>performed ^[3] 673:15 680:16 711:5</p> <p>perhaps ^[6] 617:2 672:10 684:2,4 710:18 722:4</p> <p>period ^[3] 590:25 644:16 646:1</p> <p>permissible ^[7] 661:23 690:24 699:25 701:5 716:17,24 717:5</p> <p>permission ^[3] 686:15,19 699:9</p> <p>permit ^[2] 683:16 684:6</p> <p>permitted ^[6] 666:6 675:12 697:3,8,17 720:12</p> <p>person ^[1] 671:15</p> <p>personal ^[4] 629:11 639:20 651:18 709:6</p> <p>personally ^[1] 711:18</p> <p>perspective ^[8] 653:13,17 660:8 680:9 707:5,6 712:6,18</p> <p>petition ^[2] 603:19 658:3</p> <p>petitioners ^[1] 681:14</p> <p>PhD ^[1] 676:25</p> <p>PhDs ^[1] 703:20</p> <p>phenomena ^[1] 644:14</p> <p>phone ^[1] 641:20</p> <p>phonetic ^[2] 611:8 726:21</p> <p>physical ^[20] 592:10 607:18 609:24 617:18 626:10 627:4,4 630:11 631:4 632:13,14 638:4 647:18 674:10 678:2,11,19 679:21 716:1,</p>	<p>2</p> <p>physically ^[2] 591:5 596:15</p> <p>pick ^[3] 596:3 670:7 718:7</p> <p>picture ^[1] 637:9</p> <p>Pictures ^[12] 587:5,5,11 589:2,8 601:9,12,22 602:4 631:20 645:18 651:10</p> <p>piece ^[2] 637:15 692:17</p> <p>pieces ^[1] 706:1</p> <p>pin ^[1] 689:24</p> <p>place ^[5] 653:9 663:25 676:6 716:23 724:12</p> <p>places ^[1] 705:2</p> <p>plainly ^[1] 689:4</p> <p>plan ^[1] 588:8</p> <p>planning ^[1] 584:24</p> <p>plant ^[2] 590:20 622:11</p> <p>plastic ^[3] 592:13 594:21,21</p> <p>platform ^[5] 645:21 646:20,24 652:12,14</p> <p>platforms ^[10] 631:17 645:24 646:9,25 648:10,14 652:5,7,11,17</p> <p>play ^[22] 591:23 593:15 611:21 612:10 616:4 622:7,21 623:2,6 624:15 639:7 642:16 643:23 652:9 673:2,9 683:19 692:4 698:3 701:23 707:5 715:15</p> <p>playable ^[5] 591:6,10 622:2 665:17 690:8</p> <p>playback ^[4] 607:11,22 612:2,4</p> <p>played ^[1] 622:5</p> <p>player ^[3] 614:2 615:25 616:3</p> <p>players ^[8] 593:7,14 607:12 611:21 614:4 615:21,24 714:19</p> <p>playing ^[6] 593:11 624:19,20 677:15,19 711:23</p> <p>plays ^[2] 588:25 639:22</p> <p>pleadings ^[1] 726:22</p> <p>please ^[10] 584:19 585:4 586:6,23 588:9,12 589:14 654:4,15,20</p> <p>plenty ^[1] 599:13</p> <p>plus ^[3] 587:6 640:3 726:11</p> <p>point ^[73] 589:23 592:14 595:3,6 597:2 598:7 600:1 602:6,10 603:20 604:24 605:24 606:9 609:16 610:21 614:13,16 615:21 618:2,7,12 619:23 620:25 622:19 623:24 628:24 630:19 631:23 633:21 634:23,23 639:23 644:10 645:25 648:13,24 649:3 660:20 666:17,21 668:3 674:1 677:25 678:22 682:11 683:17 690:14 691:10 692:16,21 693:12 699:23 703:1,1 705:17 706:12 707:18 708:23 712:7,13,21 713:2,15 715:3 717:25 720:1,18 723:20 724:18,23 725:10,19 726:5</p> <p>pointed ^[3] 724:1,24,24</p> <p>pointing ^[1] 695:3</p> <p>points ^[11] 608:12 628:10 650:21 663:11 672:7 692:14 719:8 723:1,21 725:18 727:16</p>	<p>Policy ^[4] 586:3 656:4,5 676:6</p> <p>polycarbonate ^[2] 592:17 594:6</p> <p>pop-out ^[1] 593:19</p> <p>popular ^[6] 706:15 708:2 717:18 720:7,14 721:7</p> <p>populations ^[1] 693:19</p> <p>portions ^[3] 621:1 674:17 676:1</p> <p>portrayed ^[1] 707:25</p> <p>pose ^[3] 584:11 644:22 654:13</p> <p>position ^[3] 613:18 617:8 627:5</p> <p>positioned ^[1] 686:2</p> <p>possibility ^[3] 606:14 709:18 721:2</p> <p>possible ^[7] 606:1 634:18 640:13 654:15 666:5 697:2 706:2</p> <p>possibly ^[2] 665:4 669:8</p> <p>posted ^[2] 585:3 655:1</p> <p>potential ^[9] 610:12 658:17 659:2 688:23 698:4 704:16 710:11,25 720:25</p> <p>potentially ^[2] 682:4 697:15</p> <p>practical ^[3] 630:16 705:17,20</p> <p>practice ^[2] 623:22 634:15</p> <p>practices ^[1] 612:19</p> <p>predict ^[2] 621:25 721:10</p> <p>prediction ^[1] 723:5</p> <p>preemptive ^[7] 588:25 616:6 619:11 621:14 622:14 633:23,25</p> <p>prefer ^[2] 620:10 630:23</p> <p>preferable ^[1] 608:16</p> <p>preference ^[1] 647:5</p> <p>preferred ^[1] 632:9</p> <p>premises ^[13] 674:10 678:1,2,5,11,18,20,20 679:22 690:11,25 691:1 694:3</p> <p>prepared ^[2] 636:20 706:3</p> <p>Prerecorded ^[2] 641:14 644:8</p> <p>preselected ^[1] 643:15</p> <p>present ^[4] 590:2 679:6 681:4 724:2</p> <p>presentation ^[4] 631:8 641:7,14 644:8</p> <p>presentations ^[2] 589:11 645:1</p> <p>preservation ^[97] 585:17 588:21,23,25 600:16 605:11,19,22,23 606:2,3,19 607:7,18 608:5,9 611:7 612:19,21,25 613:7,11,12,16 614:7,10,16 616:6,8 619:11 620:5,6,11,13 621:14 622:14 623:20 625:10,11 626:16,17 630:18 633:24,25 634:20 636:11 647:8 654:9 656:13,16,19 660:23 661:3 663:12,21,25 664:6,21,21 665:2 667:10,13 676:7 678:14 686:18 690:8,17,19 691:12 692:11,25 693:12,15,16 694:2,5 696:9,19 698:23 699:3,12,20 702:7,17,25 704:14 705:7,9 706:13 711:17,21 712:10,14,18 713:1 716:9 728:8</p> <p>preservation-related ^[1] 710:2</p> <p>preservationist ^[1] 687:22</p> <p>preservationists ^[1] 668:6</p>	<p>preservations ^[1] 667:14</p> <p>preserve ^[17] 605:24 606:24 624:16 631:22 635:17 661:7 664:9 668:6 685:24 690:21 696:18 706:16,18 707:16,19 708:11 710:20</p> <p>preserved ^[17] 618:23 620:2 653:4 668:8 690:23 692:10 694:4,8 697:24 698:24 702:5,7 703:6 707:1 708:3 711:4 720:6</p> <p>preserving ^[6] 625:21 634:25 667:10 691:5 707:4 727:10</p> <p>President ^[2] 587:4,12</p> <p>press ^[3] 643:23 645:23 648:4</p> <p>pressing ^[1] 591:16</p> <p>pressings ^[2] 591:12 622:9</p> <p>pretend ^[1] 616:17</p> <p>pretty ^[9] 584:12 609:16 617:12 631:1 636:3 645:4 669:21 686:9 716:13</p> <p>prevent ^[1] 652:11</p> <p>preventative ^[3] 616:6 635:24 636:11</p> <p>prevented ^[1] 609:20</p> <p>preventing ^[5] 659:19 701:7,14,21,23</p> <p>previous ^[3] 613:2 661:25 715:6</p> <p>previously ^[2] 587:14 612:16</p> <p>price ^[2] 619:4 620:25</p> <p>primarily ^[4] 661:5 677:17 695:24 722:24</p> <p>primary ^[2] 595:7 596:7</p> <p>Prime ^[3] 633:9 644:12,15</p> <p>principle ^[2] 625:20 700:3</p> <p>print ^[5] 591:11 597:25 598:1 604:8 623:6</p> <p>printed ^[1] 599:22</p> <p>printing ^[1] 623:3</p> <p>priority ^[1] 634:7</p> <p>private ^[7] 596:23,24 631:13 645:6 668:14 680:25 709:1</p> <p>proactive ^[2] 676:6 696:5</p> <p>proactively ^[2] 625:20 681:20</p> <p>probably ^[8] 593:17 604:14,17 611:4 637:1 671:17 676:2 717:8</p> <p>problem ^[20] 595:7,14,18 596:8 597:10,16 599:9,10 623:11 625:18 629:18 652:25 653:7 668:7 701:20 703:7 708:12 712:24 714:20 715:1</p> <p>problematic ^[2] 636:9 719:25</p> <p>problems ^[8] 588:16 590:14 595:7,17 597:14,14 631:5 638:3</p> <p>procedure ^[2] 604:25 727:21</p> <p>proceeding ^[5] 617:9 627:12 648:25 649:10 697:5</p> <p>proceedings ^[1] 649:12</p> <p>process ^[8] 627:14 642:24 671:10 692:8 702:20 719:16 724:10 727:20</p> <p>processing ^[2] 601:18,20</p> <p>procure ^[1] 640:10</p> <p>procured ^[1] 640:1</p>
---	--	--	--

<p>produced [7] 590:19,24 592:22 612:4 647:14,15 724:7</p> <p>producers [3] 590:16,17,21</p> <p>product [4] 624:22,23 637:20 726:16</p> <p>production [1] 598:14</p> <p>professionally [1] 703:21</p> <p>professor [6] 639:8,25 664:11 670:16 716:19 717:23</p> <p>program [2] 597:11 676:17</p> <p>programs [10] 602:1,6 603:16 623:10 654:9 658:2 676:8,12 678:15 703:25</p> <p>prohibition [1] 679:1</p> <p>prohibits [1] 678:17</p> <p>project [7] 634:13 672:22 686:16 692:2 696:15 704:25 705:2</p> <p>projects [4] 664:9 671:17 696:5 704:17</p> <p>proliferation [2] 615:11,17</p> <p>prominent [1] 720:7</p> <p>prompted [1] 706:4</p> <p>prone [2] 593:17 594:25</p> <p>properly [1] 650:13</p> <p>properties [1] 710:21</p> <p>property [1] 673:14</p> <p>proponents [26] 586:6 600:4 611:19 615:4 616:7,16 619:8 656:8 657:22 665:4,24 666:14 668:17 670:25 683:11 687:9 697:22 698:19 700:16 711:15 719:2,11,18 720:1 722:6,24</p> <p>proposal [17] 609:14 616:24 617:13,17 649:23 651:4 659:12,16 661:18 664:24 672:14,15,21 676:9 683:20 684:6 710:4</p> <p>proposals [2] 609:13,23</p> <p>propose [1] 705:12</p> <p>proposed [14] 586:6,24 589:8 601:7 605:8 628:19 650:22 664:24 665:23 666:2 667:19 681:14 683:16 690:16</p> <p>proposing [2] 615:5 667:5</p> <p>proposition [3] 672:23 687:12 694:20</p> <p>propriety [1] 719:17</p> <p>protected [1] 698:9</p> <p>protecting [1] 641:4</p> <p>protection [1] 665:15</p> <p>protections [2] 638:17 641:2</p> <p>protective [2] 592:18 594:7</p> <p>prove [1] 650:18</p> <p>provide [21] 584:22 585:11 605:5,13 637:15 638:19 646:9,17 657:23 659:17 661:20 673:13,13 683:17 686:23 691:10 696:12 722:3,16,18 727:5</p> <p>provided [8] 589:17 644:24 655:16 661:21 675:17 686:21 712:22 722:8</p> <p>providers [1] 646:12</p> <p>provides [3] 659:16 680:1 726:23</p>	<p>providing [6] 636:24 658:1 690:15 697:16 720:14 726:6</p> <p>provision [5] 626:16,17,17,20 664:7</p> <p>provisions [3] 674:2 696:12 726:10</p> <p>public [31] 585:9 591:21 596:21 641:16,24 643:10 646:20,21 647:20 666:8 683:14,15 684:7 685:10 692:19 693:5,8 695:24 697:11,15,18 698:1,4,13 704:6 707:1 711:19 722:12,17,18 728:14</p> <p>publish [2] 699:3,12</p> <p>published [2] 621:3 676:13</p> <p>publisher's [1] 718:7</p> <p>publishers [1] 721:6</p> <p>publishing [3] 652:8,20 682:13</p> <p>purchase [5] 594:1 606:22 621:23 634:11 652:16</p> <p>purchased [3] 599:7,21 619:2</p> <p>purpose [16] 588:21 614:23 630:6 652:24 667:17 668:14 680:25 687:25 688:1 690:8 691:4,24 711:23 719:12 726:7 728:12</p> <p>purposes [15] 591:14,15 611:8 614:11 637:25 638:8 648:16 649:22 653:6 665:21 666:11 675:5 691:5 698:20 727:9</p> <p>put [19] 596:10,11 597:10 602:19 629:25 636:5 640:16 646:17 661:25 670:10 674:8 675:10 676:6 683:10,15 701:16 704:8,23 705:4</p> <p>putting [4] 669:19 678:8 681:15 706:1</p>	<p style="text-align: center;">R</p> <p>R1 [1] 600:15</p> <p>raise [10] 584:13,16 589:23,24 616:13 641:11 654:15,18 682:11 700:22</p> <p>raised [5] 601:14 603:21 664:16 723:21 728:3</p> <p>raising [1] 618:5</p> <p>Ramos [4] 585:25 586:2 600:2 611:17</p> <p>range [1] 590:16</p> <p>rare [3] 600:12 637:8,13</p> <p>rate [1] 648:8</p> <p>rates [1] 721:13</p> <p>rather [9] 606:19 620:10 621:1 626:11 632:12 641:20 660:5 695:25 715:19</p> <p>re [2] 603:5 714:17</p> <p>re-found [1] 709:18</p> <p>re-release [7] 713:16,19 714:24 715:14 718:8 721:6 725:21</p> <p>re-released [2] 603:11 715:4</p> <p>reach [4] 647:22 675:11 677:5 725:6</p> <p>reached [2] 698:11 726:2</p> <p>reaches [1] 697:9</p> <p>reaching [1] 708:8</p> <p>read [5] 589:14 626:10 636:3 716:2 721:12</p> <p>readily [1] 612:5</p> <p>reading [1] 694:12</p> <p>readings [1] 618:16</p> <p>ready [2] 642:14 654:3</p> <p>real [6] 591:10 610:20 618:2 689:10 717:14 718:19</p> <p>realistic [1] 635:1</p> <p>realities [2] 668:24 679:16</p> <p>reality [5] 646:25 704:5 715:10,23 724:25</p> <p>really [50] 588:19 591:24 594:17 603:17 608:8 612:4 613:2,5,19 617:8 622:4 630:23 634:3 636:11 645:14 648:21 651:4,13 660:15 664:7,8 665:13 676:11 677:7,10 682:25 683:4 685:16 688:18,22 689:1,1,21,24 692:3,18 697:25 701:6 703:18 705:3 706:10 707:23,24 708:5 712:13,23 714:19 717:12 720:1 728:18</p> <p>reason [10] 584:15 596:15 625:5 630:4 654:17 662:5 664:8 690:20 702:12 703:2</p> <p>reasonable [6] 681:5 684:4,14 685:7,12 727:25</p> <p>reasons [3] 664:1 679:5,24</p> <p>reboot [1] 642:22</p> <p>receive [1] 594:12</p> <p>recent [1] 687:18</p> <p>recently [2] 608:1 720:20</p> <p>recognize [2] 606:16 720:25</p> <p>recognized [1] 675:4</p> <p>recommendation [1] 678:13</p>	<p>recommendations [6] 608:22 613:21 616:19 617:14 627:2 695:16</p> <p>recommending [1] 678:14</p> <p>reconvene [2] 653:21 728:23</p> <p>record [7] 618:13 648:6 666:20 672:15 692:25 695:5 715:17</p> <p>recorded [2] 585:1 654:24</p> <p>recording [1] 585:6</p> <p>recreation [1] 677:19</p> <p>recreational [4] 697:17,19 698:3 711:23</p> <p>red [1] 724:15</p> <p>redistributing [1] 598:5</p> <p>reels [1] 638:2</p> <p>reference [3] 599:19 700:22 720:22</p> <p>referencing [1] 626:10</p> <p>referred [1] 619:19</p> <p>referring [1] 725:21</p> <p>refers [3] 617:3 629:2 678:19</p> <p>regard [4] 621:13 686:9 699:6 718:23</p> <p>regarded [1] 716:19</p> <p>regarding [2] 686:17 696:8</p> <p>regardless [1] 717:3</p> <p>regards [3] 637:20 724:5 727:17</p> <p>regime [1] 706:13</p> <p>regs [1] 666:2</p> <p>regular [1] 652:18</p> <p>regulation [7] 664:24 665:21,23 672:24 697:3 720:9 722:17</p> <p>regulations [8] 665:25 666:1,6 669:14 672:11 683:16 721:15,17</p> <p>regulatory [1] 712:1</p> <p>reinforces [1] 712:13</p> <p>reissue [3] 621:22 713:4 714:15</p> <p>reissued [3] 602:14 608:19 621:20</p> <p>reissues [3] 714:17 716:5 720:20</p> <p>reiterate [2] 618:11 714:17</p> <p>reiterated [1] 696:3</p> <p>relate [1] 706:19</p> <p>Related [8] 603:20 609:10 628:24 690:17 691:18 700:25 711:9 722:25</p> <p>relates [2] 619:10 703:11</p> <p>relations [1] 587:12</p> <p>relationship [2] 693:11 696:9</p> <p>relative [2] 618:14 645:10</p> <p>relatively [7] 584:21 600:10 619:4 623:5 654:22 706:8 717:21</p> <p>release [2] 603:17 714:24</p> <p>released [6] 591:9,24 602:13 603:6 604:14 633:6</p> <p>releases [2] 647:17 714:18</p> <p>relevant [3] 601:12 618:10 693:25</p> <p>reliable [2] 607:11 630:5</p> <p>reliably [1] 612:11</p> <p>rely [2] 646:9 716:23</p> <p>remastered [2] 602:14 606:20</p> <p>remember [2] 627:25 704:22</p>
Q			
	<p>qualify [1] 681:25</p> <p>quality [2] 607:13 612:7</p> <p>quarter [1] 620:19</p> <p>question [56] 584:20 599:3 600:4 601:6,15 605:7 611:12,19 613:2 621:14 627:1,9 634:3 644:23 652:5,15 654:21 658:5 661:16 663:15 670:22 673:5 675:20 676:16 677:14 678:13 686:5 687:1 690:13,16,22 691:12 695:9 696:11 698:17,19 699:2 703:12 704:12 705:17 706:5 707:7 708:13 714:14 719:1,9 720:24 721:23,25 722:24 725:16 727:11,22,23,24 728:6</p> <p>questioning [2] 628:13 712:9</p> <p>questions [7] 584:11 588:4,13 652:9 654:14 700:12 718:14</p> <p>quick [7] 588:10 610:20 649:21 692:14 696:21 708:22 719:8</p> <p>quickly [9] 588:7 599:15 601:17 623:24 649:18 672:5 677:14 681:9 706:8</p> <p>quintessential [1] 611:12</p> <p>quite [8] 597:24 602:4,4 660:10,16 686:10 695:5 710:17</p> <p>quo [1] 615:18</p> <p>quote-unquote [1] 714:8</p>		

<p>remembering ^[1] 616:14</p> <p>remote ^[6] 658:10 692:7 705:10 710:23 718:2 727:19</p> <p>remotely ^[1] 661:13</p> <p>removal ^[1] 594:9</p> <p>removing ^[1] 592:19</p> <p>rendering ^[1] 711:19</p> <p>reopening ^[1] 721:20</p> <p>repealed ^[1] 720:21</p> <p>repeating ^[1] 720:10</p> <p>replace ^[2] 599:10 611:1</p> <p>replaceable ^[1] 597:18</p> <p>replaced ^[1] 597:12</p> <p>replacement ^[22] 591:11 597:11 599:5 609:23 610:8 611:14,14 613:16 614:7,11,17 623:9 626:17,19,24,25 628:23 629:2 631:4 632:15 634:2 676:7</p> <p>replacements ^[1] 617:16</p> <p>replicator ^[1] 604:12</p> <p>reply ^[5] 628:25 665:3,25 675:1 718:25</p> <p>report ^[2] 611:6 674:7</p> <p>reported ^[1] 598:22</p> <p>reporter ^[7] 585:2 596:3 654:25 655:3,4,6,9</p> <p>reporting ^[2] 596:22,25</p> <p>reports ^[1] 640:17</p> <p>represent ^[4] 586:9 637:9 704:20 717:19</p> <p>representation ^[1] 621:10</p> <p>representatives ^[1] 651:11</p> <p>represented ^[1] 709:11</p> <p>representing ^[6] 588:1 656:12,15,18,22 703:19</p> <p>represents ^[1] 587:6</p> <p>reproduction ^[3] 610:11 619:7 659:19</p> <p>request ^[11] 640:5,6,8 657:25 670:17 676:5,19 680:15 684:4 696:1 705:15</p> <p>requested ^[2] 637:15 657:19</p> <p>requester ^[1] 673:15</p> <p>requesting ^[2] 683:21 723:11</p> <p>requests ^[3] 645:13 696:2,4</p> <p>require ^[4] 612:25 615:1 671:23 684:25</p> <p>required ^[5] 609:10 624:4 638:18 679:20 728:1</p> <p>requirement ^[4] 589:2 674:9 685:2 689:18</p> <p>requirements ^[3] 612:18 668:20 684:13</p> <p>requires ^[2] 627:12 714:7</p> <p>research ^[41] 603:8,18 605:3 630:8 648:16 651:4,8 658:9 661:8 664:5 666:11 668:15 674:6,24 675:5 681:1,22 682:3 686:20 688:4,7,11 694:21 698:21,22 699:11,17,20,24 700:1,5,24 702:2 712:24 713:13 714:20 715:25 726:2,18,20 727:2</p> <p>researcher ^[7] 662:22 676:5,19 683:24 687:22 691:1,3</p> <p>researchers ^[19] 592:6,8 609:19 619:18 646:10 658:8 661:1 664:12 669:7,22 672:12 691:1 693:18,25 696:1 697:14,14 710:19 718:9</p> <p>researching ^[1] 596:17</p> <p>reserve ^[1] 588:12</p> <p>resolving ^[1] 659:6</p> <p>Resource ^[2] 586:12 709:14</p> <p>resources ^[1] 664:9</p> <p>respect ^[8] 599:17,24 602:3 610:10 630:9 650:8 698:5 711:10</p> <p>respects ^[1] 663:13</p> <p>respond ^[18] 584:12 595:3 601:15,17 616:10 619:9,13 623:23 652:22 672:5 677:14 682:7 709:21 711:12 719:9 722:25 724:22 725:19</p> <p>response ^[2] 659:20 726:4</p> <p>responses ^[2] 584:20 654:21</p> <p>responsible ^[2] 657:4 664:21</p> <p>rest ^[1] 589:14</p> <p>restricted ^[2] 669:21 679:21</p> <p>restricting ^[1] 679:7</p> <p>restriction ^[4] 660:4 678:10 686:13 704:6</p> <p>restrictions ^[18] 639:22 659:5 660:1 663:3 664:17 667:8,12 668:3 681:5 685:5 694:3 697:12 704:13 714:1,6,10 723:23,24</p> <p>result ^[2] 614:9 650:2</p> <p>results ^[3] 592:25 642:11 703:5</p> <p>retain ^[1] 711:1</p> <p>return ^[2] 642:25 643:1</p> <p>reusable ^[1] 609:3</p> <p>reuse ^[1] 717:17</p> <p>reveals ^[1] 715:1</p> <p>revenue ^[1] 603:13</p> <p>review ^[2] 727:3,7</p> <p>revise ^[1] 613:21</p> <p>revisit ^[1] 710:9</p> <p>rich ^[1] 708:1</p> <p>rights ^[12] 633:4,13 641:3 645:20 647:20,24 648:18 666:25 667:23 669:12 713:22 726:6</p> <p>rights-holders ^[1] 713:3</p> <p>rightsholder ^[1] 682:12</p> <p>rightsholders ^[7] 669:18 686:16,18 689:3 699:9 713:18 726:6</p> <p>Riley ^[31] 585:20,23,24 655:22,25,25 666:16 669:24 696:22 700:12,13 701:17 702:3,10 703:9,12 704:8,11,12 705:11 706:6 707:7 709:20 711:2 712:8,19 714:2 717:15 718:24 722:1,20</p> <p>risk ^[5] 608:3 689:9,13 717:8 720:10</p> <p>risk-averse ^[3] 662:7 686:10 717:2</p> <p>risk-conscious ^[1] 682:23</p> <p>road ^[1] 691:2</p> <p>roadmap ^[1] 584:22</p>	<p>robust ^[6] 602:25 609:16 645:4 646:14 680:1 702:8</p> <p>robustness ^[1] 602:15</p> <p>Rochester ^[1] 692:4</p> <p>Roku ^[3] 642:23,25 643:2</p> <p>roles ^[1] 700:20</p> <p>romantic ^[1] 642:8</p> <p>room ^[2] 627:1 689:14</p> <p>rot ^[14] 590:14 591:4 595:6 597:5,13 599:20 606:5 622:20,22,22 623:4 624:11,12,17</p> <p>round ^[2] 679:25 703:8</p> <p>rounds ^[1] 678:3</p> <p>Rubel ^[65] 585:20,21,22 588:5,6 590:5,10 592:1 593:4,22 595:2,22 596:2,12 597:7 598:6 599:1,11 600:2,3,8 601:4 602:8,20 603:20 604:24 605:6 606:11 607:3,16 608:10 610:2,19 611:17,18,25 612:12 613:14 615:4,19 616:5 617:25 618:24 620:16 621:12 622:17 628:17 631:2 632:16 633:21 634:21 636:14 641:6 644:21 646:7 647:10 648:11,23 649:17 652:2,21 653:10 655:22,23,23</p> <p>Ruberg ^[22] 656:23,24,24 660:6,7 663:6 670:16 676:20,21 680:5 691:7,9 693:7,10 701:19 703:9,10 707:23 708:20,22 715:11 717:23</p> <p>Ruberg's ^[2] 664:11 725:10</p> <p>rule ^[1] 712:2</p> <p>rulemaking ^[6] 584:7 661:25 679:25 701:3,12 715:7</p> <p>rules ^[1] 728:11</p> <p>run ^[8] 606:8 670:12,15 706:2 709:14 719:11 721:17 722:11</p> <p>running ^[2] 706:7 722:20</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>safe ^[2] 695:21 721:14</p> <p>sake ^[1] 628:18</p> <p>sales ^[1] 614:2</p> <p>same ^[26] 585:14 599:8 607:13 626:1 627:3 631:10 642:24 644:13 653:21 655:17 659:25 685:24 687:20,24 688:25 689:13 690:5 691:3,5 696:14 699:19 700:3 708:18 713:11 716:3 725:13</p> <p>sand ^[1] 592:15</p> <p>Sarah ^[3] 586:11 598:12 607:4</p> <p>save ^[2] 644:2 707:2</p> <p>saw ^[7] 604:8 612:3,8 618:25 619:9 644:25 646:23</p> <p>saying ^[11] 586:25 595:16 599:23 630:20 645:4 656:9 660:23 672:17,25 676:15 705:20</p> <p>says ^[12] 623:19 630:9 649:1 665:23 678:1 682:2 684:24 685:8 690:6 707:25 722:17 727:18</p> <p>scale ^[2] 703:11 704:9</p> <p>scarcity ^[1] 603:14</p> <p>scenarios ^[1] 614:8</p> <p>scholar ^[5] 648:20 662:22 676:25 691:16 692:12</p> <p>scholarly ^[7] 652:19,19 661:8,9 665:21 674:6 708:1</p> <p>scholars ^[15] 621:10 652:8 658:8 668:9 677:22 679:17 682:19 708:6,7 711:22 716:6 718:3 725:5,11,13</p> <p>scholarship ^[16] 621:2 648:18 663:17 668:15 677:3 680:25 688:7 697:23 698:21,22 701:7 702:22 703:14 712:24 727:9 728:9</p> <p>school ^[3] 637:23 639:17 717:8</p> <p>science ^[1] 657:5</p> <p>scope ^[4] 650:22 657:18 666:5 697:2</p> <p>screen ^[5] 636:19,22 641:10 642:25 646:12</p> <p>screening ^[1] 718:18</p> <p>screensharing ^[7] 658:10 666:22 711:7,9,16 712:3,22</p> <p>screenshots ^[2] 652:9,15</p> <p>search ^[6] 628:14 642:7,7,11 643:16 649:21</p> <p>searches ^[1] 605:4</p> <p>searching ^[1] 634:8</p> <p>second ^[12] 584:6 588:22 607:1 658:15 662:13 672:15 675:10 677:25 692:10 702:11 706:11 720:4</p> <p>Secondly ^[2] 654:23 708:13</p> <p>seconds ^[1] 655:7</p> <p>Section ^[33] 584:6 588:22 605:7 610:8 611:13 612:17 613:17,18,21,22 614:20 617:3 618:2,9 625:10,14 629:1 663:14 670:23 673:7,11,12 675:12,16 679:24 683:12 684:23 685:25 695:9,11,14,23 719:15</p> <p>secure ^[1] 686:19</p> <p>secured ^[1] 609:11</p> <p>security ^[18] 606:8 609:9 610:13 641:2 671:2,8,10 681:16 684:15,20 685:1,5,7,12 689:17 690:1 726:18 727:25</p> <p>see ^[38] 592:3,17 594:14 598:22 602:14,17 623:1 624:13,24 627:20 634:1 638:22 639:1 640:4,5 642:11,13 643:2,14,19,21,25 644:3,13,21 647:8 648:15 649:13 650:10 667:1 673:4,23 675:11 686:19 708:10 712:19 724:6 728:20</p> <p>seeing ^[4] 588:17 589:20 612:2 647:13</p> <p>seeking ^[2] 620:22 688:13</p> <p>seeks ^[1] 601:7</p> <p>seem ^[7] 594:10 595:19 633:22 655:4 683:16 708:25 709:17</p> <p>seems ^[15] 594:8 618:17,19 630:10,14 634:4 657:19 659:15 663:11 673:18 687:3 688:17 695:25 709:16 719:19</p> <p>seen ^[6] 592:11,24 598:24 625:4 687:18 715:18</p>
---	---

<p>select [2] 642:12 727:3 selecting [1] 726:25 selection [2] 643:7,11 sell [1] 603:24 semester [4] 632:23 633:15 638:23 639:16 send [2] 623:9 662:20 sending [1] 662:16 Senior [1] 587:11 sense [9] 606:10 610:1 613:5 615:23 622:13 660:14 684:17,25 691:14 sensitive [2] 685:16 717:12 sent [1] 640:8 sentence [1] 596:7 separate [2] 650:4 664:7 separation [3] 592:17,25 594:6 series [2] 598:15 643:7 serious [2] 630:7 704:6 serve [2] 680:4 716:6 served [1] 664:13 server [12] 606:6 609:24 610:6,11,14 613:13 615:5 625:18,21,23 626:3,11 server's [1] 610:15 service [17] 629:18,20 636:25 637:17 644:11 645:8,20,20 649:15 650:9,9,15,18 651:22 662:24 669:16 699:6 Services [25] 586:12,21 589:3 628:21 629:7,10 630:5 631:11,11 641:23 644:10,11,13,14,25 645:11 646:2 648:22 649:2,3,5,9,24 650:16 669:3 session [7] 584:23 585:8,10,14 655:14,15,17 sessions [1] 585:15 set [7] 598:2,14,19 628:6 638:11 694:23 710:7 settings [1] 651:5 seven-hundred [1] 632:11 several [7] 598:15 614:23 637:3 648:1 695:19 719:8 721:9 sexualities [1] 714:23 share [6] 636:19,22 639:9 641:9 709:15 713:20 shared [1] 709:18 sharing [3] 641:5 671:3 716:25 Shaw [2] 591:8,23 shift [1] 588:19 shifted [2] 607:22 648:1 shifting [1] 625:16 shifts [2] 691:25 692:1 short [6] 584:22 589:11 641:7 700:24 706:7,9 shot [1] 714:25 shouldn't [2] 597:17 697:7 show [4] 636:25 641:17 682:1 710:8 showed [1] 634:13 showing [4] 646:11 689:19 718:18,19</p>	<p>shown [2] 618:13 728:6 shows [1] 641:19 shy [1] 717:9 side [4] 584:11 654:13 655:21 675:10 sides [2] 628:20 673:23 sign [3] 623:2 655:15 671:20 sign-on [3] 671:18 672:1,1 sign-up [1] 585:9 signed [1] 585:13 significant [1] 701:6 significantly [2] 614:3 689:9 signs [2] 591:4 622:2 Silberberg [2] 588:1 657:14 similar [11] 604:2 612:3 618:4 626:25 680:10 688:5,5 720:8 723:9,16 727:2 simply [7] 618:17 619:23 629:7,15 647:9 665:15 672:15 simultaneously [1] 675:22 since [5] 613:7 633:10 675:3 693:21 713:17 Sindermann [1] 727:6 single [7] 599:23 659:17 660:21 671:18 672:1,1 713:7 sirens [1] 726:14 site [4] 638:13 693:25 701:5 708:17 situation [4] 669:12 681:23 705:5,18 situation's [1] 721:18 situations [2] 705:9,21 six [2] 615:2 632:11 six-years-old [1] 649:5 slides [2] 590:3 636:20 slowdown [1] 655:10 slowly [1] 670:5 small [2] 677:21 717:21 smartphone [1] 721:3 societal [1] 702:9 society [3] 613:10 660:12 727:6 software [42] 601:8,12,18,18,20,25 602:5,16,17 603:1 615:9 656:13,16,19 657:11 659:1 664:10 667:6,12,14 670:7,12,13 671:9 675:15,21 678:9 687:19,23 688:5 694:2,15,22 699:24 700:2,3 705:25 706:2 713:23 723:25 725:8 726:1 sold [3] 601:9 619:3 645:20 solely [1] 690:7 solid [1] 594:21 solution [1] 640:24 solve [2] 712:24 714:19 somebody [5] 594:9 608:3 641:11 672:17 673:1 somebody's [2] 595:3 651:23 somehow [2] 689:2,19 someone [10] 633:2 666:24 670:10 681:17,21,24 682:1 683:20 709:7 722:15 someone's [1] 600:21</p>	<p>something's [2] 608:24 624:13 sometime [1] 633:13 sometimes [4] 597:17 622:21 647:15 693:15 somewhat [1] 650:11 somewhere [1] 708:9 soon [4] 618:19,20 623:5,5 sorry [4] 595:25 604:4 616:14 675:7 sort [56] 584:22 593:20 602:22 603:3 613:4 631:9 636:4 644:1 646:3 658:2,16,20 659:1,3,6 662:16,24 663:6 668:11,16 672:1 673:6 675:11 678:6,25 679:12,14,15,16 680:12,20 681:3 685:10 686:22 687:3,12 692:21,23 693:19,24 694:1,3 702:15 703:2,7,8 715:3 716:7,8 719:6 722:23 723:3 724:14,23 725:11 727:19 sorts [1] 657:24 sound [3] 641:10,11 655:8 sound's [1] 641:12 sounds [2] 596:4 673:3 source [1] 604:25 sourced [1] 634:14 Southern [1] 692:5 space [9] 587:7 592:9 609:7 625:16 668:23 676:2 678:6 685:18 694:13 space-shifting [1] 605:9 speaking [3] 585:5 589:22 623:5 speaks [2] 679:12 691:10 special [1] 647:19 specialized [1] 707:11 specially [1] 688:3 specific [15] 593:14 609:13 644:22 668:3 676:1 684:25 694:23 698:10 707:11 709:14 716:14,22 717:6 719:12 723:7 specifically [9] 588:13 594:6 615:7 661:15 684:24 700:21 707:15,17 724:25 specificity [1] 609:10 specify [1] 678:2 spelled [1] 663:18 spend [3] 620:6,18 631:14 spending [1] 631:21 spent [4] 620:21 631:18 649:11 718:11 spindle [1] 592:12 spindles [1] 594:15 spirit [1] 674:4 spoke [2] 590:6 593:3 spoken [1] 719:17 spot-on [1] 612:24 spotty [1] 648:5 spring [1] 633:1 squarely [1] 703:8 stab [1] 664:18 staff [1] 620:21 standard [3] 596:11 635:21,22 standards [1] 716:14</p>	<p>standing [1] 625:19 standpoint [1] 637:22 stands [1] 694:20 Stanford [5] 657:3 669:15 670:7,9,16 start [21] 586:6 588:4 589:17 590:1 592:13 618:19 624:20 629:4 636:18 639:6 642:16 643:2 645:1,4 654:4 655:22 656:8 657:7,17,21 675:9 started [5] 589:13 590:22 591:1 596:16 654:3 starting [2] 703:25 705:21 stated [1] 612:16 statement [4] 597:25 612:20,24 723:4 statistics [1] 594:5 status [2] 615:18 719:3 statute [5] 617:7,11 659:18 678:20 681:16 statutory [4] 684:5 695:14 702:21 719:12 stay [1] 626:1 Steffan [2] 622:19 627:24 Steffan's [1] 623:23 Steffen [17] 586:14,15,15 589:25 590:2,9,12 596:12,13 607:16,17 621:12,13 632:16,17 647:10,11 step [1] 707:2 steps [2] 615:1 627:14 Steve [1] 657:9 sticking [2] 593:22 624:18 still [18] 598:10 601:24 622:5 623:8 624:15,15 636:3 639:21 649:13,25 667:2 675:2 677:2 709:17 710:21,22 711:12 716:1 stolen [4] 623:21 635:7,8 679:8 stood [1] 669:3 stop [2] 639:6 641:5 stop-gap [2] 607:6 647:9 storage [5] 597:14 613:5 624:11,12 709:13 stored [2] 588:20 625:1 stories [1] 693:21 storing [1] 709:8 story [1] 614:1 stream [6] 630:12 641:19,25 642:2,6 647:6 streaming [35] 589:3 591:13,14 599:7 618:1 628:21 629:7,9 630:4 631:3,11,17 632:6,15 633:8,16,20 641:18 642:16,24 643:24 644:6 645:8 646:2,4 647:12,21 648:7 649:8,15,24 650:9 652:17 658:2 670:19 streams [2] 617:19 627:22 Street [2] 645:23 648:4 strengthened [1] 675:3 stressed [1] 724:21 stretch [1] 597:19 strikes [1] 724:15 stronger [1] 682:4</p>
--	--	--	--

<p>structure ^[1] 700:6</p> <p>struggled ^[2] 664:23 720:24</p> <p>student ^[7] 631:6 639:15,19,19 656:18 672:18 673:1</p> <p>students ^[25] 592:5 593:8 600:23 619:18 620:21 621:4,9 638:5 639: 9 646:10 648:15 660:11,18 661:1 665:18 669:7,22 672:12,16,22 677:15,22 703:22 718:9,19</p> <p>studied ^[1] 709:19</p> <p>Studies ^[4] 586:17 587:6 617:13 621:9</p> <p>studio ^[6] 587:12 609:18 632:21 633:5 638:16 647:23</p> <p>studios ^[8] 587:6,13 620:4 633:18 638:8,16 641:1 706:17</p> <p>study ^[19] 591:21,25 608:21 609: 23 611:6,7 614:12 616:19 627:2,7 668:15 676:24 677:9 680:25 682: 20 703:20,24 725:12,13</p> <p>stuff ^[3] 715:4 716:10 718:20</p> <p>stumbling ^[1] 669:13</p> <p>style ^[2] 662:16 668:12</p> <p>subject ^[3] 643:12 667:15 682:14</p> <p>submit ^[2] 590:6 681:6</p> <p>submitted ^[1] 693:22</p> <p>subscription ^[2] 644:12 651:18</p> <p>subsequent ^[1] 591:12</p> <p>subset ^[1] 603:9</p> <p>subsidize ^[1] 620:4</p> <p>substantial ^[2] 603:4 605:3</p> <p>substitution ^[1] 646:5</p> <p>success ^[1] 648:8</p> <p>successful ^[1] 624:22</p> <p>successfully ^[1] 721:2</p> <p>suffering ^[2] 596:18 597:4</p> <p>sufficient ^[1] 588:23</p> <p>suggest ^[5] 597:20 609:21 665:3 674:18 683:1</p> <p>suggested ^[1] 722:6</p> <p>suggesting ^[5] 605:19 624:3 668: 19 715:18 725:25</p> <p>suggests ^[1] 612:5</p> <p>summarize ^[1] 596:7</p> <p>superior ^[1] 611:9</p> <p>supplant ^[1] 713:14</p> <p>support ^[7] 634:15 664:4,4,20 678: 10 686:7 709:15</p> <p>supposed ^[3] 651:24,25 728:12</p> <p>Supreme ^[2] 687:18 698:6</p> <p>Surely ^[1] 663:25</p> <p>surprise ^[2] 594:19 597:17</p> <p>surprised ^[1] 594:3</p> <p>surprising ^[2] 593:24 630:3</p> <p>surprisingly ^[1] 607:24</p> <p>surrogate ^[1] 652:18</p> <p>SurveyMonkey ^[1] 585:11</p> <p>surviving ^[1] 608:5</p> <p>Swank ^[19] 587:3,5,5,11 629:16 631:6,19 632:22 633:10,11 636: 18,24 637:21 640:12 645:5,12,14, 22 649:20</p>	<p>sways ^[1] 688:1</p> <p>Switch ^[1] 715:20</p> <p>synchronous ^[1] 674:14</p> <p>System ^[11] 587:17,22 639:11 669: 11,20 670:2,15 671:4,15,20 672:3</p> <p>systematic ^[1] 659:19</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>t-shirt ^[1] 682:2</p> <p>T.V ^[1] 603:16</p> <p>tablet ^[1] 641:21</p> <p>talked ^[6] 663:6 673:12 693:7,14 708:7 712:3</p> <p>talks ^[3] 663:12 678:20 693:4</p> <p>Tanasse ^[23] 586:19,20,20 592:1, 2 594:2,3 598:8,11 600:8,9 607:3, 4 611:25 612:1 620:16,17 634:6,7 646:7,8 652:3,4</p> <p>tape ^[1] 607:8</p> <p>task ^[1] 666:4</p> <p>taught ^[1] 646:3</p> <p>Taylor ^[25] 587:15,20,21 597:7,8 602:8,9 604:3,4 605:2 610:19,20 615:19,20 619:11 622:17,18 624: 8 626:9 641:7,9 644:9 648:23,24 650:3</p> <p>teach ^[22] 656:24 658:12 660:3,9, 11,15 674:16 677:2,10 714:5,5,10, 14 716:10,14,18 717:6,9 718:10, 11,22 719:16</p> <p>Teaching ^[20] 656:15 663:7,17 674:24 675:4 677:4,7 688:3,7 699: 21,24 700:1,6 701:8 702:22 713: 13 718:16,16 726:2 727:2</p> <p>Team ^[2] 586:18 671:14</p> <p>tech ^[1] 709:14</p> <p>technical ^[7] 594:18 595:14,15,15, 18,20 655:1</p> <p>technological ^[1] 665:14</p> <p>technology ^[6] 613:6 615:23 641: 15 657:5 726:16,17</p> <p>teeth ^[1] 681:23</p> <p>Teitler ^[28] 656:9,14,14 658:3,4,15 659:21,22 661:4,5,22 662:13 673: 24,25 682:9,10 685:22 700:25 701:1 702:12 706:8,9 707:17 714: 13 716:10,11,12 720:18</p> <p>Teitler's ^[1] 708:23</p> <p>television ^[8] 598:15 639:5 641: 19,25 642:5,15,19 644:7</p> <p>tells ^[1] 721:4</p> <p>temper ^[1] 686:22</p> <p>temperature ^[2] 600:9,14</p> <p>temporarily ^[1] 632:12</p> <p>temporary ^[2] 613:1 614:25</p> <p>ten ^[3] 630:7 642:17 643:8</p> <p>ten-year-old ^[1] 601:20</p> <p>tend ^[4] 607:12 646:25 665:14 706: 14</p> <p>tendency ^[1] 697:21</p> <p>tension ^[3] 633:23 634:5,23</p> <p>term ^[2] 594:18 629:1</p> <p>terminology ^[1] 635:6</p>	<p>termite ^[1] 622:23</p> <p>terms ^[20] 593:6 596:25 606:9 613: 23 627:9 630:16 635:19 651:20, 21 652:10 659:13 660:8 661:17 664:2 667:7,16 673:7 711:5 715:7 717:20</p> <p>tested ^[1] 669:2</p> <p>testimony ^[3] 650:25 651:13 693: 22</p> <p>testing ^[1] 671:16</p> <p>textural ^[2] 628:25 679:15</p> <p>Thanks ^[7] 587:19 632:15 645:3 653:19 691:9 714:1 728:21</p> <p>theatre ^[1] 596:20</p> <p>themes ^[1] 720:8</p> <p>themselves ^[11] 585:19 586:5 639:3 655:21 656:7 657:7 698:23 699:12,17 706:18 722:16</p> <p>there's ^[53] 591:15 595:16 597:4 598:19,22 600:25 603:2,3 604:2 606:5 608:3 609:9 616:9 622:2 623:11 625:5,9,13,14 627:13 629: 24 630:3,23 634:5 635:16 643:19 645:21 647:16 648:4 650:15,18 659:2,18 663:25 668:8,9 672:11 676:5 683:13 686:11 689:15,16, 18,24 691:23 692:4 697:21 710: 13 712:10 715:17 719:2 725:10 727:18</p> <p>therefore ^[1] 613:10</p> <p>they'll ^[1] 718:8</p> <p>they've ^[3] 616:2 651:12 719:15</p> <p>thinking ^[4] 693:6 697:4 704:25 718:11</p> <p>thinks ^[2] 668:11 681:7</p> <p>Third ^[1] 589:1</p> <p>though ^[2] 603:6 607:25</p> <p>thousands ^[5] 625:21 642:1 686: 17 703:21,21</p> <p>threat ^[2] 625:22 689:2</p> <p>three ^[15] 602:18 611:13 612:21,25 614:9,21 626:4,7 649:12 667:13 678:24 701:16 720:15 721:16 726: 13</p> <p>three-copy ^[1] 612:17</p> <p>three-minute ^[1] 640:23</p> <p>throughout ^[4] 637:8 651:14 719: 11 720:8</p> <p>tied ^[3] 605:20 694:3 702:14</p> <p>title ^[14] 591:13 599:23 632:11 639: 6,15 640:1,4,7,11 642:13 650:10, 14 670:7 718:1</p> <p>title-by-title ^[1] 631:24</p> <p>titles ^[48] 595:19 596:9,19 597:11 598:25 599:17,18,21 602:22,22 603:2,6 604:12 608:18 621:17 625:21 628:2,12,14 629:17,19,20 632:19,25 638:25 640:3,3,18 644: 20 645:19 646:23 647:3 648:3,4,6 649:12 704:21 709:23,25 710:3 717:18,20,22 718:6 720:6,7,14 721:6</p>	<p>today ^[19] 595:11 599:24 601:24 608:15 612:8 626:19,22 650:24 651:12 665:8 695:15 703:18,24 710:6 711:3 712:10 721:9 723:15 728:19</p> <p>today's ^[3] 584:25 585:16 654:23</p> <p>together ^[7] 605:4 624:19 636:5 670:10 704:23 705:5 706:1</p> <p>tomorrow ^[1] 728:20</p> <p>top ^[2] 710:24 727:5</p> <p>topic ^[11] 588:13,14,15 589:10 612: 13 654:21 672:6,8 682:8 696:23 719:7</p> <p>topics ^[7] 584:18,24 588:7,11 649: 19 654:19 700:15</p> <p>total ^[1] 642:17</p> <p>totally ^[2] 668:5 681:5</p> <p>touch ^[3] 617:25 706:11 708:13</p> <p>touched ^[1] 700:14</p> <p>towards ^[3] 607:22 680:17 693:13</p> <p>TPM ^[7] 700:19,25 701:11,20,20,22 702:1</p> <p>TPMs ^[1] 666:9</p> <p>track ^[4] 600:10 618:13 648:6 678: 23</p> <p>tracks ^[1] 663:13</p> <p>traction ^[1] 695:11</p> <p>traditional ^[10] 661:7,10 662:9 674:5 682:13 683:5,23 712:18,25 717:5</p> <p>trained ^[1] 594:18</p> <p>training ^[1] 594:12</p> <p>tranche ^[1] 629:14</p> <p>transcribed ^[2] 585:1 654:24</p> <p>transcript ^[2] 585:2 654:25</p> <p>transcription ^[1] 585:6</p> <p>transfer ^[1] 607:5</p> <p>transformative ^[20] 675:2,5 687: 19,25 688:4,7,9,12,13 691:11,11, 24 692:9 697:19 698:2 700:1 713: 10 719:24 725:25 726:24</p> <p>transforming ^[1] 700:7</p> <p>transmissions ^[1] 650:6</p> <p>transmitted ^[1] 711:6</p> <p>transposed ^[1] 687:20</p> <p>tray ^[1] 593:14</p> <p>treated ^[1] 699:19</p> <p>tricky ^[1] 637:12</p> <p>tried ^[1] 710:6</p> <p>tries ^[1] 603:13</p> <p>trip ^[1] 692:6</p> <p>true ^[5] 601:22 650:10 651:18 703: 18 723:3</p> <p>trust ^[1] 599:12</p> <p>try ^[11] 584:19 585:4 592:15 605: 25 627:24 634:14 647:21 676:6 681:20 699:1 727:14</p> <p>trying ^[23] 593:18 602:19 604:17 606:22,24 608:13 613:7 623:15 624:2 631:21 646:4 650:17 661: 18,18 667:5 680:7 685:24 688:21 691:22 710:17 718:17 719:21 724:</p>
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<p>3 tugged ^[1] 594:9 tuition-driven ^[1] 631:13 turn ^[7] 586:23 588:5 639:15 687:3 696:22 700:11 714:2 TV ^[3] 641:20 642:4,6 twenty ^[1] 649:4 two ^[17] 589:11 601:10 624:10 634:5 641:22 649:11 651:16 666:1 667:12,13 692:14 696:11 706:10 711:3 714:23 718:2 725:18 type ^[7] 694:22 706:23 707:14 713:11 723:11 724:13 725:7 types ^[17] 651:7 659:3 662:25 676:1 677:16,16 680:2,17 682:11,14,20 685:4 693:1 694:7 708:5 724:19 728:3 typical ^[1] 707:14 typically ^[5] 592:11 603:24 604:11 621:6 706:19</p>	<p>19,19,21 672:2,18,19 673:1 university-based ^[1] 664:3 unkind ^[1] 723:22 unless ^[6] 603:24 628:4 665:17 681:20 685:11 707:1 unlike ^[1] 643:3 unlikely ^[2] 717:25 718:5 unlimited ^[2] 643:6 680:8 unplayable ^[1] 592:16 unpopular ^[1] 707:3 unpredictability ^[2] 598:20 632:18 unpublished ^[3] 626:18 676:13 727:8 unreadable ^[1] 635:25 unrealistic ^[1] 683:1 unrestricted ^[1] 686:24 until ^[1] 695:10 unused ^[3] 609:5 617:16 629:1 up ^[34] 585:13 589:24 596:3 604:22 610:17 614:14,15 615:13 642:17 655:15 660:19 663:8 665:24,25 667:2 669:4,19 673:4 676:21 682:1,7 683:15 691:8 703:25 711:2,13 715:19 716:16 717:10 718:7,13,20 722:21 728:10 up-and-down ^[1] 616:15 up-to-date ^[1] 601:21 update ^[1] 679:14 upgrade ^[1] 599:5 Upper ^[2] 641:23 643:9 upwards ^[1] 611:24 USA ^[1] 645:18 usability ^[1] 716:15 usable ^[2] 617:17 630:21 usage ^[1] 640:17 useful ^[1] 662:18 useless ^[1] 636:8 user ^[5] 649:11 660:5 670:16 696:4 711:4 user-end ^[1] 659:23 username ^[1] 672:2 users ^[21] 592:6 608:2 610:25 620:20 621:7 632:3 646:17 647:7 652:6,14 661:1,6 669:10,21 672:13 673:19 675:18 678:7 680:4,15 715:18 uses ^[47] 602:4 644:24 651:5,8,10 658:6,11 659:3 661:15,23 662:1,2,17 666:14,14 667:24 668:1 670:13 674:5,23 675:2 680:2,17 681:3 687:19 688:4,12 694:14,21 697:22 698:13 699:24 700:2 701:5,7,15 713:12,13,13 716:17 717:4 719:17 720:3 723:11 726:1,9 727:22 using ^[19] 585:10,14 619:5 635:5 641:20 643:9 644:18 647:2 651:24 655:15,17 681:13 684:14 687:21,23 695:6 717:9 726:16 727:9 usual ^[1] 671:25 utility ^[1] 702:7</p>	<p style="text-align: center;">V</p> <p>vaccination ^[1] 721:12 valuable ^[1] 708:6 value ^[4] 603:7,8,18 726:24 variation ^[1] 598:23 various ^[2] 610:17 664:10 vast ^[1] 631:16 Vegas ^[1] 709:8 verbal ^[1] 590:3 verdict ^[1] 721:1 version ^[4] 601:20,21 658:23 670:14 versions ^[2] 601:25 715:6 versus ^[6] 595:11 610:6 644:10 695:9 720:25 723:15 VHS ^[6] 595:11 599:6 607:8 612:3 638:3 649:13 viable ^[5] 589:4 591:10 628:22 710:21 717:19 vibrant ^[1] 704:5 Vice ^[2] 587:4,12 video ^[54] 585:2 603:3 620:24 621:7 624:23 631:15 641:17 646:14,15,19 647:6,12,17 654:10,25 658:25 660:9 662:17 664:20 665:13,13 667:11 668:6,21 672:17 673:22 675:21 677:7,10,15 678:15 681:10 687:4,5,14,21,23 689:11 690:7,7,10 691:15 694:15 699:25 700:5,7 703:20 706:21 709:3 714:17 715:13 721:5 724:2 725:12 videos ^[5] 629:14 647:21 648:16 649:8 654:5 view ^[17] 585:14 609:16 623:15 624:7 638:5,21,24 639:2,15,19 640:24 660:22 661:22 679:2 695:10 702:18 705:17 viewed ^[1] 605:14 Viewing ^[3] 639:3 652:13 726:24 views ^[2] 613:22 673:7 virtually ^[2] 603:7 717:24 virtue ^[1] 689:3 visible ^[2] 622:4,22 visibly ^[1] 624:13 vision ^[1] 704:3 Volume ^[1] 628:11</p>	<p>596:8 597:3 599:17,24 621:15,21 628:2 watch ^[4] 601:24 629:24 643:20 644:1 watching ^[2] 585:9 644:4 way ^[27] 591:20 602:25 622:7 624:19 631:3 636:9 651:8,23,25 654:18 659:6 666:3 667:18 671:16,22 676:15 678:2 680:1,4 683:6 689:15 690:5 694:4 697:12 702:4 716:21 718:9 ways ^[7] 608:23 628:10 663:5 680:5 703:15 725:13 728:14 weakest ^[1] 683:11 wear-and-tear ^[4] 592:14,19 593:2,6 wearing ^[1] 682:2 wearing-away ^[1] 592:12 web ^[3] 669:20 686:12,20 website ^[4] 585:3 614:1 655:1 683:18 Wednesday ^[5] 585:7,12 655:12,16,18 Wednesday's ^[1] 585:10 week ^[3] 584:6 694:11,18 weigh ^[1] 726:3 weighing ^[1] 693:4 weight ^[1] 721:22 weird ^[1] 716:7 welcome ^[1] 584:5 well-defined ^[1] 711:20 well-positioned ^[1] 717:4 well-preserved ^[1] 618:15 whatever ^[5] 584:15 654:17 679:23 697:3 719:6 whenever ^[1] 615:24 whereas ^[3] 618:16 648:14 677:7 Whereupon ^[2] 653:20 728:22 whether ^[28] 588:19,23 589:2 592:21 598:2 599:3 604:2 605:1 608:25 609:1,3 622:1,2 623:25 624:6 632:4,5 638:9 639:11,12 649:12,20,23 663:18 690:4 700:17 704:13 722:5 white ^[2] 598:9 726:20 who's ^[4] 589:22 671:15 681:24 695:6 whole ^[6] 605:24 606:9 617:24 627:7 632:6 703:24 wide ^[1] 590:16 widely ^[2] 709:16 716:18 Wikipedia ^[1] 595:12 will ^[57] 584:11,11 585:2 589:15 591:18 592:13 596:6 597:16,20 599:13 605:1 606:7 611:22 612:5,10 616:4 617:25 618:1 619:12 621:25 622:1 632:10 637:19 640:12 641:11 642:3,5,22,24 645:3 653:18 654:13,25 655:18 662:20 665:16 667:9 669:20 670:10,14,15 671:13 674:18 686:21 693:3,23 702:19 706:1,25 709:4 713:14</p>
<p style="text-align: center;">U</p> <p>U-matic ^[1] 599:6 U.S ^[1] 637:8 UAPL ^[1] 642:18 UC ^[1] 592:6 UC-Berkeley's ^[1] 646:24 UC-Irvine ^[3] 660:12 670:16 709:6 ultimately ^[5] 607:20 614:21 658:25 702:8 721:1 unable ^[1] 637:14 unanticipated ^[1] 726:9 under ^[34] 623:19 624:6,8 625:10 627:18 637:5 658:6,11,12 662:3 666:6,6 669:13 674:15,25 675:12,16 676:16 678:9 681:25 685:14 687:8,13,17 702:5 706:12 707:10 708:18 710:10,22 712:3,11 718:10 719:3 undergraduate ^[1] 660:11 undergraduates ^[1] 677:18 underlying ^[2] 647:24 691:4 underscore ^[1] 632:18 understand ^[21] 595:23 604:12 613:20 616:7,15 623:16 624:2 629:4 633:4 634:23 660:24 665:10 667:3 673:6 675:7,20 678:5 681:15 685:18 706:6 723:13 understanding ^[7] 610:4 619:4 648:18 675:25 676:10 705:13 725:6 understood ^[4] 603:23 676:9 712:15 713:24 underway ^[1] 704:18 unearth ^[1] 691:22 unfortunately ^[4] 707:18 716:18 720:9 721:24 unideal ^[1] 600:19 universities ^[4] 637:8 672:12 696:5 721:19 University ^[20] 586:12,13,16,21 620:18 637:23 644:24 651:5,12 652:10 656:25 657:3 666:10 671:</p>		<p style="text-align: center;">W</p> <p>waiting ^[1] 598:9 walk ^[2] 588:7 670:4 wanted ^[43] 592:2 595:17 596:13 597:2 600:1 602:6 610:17 615:20 618:11 625:9 627:24 628:16 629:24 631:23 632:17 633:2,21 644:22 648:12 652:4 654:12 660:7,19 664:15 676:21 677:24 678:12 687:11 690:20 691:9 692:15 693:9,12 696:7 700:16 703:10,17 706:10 714:14 717:17 723:22 724:22 727:16 wants ^[2] 634:4 714:4 Warner ^[11] 590:19,22 595:6,13</p>	

<p>715:18 719:9 721:11 727:14 728:19,20 William ^[1] 716:19 Williams ^[39] 587:24,25,25 599:11,14 601:13,16 605:17 608:10,11 610:4 613:14,15 616:11,12 626:9,14,15 649:17,18 657:12,13,13 664:15,19 675:13,19,24 681:8,9 683:9 684:12 685:13 694:9,10 709:20,22 711:12 713:3 Williams ^[2] 685:9 696:25 willing ^[3] 665:5 681:6 722:7 win ^[1] 650:17 window ^[1] 726:15 windowed ^[1] 602:12 windowing ^[2] 603:12 606:16 wish ^[2] 632:24 639:24 wishes ^[1] 667:6 withdrawal ^[1] 725:20 within ^[8] 592:7 605:22 640:21 652:14 676:12 696:14 698:10 714:1 without ^[7] 608:6 666:10 682:15 686:13,13 697:11 717:5 wonder ^[3] 663:21 664:14 679:1 wonderful ^[3] 606:20 631:11 632:7 wondering ^[5] 659:20 671:5 711:8 719:5 723:8 Woodall ^[17] 656:10,17,17 674:18,21,22 687:10,15,16 699:15,16 712:19,21 723:20 725:16,17,18 Woodall's ^[3] 691:10 692:15 727:16 word ^[5] 599:12 601:18,20 652:3 727:13 words ^[5] 589:19 613:12 663:24 680:3 686:12 work ^[41] 598:17 605:25 611:2 615:21 625:3,6 634:10 637:22 638:11 658:21,24 661:3,13 663:1 668:13,14 670:3 675:22 676:17 678:7 680:24 690:1,22,23 691:6,15,24 692:9 694:4,16 699:4,5 702:13,18 706:23 707:12 709:7,19 711:5 713:4,8 worked ^[4] 594:4 638:12 682:12 691:22 working ^[9] 584:15 624:25 637:6 638:15 641:12 650:13 654:17 692:2 716:7 works ^[42] 584:12 585:17 633:11 637:18 659:3 663:5 665:13 668:2,6,8 671:11 673:17 674:2 675:18 676:1 681:11 683:5 684:21 687:7 688:15 689:7,8 691:12 693:18 694:6,7,7 698:14,14 699:17 703:4 706:15,16,25 708:5 713:10,24 715:7 725:13 727:3 728:7,13 world ^[6] 638:6,7 669:4 671:9 699:10 717:14 worry ^[1] 719:20</p>	<p>worse ^[1] 616:24 worth ^[2] 651:16 693:7 write ^[1] 712:2 writing ^[2] 659:4 665:11 written ^[8] 589:16 602:10 603:21 604:24 621:2 626:24 679:13 684:18 wrote ^[2] 672:24 722:17</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>year ^[7] 614:1 631:14,17 638:24 639:17 647:3,4 year-long ^[1] 632:23 years ^[23] 590:13 592:11 605:23 610:21,24 611:23,24 618:15 625:4 630:7,7,7 633:18 637:1 648:1 649:5 674:8 695:19 701:16 709:9 717:24 720:15 721:16 York ^[1] 692:4 young ^[1] 649:4</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p>Zambrano ^[7] 585:25 586:2 600:2 611:17 656:2 670:21 698:17 ZAMBRANO-RAMOS ^[8] 586:1 600:3 611:18 656:3,4 670:24 698:18 699:14 Zoom ^[2] 584:14 654:16</p>
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