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UNITED STATES COPYRIGHT OFFICE
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PUBLIC HEARING
ON
EXEMPTION TO PROHIBITION ON
CIRCUMVENTION OF COPYRIGHT PROTECTION SYSTEMS
FOR ACCESS CONTROL TECHNOLOGIES
+ + + + +

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COMMENTERS:

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FRITZ ATTAWAY, Motion Picture Association of
America
JONATHAN BAND, Library Alliance

SANDRA BENEDDOTTO, Pioneer Corporation
PETER DECHERNEY, The University of Pennsylvania
BILL HERMAN
STEVEN METALITZ, Joint Reply Commenters
KATHERINE SENDER, The University of Pennsylvania
BRUCE TURNBULL, DVD Copy Control Association
REGISTER PETERS: Good morning. I am Marybeth Peters, the Register of Copyrights, and I would like to welcome everyone to our final Washington, D.C. hearing on the Section 1201 rule making. This hearing, as you know, is part of an ongoing rule making process mandated by Congress under Section 1201(a)(1), which added to Title 17 - which was added to Title 17 by the Digital Millennium Copyright Act. Section 1201(a)(1) provides that the Library of Congress may exempt certain classes of works from the Prohibition Against Circumvention of Technological Measures that control access to copyrighted works for three-year periods.

The purpose of this rule making proceeding is to determine whether there are any particular classes of works as to which users are, or are likely to be, adversely affected in their ability to make non-infringing uses if they are prohibited from circumventing the technological access control measures that have been used by copyright owners. Pursuant to our Notice of Inquiry, which was published in the Federal Register on October 3rd of 2005, the office received 74 initial comments for posing exemptions to
the prohibition on circumvention, and 35 reply comments. All are available for viewing and downloading on our website.

This is the fourth and final day of hearings in this rule making. We had originally set aside four days in Washington and two days in Palo Alto, but based on the number of persons who requested to testify, we didn’t need all of those days. We only had one in Palo Alto and three in Washington. We intend to post the transcripts of all of the hearings on our website when they are available within the next few weeks. The comments, the reply comments, the hearing testimony reform the basis of evidence in this rule making, which, after consultation with the Assistant Secretary for Communications and Information of the Department of Commerce, will result in my recommendation to the Librarian of Congress. The Librarian will make a determination by October 26, 2006, on whether exemptions to the prohibition against circumvention should be instituted during the ensuing three-year period and, if exemption should issue, what particular classes of work should be exempted.

The format of this hearing will be divided into three parts. Mr. Metalitz knows the process well. First, witnesses will present their testimony, and this
is your chance to make your case to us in person, explaining the facts and making the legal and policy arguments that support your claim that there should or should not be a particular exemption. The statements of the witnesses will be followed by questions from the members of the copyright office panel. The panel may be asking some difficult questions of the participants in order to try to define and refine the issues and the evidence presented by both sides. This is an ongoing proceeding and no decisions have been made as to any critical issues in the rule making. So, if a questions seems that a decision has been made, it hasn’t. It’s just to illicit more information.

In an effort to obtain as much relevant information as possible and, therefore, evidence, the office reserves the right to ask questions in writing of any participant in these proceedings after the close of these hearings. He’s just telling me about our time problem. After the panel has asked it’s questions, if there is time - that’s the insertion - we intend to give the witnesses the opportunity to ask questions of each other. So, hopefully, if we haven’t asked all the difficult questions, one of the members of the panel will raise these questions and get answers from the members of the panel.
Let me start now by introducing the other members of the copyright office panel. To my immediate left is David Carson, our General Counsel, to my immediate right is Jule Sigall, who is Associate Register for Policy and International Affairs. To David’s left is Robert Kasunic, Principal Legal Advisor in the Office of General Counsel, and for those who have participated, he has been involved in the 1201 process since the beginning, and for a while was known as Mr. 1201. On Jule’s immediate right is Steve Tepp, also a Principal Legal Advisor in the Office of the General Counsel.

Now, with regard to our panel, I’m going to go in the order that you have seated yourself and I understand that the order that you have seated yourself is the order in which you want to testify. So, we have Peter Decherney and, I guess, with him is Katherine Sender, who is University of Pennsylvania Annaburg School. We have Bill Herman, Jonathan Band, Steve Metalitz, Sandra Aistars. And then from Pioneer, I understand we have Sandra Benedetto and then Bruce Turnbull and, finally, Fritz Attaway.

There’s two -- are we doing these one at time? Okay. There’s two proposed exceptions that we are focusing on. One is audiovisual works included in
educational library - in the educational library of a college or university’s film or media studies department, that - protected by technological measures that prevent their educational use. That’s one. Second, derivative and collective works which contain audiovisual works that are in the public domain and that are protected by technological measures that prevent their educational use. So, let’s start over here with you.

MR. ATTAWAY: Thank you and thank you to the other members of the copyright office for the opportunity to testify today. Michael Delli Carpini, Katherine Sender, and I, teach media studies at the University of Pennsylvania. This is an important field representative of virtually every major American university. As media becomes more pervasive in every aspect of our lives, teaching students to be literate and critical viewers and listeners becomes a more and more crucial job.

The use of digital clips is essential to our teaching and our careers and our profession. The swell of support our comment has received indicates that we are not only speaking about our own experience. Professional organizations representing over 6,000 media educators have supported us with reply comments.
The latest multi-media technology has been employed in classrooms at least since Columbia University started a film program in 1915. It seems inconsistent with the past 90 years of copyright and educational history to prohibit students and educators from using technology that’s necessary to their pursuits.

The use of clips has greatly improved media education. As we have demonstrated in our initial and reply comments, educators need quality digital images. And I’m going to add today that educators also need to be able to use these clips as effectively as possible.

I will use one course as an example. I regularly teach a course called The Hollywood Film Industry, which examines the way that the business of Hollywood has always driven the art of the movies. I’m going to stress that I’m an educator, not a consumer.

It’s my job to teach the history of the American film industry from Edison to the DMCA. Yes. Of course. Timing is absolutely crucial to what I do. I have 35 hours to cover 110 years of history. Ten minutes less a week means that I don’t get to cover the black list, or film noir, or another important area of film history. In addition, though, time is crucial to the classroom dynamic. Many of the reply comments suggested CSS devices that could be used to show clips
without using decryption. Most of these devices are DVD jukeboxes with bookmarking capabilities. I’ll call this method of using clips disk shifting. We were actually very happy to hear about these devices and thought that our problem had been solved. But when we investigated a little further, we were disappointed with the available technology.

Right now all the devices are far too slow to be effective. The fastest method of disk shifting turns out to be using the bookmarking feature on my Macintosh laptop, and changing disks by hand. It’s actually the mechanical disk switching which slows down the machines. At peak efficiency, it takes the Mac only 30 seconds to shift disks by hand. That doesn’t sound like a long time, but it feels like an eternity.

Just let me demonstrate. This is more effective with sound, but we don’t have sound today. Here is the digital clip on top and the disk shifting clip will come in eventually. Hopefully, you can hear the sound in your head. Right? That’s 30 seconds. As you can see, after a 30 second delay, you’ll probably have forgotten the point I was illustrating. How many people checked their Blackberry’s in those 30 seconds? Right? And we’re trying to keep student’s attention.
So we hope that these devices will improve, but we can’t imagine that they’ll be sufficient within the next three years. But I don’t want you to take my word for it. Let me offer some further evidence from the people who count – the students. I have taught this class twice, once in the fall of 2004, once in the fall of 2005. I taught practically the same syllabus and the same clips. The only significant difference was that I used the disk shifting method the first time and I used digital clips the second time. The tremendous impact of using digital clips is evidenced in the evaluations that students fill out at the end of the course.

After teaching the course using the disk shifting method, the course received a 2.5 out of a 4.0. Which, I’m embarrassed to say, is pretty mediocre. It means that it wasn’t a successful teaching or learning experience -- educational experience for the students. When I taught the course using digital clips, however, the evaluations soared to a 3.7. And you can -- and it’s sort of like you’re switching back and forth, right? So that’s a 25 percent increase in educational experience with the use of digital clips over disk shifting.

Now, I want to very briefly show you a
typical class slide. One of the subjects that I cover in this course is the impact of television and home video on movies. Responses include the adoption of wide screen and 3-D formats. This slide illustrates the difference between the DVD letterbox and VHS Pan and Scan versions. You can see that characters are cut out of the frame. We rarely see more than four of the seven children. When characters exchange glances, we confusingly only catch one set of eyes. The setting, the Alps, almost entirely disappears.

It was a film made to compete with television and, in the Pan and Scan version, it looks like television. The vistas that place the characters in their landscape are reduced to close-ups and medium shots. The expansive sweeping feeling of the wide screen version is transformed into an intimate dialogue between characters. The Pan and Scan copy isn’t the same as the film. Moreover, as you can see, the VHS copy of the film represents a dramatic loss in detail. The image is washed out, the sunny day becomes hazy, the depth of field is reduced because of the decreasing sharpness. As a result, the foreground again becomes emphasized and, in addition, facial expressions are no longer readable in long shots. And you don’t even want to get me started on the color differences.
It’s much easier to see the differences in a side-by-side comparison, I think you can see, than it would with a 30 second delay between images. It’s also essential in this case to have access to multiple formats. From the media professor’s vantage, VHS and DVD aren’t different versions of the same object and - this I think is very very important - they are different objects, with different histories, and different educational uses.

It has also been suggested that VHS tapes are a suitable substitute. Putting aside the quality issue, availability is an increasing problem. Only 37 percent of the DVDs in the Penn Cinema Studies Library are still in print on VHS, and only four percent of those exist in the VHS widescreen format. And the VHS/DVD divide is growing. According to the NPA’s own figures, DVD sales are soaring, while the VHS market is plummeting. And I can give - I’ll give you more detail -- have a more detailed document about this later.

I’ve argued that educators need quality images. We need to be able to work with clips fastly and quickly, we need to be able to plug clips into presentations for effective demonstrations, and we need access to all available media objects. I have also demonstrated that VHS is a format in decline, although
I would stress that this is not a replacement for DVD’s to begin with. This is an aside. The arguments and evidence I have presented all support both exemptions we proposed, from media studies libraries and public domain works bundled with copyrighted works.

In conclusion, I would just ask you to consider the use of clips I just demonstrated, including the 30 second time lag for disk shifting and the classroom slides. I don’t think any of my points could have been made as effectively with disk shifting. And finally, I would remind you that the stakes here are actually very high. It’s not only the success of the film industry that you’re weighing, you are also deciding on the success of the educational experience of students in the 21st Century, and ultimately how to balance the two. Thank you.

REGISTER PETERS: Thank you, Mr. Herman.

MR. HERMAN: First and foremost, allow me to thank the staff at the copyright office and the Library of Congress for their time and effort, and I thank you for allowing me to testify here today. I’m sure those of us on both sides of the issue can appreciate the amount of work that goes into this triennial exemption rule making.

I’m here in support of the two exemptions.
proposed by comment number five, submitted by Peter, Katherine, and Michael Della Carpini, from the University of Pennsylvania. I’m currently a PhD student at Penn. While I know and respect each of the three professors who submitted the original comment, I’m here speaking on my own behalf exclusively. In fact, let me give them reason to distance themselves from me right away. I actually believe that the proposed class should be expanded and I support something, like, audio-visual works on DVD’s protected by CSS. Again, though, I’m here speaking just for myself.

I’m here to speak as a student, researcher, scholar, and, if I’m fortunate, future professor of media studies. I had initially hoped to speak at some length about a number of issues, the first of which is to attempt to detail the negative effects that the ban on circumventing CSS has on teaching and scholarship. By the time I really considered these effects and all their details, however, I realized that even my full statement would barely be enough time to sketch a rough outline. I will, therefore, attempt just that.

When I began graduate study in the field of communication in 2000, I was excited by the power of digital technology to catalyze the creative re-
accommodation of media content. Beginning with this fascination, I began studying theories of authorship and originality, and I quickly came to the belief that there is no such activity as creating something totally new, and drawing from the creative works that came before. This very quickly became apparent to me in my own writing.

The very idea of scholarship as we know it is built upon a bedrock of quotation, paraphrase, critique, and integration of previous writing. Paraphrase is not always adequate either. In many cases, specific quotations are an inescapable necessity. Further, it’s only possible in a culture of permissiveness. If I had to pay a clearance fee for every time I had to use a direct quote, I would simply quit producing scholarship.

The education sector is notoriously underfunded, especially when compared – and I mean this in all respect, envy, and awe – especially when compared to the media industry. When I applied to PhD programs in 2002, I had high hopes that I could be among a new wave of media scholars. We would apply our technological savvy to the problem of media criticism. Not criticism in the sense of media as bad, but in pursuit of the question, “What does it mean to live in
a media-saturated world?" I had hoped to create non-linear or multimedia essays, bringing print rolled scholars into the digital space where they could interact virtually with characters from movies and television shows. After all, we were entering the digital millennium, and our scholarship would have to keep up. Then, I started studying copyright law, and boy did that slow my ambitions for a culture of scholarly re-mixing.

In fact, by the time I actually understood what Section 1201 meant, I had long since realized that it was helping to drown out the potential for such cutting-edge work. How am I supposed to take clips from my Daily Show Indecision 2004 DVD’s? I can’t dub the VHS version because it was never released in VHS. If I try to use the analog output, I need to buy special purpose equipment costing hundreds of dollars, some of which is illegal to manufacture and sell in the states, and it’s even harder to buy because importing it is also illegal. Even scarier is the word provide from that same subsection. If I buy this box and loan it to a fellow scholar so that she too can circumvent the Macrovision scrambling, I’ve committed a federal crime, perhaps of the same magnitude as the people who made the box in the first place. I face long odds
convincing my Department Chair to buy a box that’s illegal to make and sell, especially since, by providing it, the department may itself be violating a federal law.

But let’s say I’m stubborn, I really want to use this clip for my Daily Show DVD. I think the skit about Rob Corddry’s return to Boston is a great example of product placement. There’s one shot in particular I want to use to illustrate this claim, where there’s Rob’s face on the left-half of the screen, and a Sam Adams logo on a beer pitcher is prominently fore-grounded on the right. It steeds to look so like Rob’s drinking buddy just happens to put it down on the bar, but the pitcher lands so that the entire Sam Adams logo comes into the screen and is exactly, perfectly facing the camera. The camera is focused on Rob’s face, which is about six times farther than the beer pitcher, so the words Sam Adams aren’t quite in focus.

When you watch it on DVD though, you can see it. It would take a lot of work, however, to recapture it properly using the analog hole. Maybe, just maybe, if I’m willing to shell out the extra hundreds and buy something that I’m legally forbidden from sharing, I can get a clear enough reproduction to
illustrate my claim that this is clearly a product placement. But maybe not. In which case I’ve spent hundreds of dollars for nothing.

The notion advanced by the motion picture industry in previous rule makings, that I should just get the clip via a screen shot from a video camera, is even less realistic. A computer monitor, video camera, and tri-pod of sufficient quality to create a product, that could even snickeringly be called professional, would cost into the thousands. Even then, the quality will be inferior, even relative to the first analog hole solution, which was already problematic. So, I’m still left describing something to my virtual audience that may or may not - they may or may not be able to see for themselves.

In comment five and in reply comments addressing it, the arguments have generally revolved around the impact of Section 1201(a)(1) ban as - that it has on classroom teaching. That impact is substantial - a point to which I will also return, but I want everyone to think for just a moment about what the ban on circumventing CSS does to the potential of multimedia scholarship that would otherwise make new and creative fair uses of audiovisual works on DVD’s. Even if we accept the idea that each of the thousands
of teachers who regularly use DVD’s in their classrooms should buy expensive carousel DVD players that can be programmed to cut straight to relevant scenes, that still gets them no closer to using a Daily Show clip in their actual scholarship.

The ban on circumvention has the effect of chilling the production of scholarship befitting the digital millennium. If you look at the media study scholarship that is being produced today, you will see thousands of scholars who are technology savvy enough to produce multimedia scholarship and who honestly believe it would be valuable almost to a person, but who are scared of the legal liability and Section 1201 is part of that fear. Were the copyright office to grant an exemption for DVD’s however, it would send a strong message to these scholars. Come out and play. It is safe to make innovative uses of digital media texts in your scholarship.

Now, that’s just my version of where a media study scholarship could go. But let’s get back to the classroom, a value we all already agree on. In the reply comments the DVD Copy Control Association and the Joint Reply Commenter are quite forthcoming with what they expect of teachers who use DVD’s in the classroom. Throw money at the problem. This is
similar to 2003, when publishers made the same
recommendation to the American Foundation for the
Blind. In both cases, a profitable industry is telling
cash-strapped non-profits who serve vital social rules
to buy their way out of a legally created problem.

Of course, Penn is hardly the model for a
cash-strapped school. But Penn is certainly the
exception. An honest appraisal of the approximately
4,000 colleges and universities in the U.S. will tell
you that perhaps 100 could be characterized as
financially well-off. The rest of these schools are
highly unlikely to have the kind of five-disk carousel
DVD player with bookmarking features described in the
DVD CCA’s reply comment. These schools would have to
buy one for every classroom in which the playing of
DVD’s is a regular part of their curriculum.

Consider a typical state university, the
kind at which I taught before resuming my graduate
work at Penn. If they are fortunate, the Department
of Speech Communication alone has five AV equipped
rooms and another couple TV on a cart-style systems.
Again, if they’re lucky, most or all of these rigs
will contain at least one DVD player, but the odds are
slim that the player will be a five disk carousel with
advance features such as bookmarking. Especially an
advanced enough system to remember dozens of disks so that multiple faculty can prepare the machine in the days before a lecture.

This means buying new players at, conservatively, $100.00 a piece. Buying and installing them will also cost, perhaps, $50.00 each in person hours and extra equipment, such as mounts and locking cables. So, one department in one school has to shell out $150.00 per machine, times seven machines, or $1,050.00. Let’s call it $1,000.00 even. Now, the university is down $1,000.00, but far from done following the CCA’s advise to buy their way out of this problem. At a typical university there will be at least two to three departments that show audiovisual works on DVD’s as a substantial part of the curriculum. These are departments such as film studies, theater, and journalism and tech.com. At typical “State U”, let’s call it, the Department of Technical Communication and Journalism has to spend the same amount to retro fit their seven audiovisual units. So, the school is out another thousand dollars and the university still isn’t finished.

Departments strung across campus will also have faculty who make regular use of materials on DVD’s. Obvious candidates for heavy media use include
English, history, foreign languages, and political science, but these of multimedia teaching materials is becoming increasingly important across the academy. In perhaps, ten of these departments, DVD use by one or more faculty members will occupy a substantial portion of class time. Each will also have to shell out $150.00 a piece, give or take, to buy and install a new DVD player.

To re-equip typical state universities to media center departments and ten audiovisual stations, the university has now shelled out $3,500.00. That’s a need-based scholarship that might make the difference in whether a student can go to college or can go to a full four-year university. Now, let’s add up these expenditures. Typical State U is bigger than most of the 4,000 colleges and universities in this country, so we can’t just multiply $4,000.00 times 3,500. There are lots of mid-sized two and four-year schools. Let’s approximate what it looks like when we add them up.

The National Communication Association alone has 7,700 members. And there are thousands more scholars in media studies-related departments who are not NCA members. Further, even a small community college, teachers and departments from communication
to English and history will need these new DVD players to deliver lectures inviting comparing contrast analysis, or perhaps, making historical claims about the difference between theater genres. If we include all of these other departments, we can easily estimate that, on average, each school will need at least five DVD players, and that’s a very conservative estimate.

In other words, the U.S. Post Secondary Education Industry requires 20,000 DVD players. Let’s say that, on average, they will already have two of these five DVD players as newfangled DVD changers, the ones recommended by CCA. In other words, we’re recommending that 40 percent of these 20,000 DVD players are of sufficient quality to support the change disk methods. This leaves higher education in the U.S. with a bill for buying and installing 12,000 units at $150.00 a piece, for a grand total of $1.8 million. Let me say that again. Twelve thousand units, $150.00 to buy and install each, totaling $1.8 million. And that is the conservative estimate. To comply with the CCA’s suggestion to throw money at the problem, is expensive indeed. Think about the opportunity cost in terms of the education lost. That’s the annual salary for 36 assistant professors. That’s a four-year full tuition to state university
scholarship for 90 students. To the higher education sector, $1.8 million is a lot of money.

In the Joint Reply Commenter’s reply comment, on page 29, he writes, “At bottom, these submissions asked the register and the librarian to grant an exemption in order to relieve educators of some degree of inconvenience.” To ask the education sector to spend millions of dollars to facilitate the classroom use of a media format that is already on its way out the door, is to ask them to suffer more than mere inconvenience. It is to ask them to sacrifice precious resources from classrooms that are already underfunded.

I urge the copyright office to follow its own lead in exempting ebooks in 2003, so that the visually impaired could have greater access to audio books. The American Foundation for the Blind would suffer more than “Some degree of inconvenience” were it forced to devote more resources to creating audio books via traditional read-aloud volunteers. Without an exemption there will just be fewer audio books available because resources are finite. Again, something the Register recognized in 2003.

Without this proposed exemption there will be less education. Under one scenario, teachers waste
precious class time, the value of which has not been contested in these proceedings. Under another scenario, schools buy less books, teachers, and facilities improvements, and they’re still wasting some degree of class time, as illustrated by Peter. In either scenario, there’s simply less education. As a society, we value education and enlightenment for the visually impaired specifically, and the population generally. If the harms resulting from the resource trade off were significant enough to justify an exemption in 2003, they’re significant enough again in 2006.

Last week, I conducted an informal survey on a cultural studies list serve in order to probe the extent to which the resource trade off is occurring in higher education today. The results suggest the worst of both worlds - a lot of lost classroom time and a sizeable expenditure of resources.

I asked, “How do you use materials from DVD’s and classroom instruction and/or in multimedia scholarship (please mark all that apply)?” I gave them six choices, as well as allowing them to explain any other techniques they used. I also asked them to tell me a bit about their college and/or department, if they wanted. The six choices I offered were; a) I
fast-forward to appropriate clips, b) I program the
DVD player in the classroom using e.g., a bookmark
feature, c) I hack the encryption and I make excerpts,
in other words, I violate 1201(A)(1), d) I plug VCRs
and/or other equipment into my DVD player’s output and
make excerpts, e) I use cameras or software to take
screen shots and make excerpts, and, f) I avoid DVD’s
and use VHS.

The answers to this very simple survey
show, pretty convincingly to me at least, that
educators suffer both substantial lost class time and
substantial financial costs in order to use DVD
materials in class. Consider a) I fast forward to
appropriate clips; out of 23 respondents, 18 do this
at least some of the time. Multiplied by tens of
thousands of teachers and millions of students
affected, this represents a social cost that, if
monetized, would vastly outweigh even the costly
investment of replacing all of these classroom’s DVD
players. As one respondent describes it, this is “the
worst possible option,” yet, one to which he sometimes
resorts. Next, consider answer b, I program the DVD
player using e.g., a bookmark feature. Only 9 of 23
ever do this, supporting my earlier claim that perhaps
two in five, or about 40 percent of classroom DVD
players are equipped to do so. One response in particular is instructive. A woman who teaches as an adjunct at; a) A large university, b) A liberal arts college, and c) A community college, either uses the fast-forward button or the bookmark feature, depending on which campus she is teaching at that day. In other words, without circumvention of CSS, students get more or less instruction per hour of classroom time, depending on the resources of their school that they attend. And I frankly think that is a tragic injustice.

I’m going to jump ahead a little bit and consider f) I avoid DVD’s and use VHS. Only four of 23 chose this option, and both those who do and do not choose it, do write it as a seriously sub-optimal solution; many materials are simply not available on VHS. This list includes many television shows such as Indecision 2004, the Daily Show, 3-Disks DVD set. If I rely on this option, I am excluding a number of works, as well as DVD extras, such as trailers, out-takes, and commentary. Further, at least one person noted that classrooms often have DVD players, but not VHS cassette players.

Next, consider e) I use cameras or software to take screenshots and make excerpts. Only
seven out of 24 ever do this. Unfortunately, those
who do so did not often answer questions about
department size and strength, but the two who did are
from relatively large departments in large schools,
with relatively solid funding. And nobody who
describes themselves as underfunded does this. This
is an expensive solution that would not be funded,
even in many communication departments, let alone the
rest of the department - the rest of the academy.

Option d) I plug VCRs and/or other
equipment into my DVD player’s output and make
excerpts, is another example of how different schools
enjoy different levels of access, as long as the basic
ban applies to DVDs. Eight out of 24 do this, but of
those five who identified school information, four are
from large departments and large schools with decent
funding.

Finally, let’s consider answer c) I hack
the encryption and make excerpts. Six of 23 do this.
All five who provide any information on their
departments are from large schools with relatively
solid funding. In other words, about one-fourth of
respondents are willingly violating 1201(a)(1) because
they believe it a system as they do their jobs and
they do so even the departments that can best afford
other solutions. A few choice quotes illustrate why instructors often resort to breaking federal law. One person argues, “Budget isn’t the primary reason. It just produces better quality - the best quality image, and it most accurately represents the material I want the students to analyze.” Another laments, “I break the DMCA because it is the ONLY way to do my job effectively.” Finally, one person begs, “Please tell the folks at your hearing that this is just one of the ways recent encroachments of traditional fair use rights are seriously damaging education.”

We’re talking about sensible people here. Otherwise law-abiding citizens, who simply want to teach their students about the significance of media in our society. But they already know that which I have told you, that the legal ban on circumventing CSS cost them millions in cash and person hours, and lost educational opportunities.

It is especially in light of the historic and continuing failure of the Copyright Coalition to successfully identify a class of people who are willing to violate Section 106, but unwilling to circumvent CSS on route. In other words, considering the other lack of unique threat of infringement posed by even the most ambitious exemption for DVDs, this
heavy financial and social cost is tragic and unacceptable. I urge you to ameliorate these costs and grant as broad as possible an exemption for DVDs.

REGISTER PETERS: Thank you. Mr. Band?

MR. BAND: We’ve heard a lot of worry about how this - the Prohibition on Circumvention is affecting the classroom, and we’ve also heard how the basic solution that is offered by the CCA is basically buy a Pioneer. We’ve also heard how buying a Pioneer really doesn’t solve the problem. How there is this incredible disk shifting inefficiency, that it just takes time because you have to load the DVD - it just takes time for it to key into the right place. On top of it, what wasn’t mentioned, was just - imagine, sort of, the programming costs we heard just now but you have a - even if you have a Pioneer that’s installed in every classroom, still somewhat the teacher has to go and program that Pioneer and they have - there’s a lot - and the Pioneer can only hold so much - how it only has the capacity for storing so many bookmarks, so that still would involved probably teachers having to go into the - find the time to get into the classroom beforehand, program it, program the machine there, and then, you know, then they have to do that programming every - before every single class. And
that’s, again, just an incredible inefficiency.

But rather than focus on that, let me, you know, because we’ve heard a lot about now what the problem is and how the proposed solution really is not even second best, it’s the third best alternative. I mean, it’s great for Pioneer, but it’s not really very good for the - not a very good solution for the students or for the educators. But, let’s step back and see what’s really going on here. We have CSS, right, that’s the encryption system. There’s also DCSS, which is widespread - it’s all over the Internet. You can, you know, I’m sure Bill, right now, could probably, if he had Internet access, he could probably find literally a hundred thousand sites, if not two-hundred thousand sites, from which he could download DCSS.

We’ve already heard how, in his informal survey, a quarter of the professors are already sort of using DCSS, because that’s the only way they could teach their class effectively. So, the point is this, is that the technology that allows the circumvention is out there, it is already being used by some professors because it’s the only way they can effectively teach their class. The others would like to use it because, again, it’s the only way to
effectively prepare and teach their class, but they’re afraid of breaking the law. The obvious solution is to give them the exemption - to allow them to do something that everyone clearly acknowledges - if you read these comments - they acknowledge it’s a fair use, it’s a valuable use.

Will it have any negative impact at all on the revenue of the MPAA members? Of course not. Zero impact. We’re talking about film clips. And the notion that somehow this is going to open - this little exemption is going to open the floodgates, come on. DCSS is widely available. If people want to circumvent to access full movies, they can do it already. They don’t need this exemption.

This exemption will only be used by a narrow group of people who want to do the right thing. They would like to be not the four or five respondents, but they want to be the ones who are, you know, it’s the ones who are currently obeying the law, they want to do the right thing, they want to obey the law but teach their classrooms effectively. So, this, a narrow exemption of this sort will allow them to do that and will cause absolutely no harm to the motion picture industry. Thank you.

REGISTER PETERS: Okay. Thank you very
much. Mr. Metalitz.

MR. METALITZ: Thank you very much and I, excuse me, I appreciate the opportunity to be here again to present the views of the 14 organizations that have joined together as the Joint Reply Commenters. I’m going to be very brief at this point because I think we’ve heard a lot from the proponents of the exemption about the issue of alternatives. Are there alternatives that don’t involve circumvention that can be used to carry out the non-infringing uses that they wish to make? And our other witnesses here will be, to a great extent, responding to that.

I think Mr. Turnbull and Ms. Benedetto will be making a presentation that indicates that we can - that technology is readily available to allow the educators to do exactly what they want to do in this situation. And I guess another way of putting that would be that, when you consider in light of this technology, the class that Professor Decherney is proposing is pretty close to a null set. I wouldn’t say that’s true of Mr. Herman’s much broader formulation, but just responding to Professor Decherney. So, that’s one of the demonstrations that we’ll be showing today.

We also mentioned in our reply comments
about other means of making the non-infringing use that’s at issue here, and these means have already been presented to the copyright office in the rule making three years ago and the conclusion was reached at that point that these alternatives certainly were strong arguments against recognizing an exemption in this area. And Mr. Attaway is going to demonstrate one of these in his demonstration.

Another alternative that the office recognized was significant in 2003, was the availability of VHS versions of these audiovisual works. I’ll say about that - only two things about that, first, in the original comments, there was a list of holdings of the Departmental Library and I think we took a sample of those and found that, in every single case, a VHS version was available.

And then attached to the reply comment was another list, this one an alphabetical list of A through L of the films on the register that’s been created by the Library of Congress and we’ve looked at those and will submit, for the record, a survey that shows, at least in our survey, only seven out of these 200 were available in DVD versions, but not available in VHS versions. So, the statistic that you were showing earlier I think has to be put in that context.
There are other issues relating to this exemption and we will talk about them briefly, and I’m sure a lot of them will come out in the questions. I think the last argument that Mr. Band made and a variant of it was put forward by EFF in its reply comments, it really is – well, there’s already a lot of tools out there, there’s a lot of which are used for infringement, but these uses that we’re talking about here are not infringing uses, so what is the, you know, because there’s not going any harm because there’s not going to be any marginal increase in the level of infringement.

I think one – a response to that, which I hope we’ll be able to make today, is to look at this in a broader context. This issue is not just about CSS, it’s not just about the existing means of controlling access to audiovisual materials and the existing tools that are available to circumvent them, but also about the technological protection measures that we can expect in the near future. And I think Ms. Aistars and Mr. Turnbull and others will be addressing that in their comments. So, I would suggest that I just yield the floor at this point to the other witnesses and then, if I could be recognized again at the end, if there’s any sum-up that’s needed.
very briefly, I would appreciate the chance to do that.


MS. AISTARS: Thank you very much. I’m not sure if you can hear me or not. On behalf of Time Warner and of it’s divisions, I want to first extend my thanks for your attention and allowing us to participate in the hearings. As I noted in our written testimony, Time Warner is a very multifaceted media company. Our businesses are quite diverse. They encompass everything from content creation to content distribution. Our divisions include filmed entertainment, networks, cable, publishing, Internet service providers, and I think that the diversity of those businesses and the sorts of conversations that we have within our own company amongst our divisions about how to strike the appropriate balance between being able to have fair use for our news and entertainment businesses and have appropriate business models for our cable and Internet service providers, are the sorts of conversations that we find ourselves then later having with other industries as we try to solve the sorts of problems that you’re faced with today that some of the exemption seekers are highlighting for you. So I think we’re uniquely
I’m not going to review my written testimony. I don’t think that would particularly helpful. But I’d like to highlight just a couple of points about our activities in the digital marketplace and also the role that’s played by technological protection measures in enabling those activities. And then I’d like to spend a couple of minutes providing a bit more detail about the sorts of cooperative efforts we undertake with education institutions and other non-profits, as Warner Brothers, to try and facilitate educational access to our filmed entertainment library.

So, as I noted in my written testimony, Time Warner, Inc. and its divisions make a broad array of content available digitally in a wide variety of forums and virtually all of this depends in one fashion or another on the use of technical protection measures. I highlighted a couple of examples in my written testimony, for instance, IntoTV, which is a newly announced offering that Warner Brothers and AOL are collaborating on. It streams full-length episodes from TV series on-demand and for free, that’s protected by a digital protection measure provided by Microsoft, Windows DRM, Version 10. GameTap is
another example of a new business that we’ve offered that couldn’t be offered, unless we had the ability to protect it with technical protection measures. GameTap is offered by Turner. It makes video games and related entertainment programming available, and it’s protected by an encryption and authentication system that’s been developed by a company that’s called Extent.

Our cable division relies heavily on the availability of technical protection measures to enable the sorts of offerings like VOD and pay-per-view services. Those are all protected by proprietary systems that are delivered to the home and then protected by various multi-industry developed technologies as the content is transmitted to various parts of the home from the Time Warner cable box. Other examples are Movie Link and Cinema Now, again, services that wouldn’t be available unless we had the ability to protect them by technical protection measures. And you’ve heard of course about the use of CSS on DVDs and we are very much engaged in developing technologies to use with next generation optical media, whether it’s HD/DVD or blue ray technologies – those will be protected by a technology called Advanced Access Content System.
And I would note, with regard to AACS, that that’s an example of a technology that’s been developed through multi-industry cooperation between CE companies, IT companies, content providers, and it’s been developed with the spirit of trying to enable a lot of business models and consumer offerings that we’ve seen demand for in the marketplace over the years, in using CSS. And it will facilitate new uses including the making of managed copies within one’s home and, I believe that that’s something we might want to explore a little bit further to see how the ability of making managed copies might address some of the educational uses that have been identified as well.

So that gives you a sense of the sorts of technical protection measures that we use and how important they are in bringing new services to the marketplace. With regard to developing technical protection measures, I’ve already noted for you that we cooperate very closely with CE and IT companies. Most people or many people mistakenly believe that technical protection measures are sort of developed in a vacuum and applied to content without, you know, due consideration for how it will affect consumers and how it will affect others who use the technology and the
services, and that’s just not been our experience.

Time Warner and its divisions have, as I said, been very active in various multi-industry efforts and, in fact, some of the most widely-used and best known methods, such as CSS and such as AACS for the next generation, 5C for home networks, 4C for secure recordings, all of these technologies are the product of multi-industry cooperation. And, when these technologies are developed in a collaborative fashion, they depend on protections against their convention that are provided by the DMCA, and it’s important for a variety of reasons.

The intent in developing these technical protection measures is not to build the best mousetrap, not to build the best DRM technology, you know, known to man, but rather to create something which, you know, draws the line for a consumer to say, this is where the service that you’ve purchased ends. If you’re, you know, hacking this technology, you know that you’re doing something beyond what you’ve contracted for in terms of the service that you’ve purchased.

And, when we develop these technologies, we’re also interested in offering them in a fashion where they can be flexibly implemented by the CE
companies and the IT companies that have to use them, and so that they can be implemented in the most low-cost and least intrusive manner in devices. And that’s a benefit for consumers, as well as for the CE and IT companies that are building the products, obviously, it certainly reduces the cost. But not also, in terms of the cost of the technologies, all of these technologies that I’ve mentioned that are developed through multi-industry cooperation are licensed on what are essentially cost recovery terms to maintain the licensing, not to, you know, license the actual IP that constitutes the technical protection measure, but just to keep the effort running.

If the goal is, as we said, to enable new digital businesses, to enable new services being offered to consumers, then I would suggest that it is the benefit to all of us to limit the sorts of circumventions that are possible of these technologies, so that we don’t get into a spiral of having to constantly replace, update, renew, these technologies, because that will increase the cost across the board for all users and for the developers of the technologies as well. I think that’s probably enough said about technical protection measures, and
I’ll just mention a couple of things about educational uses in particular and some of our licensing work in that regard.

Warner Brothers has a clip and still licensing department and, through that department, we regularly, you know, cooperate with educational institutions and non-profit requestors to accommodate requests to use clips or stills from the Warner Brothers movie library for things like classroom uses. I’ll note that we’ve got the largest English language library of films in the world. So, the sorts of things that we do to enable educational uses, I think, are quite significant in meeting the concerns of requestors.

I reviewed the request that we received in 2005, and interestingly none of the requests actually seeks permission to circumvent in order to make a clip, or seeks a more, you know, a greater quality of a clip. For the most part, the requests that we receive are requests for a variety of classroom uses, and uses not only to, you know, illustrate lecture points or to motivate students to understand the relevance of a particular point that they’ve been discussing in class, but also for use in things like web based interactive instruction, use in, you know,
various fundraisers, use in thesis works that students are preparing.

We’ve approved uses for clips in student movies, we approved uses of clips in talent shows, uses of clips on websites developed in conjunction with various classroom uses. We’ve also approved uses for interactive CDss that are displayed or performed in public at various educational events. So, I think it’s probably worthwhile to note that, even in instances where the requests may go beyond what is, you know, normally considered, you know, an approved classroom use, we’ve taken steps to try and accommodate the needs that folks have expressed to us.

Of the requests that I reviewed, only a hand full were denied - I don’t remember the precise number, but it was, you know, in the single digits - and those were denied either because the use was a commercial use, where the materials would be developed and then sold further, or it was because we were not the rights holder anymore for the particular clip that was being sought, so.

I guess I’ll stop here. The only other thing that I would say to add to what Steve had mentioned in response to some of the points about how, you know, DCSS is already out there, so it’s not
really significant if you allow this hack to be used, I guess I’d just note that, with regard to the use of DCSS, CSS is still a relevant technology in terms of protecting our works and we still rely on it in making decisions to put works out in digital form. And we do so because none of the legitimate devices that are sold in the marketplace actually rely on this hack. If you, as a consumer, want to use DCSS, you have to affirmatively go to a web site and download DCSS and, you know - I think it’s consistent with the message that we’re trying to send - you have to do something that feels like it’s not quite right. You realize that you’re breaking the law and doing it.

So I think CSS is still a viable protection method and still something that we rely on, so I would dispute some of the assertions made at least in written comments, I believe, by EFF and others. I’d also point to the fact that we do try and close down websites that distribute DCSS illegally and it’s my feeling that normal consumers still don’t use DCSS on a daily basis. So, again, the purpose of having CSS technology applied to our disks is still served.

I’ll stop there and I’ll be happy to answer questions about any of my written testimony or
anything else relevant to the technical protection measures that we’ve discussed.

REGISTER PETERS: Thank you, Ms. Benedetto.

MR. TURNBULL: If I could --

REGISTER PETERS: Oh, you’re going to go first?

MR. TURNBULL: If I could, well, we’re together here. It’s a DVD/CCA. Okay. Thank you. I am Bruce Turnbull, of the Law Firm of Weil, Gotschall and Manges. I am pleased to be here today representing DVD Copy Control Association, to be adjoined by Sandra Benedetto from the Pioneer Corporation. We thank the copyright office for the opportunity to appear. Ms. Benedetto is going to demonstrate one of the products that was cited in our reply comments, with regard to the clip playback issue. We’ll also be happy to respond to any questions on any other issues that were addressed in the reply comments. I’m going to let Ms. Benedetto do the demonstration and then if I could come back and make a couple of points following.

MS. BENEDETTO: Thank you. Good morning. Again, thank you very much for the opportunity to testify this morning. I am going to show you a piece
of hardware, a DVD player, produced by Pioneer called the DDVD 5000. It is a player that, one of its target markets has been for the education community to use DVD in the classroom. Additionally, I’m going to show a technology that we developed, again for teachers, which uses bar codes. And I’ll be using a bar code reader and actual lesson plans that have been created by teachers, two teachers in particular, to utilize DVD in the classroom. The two disks that I’ll be using are The Matrix, by Warner Brothers, and To Kill a Mockingbird. Both are commercially available, both have CSS, Macrovision, and other copy protection on them, and this player is fully compliant with copy protection and content protection.

So, what I’ll start with again, I’m going to start with The Matrix, utilizing a presentation by a teacher in Iowa, who is using this film and clips from this film to talk about discrepant events for teaching Newton’s Law of Motion and Physics. And I wanted to use something that was contemporary, that her students were aware of, that she can then grab their attention and begin to teach those particular points. So, I’ll put the disk into play mode here. I think we’re all set up with – and the first clip that she uses – I just scanned the bar code, which
contains the information that will search through this clip. It’s a five second clip. I’ll show it again. But again, it’s a special effects in the movie that shows the character, Trinity. I scan the bar code. Hear that beep? That’s the bar code scanning. I sent it to the player. You get another beep, and starts at the top of that clip, playing the clip.

Now, just to show you what we’re looking at here, if I put the display on on the player, you’ll see some information here. And in particular, what I’m looking at is the number, which is to the right of the word “frame”, 184467. And that’s telling me the exact frame number that I am on in the video content. And this technology that I’m using is simply - it allows the teacher to--it’s a piece of software that will work on a Mac or PC -- allows the teacher to be able to identify the in-point and the out-point of the clip, create a bar code, the software does it for you, all you say is here’s my in-point and here’s my out-point, and the bar code then contains that information. I then, again, can scan it, and send it to the player.

Just to let you know, we’re at the end of the movie, we’re an hour and forty two minutes into the movie. This is the conclusion. So we’ve immediately
gone to that section on the disk. We bypassed everything at the beginning of the movie.

Again, another clip used to demonstrate this point. And again, in teaching Newton’s Law of Physics, there’s a lesson that’s associated with this that asks the student if Keanu Reeves is 6-feet tall, and 175 pounds, please calculate his center of gravity, and is this actually possible? This little position here. So, again, using interactive clips from the movie to demonstrate the point, and then finally, in using a section from the special features of the making of -- so again, this clip now showing that what we’ve seen in the movie took a fair amount of effort and is not humanly possible. And again, asking the students to work through some physics problems in order to determine that.

I’m going to move to the second disk here. And, again, I do need to manually remove the disk from the player. And we’ll move to the disk, To Kill a Mockingbird. There are a couple of other things that I want to show here as well. Yes, there’s the FBI warning. This is actually a lesson taught by a high school English teacher to -- on the structure of the novel, using the book, To Kill a Mockingbird, and obviously using then the disk and the movie, To Kill
a Mockingbird, to support those lessons.

One of things that I want to be able to show is that, in here, in the lesson plan, it’s telling me if I want to be introduced to the characters, that I can actually - and this was actually an activity for the student - I can actually put in a frame number - you see the frame number one there, it’s telling me on the lesson plan, that I can search to 1576 - did I hit six? No. Okay. 157655 search, and that should introduce me to the character, Addicus Finch. So all the characters are introduced to the students in this way. This is searching to a still frame within the video content, immediately getting to the content.

There’s also, from the instructor’s point of view, there are bar codes here that allow you to look at -- actually the plot structures, from exposition to conflict. If I were to take a bar code reader and look at the conflict, having read the novel I could go to that section in the movie. Okay. So there’s the clip, again, presenting the conflict, not only in the movie but in the novel.

A couple of other things that I’d like to show here with the final presentation. There is also a student lesson here, where the student sits down
individually in front of the DVD player with a set of bar codes that the teacher has asked them to stand through, and basically there are 12 scenes and the student needs to order those scenes, having read the book, in how they’re presented in the book, from beginning to end. So they’re randomly on this page and then the student, as part of their quiz, needs to order them properly.

But one of things before that, that I’ll show you, is that if I go to - this player has something called a command stack. A little bit different than the playlists that the folks have made reference to this morning. This is basically - if I move down, I’m using just the remote control unit that comes with the player - you move to the command stack and this is a list of commands that the teacher can put into the player prior to the class. It’s very easily done.

I’m going to back out of here and show you how that’s done in a second. But this is something that is saved in the player’s memory and non-volatile RAM, you can pull out the plug, you can, you know, send it across country, and plug it back in and this information is here. So, once you create this, this stays in the player. You can create up to 300 of
these groups, with 999 commands in each group, so that’s quite a bit of information and interactive video clips that you can store.

So let me just sort of back - let me back out of here and show you how this is - I’m going to just stop the disk playing here and move into - the disk needs to be in the drawer, but not playing. You go to the command stack area, the van setup icon. Here’s the first group that I created which actually does support The Matrix. Here’s the second group that I created that I’ll show you, that deals with To Kill a Mockingbird. Here’s a third group, and let’s say I want to create a fourth group. I’ll create that here. I’m now in the first command of the fourth group, and, having made these bar codes, I can scan a bar code, send it to the player, and there’s the command. It actually rehearses it beyond the scene so that I can see whether or not I’ve made the appropriate selection.

If I wanted to, and I didn’t have these bar codes previously made, I can go to the command and it will come up. And using the remote, I just hit enter, and it says well, what kind of segment play do you want. It would ask me what title, what frame number, what n-frame number, do I want a particular
subtitle to be shown, which audio track, etcetera. Or
I could simply use the chapters that have already been
predetermined by the producer of the disk, and say I
want chapter 35 to play, I switch to 35 right here, and then play to the chapter that I want it to end at.

So that’s how I would create the group.

Let me go back here and back out. So now - I’m going
to move back out of here - now if I go into the
command stack, I can actually - it’s group two that
actually supports this disk. There are 12 commands in
there. But before I actually move through it, I want
to just give you an idea of that command stack
supports this particular quiz for students.

And, again, there are clips here that ask
me to go through - I’m going to scan a particular
clip, send it to the disk, and this is a scene title
called Wood Carvings. As a student, I need to
determine where this appears in the novel. So, a very
short clip - the student needs to figure out where
that’s placed in the novel. I’ll just show you
another one in the interest of time. And another
quick scene. So now as the student, I move through
all of these, I order them appropriately, but if I
move back now to the teacher’s position - I’m in the
classroom and now want to go through these - and say
to the students, okay, well we’ve all submitted our
answers to the quiz, let’s now look at what the
correct order is. I can move around the classroom and
I don’t have bar codes with me, I just have the remote
control, I go into the play mode, I’ve already saved
the command stack in the proper order that supports
this particular exercise. I can say, begin to play,
and now it will move to the very first clip in the
right order. Clip one. Searches now immediately to
clip two. This is a little bit of what we saw earlier
with the conflict - setting up the conflict. And clip
three. And I won’t go through all the clips. There
are 12 of them. They go in order as they appear in
the novel.

So, just in closing, this is a player that
allows you to take commercially available disks and to
create interactive clips exactly - with a piece of
software and some other tools - exactly to the points
that you want - to play the in and out-points - that
you would like to use to illustrate your points to the
classroom. I think that’s pretty much it. Thank you.

MR. TURNBULL: Maybe if I can just spend
another couple of minutes. I think, obviously, this
demonstration was intended to show that there are
products in the marketplace - this product in
particular - but there were a number of others that we cited in our testimony that have similar functionality, including the MAC OS DVD playback system, that permit the kind of playback experience that at least some of the exemption requests have requested. There are, of course, other means, as people have said, of enabling clip compilation and playback capabilities. Mr. Attaway will demonstrate one of these.

Ms. Aistars’s comments talked about other technologies, both coming into the market and also direct authorization rights that can be obtained. And, in that regard, let me emphasize a point that DVD/CCA has made in its submissions in each of the now three proceedings of this type. If there are particular uses that a group or individual wishes to make of CSS protected DVD content, we are open to requests, presentations, and discussions about how we might enable those to be accomplished in an authorized licensed fashion. To date, we have been disappointed that no one has ever approached us for such discussions. And I also want to make a point, underscoring what Ms. Aistars said, that with regard to CSS, the system still works.

Now, ten years after its introduction, six
years after the much publicized of the hack of the encryption technology, DVD players, DVD/ROM drives, and DVD playback software that is sold in legitimate channels of trade are licensed and compliant. When products have appeared at retail distribution that are either not licensed or not compliant, DVD CCA or the content owners, exercising their third-part beneficiary rights under the CSS license, or they’re DMCA anti-circumvention rights, have sought out the manufacturers and distributed, requested voluntary action by those parties to bring products into licensed compliant, and I might say, that’s actually the largest number of cases. There are voluntary efforts. And, where that has not succeeded, have pursued our rights in court to get those products off the market and off the shelves. As a result, to our knowledge, there are no legitimately sold products that make use of DCSS or unlicensed CSS playback systems.

The DMCA Protections Against Circumvention of CSS have been a vital part of the legal regime that has supported CSS and the DVD video business. Exemptions of the kind requested in this proceeding are not necessary and would undermine the legal regime that has worked so well for the benefit of consumers.
and the businesses that participate in the DVD industries. As indicated, we will be happy to answer any questions. Thank you.

REGISTER PETERS: Thank you. Mr. Attaway.

MR. ATTAWAY: Thank you. Once again, I’d like to introduce my colleague, Kelly O’Connell, who is going to set up a little demo for us. My message here is very simple. The issue of fair use with respect to audiovisual works that can legally be displayed on a television screen simply does not exist. There is no fair use issue. There are many ways of exercising fair use without violating the DMCA and hacking CSS. Ms. Benedetto just displayed one of those and I think this is a great product. It occurred to me, as she was demonstrating it, that this is an example of an industry responding to marketplace demand. We do it as motion picture producers. The consumer electronics industry does it with respect to equipment and consumer devices. If people simply ignore the law and become free riders, equipment like this isn’t developed. The DMCA I think can be credited for developing equipment like this that provides greater opportunities for educators to do their job. However, if this equipment is too expensive or if disk shifting is too cumbersome,
there’s yet another way as Kelly will demonstrate. I hope.

MS. O’DONNELL: This is just a tape that I made off of a television at my office and it’s just clips of a movie that our intern picked out for us, so.

MR. ATTAWAY: With what you just saw directly from a DVD. Note this is the full 9 by 16 aspect ratio. It’s not Panned and Scanned.

MS. O’DONNELL: That was my assistant right there. He’s pretty high tech. Okay.

REGISTER PETERS: Can you identify what the camera is?

MS. O’DONNELL: This camera is a pan-in. This is a Canon digital video camcorder, NTSCZ8-85 model.

MR. ATTAWAY: That’s Kelly’s personal camera and she would be the first to take issue with Mr. Herman’s suggestion that we in the media industry are lavishly paid. I can assure you she is not. And she can assure you as well.

REGISTER PETERS: I notice the telephone book supporting ...

MR. ATTAWAY: This is a very inexpensive, relatively low-tech way of producing film clips.
These movies that you saw clips of just happened to be in the library of our current legal intern and he came in last Friday and we did this - or I should say, he and Kelly did this - in just a very few minutes. The point is, and I’ll say it yet one more time, there simply is no issue of fair use for educational purposes or any other purpose with respect to audiovisual material that can be legally displayed on a television screen.

And, finally, I just want to quote from the Second Circuit Court of Appeals in Universal Studios, Inc. v. Corley. I’m sure you’ve heard this hundreds of times before, but I think it bears repeating. I quote, “We know of no authority for the proposition that fair use, as protected by the copyright act, much less the Constitution, guarantees copying by the optimum method or in the identical format of the original. The DMCA does not impose even an arguable limitation on the opportunity to make a variety of traditional fair uses of DVD movies, such as recording portions of the video images and sounds on film or tape by pointing a camera, a camcorder, or a microphone at a monitor as it displays the DVD movie. The fact that the resulting copy will not be as perfect or as manipulable as a digital copy
obtained by having direct access to the DVD movie in
its original form, provides no basis for a claim of
unconstitutional limitation of fair use. Fair use has
never been held to be a guarantee of access to
copyrighted material in order to copy it by the fair
user’s preferred technique or in a format of the
original.” And end of presentation. Thank you very
much.

REGISTER PETERS: Thank you. Mr. Metalitz, you asked to have the opportunity to end.

MR. METALITZ: I think in view of the
testimony we’ve heard, I’d be glad to yield whatever
time remains and go directly to questions.

REGISTER PETERS: Before we go directly to
questions, however, we learned from last from last
Friday morning, it is probably a good idea to take a
short break so that people can do whatever they need
to do. So we will resume in, what, ten minutes.

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

11:08 a.m.

REGISTER PETERS: We’re going to start
the questioning with Rob Kasunic, and then we’re going
to go to Mr. Sigall and Mr. Carson, and then me, and
then Mr. Tepp.
LEGAL ADVISOR KASUNIC: Thank you. First, I’d like to just start where we sort of left off with the - Ms. Benedetto, can you walk me through how the bar codes are created? I was not real clear on that. How is that generated?

MS. BENEDETTI: Sure. I don’t have my computer set up with the software now, but this is a disk, that I’m holding in my hand, that can contains software called DVD Bar and Coder, that Pioneer created, that we give to educators, where it’s on both MAC OS and Windows OS. And basically what the - there are a number of different ways that you can use this software to create bar codes. The easiest way is that there’s also a cable that can connect to this particular player and you can control the player through the software, scanning to or putting in a frame number, and getting the exact location that you want, simply hitting a button on the screen on the software that says, “Get that frame number.” And it takes it and puts it in its appropriate location, and then you move through the video and you say, that’s my end frame, that’s what I want, let me rehearse that clip, and the computer software now is controlling your player, say, that’s exactly what I want, make the bar code, and the software will actually generate a bar
code. You can then take that bar code - you can see this - this is a printed document which is actually a Microsoft Word document. You can actually take that bar code and cut and paste it into your Word document so that, as an instructor, you can say, okay, here’s the bar code and you can label it. The scene, title - and what the instructor has done here is asked the student to name the characters, the setting, the context, etcetera. So it’s a piece of software that does -- you don’t need to know anything technological about bar codes and how they’re made, you just need to know what your in- and out-frame numbers are. Or, you don’t even need to know the frame numbers. You can connect the computer that’s running the software to the player and say, “Oh that’s where I want to start,” hit click, and that information will be sent from the player to the computer, software, and it’s already in the software program. So, does that help?

LEGAL ADVISOR KASUNIC: Yes. And, what would be your estimate of how long it would take to create, for instance, that page that you just showed of the bar codes?

MS. BENEDETTO: I actually think that the selecting and creating this page is not so long. I think the time is spent in identifying the clips that
you want to be able to show, which is obviously the
time that the teacher/professor needs to spend, in any
event, to be able to identify what sections they want
to show.

LEGAL ADVISOR KASUNIC: But, if the
teacher had in mind a certain group of selections that
they want to do, how long would it take them to create
that?

MS. BENEDETTO: I would say this
particular sheet, and the woman that I know who
created this, probably a half an hour to 45 minutes.
These are the 12 clips that she created for the quiz
for the students.

LEGAL ADVISOR KASUNIC: And now, in order
to create that, you would have - you would just need
the software and, would you need that DVD player, the
Pioneer, in order to create it and to show it then?

MS. BENEDETTO: Yes. No. You don’t need
it - you don’t need this particular DVD player to
create it. There are some features of the software
that facilitate the creation of the bar codes with
using this player. And that allows the computer and
the player to talk to each other. But if you didn’t
have this player, you could just simply have your
software on your computer and watch the disk on any
DVD player, and say, okay, that’s my in-point, that’s my out-point, and label that in the software.

LEGAL ADVISOR KASUNIC: Label it by frame numbers and time code --

MS. BENEDETTO: Or time code or chapter. Yes.

LEGAL ADVISOR KASUNIC: And so that would then take longer, you’re saying, because this would – if you had that player, it would facilitate, meaning it would --

MS. BENEDETTO: Yes. Yes.

LEGAL ADVISOR KASUNIC: -- speed the process up. What is the cost of everything together, the bar code reader, the player and the software?

MS. BENEDETTO: The player’s list price is $375.00, the bar code reader list price is $100.00, and as I mentioned, the software is something that we will give to educators.

LEGAL ADVISOR KASUNIC: You will send that directly --

MS. BENEDETTO: We will send – yes.

LEGAL ADVISOR KASUNIC: -- to them. So they have to request that independently.

MS BENEDETTO: Yes. Yes. And usually, we don’t sell directly to educators. We work through
educational dealers that sell our products. So, that
of course, is ordered through the dealership.

LEGAL ADVISOR KASUNIC: Thank you.

MR. TURNBULL: If I can just note as well, the
prices that were given were the list prices, and
when you’re going through a dealer or a retailer, or
whatever, obviously they can do whatever they do with
those prices.

MS. BENEDETTO: Exactly.

LEGAL ADVISOR KASUNIC: For the record, we’ll go with the list price for now. Professor
Decherney, aside from the issues of costs, why isn’t
the Pioneer player a sufficient means to accomplish
your pedagogical purposes? Is switching the disks and
that startup sequence that we saw with copyright
notice still a problem in that situation?

Professor Decherney: Yes. I’m actually
of the opinion that I’m willing to put any amount of
time into making my classes effective, and the cost
issue is significant, as you know, for universities
with small budgets. But, the much more serious issue
is the effectiveness of teaching in the classroom.
We’re trying to keep the attention of 19-year-olds,
who have cell phones with SMS technology, you know, at
the ready, and so, being able to teach quickly and
effectively to move between clips quickly is significant.

I mean, you saw the difference a 30 second delay could make. It was -- someone else timed it -- but a one to two minute delay between disks here, in which, you know, you have to go through the FBI warning and the corporate logos, in addition to having to then find the clip. And so if you’re using more than one disk, it’s not terribly effective. But even more than that, you can’t compare clips, show them on the screen at the same time. You know, there’s certain kinds of manipulation label things, as the same way you could with a digitally made clip. So, I think this would be a significant detriment to the effectiveness of teaching.

But it’s actually -- I’m very heartened to see that the technology is there and I would hope that continuing to work with educators working with Pioneer, that maybe in a few years -- I don’t know how long it would take -- that this technology would be there. And, so a three-year exemption would be able to buy educators enough time until the technology caught up with their needs.

LEGAL ADVISOR KASUNIC: Now, how important is the digital quality in all aspects of clips that
you use within the classroom? I can understand that there may be certain situations where quality is very important, but I would imagine, in other situations, it may be less important. Can you comment on that?

PROFESSOR DECHERNEY: Yes. If you were teaching, maybe, the plot of a film, or if you’re using film as an example of a historical period, then quality might not be an issue. But in media studies classes, where generally film is taught as an aesthetic object as well as an industrially created object, the quality is absolutely essential. We’re looking at the image and that’s what’s being studied. It would be like studying a text that was fuzzy and hard to read. Or which had been damaged in some way. And so, the clarity of the image is ultimately extremely important and, I mean, essential.

LEGAL ADVISOR KASUNIC: And, could you also comment on the images we saw that were taken by means of the screen capture, and what was the usefulness of those particular types of images?

PROFESSOR DECHERNEY: Yes. I mean, they were terrible. If anyone - If I found that anyone, any film educator was using those clips, I think they’re card should be revoked. They’re an example of something, and if I were teaching, maybe the kinds of
pirated DVDs and tapes that are distributed widely, that would be a good example – of kind of camcorder examples that exists. But there was tremendous problems with the image. It’s transformed by being moved to a new media, so there was a lot of pixelation, it was a flatter image, the color, especially in Snatch was dramatically altered. The sound in all of them was very different -- there was a humming in room sound. Contrast was different. There was actually glare from the screen that you can see in the upper lefthand corner, and there was actually re-framing in some of the shots, so even though we did have the widescreen film in one example -- in The Third Man, there was a hat in the right side was actually cut off a little bit. So, there’s a dramatic change and a student will have to analyze that in a different way than they would analyze the DVD copy because they’re different objects.

LEGAL ADVISOR KASUNCIC: Now, why haven’t you contact the DVD Copy Control Association or Warner Brothers or anyone else to obtain permission to circumvent?

PROFESSOR DECHERNEY: Yes. The whole question of licensing, I think, is interesting. I actually believe that this is a – that classroom use
is a fair use of clips, and moving from fair use to licensing agreements would be a dramatic change in the way that, actually, the universities work. So this seems beyond the scope of the hearing, but it’s something interesting to talk about. In - I have had a student look into the Warner Brothers licenses for past month but hasn’t gotten very far. He hasn’t even been able to get an agreement for one clip. We do have one colleague who did this to create a DVD for educational use that was only about four or five minutes long, and he actually cleared every clip and it cost -- his name is Joseph Turow - and this is going to be used in a number of classes, not just his own - but it cost in the tens of thousands of dollars for one four or five minute clip compilation.

LEGAL ADVISOR KASUNIC: Ms. Aistars, in your reply comment on behalf of Time Warner, you state that Time Warner is utilizing technological protection measures in ways that are responsive to legitimate consumer expectations, and that the development of the Advanced Access Content System, intended to be used with the next generation of optical disks, might enable an educator who wishes to make a clip compilation for use in a media class, to obtain authorization to make several short recordings of
clips. What does that mean? Does it mean that Time
Warner accepts clip compilations for pedagogical
purposes is a reasonable expectation and, if so, why
would an educator need to obtain authorization? Is
this authorization for circumvention or what?

MS. AISTARS: Yes. Let me explain a bit
further. I think what I was referring to was the
capability of the Advanced Access Content System,
which will allow the making of, what’s referred to as,
a managed copy within the user’s device. At present
the concept is that every content participant that
signs up to use the technology to protect their works
would be bound to extend an offer to a consumer to
make an entire copy, full-quality resolution of any
disk that’s protected by AACS. And my comment was
intended to suggest that certainly if you can make a
full managed copy, the technology could also
accommodate the making of clips if that was something
that was desirable.

So, if instead of making - if instead of
relying on a technology like the Pioneer technology
that allows you to, you know, navigate the disk using
the bar coder, you felt that you needed to make an
actual copy of the work to use it in your classroom
presentation, the AACS technology can accommodate that
sort of copying in a secure fashion.

LEGAL ADVISOR KASUNIC: Now, how far along is the AACS system?

MS. AISTARS: It is currently being licensed both to content participants and to adopters. The licenses are available on the AACS website. This is, I guess, the, what, a month or so since adopters have started signing up for technology licenses.

LEGAL ADVISOR KASUNIC: Okay. Well, let me switch gears for a minute and just get to the nature of the use that is at issue in these proposals. After six years of dealing with CSS and this rule making process, it’s fairly settled that CSS is a technological protection measure that protects access. But what about this specific use? Do any opponents of the exemption, and I would actually ask more pointedly, possibly Mr. Metalitz because there seemed to be some indication in your reply comment that there was a question about the non-infringing nature of this specific type of use.

But, generally do any opponents of the proposed exemption question the non-infringing nature of making excerpts of motion pictures for pedagogical purposes in film and media classes? Is this not paradigmatic fair use? A single copy, not multiple
copies as in the preamble of Section 107 of a small portion of the work solely for purposes of the display that would be authorized by Section 110. What is the opponent’s view on this particular type of use?

MR. METALITZ: I think we’ve been operating from the assumption that many of the uses that are being talked about here by Professor Decherney are non-infringing uses. Certainly, the performance in the classroom, 110 would apply. The issue we raised in our reply comments was that, of course, that doesn’t have to do with the reproduction right, and it’s a separate question whether reproductions of portions of motion pictures would constitute fair use or fall within any other exemption. But - so you can’t give a blanket answer - it all turns on the application of the fair use factor. But certainly a lot of the kinds of things we’ve been seeing and talking about there would probably fall within fair use as far as the reproduction is concerned.

LEGAL ADVISOR KASUNIC: So everyone is in agreement with that.

MR. TURNBULL: I think the concern that we have is less the fair use of the types of proposals that have been made, but a combination of the -- if
there were an exemption permitted here, the legitimization of the DCSS technology and the potential for misuse of an exemption that permitted the use of that technology. And that’s why our proposals were to say that there are a variety of other ways of accomplishing the same basic purpose. And I did also make clear that when I was talking about getting a license from DVD/CCA as a possible alternative to some of this, that that’s not a license for the clips, that’s a license to permit the use of the CSS technology in a way that is not now permitted. To decrypt the content and then have, in some protected manner, a mini DRM or whatever, so that when you actually make the copies in the technology that you use to make the clip copies is not the sort of general DCSS, which can then be used to make a copy of the entire work. I mean, there are various technologies - and that’s, I think, what Ms. Aistars was referring to as well - that could be used to permit clip copies in a, what we’d describe as a protected manner.

MS. AISTARS: I can comment from the Warner Brothers perspective that typically when we’re approached by a educator seeking the permission to use a clip, our response is typically this falls within
the classroom exception and you don’t need our permission to use this clip, but here’s a letter anyway, so.

LEGAL ADVISOR KASUNIC: Well, let me return for a minute to the concern that you mentioned, Mr. Turnbull, about the ramifications were this exemption to issue. Given the present easy access to DCSS, and I, you know, just yesterday, in thinking about this, did again a quick Google search and came up with pages and pages and pages of links to locations for DCSS. One of which I remember from - has been up for - Gallery for DCSS Descramblers at David Touretzky’s site - and a number of others that just linked directly to DCSS or a host of other similar variations. And also then looking at other sites, for instance, and this actually refers back to something that Ms. Aistars mentioned about the unseemly nature of places where you might be able to purchase some of this material.- Went to one site that was, it’s called Top Ten Reviews, and it lists a review of a number of different types of software, gives you the prices up top, and then has a interesting little feature. Along with all the other few pages of features that are offered here and what compatibilities -- and the printout did not print out
the checkmarks that were on the screen -- but there's also a subcategory for CSS decryption. Copy protection removal built in? the question asks. And then after going through each of these, it lists whether -- in each particular case -- whether the CSS hack is either built in, which it defines as the CSS decrypter -- copy protection removal is included as a feature in the application. There are no additional downloads, installations, or executables necessary. And that's listed as best. Integrated, which is listed as good, the software provides an easy link to an external CSS decrypter -- copy protection removal -- which you must first download and install. After installation the decrypter works in the background and is invisible. The process to copy a DVD, including the decryption, is started and finished with the DVD copying software.

And then the last feature, which some of the software listed have is that it's separate, and that's categorized as fair. And you must first find, download, and install an external CSS decrypter, then, depending on which decrypter you use, there may be additional steps that you must complete for each DVD before you use the DVD copying software to compress, and/or burn your copy. So this particular site, if
someone were to stumble upon this, which they could fairly easily, doesn’t really look like a hacking site, it looks like a standard commercial site and I would think that many consumers might not -- who were not well versed in the subtleties of Section 1201 -- might not be aware of what they are doing.

So, given the easy access to DCSS and a multitude of other tools to decrypt CSS that are readily available online, how would an exemption for a socially beneficial purpose adversely affect the market for, or value of, motion pictures?

MR. ATTAWAY: May I respond to that?

LEGAL ADVISOR KASUNIC: Please.

MR. ATTAWAY: You’ve hit on exactly why we are all here. None of this on this side of the table have any intention or desire to prevent the fair uses of material on DVDs for educational purposes. We’re here to maintain the DMCA Prohibition Against Circumvention because most people are honest and they don’t want to violate the law. I find it disturbing that so many people, so many responses to Mr. Herman’s survey said that they break the law, that they’re above the law. It doesn’t say very good things about the people who are teaching our children. But most people don’t want to break the law.
Once you start creating exceptions to the Prohibition Against Circulation, that line becomes very fuzzy. You create confusion. Okay. Well, it's okay to circumvent for some purposes but not others. What are those purposes? Then we have a real problem. We're here to maintain the simple proposition that it is illegal to circumvent and there is no need for educational purposes or any other purpose to have to circumvent to exercise fair use.

MR. TURNBULL: Two things. One is that I think these sites -- and you didn't identify them exactly -- but I would be very surprised if any of those sites would be recognized as retail, either online or brick and mortar, kind of retail stores that consumers are used to buying legitimate products in. And that, as I've said earlier, so far as we know, there a no such, sort of, known retail sites or retails stores that sell products that are in violation of the CSS license agreement.

The second thing is, imagine if you will, that the sites that you looked at all of a sudden say, "As authorized by the copyright office to permit teaching. This is a teaching tool." For years and years and years, the Macrovision stripper products that were sold, before the DMCA went through and
prohibited them directly, we sold as image stabilization products. Now, they didn’t stabilize the image on your television, they stabilized the image on the copy that you made from the VHS tape that was encoded with Macrovision. And I would say that the concern we have is that you would have the same thing -- it would be a teaching tool -- for the making of clips for classroom use. And there would be disclaimers and all kinds of wonderful things, but it would say ‘as authorized by the copyright office.’

And we would much prefer to deal with individual situations that, first of all, the Pioneer player, for lots of purposes, the camcorder that Fritz showed, work very well for lots of purposes. Where those don’t work well enough, where there are other needs, let’s deal with them on a particular case basis and we’re happy, as DVD/CCA to work with people to enable that without having a broad exemption that would have the effect that I talked about.

LEGAL ADVISOR KASUNIC: But doesn’t a bright line rule that doesn’t -- that just says all circumvention is bad, illegal. That provides clarity, but it doesn’t provide any subtlety. I mean, how can we -- how can -- misinformation is something that is going to exist no matter what happens. We’re seeing
that all the time with Section 117 and what people claim you can do about backup copies and of whatever. That’s reality, and misinformation on the Internet is not a great surprise.

But, the point here being that CSS decryption tools are readily available on -- and also have to note that the DVD market seems to continue to be strong -- how would an exemption that would allow honest people to make non-infringing uses cause any harm if -- infringers can currently infringe and then violate the prohibition with ease, but law abiding educators or citizens, well, in this context, educators, are being constrained in uses, that it seems to be agreed, is non-infringing. Isn’t this really an intolerable result that adversely affects the legitimacy of copyright in the eyes of the public?

MR. ATTAWAY: I don’t hear anyone saying that legitimate uses are being constrained. Unless you think the Second Circuit was wrong, the Second Circuit set forth the law on fair use and, to quote again, “Fair use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user’s preferred techniques, or in the format of the original.” If you don’t agree with that, well then we have a different discussion. But,
I think we’re here talking about the law as it is today.

MR. METALITZ: This whole argument that because DCSS is widely available, this kind of justifies or broads the basis for an exemption, is kind of a curious one to me because it’s basically -- I mean, we’ve already heard the testimony from the DVD/CCA and from, we’ve heard it in the past from the copyright owners that they have pursued people -- and the whole Corley case was about someone who was purveying DCSS. We’ve heard about other cases. We’ve heard from Mr. Turnbull that when people put out products that are not licensed or non-compliant, DVD/CCA and/or the right-holders pursue that and are either voluntarily or necessary, they initiate litigation to bring that to a halt or to bring them into compliance or require them to get a license.

So, I think that the argument kind of boils down to, I guess, boils down to, yes, we understand that the right-holders and, in this case, the proprietors of the technology have tried to stop this, but we still think they’ve done a good enough job, and, therefore, we’re going to hold that against them in terms of whether an exemption would be given the imprimatur of the copyright office, the Librarian
of Congress, and the law in this area. And I think Mr. Turnbull’s absolutely right about how that would be portrayed to the public.

But I think the more fundamental point is, I don’t think that the availability of an exemption ought to turn on someone’s critique of how well or how poorly right-holders and the proprietors have succeeded in enforcing their rights, and in preventing the non-licensed, noncompliant products from getting to the market. Of course they haven’t totally succeeded. They’ve had to make decisions about resources and what’s the best way to proceed, and those decisions certainly could be debated and discussed about whether they were the right decisions, but they have in no way abandoned the effort to do this. And, the fact that they have not totally succeeded in keeping these items out of the marketplace, they have, I think to a great extent, succeeded in keeping them out of the most conventional, legitimate parts of the marketplace, at least in the United States, and I think that that’s a rational way to kind of prioritize enforcement here. But the fact that they haven’t succeeded in the Internet at large, I don’t think should be held against them.
LEGAL ADVISOR KASUNIC: But would the misinformation that would occur as a result of an exemption change that situation? I mean, would we see Best Buy and other stores selling this software now with that disclaimer on it or would we only see that where we see it now, the misinformation now, in the Internet context?

MR. METALITZ: Well, I don’t -- I hope that we wouldn’t see it in the Best Buys of the world, and I think that DVD/CCA and the right-holders would try to make sure that that didn’t happen. But I think it would be significant if the copyright were to say, in effect, yes, you can use DCSS for -- under certain circumstances.

MR. BAND: If I could just respond to a couple of these different arguments. First of all, there’s no -- no one on this side is arguing that the reason an exemption should be given is because DCSS is available. I mean, the reason exemptions should be given is because these people want to engage in a legitimate activity and are being prevented by the DMCA from doing so. So that is the basis.

Now, when we then go drill down further and talk about some of the factors the copyright office should consider -- and one of them is the
effect of the circumvention of technological measures on the market or the value for the copyrighted works -- then we look at the real world. And when we say, okay, now we’ve talked about the legal basis, we’ve talked about the theory, now let’s talk about the real world, the real world in that context, the availability of DCSS is relevant because the point is this will have zero impact on the market for, or value of, copyrighted works because, you know, they’re not going to engage in any kind of infringing conduct and it’s not like they’re going to be developing new technologies that will somehow escape and be used by others and so forth. So that’s -- it’s only relevant to the extent that we’re talking about factor ruminate four here in the statutory factor.

The other thing in terms of bright lines, I must say I find Mr. Attaway’s argument a little bizarre that in terms that he wants people -- is he saying that he wants to encourage people to start camcording off of plasma TVs? I mean, the notion that that’s an encouraged behavior really seems very odd given the position the MPAA has taken and the statutes that they’ve tried to enact at the state levels and have succeeded in enacting at the federal level against camcording. And talk about sending a
confusing message to consumers, to basically say, yes, it’s okay to camcord off of the TV for a classroom use but not okay to camcord off of a TV if you want to share it with your friends. I just think it’s very odd.

I -- it would seem to me that it would be much more effective in terms of sort of setting bright lines as rather than relying on this vague notion of people understanding when they should camcord off of, you know, Hi Def TVs and when they shouldn’t, that instead you all come up with a very clear exemption under the circumstances under which people can do the right thing -- people want to do the right thing -- that would be a much better way to have bright lines, rather than letting people camcord or basically, you know, having all of the urban legends that go around on the Internet about when you’re allowed to use DCSS, when you’re not.

It just seems, in terms of the messages that are being sent, it would seem that the clearest message would be for you to have an exemption that allows people to engage in an activity that everyone sort of acknowledges as lawful.

MR. ATTAWAY: Just for the record, I would like to ask Mr. Band to support his statement that
MPAA or any member company has ever said that people should not be allowed to camcord off of televisions.

MR. TURNBULL: Could I just add one point? We focused here and, from the standpoint of my client, that is the focus on CSS. The requested exemption is actually not a CSS exemption as I read it, it is an exemption for all forms of technological protection measures that don’t permit the making of clips. And so, to the extent that AACS in its initial form would not allow that this would be an invitation to the hacking of AACS under the guise of somebody doing it legitimately for an exempted purpose -- the superaudio CD was sited here as well, as there’s a technology that protects it. So while we focused on CSS and, again, from my client’s standpoint, that is the focus, the exemption is much larger and there are not existing hack tools available for these other technologies that I’m aware of.

LEGAL ADVISOR KASUNIC: If I could switch gears for a minute and, Mr. Metalitz, you characterized Mr. Decherney and the Library Copyright Association’s proposals as use-based exemption proposals, and state that this proceeding is without authority to recognize such an exemption. How do you harmonize your view with the mandatory factors the
Librarian must examine, three of which require examination of the effect of the prohibition on use, and two of which focus on particular types of use, including education, criticism, comment, teaching, scholarship, and research. Isn’t the use at issue here central to the Librarian’s requisite inquiry?

MR. METALITZ: Well those -- certainly those are appropriate factors to be looked at as Congress directed, but I was referring to the decision that the Register made and the Librarian supported in the past two rule makings, that you can’t define a particular class of work primarily by -- on the basis of what use is being made or what users are making them. This is really more of a user-based as well as use-based. Professor Decherney is not seeking an exemption for everybody, he’s seeking an exemption for educators or people that are making uses in an educational environment.

So, the point that we were making in the reply comments is that this is a approach that the Register and the Librarian have consistently rejected as inconsistent with the statute, even though the statute does direct this proceeding to look at particular kinds of uses. And that’s certainly the appropriate inquiry. That’s why we’re trying to
explain that the non-infringing use that’s being
talked about here can still be made without
circumvention in a variety of ways, and perhaps there
will be even more ways in the future as we move into
new forms of technological protection measures that
may have some different rules that apply to them. But
even today, the non-infringing uses that the
educators wish to make can readily be made without
circumvention and, therefore, the class that consists
of audiovisual works protected by measures that don’t
allow these uses, I would submit doesn’t exist.

LEGAL ADVISOR KASUNIC: Well, to what
extent is the office’s interpretation of the term
“class of works” a source of the problem? If a class
could be defined in relation to a specific type of
use, or relation to a specific user, wouldn’t we be
able to define a class in a much more refined manner
in this situation? Wouldn’t use or user-based class
limit the unintended or adverse consequences of an
exemption?

MR. METALITZ: Well this is -- I think you
characterized this as a problem. I’m not sure it’s a
problem that the office is consistently interpreted
the statute this way. But, of course, the office
could change it’s interpretation or the Librarian
could change his interpretation if it. I think one of the problems that you see with moving into a use-based approach is really exemplified by the case that we have here, where there is a widespread concern, as you’ve heard, that legitimizing the use of DCSS, even for some purposes, is sending a very unhelpful message and a contrary message that will be basically read by the public as much broader than what the office intends.

One of the advantages of the approach that Congress asked the Register and the Librarian, at least Congress asked that, if your prior interpretations of the statute are correct, is that it helps to minimize that problem by focusing on the nature of the work and perhaps on the type of control that’s applied to it, rather than on certain categories of users, certain categories of uses. And I think that this is particularly difficult when you talk about fair use, which is really what we’re talking about here in terms of the reproduction -- again, not in terms of the display and the performance in the classroom, but in terms of the reproduction, it’s fair use that’s being talked about here. And, therefore, it’s particularly difficult to spell out what category of user is eligible to exercise this.
Certainly anybody — uses by any person could be fair use under the appropriate circumstances.

So that’s particularly true, I think, of Mr. Herman’s proposal. But even of Mr. Decherney’s proposal, the problem comes more if you change the interpretation that you’ve consistently made, rather than if you maintain it.

LEGAL ADVISOR KASUNIC: Is there any difference, though, where fair use generally as a use-based class may be a problem when there’s a much more specified type of use? Does that change the situation, I mean, and avoid some of those problems?

You said anyone could claim fair use. Well, if you define the specific type of fair use that you are intending to allow, aren’t you minimizing that concern?

MR. METALITZ: Again, let me look again at the approach you have taken in this consistently over the past six years. Look at the exemption that was granted to the Internet Archive. Theirs was not based primarily — they did reference fair use — but basically, they were making a Section 108 argument as to the types of uses they wished to make. And, in that circumstance, at least it’s a somewhat defined category of entities that could take advantage of it.
And even so, you were very reluctant to grant -- and decided not to grant the exemption that they wanted or they originally asked for, because you said we can’t define it by use or by the class of user. Even though, in that case, you could define the class of user much more definitively than you could perhaps in the Section 107 example. You instead fashioned it in a way that you felt did meet the requisites of the statute and it would, to at least some extent, satisfy the concerns of the Internet Archive.

So I think, particularly with Section 107 -- but even when it’s not a Section 107 issue, you’ve consistently taken the approach of not defining it based on use, and I think that’s been a good interpretation of the statute. Obviously, if you are planning to change that interpretation, you know, the analysis might be somewhat different. But, we’ve been operating on the assumption that, of course, it’s the proponent’s obligation to persuade you why you should change your interpretation, and I haven’t heard anything that would -- I guess, that’s really the question that would be before you on this.

PROFESSOR DECHERNEY: I actually think that there will be advantages to a use or user-based
exemption, but I don’t think that’s what we proposed.  
I think we’ve stayed within the limits of the -- we 
thought very hard about this, and I think we have 
proposed something that’s really a class of works.  
And, what’s really been difficult here is to try to 
separate consumers from educators. Actually, many of 
the things that we’ve been discussing are applied to 
consumers, but are not necessarily to educators.  

I’m not even sure that the Second Circuit 
decision that Mr. Attaway keeps referring to is 
specifically for educators. It may only apply to 
consumers. But I’m not a lawyer. And, so the kind of 
-- our first exemption that we proposed is really 
specifically about keeping basically this kind of 
copying within an educational sphere. We -- it’s a 
proposal for a very specific kind of library within a 
very specific type of department within an educational 
institution. Libraries and educational institutions 
have always had, you know, a wider -- are always been 
looked on as special cases, especially more thinking 
about fair use. So I didn’t know what a class of 
works was when I first came to thinking about this. 

And so, the only thing I have to go on is 
the current exemptions. All the exemptions modify a 
certain category in some way. So, when is about the
way a dongle or obsolete technology modifies the way that you can actually access certain video games and some types of software. Sometimes it’s about functions that are turned off. Like audiobook function, right? So these are all ways in which a class of works or a category of works is actually modified by something else. In every case, it’s the technology. In our case, it would be modified by an institution, not a technology. It’s a specific kind of university library. I’m not sure that -- and so I don’t think this changes the interpretation of class of works in any way. And it wouldn’t open up a wider category for more classes of works or new types of classes of works. It would just be a new class of works in exactly the same mode as the four current exemptions that are exempt.

I would also add that there is a certain bit of userness to all of the -- to the ways in which all of the current exemptions have been considered. The audiobook function is really specifically thinking about the harm to blind readers. The Internet Archive exemptions, as we’re referring to them, are really specifically about archivists. So this would be a class of works in the way that all the other classes are classes and exemptions, but this specific harm
would be to a kind of user and use that I represent.

LEGAL ADVISOR KASUNIC: Okay. Let me switch gears for a minute and look at the issue of use in another way. CSS is a technological protection measure that protects access, and I don’t mean to pick on CSS, but that’s the main point at least in relation to the specific facts that we have here. But the purpose of the CSS systems is essentially to limit copying. Access is the hook for the contractual copy restrictions that are put on DVD players. But there’s no prohibition on the circumvention of technological protection measures that protect Section 106 rights. One could circumvent and -- this is actually might be an initial question asked -- one could, if they could, circumvent a DVD player’s use restrictions without violating 1201 in any way, right? Now, before I go any further, is it possible to do that? Can I circumvent -- my understanding is that DVD players do not have a digital out on them.

MR. TURNBULL: No unprotected digital out. Unencrypted.

LEGAL ADVISOR KASUNIC: No unprotected. So, would there be a way to hack that feature?

MR. TURNBULL: I actually think it’s possible, I suppose, to take apart a DVD player and do
something to hack that feature. I think the direct answer to your question though I think is more apt in the computer context, and actually a number of the products that you probably found, I would guess work this way, which is post decryption. What happens in a computer, is that you put the disk in the drive, the drive authenticates itself with the playback software, the playback software then takes the content and decrypts it from CSS and then, according to the rules of the CSS license, it sends the content unencrypted to the playback system and the display. The place where the vulnerability is greatest of the system is after the content has been decrypted and as it’s being carried through the computer to the display. And a number of the products that you probably found are called DVD rippers and they actually act on the unencrypted strength.

LEGAL ADVISOR KASUNIC: That’s part of the analog hole, probably.

MR. TURNBULL: In this case, it’s a digital hole because the content is still in digital form. After it’s been decrypted, first of all, it may be going to a digital computer display these days, and so it may never get to analog until you see it. And, secondly, it’s likely converted to analog at a
different place than the place where it is decrypted from -- it’s decrypted and then it’s converted to analog at a -- in different steps. I’m not particularly advocating the use of these products, but in answer to your question, yes, those products could work and defeat the CSS overall system.

LEGAL ADVISOR KASUNIC: Okay. Then, so it, setting aside the digital hole situation, where it would just be an issue in terms of hacking protection measure that was applied to the DVD player, the copy control or the use control on that player. This whole question, in such a case, would be whether the use of the work after circumvention of this copy control is infringing or non-infringing. It would be a simple question of infringement. So, why should we consider the uses, including infringing uses, that might occur if an exemption is created?

By statutory design, technological protection measures are -- technological protection of access in Section 106 rights are distinct and treated differently within the act. If CSS is an access control, shouldn’t our only concern be the harm that will result from allowing access, not the harm that will result from other uses of the works, such as copying after access is achieved?
MR. TURNBULL: I think the difficulty here is dealing with the actual application of technology within a framework that the Congress has established, in that as you correctly point out, the ability to access the work then allows you to do a variety of things with the work, which the access control is intended to prevent and/or to inhibit. And it seems to me that the Congress -- CSS and the DMCA were sort of developed in the same sort of time-frame, and that CSS was, in fact -- and you can go back to some of the legislative history -- was exactly the kind of thing that the Congress was intending to protect.

And so the question of whether the protection is for the purpose purely of accessing the work so that you can see it or whether it actually -- the protection is against accessing the work for a whole variety of downstream purposes, that then might be enabled because you gained access to the work in an authorized way. And I think that’s how I would look at that.

LEGAL ADVISOR KASUNIC: Okay.

REGISTER PETERS: Can I ask a question?

LEGAL ADVISOR KASUNIC: Of course.

REGISTER PETERS: I’m trying to get a handle on the issue of access control. Somehow I
think I’ve lost it. In this instance, you actually do have access to the work. You’re problem is that you want to go to a particular scene, so you’re trying to directly access a particular scene as opposed to access the work in general?

PROFESSOR DECHERNEY: There might be a number of ways of solving the problem. The problem is how to use clips in this -- you know, quickly, effectively, being able to compare them, and so, it’s possible that there were a device that would allow you to do that, and then you would be able to access multiple DVDs at the same time and go specific points, and do it quickly. Right now, the best way to do it, the only way that I know of, is to actually make copies of segments of the work. And the only way to make a copy of the segment of the work that I know of, and to do it at a high quality, is to use some sort decryption device software.

REGISTER PETERS: But when you’re decrypting, aren’t you focusing on the copy control, rather than the access control?

PROFESSOR DECHERNEY: Yes. But that’s the way, I mean, again --

REGISTER PETERS: Oh I know you’re going to talk about the mixed --
MR. BAND: Yes. I think it’s all, I mean, it’s all bundled together. I mean, and so the only way to get to the -- the only way to get for your computer to make the copy, or at least one way, I mean, maybe there’s other technologies now that allow the copy to be made later on and don’t really involve decryption, but involve breaking into the stream somewhere else, in which case that would be right, that you don’t need to circumvent the access control, you’re doing something else. And that software is certainly unlawful under 1201(b), I would imagine, but the act of using that software would not be unlawful, you know, given the peculiarities of the drafting of the DMCA. But, to the extent that we’re not, you know, we’re not talking about using that 1201(b) infringing software, to the extent we’re talking about something like DCSS -- the way that DCSS works is it firsts decrypts it to make the copy because CSS doesn’t allow you to decrypt and make a copy.

PROFESSOR DECHERNEY: Is it a logical possibility to make a copy without access? Wouldn’t access have to precede copying?

REGISTER PETERS: You really do have access to the content on the DVD. I mean, you have an authorized copy, you have a compliant player, and
therefore, you do have access to “the work.” So, I’m still struggling a little bit with regard to the issue of this being an access control problem. Yes.

MR. HERMAN: If I may. I’d like to ask the office to imagine the scenario under which somebody -- let’s say take my iBook, and I -- let’s say I take my iBook’s licensed DVD player software, and I hack into it, and I reverse-engineer it so that it still uses the DVD key -- the CCA key, the thing embedded in the software, but now it will also spit out clips of movies for me to use in a PowerPoint presentation. Now I ask you to imagine this scenario happening and to imagine me developing the software and, as someone who is violating either and/or 1201(a)(2) or 1201(b), that the DVD/CCA and/or the motion picture industry takes me to court over this issue, because I’ve clearly violated the development trafficking bans, right?

Now, I ask you to imagine the scenario when they do so, and don’t claim that using the software also is a violation of 1201(a)(1). Imagine that scenario. I have a lot of trouble imagining that scenario, right? And I don’t think that the motion picture industry or the DVD/CCA would hold back from making that claim in saying that, by hacking this
software, I’ve eliminated my license, right? I violated my license to use the licensing terms that the CCA provides, and I’ve, therefore, also committed a 1201(a)(1) infringement.

REGISTER PETERS: Okay. Let me just see if I’ve got this right. Although -- the argument is that the reproduction and the access control are combined, and therefore, the real issue is that in order to take advantage of the ability to copy what I believe is a fair use, even thought I have access to the work itself, I have to crack it to enable the use. Right? Okay.

PROFESSOR DECHERNEY: And all the other existing methods for accessing the work don’t meet the educational standards, I would say. So, disk switching for example, or the camcorder, right? Those are other access models. But, since those are not adequate, this is the only access control that’s needed then.

LEGAL ADVISOR KASUNIC: Although we do have some evidence now that there’s a possibility of hacking it without circumventing -- that everybody has access when they put it in an authorized DVD player. So, lawful acts is not an issue. The question is, how do you get past the contractual restrictions that the
electronics manufacturers have agreed to and imposed in their technology? How do you get to the ability to reproduce and at least -- Mr. Turnbull said that it is possible and there is no prohibition on the act of circumventing, if someone could do it, of circumventing that copy control.

MR. TURNBULL: I might indicate that the CSS license requires its licensees to take measures to make it difficult to do what we were talking about before. And some of the measures that the individual implementers may use, may themselves be technological protection measures that would be subject to circumvention rules. But, the CSS license itself and CSS itself, by that time, is gone. Okay. So it might be more complicated.

LEGAL ADVISOR KASUNIC: Well, let me turn back to something you said, Mr. Turnbull, about in terms of my question about should we consider the adverse affects of uses as opposed to the adverse affect of access, which, like we said, everyone has access. So there isn’t any adverse affect to the access because we all, as long as we’re not buying illicit players, that we have access. Why should we care about the use?

You mentioned that things that Congress
knew about and -- but one thing we see in the plain language of the statute is that -- and pretty clearly in the legislative history, is that there was concern for distinction between circumvention of access controls to which we have protection, and circumvention of copy controls that were found to be unnecessary. So why should we be concerned about the uses in relation to the potential effects of uses?

MR. TURNBULL: I guess if -- the proponents of the proposed exemption are the ones who have sort of brought forth the uses that they want to make, which are beyond access. And, so, on the one hand you could look at that and say, no, what you’re really talking about is something that’s not covered by this proceeding because you do have access to the work. And that would be a way of looking at that, and I don’t know that we would object to that if that’s where you came down and you denied the exemption on the ground that it was asking for something that went beyond access.

I think the intertwining of the access technological protection measure with the sort of rules that lie behind that, I mean, are the practical effect of that’s what’s happened in the marketplace. But, if you didn’t want to see it that way and you
want to divide it, then I think you would have a basis for denying the exemption request, because it doesn’t seek access.

LEGAL ADVISOR KASUNIC: Okay. Let me -- I have one final question, then I’ll turn it over to my colleagues. Since we have a distinguished group of 1201 experts here with us today, I wonder if you can help me with a problem that occurred after something -- thinking about something that Mr. Metalitz -- an argument he made in a previous hearing a week or so ago. If an exception to the prohibition issues during a three-year period, we have concluded that the record is de novo in the next three-year period, but can this be true in all cases? For example, if the Register were to recommend an exemption in this case, would the fact that new ways to purchase motion pictures became available in the future that allowed copying clips change the reality that libraries of works on DVDs with CSS are being created now?

If the Library of Congress or if a university library were to invest in a comprehensive film archive in DVD format, would later formats have any relevance to non-infringing uses of the format to which they had invested in the DVDs? Would these libraries be expected to re-purchase new copies of all
of these works in order to get the benefits of less restrictiveness on the particular copies such as that suggested by, perhaps, the AACS system for new optical disks?

MR. TURNBULL: Yes. I can say two things. One is that, again, the requested exemption would apply to AACS protection potentially here. And so the four corners of what you would have exempted would have covered the technology that’s coming onto the market with the added capabilities. And so I think you need to think about that as well. The second thing is that a number of the technologies that we’re talking about are not technologies that are inherent to AACS, it’s simply that they’re coming into the market in the context of AACS because it’s a new system and they’re new ways to provide rules.

It is possible to apply many of those same techniques to the existing CSS protected DVD. And so some of those same techniques, for example, putting the disk in a computer DVD tray and having a website to go to to get authorization to do a particular thing with that DVD, whether it’s a clip or a full managed copy or whatever, is something that could be done with the existing CSS protected DVDs. And so the fact that it sort of first arose in the context of AACS doesn’t
mean that it’s only applicable there. And, I would say, that if you give an exemption, I would be concerned that you would inhibit the development of those kinds of new technologies.

MR. METALITZ: I think if you look at the exemption that’s requested here, it deals with copies that are protected by technological measures that prevent their educational use. Now, I think from what we’ve heard today, I think the proponents equate that with DVDs with CSS. I don’t know if it applies perhaps to something else, but I think they’re equating it to DVDs with CSS. Today, we have to look at whether that in fact this description, protected by technological measures that prevent they’re educational use, actually describes DVDs with CSS. We would assert that it does not for several reasons. I mean, we’ve demonstrated other ways to make educational uses of DVDs that are protected by CSS. Professor Decherney says they’re not good enough and I appreciate that.

The problem is that we’re not dealing here with what are the best standards as perhaps developed by a group of educators in the field of media studies, we’re dealing with the concept of fair use. And as we’ve heard a couple of times from Mr. Attaway, the
Second Circuit, at least, in interpreting this, and I think it does very much apply to anyone who is claiming fair use, no just to consumers, has made it clear that fair use doesn’t require that you meet the best standards, that you meet the best practices in a particular professional organization.

So, the issue kind of is, is it good enough, does it satisfy they’re requirements of fair use, does it satisfy the availability for use for non-infringing purposes, which is what the statute asks you to look at, or does it fall short of that? The second reason why we would say that protected by technological measures that prevent they’re educational use does not equate to DVDs with CSS is what Mr. Turnbull said. There may be ways with CSS to enable them to make the uses that they wish to make in a manner that’s even better than what was demonstrated with the Pioneer technology or the other ways that have been talked about here. They’ve never approached the DVD/CCA to try to see if there are such methods.

But, at least what Mr. Turnbull is saying, is it may be possible to do that and to enable clip compilations even with the existing CSS. If we move, or when we move to a system where DVDs for example or audiovisual works are protected by -- but we already
are in a system where they’re protected by technological measures other than CSS, but when we move to AACS then you’d have to look at whether that meets this description, and I would submit that it doesn’t based on what I’ve heard here today, but I’m no AACS expert. You’ve got some people that are much more knowledgeable about that than I am.

But the uncertainty that would be created by this as to whether CSS is now would be covered by this exemption in all cases and, certainly with new technologies that might come out in the next three years, it would be even less clear whether this exemption covers them. I think that uncertainty is also something that you would probably need to take into account.

REGISTER PETERS: I was going to actually ask a question that’s somewhat similar. I was going to ask you because it’s your proposed exemption. In using the words, “prevent” educational use, it’s very clear by even the examples that we saw the use isn’t prevented. You just don’t think it’s the best educational experience. So if in fact you did in fact use these words, I’m not sure this gets you where you want to go.

MR. BAND: Well, there’s different -- at
least the wording that the Library’s proposed would be that prevent the creation of clip compilations because we’re working from the assumption that, at least at this point in time, the only effective way to be able to, you know, do everything that Professor Decherney was talking about, in terms of the seamless movement from one clip to the other or the side-by-side comparison, could only be done by a compilation. And so the only way -- and CSS in its current form or the other technologies that are being talked about in their current form, would prevent the making of that compilation.

Now, it could very well be that in three years the technology is at the point that there really is no need for making compilations and these people won’t be, including myself, I guess, if I’m back here in three years, will not be able to make a case. And at that point, you know, you’ll well there’s really no reason to have to make a compilation, and, therefore, you don’t get an exemption.

On the other hand, if the technology still has not advanced to the point where the educator is able to do everything that he or she needs to do to teach the class effectively, at that point, you could say, yes, okay, we’ll go another three years to do
clip compilations until again, you know, in three years after that, maybe at that point, the technology will be out there that there’s no need to make compilations, and we won’t be able to meet our burden of showing that it’s important.

PROFESSOR DECHERNEY: I hope it doesn’t come down to a decision about quality and the kinds of images that are used, because clearly there’s a sort of hierarchy of issues of quality. And so, a camcorder versus a DVD, time shifting versus the quick change of digital clips. Right now, this is the educational standard and it’s very important to be able to use the current educational standard in education. You wouldn’t ask students, for example, to use a 1970’s textbook in the same way that we might be asked to use a VHS tape, right? This is an older medium, it has an older educational use. And what you use in education today are DVDs, and actually what’s used in hundreds of classrooms everyday, university classes around the country, are digital clips. This is the standard for education. So by educational use, this is what’s available, this is what we use.

REGISTER PETERS: Fritz?

MR. ATTAWAY: If you define the ability to exercise fair use in terms of quality, then even if
you give them the exemption they’re asking for, arguably they’re still not able to exercise fair use because the quality of a DVD is nowhere near the quality of hi def. So, they’re still not able to exercise fair use as they define it as the best possible quality. When you get into a discussion of what is acceptable quality of use, you get in on a slippery slope that leads you all sorts of places, and I just don’t think you want to go there. Certainly, the Second Circuit didn’t want to go there.

PROFESSOR DECHERNEY: I was encouraging that we not get into a discussion of aesthetics and quality. The category is actually multimedia works protected by technological protection measures that would include high definition, and this is a way of avoiding discussions of quality. It’s not an exemption for DVDs.

REGISTER PETERS: My question had to do with the word “prevent.” And what I’m hearing in your answer is in reading, “prevent their educational use,” that you focus on educational use and that there are standards within educational use that really go to what Fritz is referring to about “quality.” Is that right?

PROFESSOR DECHERNEY: Yes.
REGISTER PETERS: I won’t --

PROFESSOR DECHERNEY: But now I’m hoping that you’ll accept it as enough for people in the profession that this kind of standard is important. It’s important to me, to my colleagues, to students, and it’s that kind of standard that we would like to protect.

REGISTER PETERS: I was just trying to figure out the scope of the exemption. What you were proposing.

LEGAL ADVISOR KASUNIC: Just one last question for Mr. Decherney. Does the proposed class that the Library Copyright Association proposed; audiovisual works and sound recording distributed in digital format, when all commercially available additions contain access controls that prevent the creation of clip compilations and other educational uses. Does that formulation work for you?

PROFESSOR DECHERNEY: Now that’s interesting. So the only difference between that and our exemption really is -- no, no, it doesn’t obviously. We really care about keeping things in an educational context and narrowing that context as much as possible. So this wouldn’t be as a broad based exemption. It’s actually a narrowly focused
exemption.

LEGAL ADVISOR KASUNIC: I guess I’m not clear in what’s the problem you had with this?

PROFESSOR DECHERNEY: Can I hear it one more time?

LEGAL ADVISOR KASUNIC: Yes. Let’s let him read it for a second.

PROFESSOR DECHERNEY: No. I think actually that would satisfy us. If there were digitally available examples that were unencrypted, then we would be happy to use those non-encrypted versions as long as the quality was the same.

LEGAL ADVISOR KASUNIC: Now, we’re just looking at the language of this and wouldn’t -- it looks like it could be a little bit unclear, particularly in the context of where there is evidence that there are VHS versions available of this, would -- I guess that could be corrected if you had the insertion of digital editions, when all commercially available digital editions contain access controls that prevent the creation of clip compilations and other educational uses. Is that --

PROFESSOR DECHERNEY: Then that’s better.

Yes.

LEGAL ADVISOR KASUNIC: Okay. That’s all
I have.


ASSOC REGISTER SIGALL: I have a series of questions for Ms. Benedetto mostly. Pioneer makes a recordable DVD player that they sell to consumers. Is that right?

MS. BENEDETTO: Correct.

ASSOC REGISTER SIGALL: This allows you to produce DVD disks that can be played in other DVD players, right?

MS. BENEDETTO: Correct.

ASSOC REGISTER SIGALL: What kinds of inputs does that kind of player accept? What are the -- does it include the RCA jacks, S Video? What kinds of things does that kind of player accept?

MS. BENEDETTO: A number of different inputs, RCA, composite, DV from a DV camera, or S video.

ASSOC REGISTER SIGALL: Does that kind of player restrict the recording of material coming in through any of those inputs onto a DVD?

MS. BENEDETTO: Yes it does restrict it. If it detects that it’s being -- if there’s a source content from a DVD player that has a DVD in it that has CSS encryption or any other type of copy
protection, it detects that and it does not allow you
to record that.

ASSOC REGISTER SIGALL: Even through the
standard composite jacks, it would not record it?

MS. BENEDETTO: That’s correct.

MR. TURNBULL: I think it’s the
Macrovision that’s generated by the DVD player that
actually accomplishes it, not the CSS natively. So
it’s --

ASSOC REGISTER SIGALL: So Macrovision is
the thing that the recorder or DVD player reads and
then determines that it shouldn’t record this material
on to a --

MS. BENEDETTO: That’s correct. Mr.
Turnbull is correct. It’s detecting the Macrovision
signal.

ASSOC REGISTER SIGALL: Is Macrovision a
copy control or an access control? For anyone.

MR. TURNBULL: I think that’s pretty
clearly a copy control because it doesn’t have
anything -- there’s no inhibition on access.

ASSOC REGISTER SIGALL: And is Macrovision
the only thing that a recordable DVD player uses to
determine whether it should record the material onto
the DVD?
MS. BENEDETTO: Yes. Well, on the
recorders -- I mean CPRN --

MR. TURNBULL: No CG, no. I’m not sure
about the Pioneer recorders, but a number of recorders
that are on the market also look for what’s called
CGMSA, which are signal electrical pulses in the
vertical blanket interval that have the effect of
creating sort of -- it’s copied freely, copy one
generation or copy number. And so CGMSA is also
required to be generated on the output -- on the
analog outputs of DVD players. And so frequently the
analog signal will carry both Macrovision and CGMSA.

ASSOC REGISTER SIGALL: Is CGMSA a signal
that’s sent from an ordinary DVD -- commercially
released DVD? Or is it just restricted to broadcast
signals.

MR. TURNBULL: No, no, no. It’s from --
it’s required to be generated off of a -- on a DVD
player where the content says that, you know, whatever
the signal is, whatever the copy control state is
based on what the content says.

ASSOC REGISTER SIGALL: Okay. Is CGMSA a
copy control or an access control?

MR. TURNBULL: Copy control.

ASSOC REGISTER SIGALL: It’s a copy
control. So what kinds of things can be recorded onto a recordable DVD in ordinary -- what kinds of things can -- kinds of input material would not fail the test and be allowed to be recorded?

MS. BENEDETTO: Anything that does not contain Macrovision coming from a tape or tape source, broadcast signal that has some of the other copy protection that Mr. Turnbull talked about. So, any source that’s not protected.

ASSOC REGISTER SIGALL: So if someone were to -- do you think it’s possible for someone to alter the technology in a recordable DVD player to not pay attention to Macrovision or CGMSA, and allow the recording to happen? Is that a technological possibility?

MS. BENEDETTO: Sure. It’s technically possible. There would need to be -- that would require both firmware and hardware, certainly in our recorder’s packs.

ASSOC REGISTER SIGALL: Do you know of any devices out there that don’t obey the Macrovision rules or the CGMSA rules and allow recording of material?

MS. BENEDETTO: No. I’m not aware of any of those devices.
MR. TURNBULL: I would add that I’m also not aware of any legal obligation, so this is something that a number of manufacturers, maybe all the manufacturers, have voluntarily done as part of their participation, sort of, in the overall ecosystem. But there’s no requirement by law that says that the DVD recorder and the analog input has to look at either Macrovision or CGMSA.

ASSOC REGISTER SIGALL: And if you were using -- would it be possible to both either build such a device and use such a device without circumventing the CSS controls on an ordinary DVD? You’re shaking your heads. That’s a yes?

MS. BENEDETTO: Yes.

ASSOC REGISTER SIGALL: Okay. Ms. Benedetto, another question. The Pioneer device that you showed and the examples that you cited as for educational use, do you have a sense of how much this has been used in film education classes as opposed to general English classes or other types of educational courses? Has this been used with respect to film education?

MS. BENEDETTO: It has, but I couldn’t document that or give you an indication as to how frequent.
ASSOC REGISTER SIGALL: Okay. We may follow up with a question along those lines. Let me ask Professor Decherney, if it were possible for you to have a DVD of clips, is that something that in your mind would satisfy the educational environment that you’re trying to live under? A DVD in an ordinary player that could skip and pause and jump back and forth. One that you can create so you can have some customizable -- it’ll be customized to the class you’re trying to teach. But would that, a physical disk, a DVD, be something that would meet your standards in terms of educational objectives?

PROFESSOR DECHERNEY: I’m just trying to envision this kind of machine, it would be -- I don’t know you would create the content of that DVD so that it was useful for every class. How can it be done without some sort of copying and creation.

ASSOC REGISTER SIGALL: I’m not talking about --

PROFESSOR DECHERNEY: Yes, I know. I mean its, potentially there could be some device that would meet all of our needs. There doesn’t seem to be a device that exists now. We keep talking about what that potential device would look like. I don’t know how long it would take to develop that device. I
don’t know if there’s a market for the device and so, I can’t speak as well as the other members of the panel to the possibility of that device existing.

ASSOC REGISTER SIGALL: Let me get at it this way. Of the uses that you have described that you’d like to make, that you think are the best suited for the environment in which you are trying to teach, are these all necessarily computer based, hard drive based copies on which you’re relying? In a PowerPoint presentation, is it the case where you put in on a laptop and you come in and have the kind of random access that the laptop and that kind of copies affords you? Is that -- I just want to make sure I understand exactly the technology you’re using.

PROFESSOR DECHERNEY: Right now that’s the only technology that seems to work.

ASSOC REGISTER SIGALL: Okay.

MR. TURNBULL: If I can just interject. The DVD RAM recordable disk is designed for precisely that kind of use, and so that is a form of DVD recordable media that is a random access. It was intentionally designed for that purpose.

ASSOC REGISTER SIGALL: Okay. Is there a device on the market today that would allow a film instructor to take commercially released DVDs,
authentic copies that they’ve purchased, and create a DVD RAM clip compilation that they can use in class?

MR. TURNBULL: I don’t know because I don’t know the population of DVD recorders that record onto DVD RAM whether they respond to Macrovision and CGMSA. I know that many do. I don’t know whether all do.

ASSOC REGISTER SIGALL: Ms. Benedetto, does Pioneer make the thing that records onto DVD RAM?

MS. BENEDETTO: No, we do not.

ASSOC REGISTER SIGALL: So, getting back to the questions about your -- the environment. Right now, the use you’d like to make is one that you use computers and hard drives to make the types of educational uses.

PROFESSOR DECHERNEY: Right.

ASSOC REGISTER SIGALL: Is it -- maybe you haven’t considered this because the technology isn’t there, but is it possible for you to make a similar use using DVD technology, assuming you can construct the DVD, maybe using the tools they have --

PROFESSOR DECHERNEY: No, no. It’s possible. But wouldn’t it require a similar exemption to bypass -- right now, at least, to bypass CSS or other forms of encryption in order to get there?
Isn’t that what we just heard?

ASSOC REGISTER SIGALL: Well, I’m trying to get -- well they seem to say that the recording of the DVD, the technology doing that, doesn’t use access controls, it actually relies on copy controls, like Macrovision and CGMSA. And, the law, the statute 1201 doesn’t create a liability for the act of circumventing copy controls in part because that was inserted there to preserve fair uses and other uses of materials.

MR. BAND: The technology that would allow the circumvention of the copy control is driven under 1201(b), so it still wouldn’t be available to the Professor. Either way, I mean, basically, I mean, you’re creating a situation that’s kind of a catch 22 to say, well, you can’t get an exemption here because there’s a cockamamy way of doing it this way, but of course in the real world, there is no technology that will ever allow you to do that legally. So, you know, it’s like you’re damned if you do, your damned if you don’t.

You know though that if we do it this way, there is a -- you know, again, this is part of the problem that the crazy way the DMCA was drafted that, you know, 1201(b) allows circumvention, but doesn’t
allow circumvention devices. 1201(a), again, has an exemption for certain acts of circumvention, but again, doesn’t provide any exemption -- you don’t have the authority to grant an exemption for circumvention devices. At least in this case we know that there happens to be a technology out there that people could use.

Again, this is sort of an interesting construct, but in the real world it will be useless. It won’t help media professors to do anything because that technology, at the end of the day, won’t be available.

GENERAL COUNSEL CARSON: So the only time we should grant an exemption is when there’s an illegal device like DCSS freely available? Is that what you’re saying? Because it sounds like that’s what you’re saying, as a practical matter.

MR. BAND: Well, I mean, look, I didn’t write the DMCA, but it certainly seems that, you know, I think that it would be obviously better to have exemptions -- it makes more sense to have exemptions that work than exemptions that don’t work. And so if we’re trying to come up with something that works, here we at least finally --

GENERAL COUNSEL CARSON: In reality
though, the premise that it works is based upon the marketing and trafficking of an illegal program.

MR. HERMAN: But that criticism exactly also applies to all of the responses, if you can hack -- you can hack Macrovision and you can hack the -- I don’t know the analogy there.

GENERAL COUNSEL CARSON: There’s nothing illegal about hacking Macrovision.

MR. HERMAN: But the same problem will exist that it’s illegal for a manufacturer to distribute or import a device that hacks it. And so those technologies that circumvent Macrovision fall into the same critique that you’re levying about DCSS, right? And the simple question is, should we allow people to use these technologies that are illegal to manufacture and sell in order to make a non-infringing use.

MR. BAND: And I would submit, you know, maybe the best solution obviously would be, you guys grant this exemption and then Mr. Turnbull’s clients come up, or maybe Time Warner comes up with a circumvention technology, you know, especially aimed at the educational market, and they make it available at not cost or low cost, and that way there’s no notion of legitimization or DCSS. That they just
provide a legal alternative but then make sure that it’s only provided to the kinds of people they want to provide it to, again, knowing to some extent that this is all a bit of a kabuki, like everything -- like this whole proceeding, but it’s the notion is -- but a kabuki that they’re giving you the same thing that you can get, you know, from any of Rob’s -- any of the websites that Rob found. But at least, that way they’re not legitimizing the fact and we don’t have to sort of -- we sort of can pretend that we’re -- that everyone’s, you know, doing everything above board.

ASSOC REGISTER SIGALL: Let me test -- let me try to reframe my generally to test what I think are two assumptions in your response. The one assumption is that there is no technology available that would allow someone to make a clip compilation on DVD right now. I don’t know if that’s true or not. It seems like it’s possibly true, but we don’t know that information. So, my first question is to, does anyone on the panel have information as to whether either a recordable DVD player or other technology can allow people to make compilations on disk of films from commercially released films?

MR. ATTAWAY: Well, Mr. Sigall, you obviously attended the analog hole demonstration that
I did several weeks ago, and you know that such devices do exist. I wouldn’t suggest that you rely on the availability of the analog hole to deny an exemption for clips for educational uses because I’m hopeful that Congress will soon remedy this situation of the analog hole. But, yes, devices exist today that do take advantage of the analog hole that will record on a DVD directly from a DVD player, and this can be done quite easily, and compilations can be constructed in that way.

ASSOC REGISTER SIGALL: I’m glad you brought up the analog hole because that was actually my last question. I still want to go back to this group to ask another question based on Jonathan’s comments. Is the recording of film using a camcorder like you’re demonstration showed, is that an example of the analog hole?

MR. ATTAWAY: No. Certainly not as we see it. It is -- I guess in one way it is taking digital material and converting it to analog, which is what you see with your eye and the eye of the camera, and then the camera converts it back to digital. So, in one respect, I guess it is, but that’s not -- our analog hole solution would not interfere with camcording.
ASSOC REGISTER SIGALL: And that’s my next question. Why wouldn’t any potential analog hole legislation not interfere with camcording?

MR. ATTAWAY: I guess it’s because we don’t see that as a significant threat to the exploitation of motion pictures. If we can convince the Congress to close the analog hole along the lines, that we have recommended, that would not interfere with camcording, I think that would meet our needs.

ASSOC REGISTER SIGALL: Is it not a threat because the quality of the resulting is not very high?

MR. ATTAWAY: No. I think it is the inconvenience is the primary deterrent. DVDs are so inexpensive that we don’t feel that a substantial number of consumers would take the time to camcord off their neighbors DVD so they could have a copy a movie that they could go and buy for $25.00. Of course it will allow for commercial piracy, but we’re going have to deal with that in any case and we do deal with that through the criminal statutes.

MS. AISTARS: If can also just step in a little bit about the analog hole legislation. As with other multi-industry efforts that we’ve engaged in, our intent is always to craft a solution that is as narrow as possible and doesn’t sweep in legitimate
products. And so to address the sort of activity
that Mr. Attaway was demonstrating for you would
entail significant burdens on legitimate consumer
electronics devices and that’s just a step that we
haven’t been willing as multi-industry collaborators
to solve these issues to take. Because, again, the
effort here has always been to keep solutions at a low
cost and keep them easily implementable and leave as
much design and creative ability for the folks that
are building devices and selling them to consumers as
we can. So, we’ve taken the same approach in
legislative and regulatory activities.

ASSOC REGISTER SIGALL: Okay. Let me just
go back to the proponents again, because one of the
things that Jonathan said was that -- I think he used
the legal term cockamamy to describe the production of
a DVD and that’s really my question which you’ve
answered a little bit, but I just want to make sure
I’ve heard everything. I mean, would it be cockamamy
to suggest that you could have a similar educational
value to have a DVD which had relatively random access
to various clips in your classroom, as opposed to
potentially a computer-based type copy of the --

PROFESSOR DECHERNEY: Right now, as far as
we know, the only way you create that DVD is through
a computer using DCSS.

ASSOC REGISTER SIGALL: But, assuming, I’m not talking about you create it, but the actual having that result and product, would that be satisfactory to your educational purpose?

PROFESSOR DECHERNEY: In general, I like the flexibility of a computer. I think it’s necessary. All the examples I show here can only be achieved using a computer and a presentation. None of the slides I showed could possibly have been created using just a DVD.

MS. AISTARS: Could I just weigh in a little bit about -- this certainly isn’t the case today. But, we have mentioned AACS a couple of times in these discussions and I think that that does potentially provide a solution to these issues as we move into licensing it further. The technology that’s currently being licensed is sort of -- we’re offering the first phase license for the technology in which the managed copying ability isn’t yet fully flushed out. But very shortly we intend to move to the final stage of licensing which will enable people to make entire managed copies onto their hard drives for instance, for a home media server.

And, as I referred in my written
testimony, there’s no technological reason why the same AACS technology that allows you to make a full copy couldn’t allow you to make protected clips, if that’s what the market showed a demand for. So I think, if this is truly the case that there is a desire for this kind of ability, then certainly the technology can accommodate it.

ASSOC REGISTER SIGALL: One last question. Does the AACS and managed copy system that you’re describing, is that an access control or a copy control?

MS. AISTARS: It’s an encryption system with key authentication, so it would be both.

REGISTER PETERS: Can I ask Ms. Aistars, this AACS, when in the next three years or three and a half years, do you see it being deployed for use by people who teach film studies?

MS. AISTARS: That’s probably something that’s beyond my scope of knowledge to comment on. But I can say that the AACS technology is one element of next generation optical media technology. So you should look also to people who are proponents of either the HD/DVD technology or the blueray technology, which are the two formats that we know of thus far that would be incorporating the AACS
technology as one element of those formats. I know that HD/DVD has launched and there are players available on the market and our company is issuing disks to support those players, so I suppose it’s a question, you know, how quickly either one of those formats will be picked up by the consumer in education marketplace. But they’ll certainly be available and are available.

REGISTER PETERS: More likely or less likely that that happens before October 28, 2009?

MS. AISTARS: I think we would be incredibly disappointed as promoters of the format if they didn’t take off by the end of the year, frankly. End of this year.

GENERAL COUNSEL CARSON: All right. So, I guess to be sure we understand, product will be out there for consumers that has AACS on it, probably before the end of this year?

MS. AISTARS: Product is currently out there for consumers that has AACS on it. It doesn’t -- the devices that I am aware of in the marketplace do not yet have the managed copy ability incorporated in them, but all of the disks that are being issued under the content protection licenses will include a URL that will direct the disk to go to the appropriate
website of the content owner to authorize the making of the copy. So, the disks will already be capable of providing the managed copy functionality as soon as devices that can support that sort of copying are produced.

GENERAL COUNSEL CARSON: What do we know about when the managed copying function will actually be available?

MS. AISTARS: I’m trying to think what the public announcement was. I mean, it’s certainly -- the technology has been specified and, at the moment, the companies who are licensing the technology are finishing the details of the next set of licenses. So, it’s hard to predict how long that would take. The interim licenses that are currently available will be available only until the end of June in the case of devices applicable to CE and IT products and the end of July in the case of content product. So, that, I would suggest as a likely time frame for the second set of licenses and the products implementing them to come onto the marketplace.

GENERAL COUNSEL CARSON: And how much do we know about whether, once this managed copying functionality is available, whether it will permit the making of clips? It strikes me that if you can do the
whole, you should be able to do the clip. But you
seem to have expressed at least, perhaps, some
reservation on that. So I just want to know what we
know about that.

MS. AISTARS: I can tell you what the AACS
licensors require of content participants, so it’s
really a question of what content participants might
wish to offer in addition to what’s required. So the
requirement on content participants will be to enable
the making of a full managed copy. But certainly --
and I don’t know what the plans are of particular
studios in this regard, because it’s not something
that’s been publicly announced. But, certainly,
people are considering a variety of other sorts of
offerings that you might want to enable.

You can imagine that, for instance, if a
consumer wanted to have a copy to take on a small
portable device, the consumer might not be interested
in having the full resolution copy, and would prefer
a copy more suitable to the portable device’s
capabilities. So that might be one option that you
see people offering. I’ve suggested the clip scenario
as another option, and certainly there may be lots of
other things that studios are thinking about that I’m
just not aware of and won’t be until it’s publicly
announced. But it’s not a technology-driven issue. The technology can accommodate it. It’s a question of whether there’s interest in the marketplace for enabling such a use.

GENERAL COUNSEL CARSON: Are you aware of any discussions among content providers or the people who are responsible for AACS, specifically about permitting the making of clips, portions of the entire content of the DVD?

MS. AISTARS: Sorry. Can you repeat your question?

GENERAL COUNSEL CARSON: Yes. You say you’re not sure what’s going to be done. Have there been discussions specifically about the ability to make clips -- to make copies of portions of the entire --

MS. AISTARS: Whether the technology is capable of doing so?

GENERAL COUNSEL CARSON: Whether that will be deployed. Have there been any discussions about even, should we, shouldn’t we, will we, won’t we?

MS. AISTARS: Yes. It’s not something that we’re allowed to discuss in these discussions.

MR. TURNBULL: They’re two different issues. I think that the studios offerings, in terms
of managed copy, I think is what Ms. Aistars is
talking about, I think the question of whether the
technology would be deployed in a fashion that would
be user-friendly to the clips is a different question.

GENERAL COUNSEL CARSON: Can you answer
that question?

MR. TURNBULL: Well, since, if we get out
of here at some point -- there are a couple of us on
this panel who are headed to an AACS meeting. Perhaps
we could carry a message.

GENERAL COUNSEL CARSON: And if there’s
any messages you can deliver back to us, that would
help as well. Let me ask the folks on the right side
of the table. I assume, up until now, you’ve had no
problem with AACS because you haven’t encountered it.
Is that correct?

PROFESSOR DECHERNEY: Yes.

GENERAL COUNSEL CARSON: Let me ask
whether, in terms of talking about the next three
years, if there were to be an exemption, if it were
limited to addressing motion pictures that are
protected by CSS, would that serve your needs for the
next three years?

PROFESSOR DECHERNEY: It’s difficult
because I only know as much as you do about the market
for high definition disks for blueray and HD/DVD. And
so there would be too many unknown factors. Not just
the capabilities of AACS, but the availability of
DVDs. But if, in a year from now, high definition is
the standard, and I really hope that it will be, we
would, you know, like to have access to those clips.
I don’t know if AACS will provide the kind of access
we need, so it’s actually -- I would prefer -- I mean,
there are too many unknowns to be able to make that
decision right now.

GENERAL COUNSEL CARSON: Is there anyone
on the panel who has any reason to believe that during
the next three and a half years commercially released
motion pictures won’t continue to be released on DVDs
with CSS as one option? Another way to put the
question is, is there any reason to believe that these
more advanced formats which will AACS on them may, to
some degree, supplant the DVDs that we’re all buying
and viewing today, so that there will be commercially
released motion pictures on the new media that aren’t
available on DVDs with CSS in the next three and a
half years?

MS. AISTARS: My guess is that the markets
will continue to exist in parallel. Not every
consumer is going to switch over to the next
generation of optical disks immediately, and certainly as a studio, you want to have your content available to consumers in the formats in which they’re seeking to access it. So I would expect that we would continue to issue both CSS protected DVDs and also AACS protected HD/DVDs and blueray disks.

I’d also want to comment though, you’re question implied that it may not be problematic to allow a circumvention of CSS during the next three-year period, but -- and I think maybe Bruce Turnbull is more suited to discuss this with the panel, but certainly there have been, as Mr. Turnbull noted, since AACS is maybe the first place where we talked about the enabling of managed copies, there’s nothing, you know, magical about AACS being able to do that. You can enable the same sort of thing with CSS for instance. So, I wouldn’t want to do anything in this rule making proceeding that would preclude the ability or the likelihood of that sort of a step being taken in the DVD/CCA licensing context.

GENERAL COUNSEL CARSON: Okay. Although, you have suggested the possibility, perhaps likelihood, that there will be such an ability with AACS. At this point, no one, I assume, is aware of any possibility or likelihood that it will be made
available with respect to CSS. Is that correct?

MR. TURNBULL: It’s a little awkward, candidly, because the internal discussions of DVD/CCA are, if not subject to an NDA, at least subject to an expectation of confidentiality. Perhaps I can say, and then I can consult with my client, as to what we might say in the follow-up, that the notion of managed copy is something that has not escaped the attention of the DVD/CCA.

GENERAL COUNSEL CARSON: Alright. Well, you can only tell us what you can tell us. But, of course, keep in mind that what you can’t tell us, we can’t take into account.

MR. TURNBULL: I understand and I will take that back and see if we can provide more.

GENERAL COUNSEL CARSON: Alright. Now Mr. Turnbull, you have talked about the possibility of DVD/CCA giving licenses to people like Professor Decherney to engage in the circumvention that they say they need to engage in. Is that correct?

MR. TURNBULL: I have said that we have invited people to come talk to us and that no one has.

GENERAL COUNSEL CARSON: Does DVD/CCA itself have the power to license someone like Professor Decherney to circumvent CSS for particular
purposes?

MR. TURNBULL: I believe it does. It has
an exclusive license -- it is the licensor of CSS
technology, and so to license what would amount to a
special purpose product, which would instead of
directing the content to the playback system -- the
display system of a computer would allow the making of
copies of at least clips of the movie. I don’t know
of any reason why it’s not in their power.

GENERAL COUNSEL CARSON: So let’s say
Professor Decherney came to you and said I’d like a
license to circumvent CSS in order to make this
compilation that I want for my class --

MR. TURNBULL: I don’t know that I would
describe it as circumventing CSS. First of all, it
would be done by permission, and so what Chris was
saying is that it wouldn’t be circumvention.

GENERAL COUNSEL CARSON: All right. Fair
enough. Fair enough.

MR. TURNBULL: Second of all, what I’m
talking about is what happens to the content after it
is decrypted. And so the CSS is actually already
removed at that point and so you’re not circumventing
any more, that’s --

GENERAL COUNSEL CARSON: You would give it
to him removed, is that what you’re saying?

MR. TURNBULL: No. What -- you would have
a playback system, and that’s actually how DCSS works
is that it decrypts the content from CSS, and rather,
at that point, rather then sending it to the display,
which is what the license requires the playback system
to do currently, it sends it to the hard drive to make
a copy of it. And in the possibility of an authorized
system to do that, you would then say, okay, once
you’ve decrypted the content, instead of displaying
it, you’re permitted to use the computer internal
routing system to send it to a hard rive to make a
copy of it, under the following circumstances. And,
again, I don’t mean to be speaking ahead of the Board
of Directors of DFD/CCA, but it is the case and in
each rule making, you know, we have offered the
opportunity for people to come forward and talk to us.
And I think that there would be sympathy for this kind
of a situation.

GENERAL COUNSEL CARSON: So clearly,
you’re not telling us you would permit them to do
that, you’re jut saying you’d talk to them about it
and you’d see what happens.

MR. TURNBULL: Well, I -- right. Because
you need to see what the specific proposal is, and
again, you know, sitting here today, we haven’t had any proposals made to us. For example, one of the things that people would look at is does the device that you’re authorizing allow the making of a copy of the entire movie? Or only, is it somehow enabled for 30 or 45 second or 60 second clips. And then, you know, those kinds of issues you’d have to get into.

GENERAL COUNSEL CARSON: I’m trying to figure out how useful this would be for Professor Decherney. You’re talking about a device. I mean, you license devices. Frankly, all Professor Decherney wants to be able to do is what, for all I know, he’s already been doing, but he probably doesn’t quite admit it -- use whatever means that are available out there already so that he can make the copies of the clips that he wants to make. Because he’s probably not -- he probably doesn’t have the capability to make a device. Let’s face it, he’s a film professor, he’s not a technologist.

I gather, I think, if I’m hearing you correctly, you’re not saying the DVD/CCA would consider giving Professor Decherney permission, even if it has the power to do so, maybe it doesn’t to engage in that kind of conduct. What you’re saying is you would license him to make a device that he’s
probably not able to make -- or somebody --

    MS. AISTARS: I guess I’m not certain that
it would be Professor Decherney that would be
approaching us to make a device. I would imagine it
would be somebody who wants to, you know, issue a
software product that enables this. But, that aside,
I think this solution that the DVD/CCA is suggesting,
you know, frankly, takes care of the problem that
people have been complaining about this morning, which
is that even if you grant an exemption for certain
purposes, you may not have the technology available to
you. So isn’t it better to have a dialogue with
DVD/CCA to enable the creation of legitimate devices
that can be used for such purposes.

    MR. TURNBULL: I suspect that, well, I
know in other circumstances there have been computer
science courses that have been aimed at hacking CSS
and that have been offered at various universities.
I suspect that you could offer a course where the
assignment would be to create such a software product
and that might actually be useful.

    MS. AISTARS: DCSS was created by a 14-
year-old, you know, guy. I’m sure we’ve got talented
folks at the University of Pennsylvania.

    GENERAL COUNSEL CARSON: Steve, first
signal. You're free to talk but let Steve go first.

MR. METALITZ: I just was going to say, I assume that if someone approached the DVD/CCA, they would be thinking maybe there's a market for this. And I think there's two possibilities here. One is that all the hundreds and hundreds of film and media studies professors who Professor Decherney has referred to, and in their organizations in support of his proposed exemption, they might be interested in such a product. And, therefore, perhaps there would be a market for it.

The other alternative is that Professor Decherney, who I know is a very hard guy to please, because he's not satisfied with any of the alternatives that have come forward here, including the alternative that Mr. Sigall was drawing out about something that does what he wants to do but does it on a DVD player rather than on a computer. He may be the only one. And it may not be possible to please him -- to create a device that will satisfy him but maybe it would satisfy the rest of that part of the market.

GENERAL COUNSEL CARSON: I think sitting next to him is probably another one.

MR. BAND: But I guess the point is, and this is what underlies -- you know, and I completely
agree with the premise of the question, and that is that, you know, it is, at the end of the day, a very small market, maybe it’s just Professor Decherney or maybe it’s, you know, a hundred people, maybe it’s a thousand people, it’s still a relatively small market. And I suspect, not withstanding the protestations down the table of how willing people are to work, I have a feeling that the negotiation is going to take some time. Okay, because the DVD/CCA has many numbers and it’s going to take time and it’s not going to be something that a -- even if Professor Ed Felten’s class, they wanted to develop -- I have a feeling it’s still enough to hire a lawyer to sit down and work out a license arrangement and, you know, it would take a year or two, and then maybe there would be something available. So again, as a practical -- I mean, it sounds good, but in the real world and as a practical matter, it is, you know, sort of this offer well we’re willing with you, it’s sort of a meaningless gesture.

GENERAL COUNSEL CARSON:  Okay. Ms. Aistars, we heard sort of a similar sentiment from you in your testimony about Time Warner’s willingness to talk to people like Professor Decherney and cooperate with them and try to work something out. Is it along the same lines as Mr. Turnbull’s? In other words, are
we talking about the licensing of devices or are we
talking about perhaps a situation where you would
actually tell Mr. Turnbull, yes, you can go ahead and
use whatever means you need to in order to make that
clip compilation off of our DVDs of our movies. Is
that a possibility or is that not a direction in which
Time Warner would go?

MS. AISTARS: The requests that have been
made to Warner Brothers that I’m aware of have not
been to make compilations, but rather to use clips in
particular scenarios. So our authorizations have
always been directed towards the use of the clip
rather than the creation of a compilation. I mean, we
are periodically approached to get the authorization
to get a particular clip for use in a particular
scenario. Those aren’t really the norm of our
requests, and I guess it would have to be judged in
the context in which it’s received. It’s really an
issue of the effort and underlying costs to produce
the clip. If we’re requested that requires us to
master specifically for one user, that may be cost
prohibitive to do for the user.

GENERAL COUNSEL CARSON: Okay. I think you
just clarified what wasn’t clear for me in the last
sentence or so. But the kind of requests you’re
talking about are requests for you to actually give them the clip. Is that correct?

MS. AISTARS: We typically don’t get those requests is what I’m saying. We typically get requests from people who, in one way or another, already have access to the clip. You know, I don’t know whether they’re accessing it through, you know, playing it back on a Pioneer system or whether they’ve, in some other fashion obtained access to the clip. But the request to us is typically I want to use the following segment of The Matrix on this interactive classroom website to demonstrate the following point. And so it’s the use that we’re considering and not actually how they obtained the clips.

GENERAL COUNSEL CARSON: You don’t really ask them how they got it, you just go ahead and say it’s all right to use it, basically, when you do grant it. Is that what’s going on?

MS. AISTARS: To the extent that -- I mean, I can give you copies of some of the letters that we have issued, if we’re talking about a classroom exemption letter, those typically say, assuming that the disk was legally obtained and that the use is for an educational use and in a classroom
setting, and not otherwise commercial, the classroom use exception would, you know, apply, and you’re authorized to use the clip.

GENERAL COUNSEL CARSON: Is it your interpretation of those authorizations that they would also extend -- would they have any effect whatsoever with respect to a potential claim that Warner Brothers might have against the person, if it turns out that person had hacked through CSS in order to make that copy? In other words, you said in at least an implicate authorization for them to do that? Is it a waiver of your rights against them or do you have every -- have you retained right to pursue your cause of action against them for violation of 1201(a)(1)?

MS. AISTARS: I can’t give you a blanket answer on that.

GENERAL COUNSEL CARSON: It’s pretty key to what we’re talking about here though, isn’t it?

MS. AISTARS: Again, I can’t give you a blanket answer that applies to, you know, every requested use. Our letters are typically targeted to a particular user’s request. Frequently, they are issued in the form of, you know, no objection letters, so, I would have to answer it on a scenario by scenario basis.
GENERAL COUNSEL CARSON: Okay. So Professor Decherney came to you and said, look, I teach film. I’d like to be able to take clips from DVDs of various Warner Brothers movies and put them into compilations that I will use only for purposes of display to my classroom -- in the classroom. And to do so, I’m going to take them off the DVDs and put them into these compilations on my hard drive. Any prediction on how Warner Brothers would react?

MS. AISTARS: I don’t have a prediction. I would be happy to consult with our Director of Clip and Still Licensing if you wish.

GENERAL COUNSEL CARSON: Okay. Well, if you have anything meaningful about that, that could be helpful. Yes.

Mr. Metalitz -- actually, everyone starting at Mr. Metalitz to the left. Let’s assume for the moment that an exemption is going to be issued. If that’s the case, wouldn’t it be preferable from your point of view if that exemption were limited to circumvention for purposes of classroom teaching, rather than just an exemption that extended to DVDs?

MR. METALITZ: Yes. Based on the assumptions that you gave, yes. You would have to decide that that was a -- that that described a
particular class of works, but assuming that you did,
yes, that would be better than saying anyone can
circumvent CSS on DVD for any reason.

GENERAL COUNSEL CARSON: And you certainly
recounted to us what the process we went through in
the first two rule makings in determining how one
defines a class of works. But let’s assume that we’re
willing to rethink that. Is that something you’d want
us to do? Is that something that’s preferable rather
than come out -- not really the situation now, where
if we find there is a justification for an exemption,
we issue an exemption that is potentially much broader
than the harm that was brought to our attention. And
isn’t it perhaps preferable for us to be able to issue
an exemption that is more finely tuned to the problem
that’s been presented to us?

MR. METALITZ: Well, speaking for myself,
I’m confident that if you found that this request met
all the statutory criteria and that you were going to
issue an exemption, that you would do as you have done
in previous ones, and try to fit it as closely as
possible to the particular non-infringing -- the
particular impact that has been proven on non-
infringing use. I think you’ve done that. You’ve
sought to do that. Whenever you’ve recognized an
exemption and, I mean, we can go into the details in specific exemptions, but I think that’s how you’ve approached it. And I would encourage you to approach it in that way too on this one, if you conclude that the statutory criteria have been met. Which we hope you will not conclude that.

GENERAL COUNSEL CARSON: Understood.

Also, Mr. Metalitz, you say you accept that the existing methods, the ones that we’ve heard from everyone at that end of the table, aren’t good enough, at least for Professor Decherney. And you point out that, you know, nevertheless, there are methods out there. Shouldn’t we take into account that if it’s a fact, and it’s certainly been asserted, that Professor Decherney at least doesn’t believe -- and he’s made at least some kind of a case, that the methods that have been demonstrated at that end of the table aren’t really sufficient for his purposes. I mean, isn’t that something we should take into consideration and, if in fact we conclude that he’s right, then isn’t he perhaps entitled to an exemption that would permit him to do what he needs to do for his pedagogical needs?

MR. METALITZ: Well, I think the problem with that approach is that it kind of reads into the copyright act a requirement to incorporate the
professional aspirational standards of every different
group, in this case, film and media studies professors
-- as to what would be the best way for them to make
these uses. And it kind of reads that into the Fair
Use Doctrine. I think what the Second Circuit and
they’re not the only ones, but the Second Circuit, I
think, said it quite forcefully and in it’s context is
that that’s not fair use is about.

GENERAL COUNSEL CARSON: Didn’t they say
that in the context of a First Amendment challenge?

MR. METALITZ: Pardon me?

GENERAL COUNSEL CARSON: Didn’t they say
that in the context of a First Amendment challenge?

MR. METALITZ: Yes. I mean, it was.

GENERAL COUNSEL CARSON: Different
context.

MR. METALITZ: But that was based on, well
that was based on the argument that fair use is
constitutionally required. That’s how the Plaintiff
chose to bring that case.

GENERAL COUNSEL CARSON: But, are you
saying that what Professor Decherney proposes to do is
not a fair use?

MR. METALITZ: No. I’m not saying that
what he’s proposing to do is not a fair use. I’m
saying that the Fair Use Doctrine does not necessarily give him the right to do it by -- over the objection of copyright owners, doesn’t necessarily give him the right to do that in the best possible manner. In the manner that most fully satisfies his objectives and his desires with regard to how he’s going to make that use. I agree this is a matter of degree. I mean, there’s at some point at which potentially it falls below the floor. And, so I’m not saying that it’s an irrelevant criterion. But I think the starting point has to be, is he able to make the use, even in a form that’s not totally satisfactory to him, or does the Fair Use Doctrine really incorporate some requirement to meet the highest possible standards that could be developed by a professional organization, without regard to the technologies perhaps, without regard to the market conditions, and so forth.

That I think is really the end point of his argument, which is that, no it can’t be on the Pioneer machine, and it can’t be on the other machines that do something similar to that, and it can’t even be on a DVD player. It’s got to be on my laptop. And if it’s not on my laptop, I’m not able to fulfill my responsibility as an educator. I think that’s a -- it would be a pretty extreme reinterpretation of the
Copyright Act to say that that’s the criterion by which we define what’s fair use and what’s not fair use.

GENERAL COUNSEL CARSON: Would it be an extreme interpretation of the Copyright Act to conclude that the way he does it is a fair use?

MR. METALITZ: The way he does it?

GENERAL COUNSEL CARSON: The way he makes his compilations is a fair use. Would that be an extreme interpretation of the Copyright Act?

MR. METALITZ: Well, the question you have to ask is what’s the impact of 1201(a)(1) on his ability to make non-infringement uses.

GENERAL COUNSEL CARSON: That’s right.

Absolutely right.

MR. METALITZ: And without regard to what he wants to do may be a non-infringing use, but there may be many other ways to make non-infringing uses that don’t require circumvention.

GENERAL COUNSEL CARSON: Understood.

MR. METALITZ: And that’s I think the way that you’ve approached this, including the availability -- you know, no one likes to talk about the, you know, the old person in the attic but VHS still exists. And, in fact, we’ve seen time again in
these proceedings assertions that, well, VHS isn’t even available anymore. And, in fact, that turns out to be factually not true in many, many cases. Of course it’s not as good as showing the DVD clip, but is it enough to satisfy the requirement that you, which you have to look out for, is what’s the level of impact on non-infringing use.

GENERAL COUNSEL CARSON: Mr. Attaway, you wanted to say something.

MR. ATTAWAY: Yes. A couple of points. First of all, going back to the Second Circuit decision, they’re discussion was not limited to the First Amendment context. They said, “We know of no authority for the proposition that fair use, as protected by the Copyright Act, much less, the Constitution, guarantees copying by the optimum method.” So, it was not limited to just eh First Amendment context.

And, secondly, if you were to decide that despite the fact that the ability to exercise fair use in a way that the educators say they want to exercise fair use is available but not in sufficient quality, I think you would have to base that decision on a decision to grant an exemption on probative evidence that the educational experience somehow is adversely
affected by the difference in quality. And I’m certainly not aware of any evidence in this record, other than mere assertion that the difference in the quality between a camcorded copy or a VHS copy and the original DVD adversely affects the educational experience.

MR. TURNBULL: I have a unrelated point. In relation to the aforementioned AACS meeting, I have a flight leaving in an hour and a half. Are we likely to go on? Should I excuse myself for five minutes and see if I can make alternate arrangements?

GENERAL COUNSEL CARSON: Is the meeting today or is it tomorrow? I mean, how --

MR. TURNBULL: The meeting is tomorrow, and I could conceivably could get a later flight. It’s just that, at the moment, I based on the 12:30 end time, I made this arrangement. I apologize.

GENERAL COUNSEL CARSON: Sure. Well, no, we clearly have a lot of questions. I probably got about ten minutes worth. I don’t know if that tells you. And a couple more people. Yes.

MR. TURNBULL: As I said, if I can excuse myself from the table for just a couple of minutes, I’ll go make the phone call and see if I could rearrange.
GENERAL COUNSEL CARSON: Do we want to take a break and just throw in the towel and say we’re going to be here a while? Let’s take a ten minute break. It’s been over two hours since our last one.

(Whereupon the above-entitled matter went off the record at 1:16 p.m. and resumed at 1:32 p.m.)

GENERAL COUNSEL CARSON: First, Ms. Aistars wanted to give us some more information in response to one of the questions I asked before the break, so, go ahead.

MS. AISTARS: Yes. You had asked about if there was anything helpful that I could point you to in terms of previous approvals we might have issued or otherwise, you know, how we might react to a request to make a compilation. And, as I noted, that’s something that we do on a case-by-case basis. But I, in the break, was able to flip through a file and pull out a request that was submitted by someone at the Bowling Green State University who wished to use clips of the Hudsucker Proxy in both face-to-face and online distance education course that he taught. From the context of the letter it does appear that the clips were obtained from legally purchased tapes. I think,
in this instance, it may have been from a VHS. But, in any event, the approval was granted to make a copy that is available on the website and to students both in the distance education and face-to-face versions of the class. I’d be happy to go through and review the files a bit more closely and see if I could find something that is more directly on point to the particular question. But certainly there have been requests granted that involved copying.

GENERAL COUNSEL CARSON: Okay. While we’re on that subject, does anyone here have any knowledge of the practices of the other motion picture studios? Are they similar to Time Warner? Does anyone know in this respect?

MR. HERMAN: I have a story from an article that’s either just coming out or has come out. It’s by Stretchers and McLeod and it’s in a journal called Cultural Studies. I’m confident that they would be comfortable with me giving you the full copy of the article. But here’s a story from the article that I think illustrates sort of the concerns on the academic side of things.

“Directors, Rob Epstein and Jeffrey Friedman, who transcribes Russo’s argument from the medium of point to the screen, secured permission for
every clip that they used in The Celluloid Closet. In fact, they sought hundreds of permissions from over 40 different rights holders to use these properties. In the DVD commentary track, Epstein and Friedman implicitly make it clear that this film could not have been made by anyone but privileged Hollywood insiders. They began the rights clearance process by writing letters to the studios. But after these businesses did not respond, they grew increasingly frustrated and angry.” And the authors are quoting the words of these directors here. “Frustrated and angry. “Normally this would spell the end of a production before it got off the ground. But one of the film makers grew up ‘in the business’ and knew many of the studio heads. So, with a few phone calls to some key executives, the directors cleared the rights to many of the clips that Russo describes in his book. Many, but not all. In the same commentary track, the directors openly discuss numerous examples of parts of the book that were self-censored out of the film because they could not obtain the rights.”

And I feel like this description, combined with the second-hand story that I gotten from Joe Turow himself, in describing the assemblage of clips for a five minute documentary called Primetime
Doctors, Why Should You Care, which has perhaps two to three minutes total worth of five clips from old TV shows and movies, and the way the Robert Wood Johnson Foundation spent $17,500 for clearing these clips for something that was merely distributed for free as an educational tool to doctors, so they could better understand how media framing and media representation of doctors will shape patient expectations.

I think when you combine these written stories as well as a lot of specific experiences that people have had, you see that -- I express great skepticism towards claims that academics can approach rights holders and say, hey, you know I’d like to use this in this or that context and just clearly -- it clearly would be fairest, but I just want to clear it with you first in advance and then have that not -- our experience has not been that that’s easy or cheap.

GENERAL COUNSEL CARSON: Yes. I’m sorry.

Can you state your name again?

PROFESSOR SENDER: My name is Katherine Sender. I’m a colleague of Peter’s at the University of Pennsylvania. I also agree that I think licensing goes against the spirit of fair use and even in the case of getting licenses, I mean, my trying to get a license to use a piece of music in a video, it took me
two months to even find out who owned the licenses even though there are two centralized agencies that are supposed to issue this kind of information. And, particularly when there’s no profit involved, these companies have absolutely no motivation to give licenses.

And, in terms of the time delay, when we’re planning classes, we’re often assembling materials, you know, the day before, the night before, the morning of. If we want to use something in class, obviously we’re not going to have time to then go and say, okay I need to get a license to use this clip. So I think -- licensing I think is anti-fair use and I also think it’s incredibly impractical.

GENERAL COUNSEL CARSON: All right. But just continue on that. Professor Decherney or Professor Sender, have you ever actually sought permission from a motion picture studio to do what you think you need to do in order to present film clips to your classes?

PROFESSOR SENDER: I haven’t. No.

GENERAL COUNSEL CARSON: Mr. Decherney?

PROFESSOR DECHERNEY: No. It would never occur to me. What we do is using fair use in a very clear various contacts, and --
GENERAL COUNSEL CARSON: We get the fair use point, but given that we’re dealing with Section 1201 here and you’re asking for an exemption from Section 1201(a)(1), the question is, has it ever occurred to you and have you acted on if it has occurred to you to go to the rights holders and say, hey, would you please give me permission to circumvent so I can engage in this fair use?

PROFESSOR DECHERNEY: It’s not actually something that occurred to us until we read the reply comment and we’ve actually had a research assistant contacting Warner and trying to find out the details of the licensing agreement, and actually have not been able to get very far in the three or four weeks that we’ve been working on it.

GENERAL COUNSEL CARSON: Maybe you should talk to Ms. Aistars.

MS. AISTARS: I would be real interested as to who you spoke with because the files of letters that I’ve looked at typically get turned around in one business day, so the requests that I’ve seen are, you know, very quickly acted upon. So, if you need a contact I could put you in touch with our Director of Still Licensing.

PROFESSOR DECHERNEY: I’d really like to
hear more about it, yes.

MS. AISTARS: Only one other thing that I wanted to say just to be clear. We’re talking about licensing and how expensive it is and so forth. At least with regard to the approvals that I’ve referenced, they haven’t been fee-based licenses, they’ve typically been no objection letters or letters pointing the professor to either the classroom exemption requirements or something along those lines. So, in most events they’ve been entirely free.

GENERAL COUNSEL CARSON: Great. Ms. Benedetto, the Pioneer device that you showed us, I believe that it accommodates one DVD at a time, is that correct?

MS. BENEDETTO: That’s correct.

GENERAL COUNSEL CARSON: Now, are there similar devices that would accommodate more than one DVD at a time?

MS. BENEDETTO: There are carousel players with these particular features. The advanced interactive features that I showed you other than the play list, no.

GENERAL COUNSEL CARSON: Okay. So, if you want to do -- assuming that you were teaching a class and you’re talking about more than one film, aren’t
you really constrained in how you can do that since you’ve got to be flipping DVDs back and forth in the device?

MS. BENEDETTO: It does require you to manually change them. Yes.

GENERAL COUNSEL CARSON: And there are going to be delays, that at least in the course of the classroom, are going to be rather significant, aren’t there when you do that?

MS. BENEDETTO: Yes. It does depend on the disk. I mean, the disk also -- I mean, obviously it’s the time to change to the disk and some disks require you to watch the FBI copyright, some do not, so some of them allow you to get right to the content immediately.

GENERAL COUNSEL CARSON: Okay. Professor Decherney, one of the things you talked about, in terms of why you need to do things the way you’re doing them, is the side-by-side presentation. How often is that a techniques that you use in your classes?

PROFESSOR DECHERNEY: It’s hard to quantify it, but it’s something I do at least two or three time in a lecture, and I give two lectures in a class a week. So, say six times or so a week. Or, if
it’s two classes, 12 times a week.

GENERAL COUNSEL CARSON: Good. That’s all my questions.

MR. BAND: If I could comment specifically to a point that Mr. Attaway was making before about the quality issue. You know, ever since I’ve been a small kid, I’ve been watching the Academy Awards and they’ve always had all these awards for these categories that I never quite understood. Sound effects, sound editing, cinematography, all kinds of other issues about visual editing, and, you know, I can’t understand the distinctions,

I guess Mr. Attaway’s point is, you know, that’s kind of just a sham. I mean, there’s really no reason to give people all these different Academy Awards because all those quality issues really are irrelevant, and there’s no need to teach the next generation of American film makers any of those techniques, because they really, at the end of the day, are irrelevant. They’re these, you know, kind of high quality issues that only point to headed academics like Peter Decherney worry about. Or I guess, some members of the Academy worry about, but it really isn’t important. I just wanted to make that point. Thank you.
REGISTER PETERS: Okay. I just have a couple of questions. One has to do with, you are looking for an exemption for educational uses. What exactly do you mean by educational uses? What’s the scope that you’re talking about?

PROFESSOR DECHERNEY: Again, that’s not --

REGISTER PETERS: I know it comes from a university or college library. That’s the source of the audiovisual work.

PROFESSOR DECHERNEY: Right. So, yes, there are other things delimiting the scope, So, this would be DVD and DVD clips available to only to professors who are going to use them within lectures, as the way that it’s primarily used now. It’s possible that they could be used even in a broader context than that. So, for example, we use clips from books, you might say, right. And those can be distributed to students in a variety of ways through -- keeping them within a classroom context. So, for text, we use authenticated software and a program called Black Board to make text available. And so there’s nothing in the exemption as it’s written now that I think would preclude that.

REGISTER PETERS: You’re not talking about distance education?
PROFESSOR DECHERNEY: No.

REGISTER PETERS: Okay. So, you’re totally not using Section 110(2), which is available for distance education. But just in class, in --

PROFESSOR DECHERNEY: In class, “on the ground” as it’s called, context.

REGISTER PETERS: Okay. Can I ask --

PROFESSOR DECHERNEY: You’ll have to refer back to a clip or to use it while taking a test for example.

REGISTER PETERS: So the clips are stored on a class website?

PROFESSOR DECHERNEY: No. Right now they’re stored on a private hard drive within the department context. But, I’m just thinking about the broader implications of the exemption and there might be ways of using the clips in educational context within a classroom context.

REGISTER PETERS: Okay. The exemption that, with regard to derivative and collective works, which contain audio works that are in the public domain, I assume you’re looking for something very similar. And I guess my question is -- you’re point is that you have a right to get at the public domain material, but the derivative or collective work itself
may well be copyrighted work, so you want to
circumvent that. Does it matter whether or not
there’s any other way to get the public domain
material?

PROFESSOR DECHERNEY: For the most part,
I mean, all the same concerns arise about quality and
the kinds of objects we’re looking at. But in
addition, it’s often less likely that public domain
works are available in any other context. We just --
for example, Keno video was one company that’s
specialized in presenting classic films, many of which
are in the public domain. I submitted just a list of
DVDs that they distribute that are of great
educational use. In fact, those are I use DVDs more
highly, more frequently than any of the others, I
would say. And they’re all on DVDs in which they’re
bundled with copyrighted content. I know in previous
rule makings there’s been a discussion about whether
or not works in the public domain could be available
on DVD and not encrypted while copyrighted work could
be encrypted. And while that sounds good, it’s almost
impossible to find a public domain film that doesn’t
have a copyrighted soundtrack added to it when it’s
released on DVD. So, that would be another question
I guess, whether or not the soundtrack could be
separate from the image track.

REGISTER PETERS: I know the Library of Congress, when it was doing some experiments, did them without the soundtracks because we couldn’t clear the rights on them. With regard to like, really works that are extremely old, let’s say no soundtracks, silent films, is it possible that, like, places like UCF, a film archive or the Library of Congress room archive are a source, or are you really just focusing on material that’s been brought out commercially in a DVD format?

PROFESSOR DECHERNEY: In order for UCLA, the UCLA film archive, to restore something, they often make a commercial agreement to release it on DVD proof, Keno video or another collection. There actually are one or two exceptions, so like, Treasures from the Archive is a great one. That’s organized through the National Film Preservation Fund and that’s not a CSS encrypted DVD. But that’s a very special case and it’s only two brief collections of films. But most films restored by UCLA or The Eastman House in Rochester are made commercially available with CSS encryption.

REGISTER PETERS: Okay. I don’t have any other questions.
LEGAL ADVISOR TEPP: Most of mine have been asked so I only just got this one quick one. Professor Decherney, the CD switching that’s been discussed and some other work-arounds, would you characterize those options as better than nothing?

PROFESSOR DECHERNEY: Yes.

LEGAL ADVISOR TEPP: Thank you very much.

PROFESSOR DECHERNEY: Is that it?

LEGAL ADVISOR TEPP: That’s it.

REGISTER PETERS: Okay. I want to thank all of you. It was extremely helpful even if extremely long. But your testimony was very helpful to us. I’m sure we’ll have additional questions so I’m sure probably all of us -- all of you will be hearing from us. But with that, I hereby declare the hearing closed. Thank you.

(Whereupon, the above-entitled matter was concluded at 1:49 p.m.)