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SIXTH TRIENNIAL 1201 RULEMAKING HEARINGS

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Reported by: Christine Allen,  
Capital Reporting Company

1 A P P E A R A N C E S

2

3 United States Copyright Office:

4 JACQUELINE C. CHARLESWORTH, General Counsel

5 MICHELLE CHOE, Ringer Fellow

6 JOHN RILEY, Attorney-Advisor

7 STEVE RUWE, Assistant General Counsel

8 REGAN SMITH, Assistant General Counsel

9

10 Also Present:

11 STACY CHENEY, Senior Attorney, NCIA,  
12 U.S. Department of Commerce

13 BRANDON BUTLER, Glushko-Samuelson  
14 Intellectual Property Clinic,  
American University

15

16 JONATHAN BAND, Library Copyright Alliance

17 PETER DECHERNEY, University of Pennsylvania

18 BRUCE TURNBULL, Advanced Access Content System

19 DAVID TAYLOR, DVD CCA

20 MATT WILLIAMS, MPAA, ESA, AND RIAA

21 RENEE HOBBS, Harrington School of

22 Communication and Media,

23 University of Rhode Island

24

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1 P R O C E E D I N G S

2 (9:05 a.m.)

3 MS. CHARLESWORTH: Good morning,  
4 everyone, and welcome. Welcome back to those of  
5 you who may have been here before, and welcome to  
6 our newcomers here at the Sixth Triennial Section  
7 1201 Rulemaking proceeding.

8 I'm Jacqueline Charlesworth, General  
9 Counsel of the Copyright Office, and my colleagues  
10 and I will be presiding over this hearing today.  
11 I'm going to ask them to go down the row and  
12 introduce themselves so you know who they are.

13 MS. CHOE: Michelle Choe, Ringer Fellow.

14 MS. SMITH: Regan Smith, Assistant  
15 General Counsel.

16 MR. RUWE: Steve Ruwe, Assistant General  
17 Counsel.

18 MR. RILEY: John Riley, Attorney-  
19 Advisor.

20 MR. CHENEY: Stacy Cheney, Senior  
21 Attorney at NCIA, U.S. Department of Commerce.

22 PROPOSED CLASS 1:

23 AUDIOVISUAL WORKS--EDUCATIONAL USES--

24 COLLEGES AND UNIVERSITIES

25 MS. CHARLESWORTH: So, we're starting

1 off the day with proposed Class 1, which is  
2 audiovisual works -- educational uses in colleges  
3 and universities.

4 I just want to say that the format we've  
5 been following is to sort of allow everyone to  
6 make a brief opening statement, which we sometimes  
7 interrupt with questions when you say something  
8 particularly intriguing to us. So sometimes, it  
9 turns into a bit of a dialog. But we've found  
10 that that's a good way to explore the issues.

11 And in sort of making your comments, we  
12 would suggest that you sort of focus on the areas  
13 that seem to be the most in contention or perhaps  
14 debatable.

15 We've all read your written comments,  
16 and so we're familiar with the general comments  
17 that you've submitted. And the point of the  
18 hearing is really to explore and clarify the  
19 record and perhaps add to the record in areas  
20 where we felt that we didn't have enough  
21 information. So, that's what we'll be focusing on  
22 today.

23 You all have microphones, it looks like.  
24 When the light is red, it's on. And we try not to  
25 talk over one another. Sometimes, things get very

1 exciting. So if that happens, you know, we'll try  
2 to calm down for the court reporter, who is taking  
3 down your testimony today.

4           Some of you have brought exhibits. And  
5 if you're speaking about those exhibits, it's  
6 helpful for the record if you can refer to them by  
7 the exhibit number. And we'll help you do that if  
8 we remember to.

9           I guess that's about it. Before we  
10 begin with the openings, I'm going to ask everyone  
11 seated over there, all of our witnesses, to  
12 identify themselves and the organization or  
13 interest they represent, for the record.

14           MR. BUTLER: I'm Brandon Butler, and I'm  
15 with the Glushko-Samuelson Intellectual Property  
16 clinic at AU. And I'm here on behalf of the Joint  
17 Educators.

18           MR. BAND: Jonathan Band for the Library  
19 Copyright Alliance.

20           MR. DECHERNEY: Peter Decherney, from  
21 the University of Pennsylvania. I'm here on  
22 behalf of the Joint Educators.

23           MS. CHARLESWORTH: Yeah, I forgot to  
24 mention one thing about the mics, which is if you  
25 can -- yes, turn it off, exactly your impulse

1 there, when you're not using it. Because I think  
2 we can only have four or so of them on at a time  
3 before something really bad happens.

4 Okay. Mr. Turnbull.

5 MR. TURNBULL: Yes Bruce Turnbull,  
6 representing the Advanced Access Content System,  
7 Content Protection System for Blu-ray.

8 MR. TAYLOR: David Taylor, representing  
9 DVD CCA.

10 MR. WILLIAMS: Matt Williams for MPAA,  
11 ESA, and RIAA.

12 MS. CHARLESWORTH: Okay. I tend to  
13 follow a left-to-right format, so we're going to  
14 start with you, Mr. Butler.

15 MR. BUTLER: Great. So, in a moment, my  
16 colleague, Peter Decherney, is going to say a  
17 little bit about why Class 1 is helpful to  
18 educators. But I wanted to say a little bit about  
19 why these uses are lawful. So, in the spirit of  
20 proceedings, I focus on three points that I think  
21 are maybe controversial.

22 The first one is that the most important  
23 thing about all of this is to understand that the  
24 uses that Class 1 describes will very, very likely  
25 be transformative fair use. They are core fair



1 uses.

2           My second point will be that short  
3 portions has never been the law of fair use and is  
4 not necessary to ensure that the uses permitted by  
5 this class will be tailored to the purpose.

6           And my final point will be that close  
7 analysis is also not the law of fair use and is an  
8 artifact of the last cycle of this proceeding, and  
9 it's probably time to let it go.

10           MS. CHARLESWORTH: We like artifacts  
11 sometimes, Mr. Butler.

12           (Laughter.)

13           MS. CHARLESWORTH: They're there for a  
14 reason.

15           MR. BUTLER: Hey, I work with libraries.  
16 We love artifacts.

17           So, first, the uses described by Class 1  
18 will very, very likely be transformative. Of  
19 course, every use under Class 1 will be  
20 educational, and I'll talk about why that's  
21 important, in a minute. But just as importantly,  
22 they will be for criticism or commentary.

23           Criticism and commentary, as we all  
24 know, are core transformative fair use purposes.  
25 By their nature, criticism and commentary are not

1 substitutional, right? They are productive. They  
2 use existing materials as building blocks. This  
3 is exactly at the heart of the things that Judge  
4 Leval wrote about in his article, that the  
5 justices favored in Campbell. These are the core  
6 First Amendment-type uses that the courts have  
7 said it is vital that fair use protect because,  
8 again, they are critical, they are commentary.

9           It's also quite significant, though,  
10 that this criticism and commentary is happening in  
11 an educational context. It's important from a  
12 fair use point of view because, again, education  
13 is the purpose, and education relative to  
14 entertainment, of course, is different. Right?  
15 And transformativeness in the fair use context is  
16 a function of the relationship between the purpose  
17 of the user and the purpose of the creator.

18           MS. CHARLESWORTH: Are you saying that  
19 every use in an educational setting is  
20 transformative?

21           MR. BUTLER: No. What I'm saying is  
22 that when someone takes something that was not  
23 made for an educational purposes and then uses it  
24 in an educational setting, that use will very  
25 likely be transformative, assuming that the other

1 factors are also satisfied. So, when courts look  
2 at whether use is transformative, they also ask,  
3 for example, whether the amount taken was  
4 appropriate to the transformative purpose. Right?

5 So, you can say, "Well, I use it for  
6 education." Yeah, sure. But did you need that  
7 much for education? And if you didn't need that  
8 much, but you used that much anyway, you're in  
9 trouble. Right?

10 And that actually brings me to my next  
11 point. The short portion requirement is not the  
12 law of fair use and has never been the law of fair  
13 use, and we all know that, right? The amount  
14 factor is only one of the four factors. And if  
15 you look at the last two major Supreme Court  
16 decisions dealing with fair use, you see a  
17 striking -- two striking examples where the  
18 outcome was completely untethered from quantity,  
19 right?

20 MS. CHARLESWORTH: Are you talking about  
21 Campbell, because Campbell certainly --

22 MR. BUTLER: Campbell and Harper and  
23 Row.

24 MS. CHARLESWORTH: -- is remanded on the  
25 issue of quantity.

1           MR. BUTLER: It remanded on the issue of  
2 quantity, but the court said quite explicitly  
3 that, with a parody, it is necessary to take  
4 considerably more, right, than you might have to  
5 take for other uses.

6           MS. CHARLESWORTH: No, he said -- you  
7 need to conjure -- you know, with parody, the  
8 general rule is enough to, quote, "conjure up" the  
9 original. But it said you had to evaluate how  
10 much of it you needed to take in the context of  
11 the use. It didn't say you have to take a lot  
12 more. I don't recall that language in Campbell.

13           MR. BUTLER: Well, I'm paraphrasing, of  
14 course. But it's --

15           MS. CHARLESWORTH: Well, I think it's --  
16 yeah. Okay. Right. We have a little  
17 disagreement there.

18           (Laughter.)

19           MR. BUTLER: The question is, parody, of  
20 course, requires more than, for example, to parse  
21 a single sentence from a poem, right, to parse a  
22 single line. And so, I mean, just listen to the  
23 two songs side by side, right? The core of the --

24           MS. CHARLESWORTH: I think it depends on  
25 the work.

1 MR. BUTLER: Okay. Fair enough.

2 So, anyway, you get the idea, right,  
3 that that actually is my larger point, is that it  
4 depends from work to work. Right? From work to  
5 work and from use to use, the question of how much  
6 is appropriate is a function of the facts of each  
7 particular case.

8 MS. SMITH: Have you submitted any  
9 examples in the record where, of the necessity for  
10 more than short clips or where the current  
11 exemption was insufficient?

12 MR. BUTLER: Well, that actually brings  
13 me to another problem with the short portions  
14 language. That is, we submitted, not intending to  
15 make this point, but our friends intervened and  
16 helped us to make this point. We submitted an  
17 example that we thought was surely going to  
18 satisfy the current exemption, which was Dr.  
19 Wallace's use of what, from our talking with him,  
20 we believed to be short portions. But he  
21 described them as longer excerpts.

22 And we used that language. We said,  
23 "Well, longer excerpts." Can something be both a  
24 longer excerpt and a short portion? I think so. I  
25 think that a longer -- there are longer and short

1 short portions, right?

2 But the problem is all of this is very  
3 vague and subjective. And so, that's another  
4 reason that we're worried about the short portions  
5 language. Someone like Dr. Wallace might say,  
6 "Well, gosh, I think this is short relative to the  
7 whole thing." But will someone think it's short  
8 relative to some other standard? I don't know  
9 what "short" means.

10 MS. CHARLESWORTH: Well, here's the  
11 thing. I mean, I saw this in L.A. when we were  
12 evaluating this sort of use in a different  
13 context. When we write these exemptions, I mean,  
14 I know you're saying, "Just say it's fair use."  
15 But that's sort of just a circular, certainly  
16 very, doesn't give a lot of guidance. We have to  
17 write exemptions.

18 One of the tricks of this proceeding and  
19 one of the difficulties, frankly, is that we're  
20 not a court here looking at a specific use in a  
21 specific context. And so, we have to try to  
22 decide, speak a little bit more in generalities,  
23 but give some guidance to the public in terms of  
24 what conduct is permitted.

25 And overall, the record has shown, at

1 least in past proceedings, and we'll certainly  
2 discuss this more today in terms of the length,  
3 but that, you know, by far it's much more likely  
4 to be a fair use if it's a short clip, right, than  
5 a long portion or an entire, say, motion picture.  
6 And the record has supported the short clips  
7 approach.

8           And it also, I think, at the same time,  
9 the language is not so specific that there's not  
10 some room for interpretation, which helps the  
11 people that you represent. In other words, we  
12 didn't say 15 seconds or 30 seconds. So, and  
13 probably a short clip of a 10-minute video would  
14 be different from a short clip from an entire, you  
15 know, two-hour motion picture. So it does provide  
16 some flexibility there.

17           So, that's sort of the background, you  
18 know, from which we approach this. And, you know,  
19 setting a standard that has no standard is  
20 somewhat troubling because where the law, 1201,  
21 instructs us to at least be specific and targeted  
22 in the exemptions that we provide, and also that  
23 you have to show a substantial likelihood that  
24 it's a fair use, basically. So that's the  
25 challenge that we have here.

1           So, with that, you may continue.

2           MR. BUTLER: Yeah, so I certainly  
3 understand that. And so, the question is, what  
4 could the criteria for length be that would be  
5 suitably flexible? And I think what I'm  
6 suggesting is that actually requiring that the use  
7 be for purposes of criticism or commentary has  
8 built into it, by amplification, and of course,  
9 you could make this explicit in the final rules,  
10 that the length should be appropriate to that  
11 purpose.

12           MS. CHARLESWORTH: But how would that  
13 keep someone from using an entire motion picture?  
14 I mean, if you were just saying, "I'm going to  
15 comment on this. I'm going to give you a 10-  
16 minute lecture, and then we're going to watch the  
17 -- I'm going to copy and rip this film and we can  
18 all watch it together."

19           MR. BUTLER: Reasonable people know,  
20 right, that you don't need to watch an entire film  
21 in order to develop the criticism and commentary  
22 that's needed in the classroom.

23           MS. CHARLESWORTH: Well, I mean, I don't  
24 know that that's true. I mean, for one -- well, I  
25 don't know that that's necessarily the case that



1 everyone would be -- I mean, I don't understand  
2 why you would say that. I mean, a reasonable  
3 person could think, "I'm going to lecture, I'm  
4 going to comment on sort of the general, whole  
5 trajectory of this film, and then we're going to  
6 watch it, or we're going to" --

7 MR. BUTLER: Well, and then you could  
8 have that argument. This is how courts do fair  
9 use, right? I mean, this is what courts do when  
10 they're deciding whether that use would be fair.

11 And so, the rights-holder who thinks  
12 this is a violation of the DMCA and that it  
13 doesn't qualify for this exemption would go to  
14 court. And they would do exactly what they did as  
15 they were litigating the fair use question and the  
16 infringement question. They would say, "Look. If  
17 you balance the use and the amount against the  
18 purpose, it's clear that the purpose is not --  
19 that their claim about a critical or commentary  
20 purpose is not believable."

21 And again, the scholarship on fair use  
22 shows that this is what courts have been doing  
23 since Folsom against Marsh. Folsom against  
24 Marsh involves the question of whether the amount  
25 used in the abridgement of the George Washington

1 biography was a reasonable amount, given that the  
2 purpose was to create a fair abridgement, right?

3 MS. CHARLESWORTH: But that's not the  
4 question before us. The question before us is  
5 whether something, looking at these uses as a  
6 whole, what they're likely to be a fair use. I  
7 understand in an individual case. Although I have  
8 to say, an individual case, an educator who goes  
9 to court and says, "I copied a home movie," and  
10 said, you know, "presented it to my classroom,"  
11 I'm not sure they would win that.

12 MR. BUTLER: Sure.

13 MS. CHARLESWORTH: It would depend on  
14 the circumstances. It seems in many cases  
15 unlikely they would win that case. That's the  
16 issue.

17 So that's why the exemption reads the  
18 way it is. I mean, I'm curious to know if you  
19 have any other sort of -- you know, you were  
20 talking about your narrowing language. In lieu of  
21 short clips, what would you be proposing?

22 MR. BUTLER: Well, another alternative -  
23 - again, I mean, you won't be much happier with  
24 this, I'm afraid. But again, appropriate amount,  
25 something that makes clear that the amount should

1 -- or a tailored amount.

2 MS. CHARLESWORTH: Is what you're  
3 driving at an amount that's the amount needed to  
4 engage in the criticism or commentary?

5 MR. BUTLER: Yes. That's exactly right.

6 MS. CHARLESWORTH: Is that the idea?

7 MR. BUTLER: Yeah, Yeah.

8 MS. CHARLESWORTH: Okay.

9 MR. BUTLER: And so, you could go from  
10 appropriate to tailored, and even tighter, you  
11 could say necessary. That, of course, is much  
12 tighter than fair use. Fair use doesn't require  
13 that it be necessary. But if you wanted to go  
14 tighter, that's somewhere you could go.

15 MR. RUWE: Could you, could we go back  
16 to Regan's question about negative impacts that  
17 may have been realized from the current exemption?  
18 You pointed to Dr. Wallace's example. But it  
19 seems like -- and you argue that the current  
20 exemption is vague. But it seems as if it was  
21 specific enough for him to rely upon it.

22 MR. BUTLER: It was, but now we have  
23 someone saying, on the record in this high-profile  
24 proceeding, that he was wrong.

25 (Laughter.)

1                   MR. BUTLER: And now his general counsel  
2 might read that and other general counsels at  
3 other universities might read that. And they're  
4 all going to wonder now, "Well, what is a short  
5 portion? What's going to be" --

6                   (Cross-talk.)

7                   MR. RUWE: We also have you on record  
8 saying that, obviously, short portion is relevant.  
9 And you could have a short portion from a long  
10 piece. So I don't know that we're finding that it  
11 is not something that can be relied upon,  
12 reasonably.

13                  MR. BUTLER: Yeah. And look. I work in  
14 a clinic. I love to work with nice people, and  
15 professors are nice people. So if they want to  
16 all come and seek my advice, that would be  
17 fantastic. But we have a really small bandwidth to  
18 help people.

19                  And my concern is that I'm really -- I'm  
20 really happy to talk with people about what a  
21 short portion is and to hear them out, and we do  
22 this kind of work all the time. But a lot of  
23 people don't have access to those resources. And  
24 a lot of people, if you read again the listservs  
25 that professors and librarians are on where they

1 talk about this stuff, you know, they'll say,  
2 "What is a short portion? How do you guys define  
3 a short portion?"

4 I don't know. This is the kind of thing  
5 -- it's like putting a grain of sand in an oyster,  
6 right? They worry and fret.

7 MS. CHARLESWORTH: But wouldn't they  
8 just be fretting, though, over what was fair use  
9 under your standard? I mean, what do you -- I  
10 don't understand.

11 MR. BUTLER: No, because --

12 (Cross-talk.)

13 MS. CHARLESWORTH: I mean, and under any  
14 standard --

15 MR. BUTLER: My standard is indexed to  
16 their purpose. And they know what their purpose  
17 is.

18 MS. CHARLESWORTH: Right.

19 MR. BUTLER: And they understand, again  
20 because they're educators, they know how to design  
21 a lesson plan. Right? So they know how to design  
22 a course that involves -- a really nice example  
23 that I recently encountered was at a conference  
24 about clinical teaching. There was a whole  
25 session about how to use multimedia in your

1 clinical teaching.

2           And of course, I went with sort of two  
3 hats on, curious to see what they'd say. And I  
4 was delighted to see what they said. There were  
5 all of these wonderful examples of transformative  
6 uses of pop culture.

7           For example, the one that really stuck  
8 out to me was the TV show, "The Guardian." I  
9 mean, there are million TV shows about lawyers,  
10 which is great for us. And in the TV show, "The  
11 Guardian," there was a really nice clip that they  
12 showed of the main character, the sort of  
13 attractive, charismatic dude, meeting a client for  
14 the first time and really doing an awful initial  
15 client interview.

16           And then, you know, you pause the clip,  
17 and then you talk about what he did wrong. Right?  
18 This is not the purpose of the television show,  
19 right? We are clearly in transformative land. And  
20 it was a really generative discussion. And they  
21 knew intuitively how much was the right amount to  
22 make that point.

23           MS. CHARLESWORTH: And how much did --

24           MR. BUTLER: Right? She stopped it as  
25 soon as they moved on to the next aspect of the

1 plot. We're done with the client interview. The  
2 client interview is the part that I care about.

3 Now, in this case -- I see you nodding -  
4 - this was, I would say, clearly a short portion.  
5 But she didn't have to even -- and she didn't  
6 think about -- she would have had to and she did  
7 have to, and I told her afterward, "You're lucky;  
8 that was a short portion."

9 My point is that she shouldn't have to  
10 worry about whether that was a short portion. She  
11 should only worry about whether it was good for  
12 her teaching. And if it is, it's fair.

13 MS. CHARLESWORTH: That is not the law.

14 MR. RUWE: Was she lucky or --

15 MS. CHARLESWORTH: Excuse me. That is  
16 not the law, Mr. Butler. The law isn't that if  
17 you're using it in a classroom it's fair. That is  
18 just not the law.

19 MR. BUTLER: That is not what I said.

20 MS. CHARLESWORTH: Well, you're saying  
21 the test you --

22 MR. BUTLER: I appreciate that.

23 MS. CHARLESWORTH: No, you just said  
24 she's using it for her teaching and therefore she  
25 doesn't have to worry about it.

1 MR. BUTLER: She's using it for her  
2 teaching, and it was not made for her teaching.  
3 And therefore, she doesn't have to worry about it.

4 MS. CHARLESWORTH: Okay. That's not the  
5 law.

6 MR. BUTLER: Okay.

7 MS. CHARLESWORTH: Do you want to finish  
8 your remarks?

9 MR. BUTLER: Yes, it is. Thank you.

10 MS. CHARLESWORTH: Mr. Band.

11 MR. BAND: Thank you. I'll just make a  
12 few brief points, and I will try not to repeat  
13 myself too much during the four hearings today.

14 First, the opponents don't oppose  
15 renewal of the existing exemption. So, what we're  
16 talking about today is the possible extension of  
17 the exemption to make it work better for higher  
18 ed.

19 Second, much of the opposition's focus  
20 is on the issue of quality and how the highest-  
21 quality material is not necessary for many, if not  
22 all, educational uses. My friends on the other  
23 end of the table have made this argument before,  
24 and it makes no more sense now than it did  
25 previously. If high quality doesn't make a



1 difference, why do they sell high-quality formats,  
2 such as Blu-ray? Either they think there is some  
3 advantage to these high-quality formats, or Blu-  
4 ray is just a marketing ruse to get gullible  
5 members of the public to spend more for  
6 essentially the same products.

7           And assuming that they think there is  
8 some advantage to high-quality formats, why should  
9 those advantages be available only for  
10 entertainment uses and not educational uses?

11           Similarly, if the quality of copies made  
12 with screen-capture technology is adequate, then  
13 why do they bother with any technological  
14 protections? Why are we here? Let me just say  
15 that the screen- capture exemptions should be  
16 renewed because screen capture may involve  
17 circumvention.

18           I'll just close with a personal  
19 anecdote. I purchased a 60-inch TV earlier this  
20 year, and for certain programs the picture looked  
21 distractingly artificial. I consulted the most  
22 knowledgeable person I know about image quality,  
23 Peter Decherney, and he explained that this is  
24 what is called "the soap opera effect," and it's  
25 caused by a motion- smoothing setting that I could

1 turn off. I did so, and now the image looks  
2 correct.

3           The point is that image quality makes a  
4 difference. If the image doesn't look right, it  
5 doesn't have the impact on the viewer that the  
6 author intended. Indeed, if the image doesn't  
7 look right, the viewer might not see anything at  
8 all other than a distorted image. And that really  
9 would have a negative impact on the educational  
10 purpose of the use. Thank you.

11           MS. CHARLESWORTH: Mr. Band, do you  
12 think, I know last time there was a distinction  
13 between close analysis, you know, film studies  
14 type uses and just general illustrative purposes.  
15 I mean, what's your view on that? I mean, that  
16 was based on the record in terms of the need for  
17 high quality versus, you know, in some cases  
18 versus other instances where, say, you're just  
19 showing a clip to illustrate an historical event  
20 and people aren't really focused on the nuances of  
21 the film as much.

22           MR. BAND: Well, it's interesting that  
23 you bring up the historical event. So, when  
24 "Saving Private Ryan" came out, the Steven  
25 Spielberg movie about D-Day, I mean, there was

1 this huge discussion about the opening sequence,  
2 which is the invasion of Normandy on D-Day, and  
3 how graphic it was and how, you know, it sort of  
4 felt like you were there.

5           Now, imagine you are in history class or  
6 military history class and the point is to have  
7 the students try to experience what it was like to  
8 be a soldier at D-Day. Well, trying to have the  
9 highest quality possible, what is most similar to  
10 what the original, sort of the motion-picture-  
11 theater experience, would give these students a  
12 much better appreciation than sort of a low-  
13 resolution low-sound- quality experience.

14           So, I think the close analysis is  
15 unnecessarily limiting. And I think you could  
16 find many, many other examples where, even though  
17 it's not a film class, that there is a certain  
18 point and certain poignancy of having it be  
19 true to what the filmmaker did and trying to have  
20 the same impact that the filmmaker intended to  
21 have.

22           So again, you know, D-Day in "Saving  
23 Private Ryan" is one example, but, you know, there  
24 are many others.

25           MS. CHARLESWORTH: Do you think there

1 are examples -- and, you know, taking your point  
2 that in that case there was an interest in -- your  
3 hypothetical, I guess, there was an interest in  
4 conveying sort of all the -- as much immediacy and  
5 kind of authenticity or whatever to the students  
6 as possible.

7           Do you think there are some uses,  
8 though, where that really is not necessarily  
9 required in terms of the educational purpose?  
10 Would you concede that every classroom experience  
11 would require that, sort of the high-res or high-  
12 def experience for the students?

13           MR. BAND: Well, I suppose you could  
14 come up with some examples. But then, I would put  
15 to you, why would we need to bother with that  
16 limitation? In other words, why make it so  
17 difficult for educators to apply this exemption?  
18 Why make it such that they would need to have an  
19 exemption which is so technical and so limited  
20 that it's hard to use?

21           MS. CHARLESWORTH: Well --

22           MR. BAND: I mean, I think the point is  
23 that there's never been any -- no one has been  
24 able to show any infringement resulting from any  
25 of this. And so, why make it difficult? Why not

1 make it easy for educators? I mean, everyone  
2 talks about there being an education crisis in  
3 this country. Let's make it easy for the  
4 educators instead of having them try to parse out,  
5 "What quality do I need for this particular clip?  
6 You know, is it okay to use Blu-ray? Or would it  
7 be okay?"

8 I mean, why not just say, "Just do it"?  
9 And that would save yourselves time. It would  
10 save educators time. And it would have zero  
11 impact on infringement.

12 MS. CHARLESWORTH: Okay. Well, we'll  
13 hear from the other side of the room on that. I  
14 mean, there is significant concern on the part of  
15 the opponents here about, particularly about Blu-  
16 ray. But we'll hear from them in response to your  
17 inquiry.

18 Mr. Decherney.

19 MR. DECHERNEY: Yeah. I'm just going to  
20 pick up on what Jonathan was saying. There's an  
21 interesting reason that "Saving Private Ryan"  
22 comes up, and it's one we talked about in our last  
23 submission.

24 It's a process that uses something  
25 called "bleach bypass." And so, when it printed,

1 it leaves the silver highlight on the film stock,  
2 of which we talked about in our submission. And  
3 according to reviews and filmmakers, that's  
4 actually a process that can be captured on Blu-  
5 ray, but can't be captured on DVD. So that's a  
6 particularly interesting example.

7           Also, we submitted material that show  
8 that there are studies that students, in  
9 particular, feel the impact of image, of high-  
10 definition images; they don't just see the detail.  
11 But there is an emotional, physiological response,  
12 as well. That's been quantified.

13           Yeah. So, I just thought I'd just add,  
14 you know, educators have been playing to harm done  
15 by adding circumvention provisions, at least since  
16 the first 2000 rulemaking, and we haven't seen any  
17 viable alternatives yet. I'm happy to talk in  
18 more detail about the alternatives that have been  
19 suggested, but I think none of them quite meet the  
20 needs of educators.

21           Also, I'd just respond to the question  
22 about whether or not there are ever cases in which  
23 lower quality images are enough. And I would say  
24 there are actually a lot of instances when we need  
25 DVD or VHS. I'm someone who teaches the history

1 of media, and I actually teach those images all  
2 the time.

3           The one I don't teach to the same effect  
4 as the others is Blu-ray because it's banned from  
5 classrooms, at least short portions being used as  
6 excerpts. Yes, now I have to take a DVD disk and  
7 scrub through it. But we've shown in the past  
8 many times now, and it's been conceded by the  
9 opponents, that there is real value, educational  
10 value, to creating excerpts and using them in  
11 classrooms.

12           MS. CHARLESWORTH: And did you have an  
13 exhibit that you wanted to, or a demonstration  
14 that you wanted to make today?

15           MR. DECHERNEY: We have one. Yeah,  
16 sure.

17           MS. CHARLESWORTH: Okay. So, this is --

18           MR. DECHERNEY: What number is the  
19 exhibit?

20           MS. CHARLESWORTH: I think it's Hearing  
21 Exhibit 13. Did you want to present that? Okay.

22           For the record, we received a copy of  
23 that on a flash drive.

24           MR. DECHERNEY: Oh, great. So this is a  
25 Blu-ray, an excerpt from the Blu-Ray version of

1 "Titanic." And you'll see that it could be used  
2 for teaching the history of CGI, computer-  
3 generated images. One of the things you can see  
4 on the Blu-ray in particular is how bad the CGI  
5 actually looked, in retrospect.

6 (Laughter.)

7 MR. DECHERNEY: So, here is the clip.  
8 And particularly, you'll notice the people who  
9 look like Lego figures or like a bad-rendered  
10 videogame.

11 (Hearing Exhibit No. 13 was presented.)

12 MR. DECHERNEY: The other interesting  
13 thing about Blu-ray is that it uses a very  
14 different technology from DVD's. DVD's use  
15 interlaced images, where Blu-ray uses progressive  
16 scan images. And so, as you scrub through the  
17 image, you actually always get a clean frame in a  
18 way you can't from a DVD. So no matter where I  
19 stop, it's always very clean. I see the full  
20 frame. I never have an interlaced issue.

21 So, that's Exhibit 13.

22 MS. CHARLESWORTH: Okay. Thank you. You  
23 don't have a comparison --

24 MR. DECHERNEY: I don't have the DVD  
25 comparison, no.



1 MS. CHARLESWORTH: The DVD? Okay. Is  
2 it your -- I'm sorry. You can return to your  
3 seat.

4 (Pause.)

5 MS. CHARLESWORTH: I had a follow-up  
6 question. Is it your testimony that if we looked  
7 at the DVD version of that, it would look  
8 different?

9 MR. DECHERNEY: Yes.

10 MS. CHARLESWORTH: And can you explain  
11 how?

12 MR. DECHERNEY: Yeah. So you would not  
13 -- yeah, you would see that the -- you wouldn't  
14 see the detail in the figures. And it's actually  
15 that detail that reveals them to be the different  
16 standard than you would see if you went into a  
17 movie today.

18 Also, if you scrubbed through, you  
19 wouldn't get a clean frame every time. You would  
20 be stuck between frames. And they're not even  
21 frames. It's a different process entirely. So  
22 there are horizontal lines. The video and those  
23 lines are replaced by additional horizontal lines  
24 in the DVD. In a Blu-ray you actually see still  
25 images in succession.

1 MS. CHARLESWORTH: Okay. So, in the  
2 Blu-ray clip you just showed us, you were  
3 pointing out that the CGI -- I think that's what  
4 you called it.

5 MR. DECHERNEY: Yeah.

6 MS. CHARLESWORTH: Computer-generated  
7 images --

8 MR. DECHERNEY: Exactly.

9 MS. CHARLESWORTH: -- looked a little,  
10 for lack of a better word, cartoonish or --

11 MR. DECHERNEY: Yeah. They're not  
12 rendered to the same level as they would be --

13 MS. CHARLESWORTH: They didn't look  
14 exactly real, I'll say, to use a scientific term.

15 (Laughter.)

16 MR. DECHERNEY: Yeah.

17 MS. CHARLESWORTH: I just want to home  
18 in on this because we don't have the comparison  
19 here. Are you saying that if we watch that in DVD,  
20 we would not --

21 MR. DECHERNEY: Yes. Please, go look at  
22 the DVD. And I think you'll notice --

23 (Cross-talk.)

24 MS. CHARLESWORTH: It would look more  
25 real? I mean, in other words, or could I see that

1 same thing if I were -- if a film studies  
2 professor was pointing it out?

3 MR. DECHERNEY: Yeah. No, I think it  
4 would look different. It would look like you were  
5 looking at it through a different lens on a  
6 different technology. It's not that one's more  
7 real, one's better than the other. They're  
8 actually different ways of rendering the world.

9 So, when Jonathan wanted to watch his TV  
10 and he had the soap opera effect, he was actually  
11 looking at a better image. So what newer TV's do  
12 is they take -- they actually put in extra frames  
13 to try to make older images, older videos look  
14 better. But our experience of that is actually  
15 that they look different.

16 And so, to Jonathan, to most people,  
17 they look like they're happening on a stage or in  
18 front of you, rather than as they would on a big  
19 screen. So it's not that we're seeing a  
20 continuum, where DVD is here and Blu-ray is here.  
21 They are actually totally different ways of  
22 experiencing media, experiencing the image,  
23 experiencing the world.

24 And so, we're not saying that Blu-ray is  
25 better and it has to be used only because it's

1 better. It just is a different kind of image. And  
2 in many, many cases the access to that image  
3 actually creates a better, or at least it's  
4 definitely a different, educational experience.

5 MS. CHARLESWORTH: Well, I mean, and I  
6 am crossing. In a prior panel, we saw, we heard a  
7 lot of testimony there's just many more pixels --  
8 in other words, it's much higher resolution in  
9 Blu-ray than DVD. And so, the theme of that panel  
10 was it was just basically much higher quality,  
11 much higher resolution, much better detail, all  
12 the things that you kind of associate with HD  
13 versus SD content. Is that not your --

14 MR. DECHERNEY: So, no, so it depends on  
15 your purpose. If you're in a biology class, like  
16 Phil Ray, who we talk about in one of our  
17 submissions, and you want to study cell biology  
18 and you want to see where the plasma membrane ends  
19 and the DNA of nucleotides, it's actually just  
20 going to be better than DVD.

21 MS. CHARLESWORTH: Okay. So you're  
22 saying -- that is something I would call close  
23 analysis, right, that in some cases you want to be  
24 able to see  
25 --

1 MR. DECHERNEY: Right, so that's an  
2 example where close analysis makes it better. The  
3 "Saving Private Ryan" example being used in a  
4 history class rather than a film studies class is  
5 actually about the physiological impact that's  
6 been quantified for showing that example. So if  
7 you wanted to talk about Vietnam or World War II  
8 to students in 2015, they would experience the  
9 Blu-ray differently than they would experience the  
10 DVD, studies have shown.

11 In a media studies class, you might show  
12 a Blu-ray, a DVD, a VHS tape to compare different  
13 ways of representing an image.

14 MS. CHARLESWORTH: In a media studies  
15 class?

16 MR. DECHERNEY: Yes. So those are three  
17 different kinds of classes, three different ways  
18 of using Blu-ray. I'm sorry that seems  
19 complicated, because there isn't one reason for  
20 every class. But that's also partly about  
21 educational disciplines and fair use.

22 MS. CHARLESWORTH: So, in this class  
23 then, is this the only audio-visual exhibit we  
24 have --

25 MR. DECHERNEY: Yes.

1 MS. CHARLESWORTH: -- comparing or to  
2 support your proposal?

3 MR. DECHERNEY: Yes.

4 MS. CHARLESWORTH: Okay. Anything else?

5 MR. DECHERNEY: No. If you want, later  
6 we can talk about the exhibits that have been  
7 submitted from the other side.

8 MS. CHARLESWORTH: Right. I think we'll  
9 be hearing about those. I assume that they're not  
10 there to help your proposal, though.

11 (Laughter.)

12 MS. CHARLESWORTH: Maybe you will find  
13 them helpful; I don't know.

14 MR. DECHERNEY: Well, they're useful to  
15 talk about if you would like to.

16 MS. CHARLESWORTH: No, no, no. We will  
17 let them talk about them first.

18 Mr. Turnbull?

19 MR. TURNBULL: Thank you. And again,  
20 I'm Bruce Turnbull, representing the Advanced  
21 Access Content System here today.

22 I want to make a few points. First, as  
23 a legal matter, I think it's important to go back  
24 to the point that fair use does not require  
25 access to the best quality or any particular

1 format or any particular resolution.

2           The Corley case, and I think actually  
3 the Joint Creators quoted a longer segment of that  
4 than we did in our comments, and I think the  
5 longer segment is actually useful because it  
6 actually goes into some of the uses that we've  
7 been talking about here.

8           And you know, "A film critic" -- this is  
9 from the Second Circuit's Corley decision. "A  
10 film critic making fair use of a movie by quoting  
11 selected lines of dialog has no constitutionally  
12 valid claim that the review in print or on  
13 television would be technologically superior if  
14 the reviewer had not been prevented from using a  
15 movie camera in the theater, nor has an art  
16 student a valid constitutional claim to fair use  
17 of a painting by photographing it in a museum."

18           And then, this is the quote that we use:  
19 "Fair use has never been held to be a guarantee of  
20 access to copyrighted material in order to copy it  
21 by the fair user's preferred technique or in the  
22 format of the original." And I think that's a  
23 very important point in this and a number of the  
24 panels in this proceeding.

25           And the reply comments of the proponents

1 here seem to say, well, no, we've distorted all  
2 this. And I think it's fairly straightforward and  
3 that Corley remains good law. And from the  
4 standpoint of the content protection that is for  
5 Blu-ray disks, it's a very important point, from a  
6 legal matter.

7           Now, the second point I want to make is  
8 that -- it actually was made, in part, by the  
9 presentation we had today. We had a clip from a  
10 Blu- ray. And I'd be curious as to how that clip  
11 was made. The proponents have not provided any  
12 information specifically about how the technology  
13 would work to make the clips from a Blu-ray.

14           It is our understanding, and we've taken  
15 quite a bit of a look at what's going on in the  
16 market with regard to ways of circumventing AACs  
17 technology for Blu-ray. To our knowledge, there  
18 are only commercial decryption products, and they  
19 require you to pay for them. And they,  
20 furthermore, are not limited to decrypting short  
21 portions of the work.

22           When you employ those technologies, they  
23 decrypt the entire work. Now, you may only use  
24 the short portion if that's what you're doing. But  
25 you have access to the entire work. It is not --



1 there are not technologies that we're aware of  
2 that allow you to use the sort of normal system  
3 and then say, "Oh, now I want to capture 30  
4 seconds." As far as I know, those don't exist.

5 And so, it's important, I think, to  
6 understand what methods the proponents are  
7 intending to use. And the reason for that is  
8 because of the harm to AACCS as an eco-system which  
9 includes both the proprietor, my client, of the  
10 technology itself for protection, and the content,  
11 the owners of the content that is protected, it's  
12 important what methods and what systems are going  
13 to be used for decrypting.

14 This is not the same as the DVD case  
15 was. The point has been made that, you know, no  
16 one has ever shown any harm from the exemptions  
17 that were granted in previous cycles of this  
18 proceeding for DVD. And part of the reason for  
19 that is that -- maybe the only reason for that is  
20 that the hack of DVD was pervasive and ubiquitous.  
21 It was available all over. You didn't need to  
22 have an exemption in order to be able to go online  
23 and find a tool and make a copy if you wanted to.

24 MS. CHARLESWORTH: Can I interrupt for a  
25 minute?

1 MR. TURNBULL: Sure.

2 MS. CHARLESWORTH: Professor Decherney,  
3 what are the -- how do you decrypt Blu-ray? Or  
4 how would you be doing it if the exemption were  
5 granted?

6 MR. DECHERNEY: Yeah. There are a few  
7 products. There's something called MakeMKV, and  
8 then you would be able to continue it. You have  
9 to put it into another format using Handbrake and  
10 then edit it using one of many, many programs,  
11 like Quicktime.

12 MS. CHARLESWORTH: And is that a  
13 commercial product, I mean commercial --

14 MR. DECHERNEY: It is a commercially  
15 available product.

16 MS. CHARLESWORTH: Commercially  
17 available, not necessarily legal.

18 MR. DECHERNEY: Right.

19 MS. CHARLESWORTH: But that -- okay.  
20 Does that answer your question, Mr. Turnbull, in  
21 terms of how they would be --

22 MR. TURNBULL: Well, in which case  
23 they're going to be using technologies which are  
24 of the sort that have been specifically found to  
25 be illegal. AACS itself brought a suit a little

1 over a year ago against a similar technology  
2 called DVDFab. That technology was enjoined  
3 preliminarily. There was a line of proceedings  
4 over a year's time.

5 And the judge in the Southern District  
6 reaffirmed his finding of preliminary injunction  
7 and denied the DVDFab creators' motion to quash  
8 that injunction or modify that injunction.

9 It's a similar kind of product to --  
10 works a little -- I think the MakeMKV works a  
11 little bit different, but it's similar in many  
12 respect to the SlySoft product that has been  
13 declared illegal by the courts in Antigua. And  
14 so, I think that this is going to be an issue  
15 which is how this actually will work and what --  
16 if there is this, quote-unquote, "legitimate use"  
17 if there is an exemption granted, then what does  
18 that do in the context of these other cases and  
19 these markets for these products?

20 The final point I wanted to make briefly  
21 at the outset here is that we've been given a  
22 number of examples. And one of the difficulties  
23 of this proceeding, and perhaps most particularly  
24 the difficulties with the proponents in this  
25 particular class, is that there have been a series

1 of things.

2           There were examples given in their  
3 original comments. There were different examples  
4 given in their reply comments. And we've seen yet  
5 another example today where -- and so, it's been  
6 sort of a shifting process for us to be able to  
7 respond.

8           Obviously, we're not prepared to respond  
9 to the "Titanic" example that was given, since  
10 that was the first time that it was presented in  
11 this proceeding. So, you know, it's a little  
12 difficult to make an effective response, but our  
13 contention is that the alternatives that are  
14 available to circumvention of AACCS technology are  
15 in fact viable.

16           My colleagues will be talking a little  
17 bit more about some of these. Obviously, DVD  
18 circumvention itself, the people to my left have  
19 agreed that continuation of the existing exemption  
20 would be acceptable. So that would be, in a  
21 sense, the first choice.

22           The screen-capture software, where I  
23 think we're going to see some examples of that,  
24 which actually do provide the detail that had been  
25 requested and discussed --

1 MS. SMITH: Are you aware of any screen-  
2 capture technology that provides Blu-ray level  
3 quality?

4 MR. TURNBULL: I think the short answer  
5 to your question is no. The longer answer to your  
6 question is that the screen-capture that I think  
7 Mr. Taylor is going to be demonstrating and that  
8 was submitted as part of the exhibits for the  
9 record was able to capture the particular thing,  
10 elements that the proponents said were important,  
11 the wires in the "Wizard of Oz" scene and some  
12 other things that were presented.

13 And so, in looking at the examples that  
14 were in the original submissions, we were able to  
15 re- create those and provide screen capture that  
16 actually did capture the elements that they said  
17 were important to be able to be seen.

18 MS. SMITH: Okay. But you don't know if  
19 it -- you're not aware of any technology that  
20 would capture even higher than DVD quality,  
21 whether or not it rose to, you know, emulated Blu-  
22 ray?

23 MR. TURNBULL: I mean, there are ways of  
24 converting signals. You can up-convert a DVD. You  
25 can, in fact, have a progressive -- there are

1 progressive scan outputs from DVD players. So, I  
2 mean, there are ways of manipulating and dealing  
3 with it. But I don't know of any where you take  
4 the native high-definition and use screen-capture  
5 on it.

6 MS. SMITH: Okay. Do you know if  
7 "Titanic" has been decrypted?

8 MR. TURNBULL: I'm sorry?

9 MS. SMITH: Do you know if the "Titanic"  
10 Blu-ray version has been decrypted already?

11 MR. TURNBULL: I suspect it has.

12 MS. SMITH: Okay.

13 MS. CHARLESWORTH: I think we just saw  
14 an example of that.

15 (Laughter.)

16 MS. CHARLESWORTH: I could be -- maybe I  
17 missed something.

18 MR. TURNBULL: Right. Right.

19 MS. CHARLESWORTH: Yeah. Right?

20 MR. TURNBULL: And let me just --  
21 finally, the screen-capture software is viable. We  
22 talked, and there were demonstrations in L.A.  
23 of the UltraViolet and Disney Movies  
24 Anywhere. And I think it would be important to  
25 sort of capture the points that were made there,

1 for this proceeding, because I think a number of  
2 them will be relevant. And Mr. Williams will be  
3 talking more about that.

4 MS. SMITH: But you're not contending  
5 that those UltraViolet or Disney Movies Anywhere  
6 have the same quantity of content that they may  
7 need for this educational use in a university  
8 setting, I mean.

9 MR. TURNBULL: Well, I think those don't  
10 natively -- the way those systems work and as was  
11 described by their proprietors, they don't  
12 natively have content. You, as a consumer, bring  
13 your content or you purchase your content. But if  
14 you're able to bring a Blu-ray -- I mean, there  
15 are thousands of titles that are available for  
16 conversion and use in those. And so, it's not so  
17 much how much they offer as it is how much you can  
18 actually, as a consumer, put into them.

19 And for that, I think the testimony was  
20 that it's many thousands of titles.

21 MS. SMITH: Well, I guess so --

22 MS. CHARLESWORTH: So -- sorry.

23 MS. SMITH: Just to understand, I know  
24 for Disney Movies Anywhere, they don't support  
25 their Touchstone brand. It's limited towards

1 kids. So you would be out of luck for that.

2 For UltraViolet, doesn't it need to be  
3 affiliated with one of the sponsoring studios, as  
4 opposed to some of these, you know, perhaps a  
5 geographic Blu-ray that I want to use for my  
6 science classroom may not be part of that library?

7 MR. TURNBULL: Yeah. Correct.

8 MS. CHARLESWORTH: So, but for the  
9 example of "Titanic," is that something where you  
10 could load up a Blu-ray into an UltraViolet  
11 account, queue it up and play that clip?

12 MR. TURNBULL: I believe so.

13 MS. CHARLESWORTH: Okay. So that --  
14 okay.

15 I guess we'll get back to the other side  
16 and whether Professor Decherney agrees with that.

17 Are you ready?

18 MR. TAYLOR: Yes.

19 MS. CHARLESWORTH: Okay. Mr. Taylor is  
20 now going to be presenting Exhibits 14 and 15,  
21 Hearing Exhibits 14 and 15.

22 So, Mr. Taylor, take it away.

23 (Pause.)

24 MR. TAYLOR: Good morning. This  
25 morning, I would like to show three quick clips



1 that demonstrate the technology, the screen-  
2 capture technology. I will refer to it often as  
3 "video-capture technology." I do not mean to  
4 confuse you, but I've been using that term.

5           So, the first clip I'm going to show you  
6 is indeed what we just heard about, that in the  
7 DVD you can see the cables pulling the lion's  
8 tail. And you can also see that, accordingly,  
9 with the video- capture software.

10           The second clip will be a compilation of  
11 some of our exhibits. It shows again that  
12 compilations can be used in the classroom setting  
13 and that the detail that the proponents said that  
14 they wanted to be able to show is indeed in the  
15 video capture.

16           And the third clip is a demo that I've  
17 made using the WM capture software that we've  
18 made several clips with, to show how easy it is.

19           MS. SMITH: Can I ask, are all these  
20 clips that we see, are they using non-  
21 circumventing technology?

22           MR. TAYLOR: Yes.

23           MS. SMITH: Okay. So an exemption would  
24 not be needed to use any of these video-capture  
25 software?

1 MR. TAYLOR: No. Right. The only  
2 additional, I think in the last panel we discussed  
3 the Camtasia and the WM capture. And this  
4 time, I've used a desktop called Snagit for a  
5 recording of using video-capture.

6 So I'm going to go ahead and start with  
7 the "Wizard of Oz" clip.

8 (Hearing Exhibit No. 14 was presented.)

9 MR. TAYLOR: And I'm going to pause it  
10 right there, hopefully, take it back. And right  
11 there you can see -- I'll try to blow up the  
12 screen some. We have marked here the cable that  
13 you can see with an arrow. And throughout the  
14 video, you will see some of the arrow. We haven't  
15 necessarily, every time you see the cable, we  
16 haven't marked it with an arrow. But we have in  
17 various places.

18 I'm going to go ahead and let it play  
19 through.

20 MR. DECHERNEY: I'm sorry. As a student  
21 in the fourth row, I don't see it. Can you see it  
22 up front?

23 (Laughter.)

24 MS. CHARLESWORTH: So, just for the  
25 record, Professor Decherney is commenting that

1 he can't see it, the cable.

2 MR. TAYLOR: Okay. And anyway, by the  
3 way, this is -- the name of the clip is "Wizard of  
4 Oz Arrows," and it would be Exhibit 14. I'm going  
5 to let this play through.

6 (Video presentation continued.)

7 MR. TAYLOR: You can actually see the  
8 cable when it swings most and it's in movement  
9 than when we still-frame it. And I want to go  
10 back and show you two specific spots in the clip.  
11 And right here.

12 (Video presentation continued.)

13 MR. TAYLOR: Okay. Let me see if I can  
14 advance it. All right. All right. So, this is  
15 the clip right here. Right now you can see the  
16 cable comes down here. And you can see actually -  
17 - we advance it just a little bit more. You can  
18 see the fabric as it's being slightly pulled away  
19 there on the lion's tail.

20 And then, on the next clip, it's a  
21 little bit even more dramatic. Right here you see  
22 that the cable comes down, and it's at a diagonal,  
23 and you can actually see where it's attached to  
24 the lion's tail right there.

25 And so, again, the details that the

1   proponent said that they want to show in the  
2   videos are found on the DVD copy. And the video-  
3   capture does indeed play that and show that when  
4   it's been recorded.

5                   And now I'm going to move on to play --

6                   MR. CHENEY: Mr. Taylor, did you use any  
7   editing tools other than just the screen-capture  
8   for these clips?

9                   MR. TAYLOR: Right. In order to put the  
10   arrows in, we did have to use a video editing  
11   software to stop it and put an arrow in. So  
12   that's the only -- and that's the amount that's  
13   been processed.

14                  MR. CHENEY: Thank you.

15                  MS. CHARLESWORTH: And I had a question.  
16   Professor Decherney, were you able to see the  
17   cable at times in those clips?

18                  MR. DECHERNEY: Yes.

19                  MS. CHARLESWORTH: You could see it when  
20   it was swinging?

21                  MR. DECHERNEY: Yes. There was one  
22   moment when it was swinging, and yes, I saw it.

23                  MS. CHARLESWORTH: Okay. Thank you.

24                  MR. TAYLOR: Okay. So I am now going to  
25   play a file called "Class 1 Compilations." And it

1 will be Hearing Exhibit 15, I believe. And I'll  
2 put the sound on for this.

3 (Pause.)

4 MR. TAYLOR: So, this is a compilation  
5 of our exhibits. It's going to start off with the  
6 "Soviet Story," a clip from the "Soviet Story" and  
7 then go through the "Shakespeare Medieval"  
8 showings, and then it's going to end with the  
9 "Birds of Paradise." And we're going to take a  
10 look at the quality of the images in the "Birds of  
11 Paradise," after it plays through one time.

12 MS. CHARLESWORTH: And for the record,  
13 this is Exhibit 15.

14 MR. TAYLOR: Exhibit 15, yes, ma'am.

15 MS. SMITH: Can I ask, so is this  
16 captured using different technology, potentially  
17 of a different quality than the exhibits you  
18 submitted with your comments? Because they are  
19 the same clips, so I don't want it to be confusing  
20 when we're talking about the "Soviet Story" clip,  
21 for example, if there's more than one version of  
22 it in terms of quality.

23 MR. TAYLOR: These clips that I am  
24 demonstrating right now were our original clips  
25 that were made from Camtasia.

1 MS. CHARLESWORTH: Are they the same as  
2 what was previously submitted?

3 MR. TAYLOR: They're not the same.  
4 They've been edited for this specific purpose so  
5 that they're shorter.

6 MS. CHARLESWORTH: Okay. But the  
7 technology and the actual capture is the same?  
8 It's just that they've been edited?

9 MR. TAYLOR: Yes. That's correct.

10 MS. CHARLESWORTH: Thank you.

11 (Hearing Exhibit No. 15 was presented.)

12 MR. TAYLOR: Okay. So I just want to  
13 show quickly the birds in that. If I can --

14 (Video presentation continued.)

15 MR. TAYLOR: And go here. This right  
16 here, here. This was the first bird that we saw.  
17 In it, you can see the yellow, and as it fades  
18 from yellow, it comes to green. You can see the  
19 blue in the bird's eyes. It's all very clear.  
20 This is the interlaced process that we're talking  
21 about. So, not every frame is picture-perfect  
22 clear. But this one is sufficient that, for our  
23 purposes, we can see what's going on.

24 And then, the next is again the same  
25 bird. And you can see how his chest has changed

1 colors. And again, you've got the blue in the  
2 eyes. And then, this is the second bird. And you  
3 can see the yellow in the feathers versus the  
4 yellow that's in the head. And in between that,  
5 you have the red. And this is actually a picture  
6 from the bird's back. And if I move through that,  
7 you can see that he shakes his feathers and  
8 spreads them.

9 (Video presentation continued.)

10 MR. TAYLOR: So, again, this was a  
11 compilation that was made from our exhibits. The  
12 compilation, the video-capture does allow you to  
13 make the compilation for instructional purposes.  
14 And the quality that you see includes the details  
15 that the proponents say that they want to show.

16 And our final video is me recording the  
17 -- making use of the WM capture technology. And  
18 it will be -- and the file is called "WM Recorder  
19 Demo Soviet Story." It's an MP4. And this will  
20 be Hearing Exhibit 16.

21 MS. CHARLESWORTH: Okay. So, we're now  
22 moving on to Exhibit 16.

23 (Hearing Exhibit No. 16 was presented.)

24 MR. TAYLOR: So, right here what you see  
25 is the basic -- my desktop. And again, I recorded

1 my desktop with a program called Snagit. And on  
2 the desktop, you see the PowerDVD, which is the  
3 player for the DVD. In the middle of the picture,  
4 you see the content that's being played back. And  
5 down here in the right-hand corner, you see the  
6 WM-capture interface.

7 And I'm going to play this through a  
8 little.

9 (Video presentation continued.)

10 MR. TAYLOR: Okay. So, I don't know if  
11 you noticed. But looking at the interface, you  
12 see that there are two buttons. There's a record  
13 button, and there's a play button. And then  
14 there's a picture of a folder. And then up in the  
15 right-hand corner, what I had moved to was the Get  
16 Video feature. And there's two features, the Get  
17 Video feature and the Mark Video windows feature.

18 And what the Get Video feature does,  
19 which I clicked on, is it actually detects the  
20 content that's in the window. And it will predict  
21 what you want to record. So when I go to the Mark  
22 Video window, you will see that the frame pops up.  
23 And it almost lines up perfectly for the content  
24 that I want it to record.

25 (Video presentation continued.)



1                   MR. TAYLOR: So, right there I had  
2   clicked on the Mark Video windows, and indeed what  
3   popped up was the green framed window, which  
4   covers the content that I was going to record. And  
5   in the middle, you see a message that says, "Move,  
6   resize this window to fit the video area." And  
7   because I had used the Get Video feature, it was  
8   automatic and there was no need to adjust the  
9   picture.

10                  MS. SMITH: And so, you've seen these  
11   video-capture technologies or this editing  
12   software. Is it your opinion -- it seems like it's  
13   just as easy or maybe even easier than ripping or  
14   circumventing the original media. Is that true,  
15   or are there difficulties? Does it depend on what  
16   kind you use?

17                  MR. TAYLOR: I have never ripped a DVD,  
18   so I cannot --

19                  MS. SMITH: Probably you've heard what  
20   the process is, I would hope.

21                  MR. TAYLOR: Yeah. I think that this is  
22   very intuitive. I imagine that there's other  
23   programs that are not as intuitive. So I think  
24   that this is very easy. What I understand about  
25   some of the circumvention products are they've

1 made it fairly easy, as well, to do. I don't see  
2 one as being any more difficult than the other,  
3 probably.

4 MS. SMITH: Okay. So you don't see them  
5 as imposing, you know, additional time demands on  
6 the educators or students?

7 MR. TAYLOR: I don't. In fact, I think  
8 if you're going to prepare a lesson, you are  
9 better served by actually putting together a  
10 compilation of clips that you're going to show.  
11 And this would be a very quick and easy way to do  
12 it.

13 MS. SMITH: And then one more thing. Mr.  
14 Band said that some types of video-capture  
15 technology do require circumvention. And I  
16 don't know if we have in the record what the  
17 specific software is. And I would invite that. But  
18 do you know whether this type of circumvention --  
19 capture software that requires circumvention might  
20 be of a higher quality or not?

21 MR. TAYLOR: I assume that if it's  
22 circumventing the content that's on perhaps a Blu-  
23 ray disk, then it's going to give you perfect  
24 quality in recording it because there's nothing to  
25 prevent it from being recorded perfectly.

1 MS. CHARLESWORTH: I think just to put a  
2 finer point on one part of that question, is it  
3 your contention that some screen-capture  
4 technology may involve circumvention and some does  
5 not? Or none of it does? We're trying to  
6 understand whether there's any need for an  
7 exemption for people who would want to employ that  
8 technology in a general sense as opposed to a  
9 specific instance of it.

10 MR. TAYLOR: None of the video-capture  
11 technology that I have used circumvents. There  
12 are products that I've seen out in the  
13 marketplace, particularly products that claim to  
14 record Blu-ray disks, that first circumvent the  
15 Blu-ray in order to record it.

16 MS. CHARLESWORTH: Is there a way, with  
17 respect to both DVD and Blu-ray, what we're  
18 calling screen-capture, is there a way to tell  
19 just from the -- I mean, it's not really packaged.  
20 But I mean, how would you know whether it  
21 circumvents?

22 MR. TAYLOR: Ultimately, by looking at  
23 the -- in my opinion, you would look at the actual  
24 output and see if it's less than perfect, then it  
25 most certainly probably did not circumvent. And

1 if it was perfect, then I would probably be more  
2 suspicious of it having circumvented the  
3 technology.

4 MS. CHARLESWORTH: Okay. So, just  
5 again, I'm sorry to keep pushing these particular  
6 technical points. But for the DVD, are you aware  
7 -- so it is possible to have DVD screen-capture  
8 technology that does circumvent? Is that your  
9 testimony, that there may be some out there that  
10 are circumventing DVDs? Or, to your knowledge, is  
11 all DVD screen-capture technology non-  
12 circumventing?

13 MR. TAYLOR: Well, I can't speak to all  
14 DVD video screen-capture technology. I am aware  
15 that there is a product on the market that bills  
16 itself as a screen-capture for DVD as much as Blu-  
17 ray disk. And in my opinion, that is a  
18 circumvention tool.

19 MS. SMITH: And then, it sounds like the  
20 reason why you know if it's circumventing or not  
21 circumventing is that the version doing  
22 circumventing is such a better quality that you  
23 can just look at it and figure it out, and that  
24 you don't need to analyze the output or the frames  
25 or any information about the resolution; you can

1 just eyeball and it's that drastic you can tell?

2 MR. TAYLOR: No. I wouldn't say that. I  
3 said that I'd be more suspicious that it is  
4 circumventing when it's nearly a perfect copy or  
5 looks like a perfect copy. But ultimately, you  
6 would have to put it on an editing timeline and  
7 compare it frame-to-frame to see if it is a  
8 perfect copy.

9 MR. CHENEY: So may I ask, has anyone in  
10 the industry taken those apart to determine what  
11 the process is that they use in those screen-  
12 capture? In other words, have they gone step-by-  
13 step in what that tool does in order to determine  
14 whether it's breaking the encryption or whether  
15 it's using another method?

16 MR. TAYLOR: I do not know.

17 (Pause.)

18 MR. TAYLOR: I'm going to go ahead and  
19 play this through.

20 (Video presentation continued.)

21 MR. TAYLOR: And so, right now I have  
22 hit Record. And over in the right-hand corner, it  
23 gives you a preview of what's being recorded. And  
24 if you compare the images, you see the boys in the  
25 images. And up here, the wife has -- oh, there's

1 the status. And that's going to change  
2 momentarily.

3 (Video presentation continued.)

4 MR. TAYLOR: And it did change. And  
5 right now, you can actually see what you're  
6 outputting and what your settings are. And here  
7 I've set the output for MP4, a picture frame of  
8 720 by 486, and in the 29-frames-per-second rate.

9 And up here, you can see what the  
10 software proposes to name the file as. And in  
11 this case, it's going to name it Snagit 12.mpg.

12 (Video presentation continued.)

13 MR. TAYLOR: Okay. So I've stopped the  
14 recording, and I'm going to close the player. And  
15 you can see that the Play, when it was recording,  
16 switched to Stop and I just clicked on the Stop.

17 (Video presentation continued.)

18 MR. TAYLOR: Now I want to see what I  
19 actually recorded and how it came out. There's  
20 this folder next to the Play button. And you  
21 click on that. And you open it up, and there the  
22 first file at the top is the Snagit 12 that was  
23 recorded. And we're going to play that back just  
24 on my desktop to take a look at it.

25 (Video presentation continued.)

1           MR. TAYLOR: And so, that was the demo  
2 of the recording. In my opinion, it is very  
3 straightforward and fairly intuitive. It, in my  
4 opinion, reminds me of those old tape recorders  
5 where you had a Play button and a Stop button. And  
6 so, it should be easy for any instructor to use.  
7 Instructors can make a compilation of it.

8           And ultimately, I think, for this  
9 proceeding, what's important is that the quality  
10 of the video capture is of sufficient high quality  
11 now that you could see the cable of the lion's  
12 tail in "The Wizard of Oz." You could see the  
13 stark images from the "Soviet Story." And  
14 finally, you can see the brilliant colors of the  
15 "Birds of Paradise."

16           So, in my opinion, I think that the  
17 video- capture software, or screen-capture  
18 software, is a much better alternative to  
19 circumvention than it has ever been before.

20           MS. CHARLESWORTH: Thank you, Mr.  
21 Taylor.

22           Mr. Williams.

23           MR. WILLIAMS: Thank you for having me  
24 here again today on behalf of MPAA, RIAA, and ESA.  
25 As we said in our comments, we are not opposed to

1 renewal of the existing exemption. We do  
2 recognize, of course, that education is a very  
3 important topic and practice, and we understand  
4 why the Office has given an exemption in the past  
5 in this area.

6 But we do not think there's any reason  
7 to expand it, especially based on the record as  
8 it's been built thus far, which basically, from  
9 the proponent's side, I think is almost identical  
10 to the record last time. And so, I don't see why  
11 it should be expanded when the record on our side  
12 actually shows more availability of a variety of  
13 formats that would enable what they want to do  
14 than the record did last time.

15 Although we do acknowledge that there  
16 are lots of fair uses that take place in  
17 educational settings, we would not be comfortable  
18 with what I think Jonathan referred to as a "just  
19 do it" approach, like a Nike approach, to this  
20 exemption. We would prefer to keep a balance in  
21 place. And we think that the types of limitations  
22 the Office has put on this in the past are  
23 appropriate and helpful.

24 So we would prefer to keep the short  
25 portions limitation in place. I don't think we've



1 heard any examples of the need for extensive or  
2 long portions to be used.

3 I would say about the Dr. Wallace  
4 example that Brandon touched on, we don't have a  
5 lot of details on what he did, and we don't know  
6 for sure that he violated the terms of the  
7 exemption. But based on what they said, that it  
8 was extensive or long portions, we just noted for  
9 the record that that seemed to be outside of the  
10 short portions limitation.

11 There's nothing in this record to show  
12 why Blu-ray needs to be circumvented, in my view.  
13 As I said, out in L.A., there are lots of HD-quality  
14 downloads and other ways to get HD-quality copies.  
15 There's a product called HDX on the market that's  
16 very close to Blu-ray quality. Under the existing  
17 exemption, you can already circumvent that  
18 product. And so, I don't think there's been a  
19 record to cover Blu-ray.

20 I believe there are only two examples in  
21 the proponent's comments of Blu-ray-exclusive  
22 content. One of those was the "Terminator  
23 Salvation" director's cut Blu-ray. And that's  
24 actually available on standard-def DVD at Target.  
25 So I believe there's only one example of a bonus

1 feature in the record that's Blu-ray exclusive.

2 MS. SMITH: Would you be opposed to an  
3 exemption that allowed circumvention of Blu-ray if  
4 the content was Blu-ray exclusive?

5 MR. WILLIAMS: Yes, we would. We think  
6 there are other viable alternatives out there that  
7 they could use. For example, the "Saving Private  
8 Ryan" example that was given earlier of showing D-  
9 Day experience-type footage, you can still bring a  
10 Blu-ray player into the classroom and show that  
11 footage. So if there's a small number of things  
12 that are Blu-ray exclusive, you can still show  
13 those in the classroom with a Blu-ray player.

14 Again, the close analysis limitation  
15 that's in the existing exemption, that's another  
16 one we think should stay in place. We do agree  
17 with the Office, as you've said on a few panels,  
18 that it's helpful to give direction to users. And  
19 that's another place where we think it's helpful  
20 to show them when it might be necessary to engage  
21 in circumvention as opposed to unnecessary.

22 One example that we'd also touched on in  
23 Los Angeles that I think is important to remember  
24 is the ability to queue up copies that you've  
25 already acquired, either be it download or via UV-

1 style service.

2           One thing that was noted in Los Angeles,  
3 as Ms. Smith said, is that not every title is  
4 available through a service like Movies Anywhere.  
5 But I think that Jamie Voris's testimony was that  
6 the Touchstone titles were available for online  
7 download and manufactured on demand onto DVD. So  
8 it's not that they're completely unavailable; it's  
9 just certain titles are not in the Movies Anywhere  
10 service.

11           We also think it's helpful to maintain  
12 the limitation that the user have a good-faith  
13 belief that it's necessary to engage in the  
14 circumvention. That was one that I believe was  
15 added in 2012, and we support continuation of  
16 that.

17           As I did note out in Los Angeles, and as  
18 I'm going to raise on a number of panels here in  
19 D.C., we do think it would be appropriate to  
20 change this exemption in one way, which would be  
21 to separate it from the current bundle of  
22 exemptions for motion pictures such that there are  
23 separate exemptions that are specifically defined  
24 for educational uses, for remixes, for E-books,  
25 and for documentary filmmaking.

1           This particular one, the educational  
2 one, is crafted pretty well to show exactly what  
3 is covered, I think. But because there are others  
4 that are a little vaguer, like the noncommercial  
5 video exemption, we're afraid that some people  
6 read that one to basically consume the educational  
7 exemption and that, of course, we don't think that  
8 was your intention. Because otherwise, there  
9 wouldn't be two separate references. So that  
10 would be one request that we have.

11           MS. CHARLESWORTH: I mean, can I ask  
12 about that?

13           MR. WILLIAMS: Sure.

14           MS. CHARLESWORTH: I mean, are you  
15 suggesting that there could be an overlap where  
16 someone, say, in an educational setting might  
17 think, "I can either take advantage of the  
18 educational line or take advantage of the  
19 noncommercial video one"? Is that the concern?

20           MR. WILLIAMS: That is the case.

21           MS. CHARLESWORTH: And if so, why is  
22 that a concern?

23           MR. WILLIAMS: It's a concern because my  
24 interpretation is that the noncommercial video  
25 exemption is supposed to be targeted to deal with

1 the types of videos proponents focus on, which are  
2 remix- style mash-up videos. They're not just all  
3 types of noncommercial videos.

4 And because educational uses are  
5 typically noncommercial uses, not always, but  
6 typically, I would be concerned that some would  
7 try to read the noncommercial video exception to  
8 consume all educational uses and render the  
9 careful tailoring you've done in the educational  
10 area basically meaningless.

11 MS. CHARLESWORTH: Okay. So, you're  
12 saying that you view the noncommercial video  
13 exemption as being more broadly drafted than the  
14 educational one?

15 MR. WILLIAMS: Broadly drafted, but I  
16 don't think the intent was as broad as one could  
17 argue it reads. I think the intent was that  
18 noncommercial videos was a reference to the types  
19 of videos that have been at issue in the record,  
20 which we're going to hear about tomorrow, remix-  
21 style videos, mash-up style videos, not every type  
22 of noncommercial video.

23 MS. CHARLESWORTH: Okay. So, some of it  
24 just has to -- it sounds like some of this has to  
25 do with the definition of "noncommercial."

1 MR. WILLIAMS: Yes. Or a definition of  
2 "remix" or some other definition, and a separation  
3 of the two from the bundle, such that there are  
4 clear contours to separate exemptions.

5 MS. CHARLESWORTH: Okay. Thanks for  
6 that clarification.

7 MR. WILLIAMS: Sure. No problem. Thank  
8 you for the questions, and given we're almost out  
9 of time, I'll finish up there for today. Thank  
10 you.

11 MS. CHARLESWORTH: Okay.

12 MS. SMITH: I have a question for  
13 Professor Decherney. I want to make sure we're  
14 looking at the studies you referenced in your  
15 testimony about, this is the logical effect of  
16 high definition. Can you point me to those names?

17 MR. DECHERNEY: I would need a minute.

18 MS. SMITH: Okay. And while you're  
19 looking for it, do you know if they were in a  
20 classroom setting? Were they examinations in an  
21 educational setting, or just sort of in general?

22 MR. DECHERNEY: No, they're in a  
23 classroom setting, looking at the way the students  
24 respond to high-definition video versus standard-  
25 definition video.

1 MS. SMITH: Okay.

2 MS. CHARLESWORTH: And can I ask, I  
3 mean, from a pedagogical standpoint, when would  
4 you be trying to elicit that kind of response?

5 MR. DECHERNEY: I'm just going back to  
6 the examples we've given. If people are looking  
7 at something because they were interested in  
8 looking at the effect of violence or romance or  
9 anything that would have an effective response, in  
10 most cases, that's all teaching. You know, we try  
11 not to teach boring works, despite what people  
12 might think.

13 You know, often, works are being taught  
14 because people have responded to them over time  
15 and because, you know, there is some kind of  
16 effective power that they have. I mean, they will  
17 return in our history class and English class, but  
18 also in a science class.

19 MS. SMITH: Assuming, if you're going to  
20 do that, doesn't it depend on more factors aside  
21 from the quality of the image? Wouldn't you also  
22 need perhaps a darkened room and a larger screen,  
23 something more typical to cinematic setting?

24 MR. DECHERNEY: Yes, certainly. There  
25 are many, many factors. And I would love to see

1 all of them in place perfectly. I actually go to  
2 long, boring meetings to fight for blackout shades  
3 in classrooms for that very reason.

4 (Laughter.)

5 MS. SMITH: Did you or do you know of  
6 others who had a problem with the way that  
7 previous exemption was structured? It's a little  
8 bit staggered, so it was saying if you can't get  
9 the content here, then you can circumvent it  
10 outside of the screen-capture technology. Or is  
11 that generally workable?

12 MR. DECHERNEY: In general, the  
13 exemptions have become more elaborate over time.  
14 And I know they've definitely led to some  
15 confusion.

16 The biggest confusion we noticed this  
17 time was the difference between 2006 and 2009. The  
18 exemption moved from being about audiovisual works  
19 to motion pictures. And just because the  
20 Copyright Act's definition of "motion pictures" is  
21 a little different than the regular working  
22 definition, that's definitely led to some  
23 confusion.

24 When the Chronicle of Higher Education  
25 contacted me and they were covering the last



1 exemption in 2012, they had a whole paragraph  
2 about how it was only about motion pictures, only  
3 about movies. It didn't even cover TV.

4 MS. SMITH: So they're confused because  
5 the Act defines "motion pictures" a bit broader  
6 than what the layman's understanding may be?

7 MR. DECHERNEY: Right. Exactly.

8 MS. SMITH: Okay. But that also brings  
9 up another question I wanted to ask, which is I  
10 didn't see in the record any evidence of  
11 audiovisual works that were not motion pictures  
12 needing circumvention. There was a reference to  
13 using videogames as a teaching tool. But did that  
14 example involve circumvention as the technology  
15 for videogames?

16 MR. DECHERNEY: No. So we found only a  
17 few examples -- movies that were made up entirely  
18 of still images. An example would be "La Jetee,"  
19 a French film that's actually taught very  
20 frequently. There are documentaries of still  
21 images. And we're not entirely clear whether  
22 those would be covered under the definition of  
23 "motion pictures," which is a series of images  
24 that suggest movement, where these are movies that  
25 don't suggest movement.

1           So even though I agree there's a very,  
2 very limited range of material that would be  
3 taught as audiovisual works and not motion  
4 pictures, the major concern is just that the term  
5 "motion picture" is confusing to people who are  
6 trying to use the exemption without legal counsel.

7           MS. SMITH: Okay. And are you aware of  
8 anybody who didn't circumvent in what would have  
9 been, you know, a lawful use or was like deterred  
10 by the language of the prior exemption?

11           MR. DECHERNEY: So, yeah, we've heard  
12 about this confusion. And we clarified it. So  
13 hopefully, the few cases we've heard, we've been  
14 able to head off confusion.

15           MS. CHARLESWORTH: Good.

16           MR. DECHERNEY: But we don't know about  
17 all the people that didn't come to us, obviously.

18           MS. CHARLESWORTH: Anything? Yes, Mr.  
19 Williams. Thank you.

20           MR. WILLIAMS: Just quickly. I would  
21 just ask that if you were inclined to try to  
22 revise the language to cover the still images that  
23 Professor Decherney mentions, I would prefer, of  
24 course, that videogames be specifically excluded  
25 from the exemption because there's nothing in the

1 record on that.

2 MS. CHARLESWORTH: Thank you, Mr.

3 Williams.

4 Do any of my colleagues have any further  
5 questions?

6 (No audible response.)

7 MS. CHARLESWORTH: Okay. Mr. Band.

8 MR. BAND: So I just wanted to make a  
9 couple of quick points about the screen-capture.  
10 So, I guess it's almost a question. I mean, are  
11 the Joint Creators willing to certify that video-  
12 capture does not circumvent and willing to  
13 indemnify educators if they happen to use the  
14 screen-capture technology and it turns out to  
15 circumvent? You know, obviously, a rhetorical  
16 question --

17 MS. CHARLESWORTH: Yes.

18 (Laughter.)

19 MR. BAND: -- because I'm sure they will  
20 say no.

21 MS. CHARLESWORTH: Well, I think the  
22 bigger question is, do you want -- you know, would  
23 you be seeking an exemption for screen-capture,  
24 which is something that's not expressly sought in  
25 your request? Assuming that some screen-capture

1 may be circumventing.

2 MR. DECHERNEY: If I could just add to  
3 that. According to the studies we've looked at,  
4 70 to 90 percent of educational environments use  
5 Macs. And there seems to be no way to use screen-  
6 capture software on a Mac without circumvention.

7 MR. BAND: No, that's not true.

8 MR. DECHERNEY: So, the DVD players  
9 block the screen-capture software. So, in order  
10 to use a Mac to use screen-capture software, you  
11 have to first circumvent and create a copy, which  
12 you then would capture.

13 MR. RUWE: But to be clear, you can  
14 screen- capture and then get a file that can be  
15 used on a Mac.

16 MR. DECHERNEY: Right. But -- yes. But  
17 it means that the vast majority of students and  
18 faculty and campus media labs would have to invest  
19 in new technology, which might just be an  
20 inconvenience, but it would be a pretty  
21 significant one.

22 MS. SMITH: So you're saying that the  
23 examples that they provided of this specific  
24 technology, Camtasia, WM captures, Snagit, EasyVid  
25 cannot be used on a Mac without circumvention?

1 MR. DECHERNEY: Right. Yes, without  
2 prior circumvention of the video.

3 MS. CHARLESWORTH: Mr. Taylor, can you  
4 respond to that, as our screen-capture expert in  
5 the room?

6 (Laughter.)

7 MR. TAYLOR: That's not my understanding  
8 at all. In fact, Camtasia is a product that we  
9 use. And doing this, I worked with several other  
10 people. They were all using Macs, and I was the  
11 only PC person. And we were able to use the  
12 screen-capture, particularly Camtasia, in the  
13 Apple environment just fine. And it was not a  
14 challenge for us.

15 MS. CHARLESWORTH: Thank you.

16 MR. DECHERNEY: Please investigate that.  
17 If you're able to do it, that's great.

18 MS. CHARLESWORTH: This is our  
19 investigation.

20 (Laughter.)

21 MS. CHARLESWORTH: But I mean, I think,  
22 going back to sort of the more mundane legal  
23 point, in the past, to deal with these issues or  
24 cases of doubt about whether there's circumvention  
25 involved, we have granted an exemption for screen-

1 capture.

2           And I guess I'd like to know whether  
3 that's something you think would have -- assuming  
4 we don't, you know, grant the full exemption that  
5 you want -- and I'm not trying to say we will or  
6 we won't. But I mean, is that something you'd  
7 still be interested in? So there's no doubt on the  
8 part of educators if they're using screen-capture  
9 technology that they can do that.

10           MR. DECHERNEY: So I think screen-  
11 capture is really insufficient for almost every  
12 single purpose that it could be used for.

13           MS. CHARLESWORTH: Well, we just --

14           (Cross-talk.)

15           MS. CHARLESWORTH: Sorry.

16           MR. DECHERNEY: That's what you're  
17 asking. I don't think -- I'd rather get screen-  
18 capture out of the conversation. I think it's a  
19 distraction. Screen-capture changes the way that  
20 images look. It changes the number of pixels and  
21 the frame size. It changes the frame rate. It  
22 actually adds interpolated frames; that's part of  
23 the way that works.

24           So that imagine just in any other field  
25 if you were saying, if you wanted to teach Tony

1 Morrison's work, the publishers are arguing that  
2 you have to have extra pages and extra words, and  
3 also words that are cut out and changed. Or art  
4 history, paintings where the people that own the  
5 copyright and the work are actually saying, "We  
6 want you to teach it in a way that changes that  
7 image." That would seem ludicrous. It doesn't in  
8 this context.

9 But just to add kind of a bigger picture  
10 so we don't lose the forest for the trees, it  
11 really changes the works that are being studied in  
12 the classroom, which I think is a pretty high --

13 MS. CHARLESWORTH: So you don't -- I  
14 mean, but the point is we just saw a demonstration  
15 of screen-capture which, arguably, for many uses,  
16 would -- might -- let's say might be sufficient,  
17 depending on the use. I mean, this gets into the  
18 close analysis issue. I mean, you're a media  
19 studies professor. And when you look at a film,  
20 you're very sensitive and your students are  
21 sensitized to those issues.

22 But there may be many uses of film clips  
23 that really don't require that level of detail.  
24 And at least, that was the finding before. And I  
25 don't know where we'll end up this time. But you

1 know, so again, to help avoid any confusion or  
2 doubt on the part of educators, we've allowed for  
3 a screen-capture exemption. You're not seeking  
4 one here, and you continue to say that. So I just  
5 want to be clear.

6 Maybe Mr. Band wants to add to that.

7 MR. BAND: Yeah. Well, I might disagree  
8 with Peter on this point. I mean, certainly  
9 speaking not as an educator, but as a lawyer, I  
10 think it would be helpful to have the screen-  
11 capture piece renewed, even though I take it from  
12 Peter as the educator that it is insufficient. But  
13 something could be better than nothing. And here  
14 we have to take what we can get. And so, I think  
15 that that part should be renewed as well.

16 MS. CHARLESWORTH: Thank you.

17 Mr. Butler.

18 MR. BUTLER: Just two quick points. This  
19 hasn't come up yet. But in the current exemption  
20 for screen-capture, there's a requirement that  
21 "the technology be reasonably represented and  
22 offered to the public as enabling reproduction of  
23 motion picture content after such content has been  
24 lawfully decrypted."

25 And I was just curious because we were



1 told that the way to tell whether something has  
2 been obtained by circumvention was to sort of  
3 eyeball it. But that doesn't get past the question  
4 of whether these companies are making the  
5 necessary representations about circumvention. And  
6 I know our friends at UC-Irvine have said that  
7 they don't think that anyone is making that  
8 representation.

9           And so, we're not sure whether -- so, if  
10 there is an exception in the future, maybe that  
11 requirement should come out, since we're not sure  
12 whether any of the software is satisfying that  
13 requirement. Or on the other hand, I'd be curious  
14 to know whether it is and we have been mistaken in  
15 looking into that question.

16           And the other thing I wanted to add real  
17 quickly is that the tech support for the Camtasia  
18 site says -- there's an entry from a technician  
19 dated January this year that Macs can't capture  
20 DVDs. And it recommends circumvention rather than  
21 using their software or using the VLC Media  
22 Player. I mean, just something to look at.

23           MS. CHARLESWORTH: Okay. Mr. Taylor, do  
24 you have any comments on those two points? Number  
25 one, whether screen-capture technology makes

1 representations about whether there's  
2 circumvention involved, and number two, the  
3 Camtasia issue?

4 MR. TAYLOR: On the first issue, I have  
5 seen on some of the marketing materials this issue  
6 of circumvention. And it's sometimes in the FAQs  
7 of the product. And they will say that it does  
8 not circumvent. And I think that it is there for,  
9 often more for the benefit of the studios as  
10 opposed to the consumer. But that's just my  
11 opinion.

12 On the second point, I have not used  
13 Camtasia personally. People that I work with did  
14 use Camtasia. And I would have to go back to them  
15 and get back to you on how Camtasia itself works.  
16 But what I see does not suggest to me that it is  
17 circumventing, because it's just still not a  
18 perfect copy.

19 And I would think that copy technology  
20 has been around for such a long time that if you  
21 have managed to circumvent this and you're still  
22 getting less-than-perfect copies, then you have a  
23 fundamental challenge there.

24 MS. CHARLESWORTH: Okay. But Mr. Butler  
25 also suggested that Camtasia can only be used on a

1 Mac or in the Apple environment. And

2 I think you said something that contradicted that.

3 I'm sorry?

4 MR. BUTLER: It's the other way around.

5 MS. CHARLESWORTH: Or a PC. You're

6 right.

7 He indicated that he believes that

8 Camtasia can only be used in a PC environment. And

9 I was just wondering if you'd further comment on  
10 that.

11 MR. TAYLOR: Again, I did not use the  
12 Camtasia; other people did use the Camtasia, who  
13 are using Macs. So I would have to go back and  
14 double-check with them to verify that's what they  
15 did.

16 MR. BAND: I think it's also, at least  
17 according to this, it's on the latest version.  
18 They're saying it's on the latest version of Mac.  
19 So it could be that they were using it on an  
20 earlier -- that they were able to do it on an  
21 earlier version of OS X and not the current  
22 version.

23 But that goes to the bigger problem  
24 that, you know, depending on the release of  
25 software, things will work and things won't work;

1 it just depends.

2 MS. CHARLESWORTH: And so, the  
3 clarification, if I understand it, is that it has  
4 to do with what version of Mac you may be using in  
5 terms of what version of the operating system  
6 you're using on a Mac.

7 MR. BUTLER: Right. And it's actually a  
8 fairly -- this has been true for actually a pretty  
9 good while. So, OS 10.7 was when Apple started  
10 incorporating a DRM that blocks not only DVD, but  
11 iTunes video-capture. And the technologists, the  
12 Camtasia technologist says, "Sorry. You just  
13 can't use a Mac that has a software system since  
14 OS 10.7, because the system blocks screen-capture  
15 of DVDs and iTunes media."

16 MS. CHARLESWORTH: Okay. Mr. Williams?

17 MR. WILLIAMS: I can't speak to the  
18 technical question. But I would just note that in  
19 the past, the Office has always said that the fact  
20 that there might be some formats that don't work  
21 in order to achieve the alternative is not  
22 sufficient grounds for an exemption.

23 MS. CHARLESWORTH: Okay.

24 MR. CHENEY: I have a question, if I  
25 may.

1 MS. CHARLESWORTH: Um-hm.

2 MR. CHENEY: Earlier, I think it was Mr.  
3 Williams mentioned or someone else mentioned that  
4 there's an ability to up-convert or to use this  
5 HDX. Proponents, can you talk about that as an  
6 alternative? Is that a viable alternative to be  
7 able to use, instead of ripping a Blu-ray, use  
8 that HDX version?

9 MR. DECHERNEY: So, like I say, I don't  
10 know enough about HDX to understand the  
11 resolution. Up-conversion is really about playing  
12 a DVD-quality standard-definition-quality version  
13 on a larger TV. It doesn't add quality. It just  
14 allows different formats to work together. But  
15 the resolution isn't really higher. The amount of  
16 detail you see isn't higher. It doubles the  
17 number -- it repeats lines of resolution.

18 MR. CHENEY: Right. And that's for the  
19 up- conversion.

20 MR. DECHERNEY: Up-conversion.

21 MR. CHENEY: How about the -- you don't  
22 know much about the HDX?

23 MR. DECHERNEY: I'm sorry. I don't know  
24 about HDX.

25 MR. CHENEY: Okay.

1           MR. WILLIAMS: I could speak a little  
2 bit to that. I think it's kind of two pieces.  
3 There's up-conversion like we heard about with the  
4 documentarians, who actually create clips and then  
5 improve the quality of those clips through use in  
6 their films. And then there's what you could  
7 refer to as up-conversion with the disk-to-digital  
8 program. And with that, you can take a standard-  
9 def DVD, pay five dollars, upgrade it to the HD-  
10 quality copy, and then, I think under your  
11 existing exemption, those digital downloads are  
12 covered already.

13           There is an HD version and an HDX  
14 version of those. My understanding, at least the  
15 way it's being marketed, is typically the HDX is a  
16 1080p quality video.

17           MR. CHENEY: And how many titles are  
18 available under that, if you can add to that?

19           MR. WILLIAMS: I don't know the answer  
20 to that. I believe that everything that you can  
21 get access to in UltraViolet is available in that  
22 quality, but I'm not certain of that. And I think  
23 we have some testimony from Los Angeles as to the  
24 number of titles available in UltraViolet.

25           MR. CHENEY: Mr. Decherney, you look

1 like you're ready to answer.

2 MR. DECHERNEY: I'm sorry. Yeah, yeah,  
3 yeah. No, just it's the same process of up-  
4 conversion that you can't take a standard-  
5 definition video and then give it more  
6 information. You can give it more, you can repeat  
7 the lines and --

8 MR. TURNBULL: No. I don't think you're  
9 understanding what was said. I mean, what was  
10 said is that you take in your standard-definition  
11 DVD and you pay the five dollars. And it is not  
12 taking that DVD and up-converting it. You are  
13 getting a new copy in an online version of it. And  
14 it is HD natively; it is not something that has  
15 been up-converted from the DVD.

16 MR. CHENEY: And I think Mr. Williams  
17 indicated that that one is available under the  
18 exemption, the HD version with that, as I  
19 understand it, from the current exemption, and  
20 would carry over if the current exemption were  
21 renewed; is that right?

22 MR. WILLIAMS: That's my understanding  
23 of how to read the current exemption. I think it  
24 refers to digitally distributed services, and  
25 these would be copies that the user walks away

1 with.

2           And I don't think Bruce meant to imply  
3 this, but just to clarify, because it was the case  
4 three years ago. You don't even have to take the  
5 disk into a Wal-Mart to do this anymore. You just  
6 sit at home, put it in your disk drive, and you  
7 can do the conversion process sitting right there.

8           MR. CHENEY: So, with that information,  
9 Mr. Decherney, do you think that would be a viable  
10 option for you instead of the Blu-ray?

11           MR. DECHERNEY: So, I'd want to know  
12 about the library of titles available. I'd be  
13 curious to know whether or not you can take short  
14 portions and then put them into a presentation so  
15 that they can be used effectively in classes.  
16 Could you take them and put them on slides with  
17 other kinds of material to show comparisons and  
18 other kinds of information?

19           MS. CHARLESWORTH: I think it's a  
20 digital download that you got. So based on my  
21 limited knowledge from the prior panel, the answer  
22 is yes, you could do those things. What it is is  
23 you're swapping out your lower-res version for a  
24 higher-res version that's delivered as a download.

25           MR. DECHERNEY: Right. And that's



1     editable, and -- it is.

2                   MS. CHARLESWORTH: Well, let me make  
3     sure Mr. Williams agrees with what I'm saying.

4                   MR. WILLIAMS: Yes. I think what you  
5     said is accurate. And then, I think that these  
6     copies are relevant in two ways for this. One is  
7     we think they can often be used without any  
8     circumvention to queue up in advance what you want  
9     to show from each of these downloaded titles. And  
10    then basically come into class and play from the  
11    start point you want to start from, these titles.  
12    That would not require circumvention.

13                  If you actually wanted to create the  
14    clip compilation that Professor Decherney wants to  
15    create, you would have to engage in circumvention.  
16    But as I read the existing exception, that's  
17    already allowed for. So we're not opposed to  
18    renewal. We're only opposed to expansions.

19                  I think we discussed some in L.A. the  
20    question of whether transmitted as opposed to  
21    distributed video is covered by the existing  
22    exemption, so whether streaming versus downloads  
23    are both covered. But these are clear downloads.  
24    They're not streams that I'm referring to.

25                  MS. CHARLESWORTH: Okay. Professor

1 Decherney, did you have something else you wanted  
2 to add?

3 (No audible response.)

4 MS. CHARLESWORTH: No?

5 Okay. Speak now or forever hold your  
6 peace till the next Triennial proceeding. We're  
7 all good?

8 Thank you very much. It's been a lively  
9 discussion, a good way to wake up this morning.  
10 And we will be back -- timekeepers, help me -- at  
11 what time?

12 MS. SMITH: We should say 11:00.

13 MS. CHARLESWORTH: I think we're running  
14 slightly behind. So we'll reconvene at 11:00 for  
15 the next class, which is Proposed Class 3. Yes,  
16 Proposed Class 3, Audiovisual works. I will  
17 reconvene at 11:00, which is 15 minutes behind  
18 schedule, but we'd like to give people the  
19 opportunity to stretch their legs. See you then.

20 (Whereupon, at 10:42 a.m., Class 1  
21 concluded, to reconvene for Class 3 at  
22 11:05 a.m.)

23 PROPOSED CLASS 3: AUDIOVISUAL  
24 WORKS -- EDUCATIONAL  
25 USES -- MASSIVE OPEN ONLINE COURSES

1 ("MOOC'S")

2 MS. CHARLESWORTH: Welcome back,  
3 everyone. It looks like we have the same  
4 distinguished panel. Thank you for coming back. I  
5 hope everyone had a good coffee break.

6 We're here now for Proposed Class 3,  
7 which is audiovisual works -- educational uses --  
8 massive open online courses, or "MOOC's." MOOC's  
9 is the acronym. So we'll be hearing a lot about  
10 that in a moment.

11 I know you're all the same people,  
12 but for the record it would be helpful to  
13 introduce yourself briefly again. I won't go over  
14 the rules of the road, since you heard them  
15 earlier. And we will proceed with the discussion  
16 of Proposed Class  
17 3.

18 Mr. Butler, if we can start with you.

19 MR. BUTLER: Sure. I'm Brandon Butler  
20 from the Glushko-Samuelson Intellectual Property  
21 Law Clinic at American University. And I'm  
22 speaking for the Joint Creators.

23 Should I just keep going? Or are we  
24 going to go down the line?

25 MS. CHARLESWORTH: No. I think it's

1 helpful for the record just for everyone to  
2 briefly say who they are.

3 MR. BUTLER: Yes.

4 MS. CHARLESWORTH: Then we will get back  
5 to you and you can make your opening remarks.

6 MR. BAND: I'm still Jonathan Band, on  
7 behalf of the Library Copyright Alliance.

8 MR. DECHERNEY: Peter Decherney, from  
9 the University of Pennsylvania, on behalf of the  
10 Joint Educators.

11 (Laughter.)

12 MS. CHARLESWORTH: Now you're switching  
13 teams.

14 MR. TURNBULL: We've been doing this,  
15 and now if we could just switch sides.

16 MS. CHARLESWORTH: That would be  
17 interesting.

18 (Laughter.)

19 MALE PARTICIPANT: Peter is off-brief  
20 now.

21 MS. CHARLESWORTH: Maybe for the Seventh  
22 Triennial proceeding we'll try something like  
23 that.

24 (Laughter.)

25 MR. TURNBULL: I'm Bruce Turnbull

1 representing, in this case, both DVD Copy Control  
2 Association and AACIS LA LLC.

3 MR. WILLIAMS: Matt Williams, thank you  
4 for having me, for MPAA, ESA, and RIAA.

5 MS. CHARLESWORTH: Okay. Mr. Butler,  
6 tell us about MOOC's.

7 MR. BUTLER: Happy to. So, again I'm  
8 going to focus on the lawfulness question, and  
9 Professor Decherney will focus on the effects on  
10 teaching.

11 So, I have just two simple principles  
12 that really motivated us here that I think might  
13 be helpful to get out front, and then sort of a  
14 critique of the other side.

15 So, the first principle that this  
16 exemption is grounded in is a core principle that  
17 the lawfulness of a use should not depend on the  
18 medium of its storage. Right? So when the "Wind  
19 Done Gone" is a fair use in paperback, it's also a  
20 fair use in hardback. It's fair use when it's  
21 read aloud as an audio book, and it's fair use  
22 when it's displayed on your Kindle as an E-book.

23 So, too, with teaching. When Professor  
24 Decherney teaches World Film History to 1945 and  
25 he incorporates media into his lectures in a

1 physical classroom, that is fair use. And when he  
2 takes that course and transfers it to Coursera,  
3 again, that use is fair. And yet we know that,  
4 without an exemption that clearly covers the  
5 Coursera context, there are virtually zero film  
6 studies courses being offered on any of these MOOC  
7 platforms, which is rather different than what the  
8 university and college campus looks like.

9           So, we see a real stark effect here and  
10 a stark difference between the two teaching  
11 contexts. There are some things that you can teach  
12 in one mode and you can't teach in another mode,  
13 and we think this is part of why.

14           The second principle is that fair use  
15 can and does operate at scale. So, to take an  
16 example from beyond the educational context, every  
17 night "The Daily Show" uses a wide variety of  
18 clips from the news industrial complex, right, to  
19 poke fun at the things we do in this town and the  
20 way the media covers the things we do in this  
21 town.

22           Segments on "The Daily Show" are then  
23 broken out and made available online in bite-sized  
24 pieces designed to further spread in a viral way.  
25 Again, the whole idea is to go viral and to be

1 shared by millions of people. VCR's and DVR's  
2 have likewise been sold to millions of people.  
3 Search engines, from Arriba Soft to TVI's, have  
4 copied thousands and even millions of works to  
5 create their search indexes.

6 All of these uses are fair. They've  
7 been found fair in the courts. And nobody says  
8 that just because they're big, they can't be fair.  
9 And we think just because MOOC's are big doesn't  
10 mean they can't be fair.

11 The critical observation I want to make  
12 about our friends in the creative industries flows  
13 naturally from those observations. If the  
14 concerns that they raise about scale and platform,  
15 among other things, are legitimate, then if  
16 activities use their fair use eligibility when  
17 they're available to a massive audience or over a  
18 massive platform, that would, of course, be bad  
19 news for motion pictures, right?

20 The Joint Creators suggest that MOOC's  
21 may not be fair use, because they function as  
22 marketing tools. They generate income, and  
23 sometimes are used as entertainment.

24 If we should fret that a MOOC course on  
25 the French New Wave is just too popular, too

1   lucrative, or too fun to be fair use, then how  
2   should we feel about "South Park," right? In a  
3   blog post in 2013, Ben Sheffner pointed out that  
4   the MPAA and its members have vigorously defended  
5   the fair use rights of filmmakers and multiple  
6   for-profit mass-market, not always edifying, but  
7   still fun projects like "South Park," "Family  
8   Guy," "Naked Gun 33-1/3" and "Midnight in Paris,"  
9   and the highlight reels for the Baltimore Ravens.

10               So, if the major studios don't lose  
11   their fair use rights just because they're big and  
12   fun and because they sometimes make money, then we  
13   don't think that educational platforms should,  
14   either.

15               MS. CHARLESWORTH: Okay. But would you  
16   be willing to agree that in the fair use analysis,  
17   whether use is commercial and for-profit is a  
18   relevant factor?

19               MR. BUTLER: Certainly. It is a  
20   relevant factor.

21               MS. CHARLESWORTH: And I have a question  
22   for you. You didn't really address this. But  
23   tell me about Section 110(2) and how that impacts  
24   your analysis or why -- I mean, is that a basis  
25   for an exemption here?



1 MR. BUTLER: No, not at all.

2 MS. CHARLESWORTH: Why? Why not?

3 MR. BUTLER: Because Section 110(2) has  
4 a very long -- it's interesting to contrast 110(1)  
5 to 110(2), for in person, it's sort of barely a  
6 page of the statute. But 110(2) has several pages  
7 of requirements that a university must meet in  
8 order to get that kind of blanket protection  
9 without having to think about whether their uses  
10 are fair. And from what we know about MOOC's,  
11 110(2) doesn't apply.

12 MS. CHARLESWORTH: So, are you  
13 suggesting that none of the -- for a MOOC where  
14 you had enrolled students and met the  
15 qualifications of 110(2), that that wouldn't  
16 provide a basis for saying it's a permissible use?

17 MR. BUTLER: It's possible. We didn't -  
18 - I know that what we did was walk through 110(2).  
19 And we found that there were at least some MOOC  
20 courses that might at least, arguably, not satisfy  
21 those requirements.

22 MS. CHARLESWORTH: Okay. Some might  
23 not. I hear what you're saying.

24 MR. BUTLER: Right.

25 MS. CHARLESWORTH: But I mean, aren't

1 there some that would? Are you suggesting that no  
2 MOOC course would ever fall under 110(2)?

3 MR. BUTLER: No, I'd be happy to take  
4 advantage of 110(2) if I could find courses that  
5 satisfied them. And we just didn't find that the  
6 bulk of them automatically would. And so we  
7 didn't want that to be the foundation of our case.

8 MS. CHARLESWORTH: I understand you're  
9 looking for something broader here.

10 MR. BUTLER: Right.

11 MS. CHARLESWORTH: But let's start with  
12 what the law does allow. And then we can talk  
13 about why, you know -- I mean, you're being sort  
14 of -- I need to understand why -- I mean, if  
15 students are officially enrolled, you know, we can  
16 walk through the requirements. Should we do that?

17 MR. BUTLER: Well, we could. To give  
18 you some background also on where I'm coming from,  
19 I know from talking with university professors and  
20 librarians and the Copyright Council and  
21 university counsels' offices that 110(2) is  
22 generally considered to be difficult to comply  
23 with. That is, universities typically do not  
24 implement -- you know, they do not walk through  
25 and tick off the boxes in 110(2) as the way to be

1 sure that their activities are lawful, because  
2 those boxes are perceived by university counsel as  
3 being difficult to tick off.

4 And I'm sort of deferring here to their  
5 expertise. They know more about the technology. I  
6 mean, there are specific technological  
7 requirements in 110(2). You have to use DRM on  
8 the clips that you put into the system, for  
9 example.

10 MS. CHARLESWORTH: Right.

11 MR. BUTLER: So, my understanding is  
12 that 110(2) is just sort of a dead letter already  
13 for mainstream college and universities. So I  
14 didn't think it would be useful for MOOC's either.

15 MS. CHARLESWORTH: So, are you saying  
16 that there's -- let's say we were interested in  
17 granting an exemption, but we looked at 110(2) and  
18 said, you know, this obviously was carefully  
19 designed and thought out by Congress as a way to  
20 enable distance education, that should simply  
21 ignore this entire part of the statute when we're  
22 talking about online, you know, MOOC's or online  
23 education courses in thinking about the basis for  
24 an exemption? Is that your position?

25 MR. BUTLER: No. 110(2), I mean, my

1 understanding is that it's a safe harbor. It  
2 describes very clearly, if you do exactly these  
3 things, your uses will always be lawful, right?  
4 And that's great, and that was useful or seen to  
5 be useful at the time that it was agreed to.

6 But again, my understanding from talking  
7 to people in the field is that, over time, the  
8 safe harbor that is described by 110(2) has come  
9 to be seen as too small, that is. And we know  
10 that 110(2) and fair use are not mutually  
11 exclusive. So.

12 MS. CHARLESWORTH: Okay. So it would  
13 help me to know why it's too small. You mentioned  
14 -- are they unable to put TPM's on the materials  
15 that they provide online?

16 MR. BUTLER: I think that is the part  
17 that is the most cumbersome, yes. It's a  
18 technological problem.

19 MS. CHARLESWORTH: So, if that were not  
20 an issue, do you think this would be a more  
21 helpful provision to you?

22 MR. BUTLER: Probably so. That's my  
23 understanding.

24 MS. CHARLESWORTH: Any other concerns  
25 about 110(2)?

1 MR. BUTLER: I don't think so.

2 MS. CHARLESWORTH: Okay. Did you have  
3 anything you wanted to add?

4 MR. BUTLER: No. That's all.

5 MS. CHARLESWORTH: Mr. Band.

6 MR. BAND: Thank you. Just two quick  
7 points before going into what I prepared in  
8 my statement.

9 First, with respect to 110(2),  
10 certainly, you know, the view of libraries is that  
11 it would be helpful to use that as a starting  
12 point. But as Brandon says, we don't think it  
13 goes far enough.

14 One of the other problems with 110(2) is  
15 just a lot of the terms -- it's unclear exactly what  
16 they mean. So even though it is very detailed and  
17 long, it still has uncertainty. And so there are  
18 questions as to how long the material can be  
19 available online and things of that sort.

20 And so, those kinds of -- that rigidity  
21 has made it less useful than it otherwise would  
22 be. But again, like I said, better than nothing,  
23 as I said before, and a good starting point.

24 I also just wanted to very quickly  
25 return to something we talked about earlier, but I

1 think would also be relevant here, the issue about  
2 short portions. And we're saying, what would be  
3 the example of when you would want to use more  
4 than a short portion? So, imagine that you have a  
5 two-hour class session, again whether it's a MOOC  
6 or a physical class, and you're studying one film.

7           During the course of that two-hour  
8 session, you might see, cumulatively, half-an-hour  
9 of the film. You might see a little clip, and  
10 then the professor would talk about it, and then  
11 you'd see something more.

12           You know, is that a short portion? Well,  
13 each clip is a short portion. But taken together,  
14 it might be half-an-hour out of a two- hour film.  
15 And I would say that, as used in that classroom,  
16 clearly fair use. But that could be -- and that  
17 would be the kind of thing we would want to have  
18 the flexibility in why short portions could be too  
19 narrowing.

20           Now, turning specifically to MOOC's, the  
21 principal arguments the opponents made against  
22 extending the existing audiovisual exemption to  
23 MOOC's is that because MOOC's are online, the  
24 potential harm to rights-owners is significant if  
25 the exemption is abused.

1           This argument overlooks the fact that,  
2 because of MOOC's online nature, any potential  
3 infringement will be much easier for rights-owners  
4 to identify and address than with typical college  
5 courses. The software tools owners currently use  
6 to locate infringing content on the Web will  
7 quickly find inappropriately long segments,  
8 enabling the rights-owners to expeditiously  
9 request the MOOC provider to remove the allegedly  
10 infringing content.

11           Moreover, this notion of MOOC's causing  
12 harm ignores reality. We all know that  
13 circumvention tools, particularly for CSS, are  
14 widely available and widely used, as Mr. Turnbull  
15 acknowledged in the previous hearing. Thus, abuse  
16 of an exemption in a MOOC will really have no  
17 discernable impact on the level of infringing  
18 activity.

19           I'll just add that in the nine years  
20 that higher ed has had an exemption for  
21 audiovisual works, there's not been one reported  
22 instance of circumvention leading to infringement.  
23 You know, there's no reason to believe that  
24 extending the exemption to MOOC's will change  
25 that.

1 MS. SMITH: But you want sort of a  
2 standing exemption beyond the traditional higher  
3 education industry; that's part of the point. And  
4 also have sort of no restrictions on the scope of  
5 the content or the users of the content or the  
6 availability of the content.

7 I mean, what is your definition of a  
8 MOOC, and how does it relate to what we might  
9 traditionally think -- for example, what Professor  
10 Decherney wants to do in his class?

11 MR. BAND: Well, in our submission, we  
12 provided a definition. And, you know, again  
13 that's the kind of thing that is something that  
14 would have to come out through this process.

15 I think that the basic point is that  
16 almost any definition -- again, frankly, if we're  
17 talking about something like DVD's, I mean,  
18 really? It's so easy for people to rip DVD's that  
19 the likelihood that any harm would come through  
20 the educational use in a MOOC, however it's  
21 defined, whether it's for-profit, nonprofit,  
22 unlimited, open enrollment, closed enrollment,  
23 really would make no difference.

24 I mean, I would certainly advocate for  
25 the broadest definition. But, you know, if you're



1 going to want this hearing, this round, have a  
2 narrow definition and see what happens down the  
3 road, that would be one way you could go. But I -

4 MS. SMITH: I guess I'm not seeing what  
5 is the definition that you're proposing? I see  
6 you rejecting everything suggested in the NPRM as  
7 ways we might define it. But what is the  
8 definition you're proposing?

9 MR. BUTLER: Sure. So I can help here.  
10 In the comments, we relied on the words in MOOC,  
11 that is it is massive, it is open, it is online,  
12 and it is a course. But in the meantime, we  
13 actually found a definition from the Oxford

14 Dictionary's dot-com site: "a course of  
15 study made available over the Internet without  
16 charge to a very large number of people." That's,  
17 we think, what a MOOC is.

18 MS. CHARLESWORTH: Without charge.

19 MR. BUTLER: Without charge.

20 MS. CHARLESWORTH: So it would exclude  
21 for-profit enterprises?

22 MR. BUTLER: No. For-profits -- so,  
23 just as Gmail is provided without charge, right?  
24 So you don't literally pay to be a part of the  
25 class. That doesn't mean that there's not a --

1 MS. CHARLESWORTH: People don't pay  
2 tuition for any of these classes?

3 MR. BUTLER: No.

4 MS. CHARLESWORTH: So, how does -- how  
5 do the for-profit ones make money?

6 MR. BAND: That's a good question.

7 (Laughter.)

8 MR. BUTLER: They're from Silicon  
9 Valley. They'll figure that out later.

10 (Laughter.)

11 MS. CHARLESWORTH: Okay. Forgive my  
12 naivete. I thought people paid to enroll and get  
13 credits. No?

14 MR. DECHERNEY: No, so that is part of  
15 the model, right? Build it and then eventually  
16 we'll figure out how to make money.

17 MS. CHARLESWORTH: Yes. The copyright  
18 owners love that one.

19 MR. DECHERNEY: There are a number of  
20 ways that Coursera and Udacity, which are the for-  
21 profit companies, make money. And actually, edX,  
22 the nonprofit, makes money the same way. The  
23 major way is people pay for certificates of  
24 completion after they have finished a course. They  
25 don't have to get the certificate, and some

1 courses have certificates that don't require  
2 payment. But increasingly, they're moving to only  
3 paid certificates.

4 MS. CHARLESWORTH: That's what I  
5 thought. So they do -- they do charge. Not  
6 necessarily to enroll, but to complete the course.

7 MR. DECHERNEY: Right.

8 MS. CHARLESWORTH: Or there's a --

9 MR. DECHERNEY: No. You can take the  
10 whole class for free. But to get a certificate  
11 that says, kind of a meaningless certificate that  
12 says you finished it -- you can also claim you  
13 finished it -- you can pay for that. There are  
14 also other ways that they make money. Companies  
15 will pay to opt into a program where students who  
16 do well in engineering courses can have their CV's  
17 and their course scores sent to Facebook or Yahoo  
18 or whoever. There are other models.

19 MS. CHARLESWORTH: Thank you. That's  
20 helpful.

21 MR. BAND: But so far, none of them are  
22 making money, for precisely the reason Peter is  
23 indicating.

24 MS. CHARLESWORTH: Okay. All right. I  
25 think I'm understanding better. Thank you.

1           MS. SMITH: So, to follow up, what would  
2 to stop me from putting out, say, a full  
3 episode of "South Park," saying it was a course  
4 and having a minute of my own commentary at the  
5 beginning, claim that, you know, just making it  
6 available on YouTube? And that's it -- no  
7 registration required. I could be a for-profit  
8 entity and there's nothing else, you know,  
9 restricting access to that. And it's also  
10 available in perpetuity.

11           MR. BUTLER: I think we've reached our  
12 quota of -- there we go. So one thing is you'd  
13 have to argue with a straight face that that's a  
14 course. And I don't think you can do it. But  
15 we've talked a little bit about possible ways that  
16 the definition could be augmented, right? So if  
17 we read clearly and loudly the concern about --  
18 and this concern is not uncommon, you know, some  
19 guy is going to say, "I'm a MOOC," right, and then  
20 do what you said.

21           Again, the first option is, that's not a  
22 course. So that guy would have to stand in front  
23 of a judge and try to say with a straight face, "I  
24 put this up with two minutes of commentary, and I  
25 call that a course." And the judge will laugh him

1 out.

2 But the possible limitations that we've  
3 come up with, you could, if you wanted to, limit  
4 the exemption to MOOC's that are offered by or in  
5 partnership with, and then in WIPO style we have  
6 lots of brackets, and we can send you this  
7 language.

8 But, you know, you could say, "with an  
9 institution," right? So not just any individual;  
10 it needs to be an institution. Or you could say,  
11 "with an institution with an educational mission,"  
12 so not just any institution, an institution with  
13 an educational mission.

14 MS. SMITH: Would that include companies  
15 like Khan Academy?

16 MR. BUTLER: Yes.

17 MS. SMITH: Because Khan Academy  
18 qualifies as an institution?

19 MR. BUTLER: Yes.

20 (Cross-talk.)

21 MS. CHARLESWORTH: I'm sorry. Just for  
22 the record, Khan Academy is a for-profit entity or  
23 not?

24 MR. BUTLER: I think Khan is nonprofit.

25 MR. DECHERNEY: Yeah, Khan Academy is a

1 nonprofit, funded by a number of foundations.

2 MS. CHARLESWORTH: Thank you.

3 MR. BAND: But also, just to go back to  
4 that question of that YouTube example and then  
5 putting aside the fact that that would certainly  
6 not pass the Content ID system on YouTube, if it's  
7 infringing, it's infringing, right? I mean, so  
8 there's no question.

9 If you're putting up the whole episode  
10 of a television program or a whole movie, it's  
11 also infringing. I mean, so remember. This is in  
12 addition to the basic way we deal with problems,  
13 which is copyright law. Right? I mean, this is  
14 meta-copyright. And so, you would still always  
15 have the fallback of copyright law and saying that  
16 that's an infringement.

17 MS. SMITH: Right. But I think we have  
18 to evaluate whether or not the uses are likely to  
19 be non-infringing. And if there's no parameters  
20 on what is being posted or what is being taken,  
21 that becomes less likely to be non-infringing.

22 MR. BAND: But it would be the same  
23 parameters you have for the other exemption. It  
24 wouldn't -- I mean, you would have the same. The  
25 idea is to say whatever you have under Class 1,

1 that would apply to this class. It's just in the  
2 MOOC context.

3 MS. CHARLESWORTH: That's helpful.

4 MR. DECHERNEY: May I add just one  
5 clarification?

6 MS. CHARLESWORTH: Yes, Professor  
7 Decherney.

8 MR. DECHERNEY: So, Coursera doesn't  
9 offer MOOC's. Udacity doesn't offer MOOC's.  
10 They're the platforms that universities use to  
11 offer MOOC's. Museums, like the Museum of Modern  
12 Art, offers a MOOC. The World Bank offers a MOOC.  
13 Many other organizations will offer MOOC's. And  
14 they'll use a platform just like edX or Udacity or  
15 Coursera.

16 So just because the platform is for-  
17 profit doesn't mean that the organization is for-  
18 profit. In the same way that if you use YouTube,  
19 YouTube is a for-profit company, but you might be  
20 a nonprofit educational institution putting  
21 lectures on YouTube.

22 MS. CHARLESWORTH: Can I ask, when you  
23 say -- does your university do this?

24 MR. DECHERNEY: Yes.

25 MS. CHARLESWORTH: Okay. So, the

1 University of Pennsylvania offers a MOOC. Do you  
2 have to register in any way? I mean, if you maybe  
3 can be more specific about -- maybe you're  
4 familiar with a course that you can discuss how it  
5 works. Is it password protected, et cetera?

6 MR. DECHERNEY: So, you have to register  
7 for all of the courses. That's one of the things  
8 that we trade in, is the information about people  
9 that are interested in the courses. And  
10 everything is password-protected. You have to be  
11 a registered user in order to access it.

12 There are more steps to registration for  
13 the for-profit platforms than there are for edX,  
14 one of the big nonprofit platforms.

15 MS. CHARLESWORTH: And do you know  
16 whether what you're offering falls under 110(2),  
17 your university? It may not be a fair question to  
18 you, but --

19 MR. DECHERNEY: As far as I know, none  
20 of the videos we provide are encrypted. So they  
21 don't have DRM, so they would not be covered under  
22 110(2), if I understand that correctly.

23 MS. CHARLESWORTH: Okay. So I guess I  
24 was sort of -- okay. So setting -- there's a TPM  
25 issue in terms of qualifying for 110(2), you're



1 saying? In terms of, is there a course that  
2 you're particularly involved in at University of  
3 Pennsylvania?

4 MR. DECHERNEY: So, I'm planning to  
5 offer a course in October.

6 MS. CHARLESWORTH: Okay. You're  
7 planning on offering a course. Okay.

8 MR. DECHERNEY: I can talk about other  
9 courses we offer.

10 MS. CHARLESWORTH: Yeah. No, I'm just  
11 trying to understand. So, if there were no  
12 exemption granted, how would you go about offering  
13 that, with video? Explain your thought process.

14 MR. DECHERNEY: So, we offer several  
15 dozen courses already. Our entire MBA core  
16 curriculum is available as MOOC's. And they're  
17 popular. We think they're part of the core  
18 mission of the university, which is to spread  
19 education and knowledge and research.

20 It's not exactly clear what a MOOC is  
21 now. I think in five years it will be very clear  
22 that a MOOC is just part of what universities do,  
23 in the same way that we offer courses, we publish  
24 books. Where exactly MOOC's fit into this is still  
25 up for debate. Is MOOC just an online course?

1           It may also be something closer to the  
2 next generation of textbook. People will  
3 register, will license courses, Coursera courses,  
4 to be used as part of the similar course to  
5 another university in the same way you would use a  
6 textbook and make that available.

7           MS. CHARLESWORTH: Do people pay for the  
8 UPenn courses? Did the registrants --

9           MR. DECHERNEY: No. So, you don't have  
10 to pay to take a Coursera course. But you can pay  
11 for a certificate of completion at the end.

12           MS. CHARLESWORTH: Okay. So under the  
13 UPenn version of this offered through, it sounds  
14 like Coursera is the platform, to get a  
15 certificate of completion or whatever, the student  
16 must pay.

17           MR. DECHERNEY: For some courses; not  
18 for all.

19           MS. CHARLESWORTH: For some courses. Do  
20 you know roughly how much they pay for that?

21           MR. DECHERNEY: I should know that.

22           MS. CHARLESWORTH: Is your course going  
23 to charge?

24           MR. DECHERNEY: So, my course we offer  
25 through edX. Starting in the fall, we'll be

1 offering a number of courses through edX. My  
2 course will have a certificate of completion you  
3 can even get for free. We will not charge for it.

4 MS. CHARLESWORTH: Okay. And when you  
5 said you were going to offer video -- I think you  
6 used that word -- I mean, what do you intend to  
7 include in your course?

8 MR. DECHERNEY: Yeah, so it's very  
9 similar to a course I teach as a normal on-the-  
10 ground live course on the History of Hollywood. I  
11 tend to use clips that are always about -- involve  
12 criticism and commentary. And this will be a much  
13 shorter version of that. And it will be one  
14 that's canned, that's a lecture that's online  
15 rather than dynamically delivered with interacting  
16 with students.

17 The excerpts will be very short. When  
18 we started two years ago, we thought 10-minute  
19 lectures were short. It turns out people, the  
20 average time for people to tend to tune out was  
21 four minutes and thirty seconds. So --

22 MS. CHARLESWORTH: You have to give a  
23 lecture in four minutes and thirty seconds?

24 MR. DECHERNEY: You give a portion of a  
25 lecture in five minutes. And then there's

1 something else that happens. A kind of quiz or an  
2 activity.

3 (Laughter.)

4 MR. DECHERNEY: The videos are very  
5 short.

6 MS. CHARLESWORTH: Okay.

7 MR. DECHERNEY: Which necessitates that  
8 the clips are very short as well.

9 MS. CHARLESWORTH: Okay. So, the clips  
10 are short, and how are you -- I mean, getting into  
11 the issue of you're seeking exemption for this? I  
12 mean, if an exemption weren't granted, how would  
13 that -- I mean, would you still have clips in  
14 there? And if so, how? I mean, would you be  
15 doing screen-capture? What's the plan?

16 MR. DECHERNEY: I've actually put off  
17 offering the course for several years for this  
18 very reason. I don't know if I will offer the  
19 course. I think it's unlikely that I'll offer the  
20 course if there isn't a separate exemption.

21 MS. CHARLESWORTH: Okay. And how many  
22 installments -- how many like of these five-minute  
23 or four-minute lectures constitute a course?

24 MR. DECHERNEY: So, it would be an  
25 eight- week course for, I don't know, probably 30

1 to 40 hours of video of lectures, not 30 to 40  
2 hours of --

3 (Cross-talk.)

4 MS. CHARLESWORTH: Of video of you.

5 (Laughter.)

6 MR. DECHERNEY: Yeah, video of me.

7 MS. CHARLESWORTH: Okay.

8 MR. DECHERNEY: Right, of which some  
9 portion would be --

10 (Cross-talk.)

11 MS. CHARLESWORTH: We want that in Blu-  
12 ray, Professor.

13 (Laughter.)

14 MS. CHARLESWORTH: Low-res will not be  
15 sufficient.

16 Okay. So, 40 or 50 hours of course  
17 lectures, and within that you would have embedded  
18 what you described as very short clips?

19 MR. DECHERNEY: Right.

20 MS. CHARLESWORTH: Okay.

21 MR. DECHERNEY: The videos we provide  
22 are always high-definition.

23 MS. CHARLESWORTH: And, you know, again  
24 if you can't answer this, but under 110(2), it  
25 sounds like the issue you're having is the TPM's

1 that are required under 110(2). Or is there any  
2 other concern about fitting under that definition?  
3 Or if it's not something you can answer, maybe  
4 it's something we'll follow up on.

5 MR. BUTLER: Well, yeah, I mean, I've  
6 been poring over 110(2). And I mean, again, it's  
7 -- there's no smoking gun that says, "Aha! Now we  
8 know. No MOOC can qualify." But there are, again,  
9 these sort of -- as part of -- the transmission  
10 must be part of the systematic mediated  
11 instructional activities of an accredited  
12 nonprofit educational institution.

13 And again, the question is, are these  
14 the activities of an accredited institution? I  
15 guess people are just concerned because of the  
16 strange sort of hybrid nature of so many of these.  
17 Again, the Khan Academy won't qualify. The World  
18 Bank won't qualify. UNICEF won't qualify.  
19 National Geographic Society won't qualify.

20 So, Peter might be in a privileged  
21 position in this respect. If he can convince his  
22 GC that these are the right kinds of activities,  
23 he might win out. But a lot of people won't.

24 MS. CHARLESWORTH: Okay.

25 MR. BAND: Also, just one of the other

1 issues, and this is talking about it, is the  
2 formulation -- well, where it talks about the  
3 retention of the work as accessible by recipients  
4 for, you know -- I mean, it's not available if  
5 it's for longer than the class session. And  
6 that's sort of like, well, what does that mean?  
7 What is the class session when you have an online  
8 class, when stuff might be available for a long  
9 period? I mean, is it a class? Is it a course?

10 I mean, there has been confusion. I  
11 mean, does it mean it's available the whole time,  
12 you know, the whole semester? Or is it available  
13 for just a week? There just has been confusion as  
14 to exactly what this means.

15 MS. CHARLESWORTH: Okay. Thank you. I  
16 guess we'll go to the other side of the table now.

17 Okay, Mr. Turnbull.

18 MR. TURNBULL: Thank you. Again, I'm  
19 Bruce Turnbull representing DVD CCA and AACCS LA.

20 I mean, a number of points that I'm  
21 trying to reposition a little bit here because a  
22 number of the points have been covered in the  
23 questions. But I mean, our fundamental concerns  
24 here are that this is an unbounded exemption, sort  
25 of anyone can be a student. Anybody can declare

1 that they're teaching a MOOC. I don't think that  
2 the efforts at definitions either in the comments  
3 or from the Oxford Dictionary helped much in  
4 relation to what would not qualify as a MOOC.

5 If you put together a course, you know,  
6 a series of "South Park" episodes over an eight-  
7 week period, with commentary, where you're playing  
8 the episode, is that a course?

9 And I think this also gets to another  
10 point, which came up in Mr. Band's comment, where  
11 he said, "Well, you can always go to court and sue  
12 people for copyright infringement."

13 Part of the purpose of the DMCA was, in  
14 fact, to avoid that by the use of technological  
15 protection measures so that you didn't have to go  
16 after individual users or posters of material,  
17 that you would have a technology that would be  
18 reasonably deployed to protect the work by itself.

19 It was self-protecting, not requiring to  
20 chase people around the world with their YouTube  
21 videos or whatever, that the Blu-ray is protected  
22 using a technological protection measure, and then  
23 you don't have to sue everybody. That was part of  
24 the purpose.

25 Now, this particular proceeding has been



1 described as sort of fail-safe. If, however, in  
2 effectuating that purpose, the technological  
3 protection measure goes too far or you can't make  
4 fair use, or some other non-infringing use, then  
5 there was a means of coming in and getting an  
6 exemption.

7           And it seems to me, however, what Mr.  
8 Band was positing was in effect turning this all  
9 on its head, where, you know, it's okay. You  
10 don't have to worry about the breadth of the  
11 exemption or the unbounded nature of the  
12 exemption, because they can always go back on  
13 copyright law. And that seems to me to be  
14 undermining the very purpose and essence of the  
15 Digital Millennium Copyright Act in the first  
16 place.

17           With regard to the TEACH Act and the  
18 110(2) discussion, I think there are two points  
19 here. One is the one that was pursued in the  
20 question, which is, if in fact these courses fit  
21 within that, then why aren't they using the  
22 requirements of the Act? And it seems to me that  
23 that, in and of itself, is a good question and one  
24 that ought to be posed to anyone seeking to do  
25 this.

1           But more broadly, this was Congress's  
2 expression of how they expected the online  
3 educational environment to work. In fact, the use  
4 of TPM's was deliberate. It was something that  
5 Congress thought ought to be there. And if it's  
6 inconvenient or whatever from the educational  
7 institution's standpoint, well, you know, I don't  
8 want to say "that's too bad," but that's what the  
9 law is. That's what Congress thought ought to be  
10 done with regard to this.

11           MS. CHARLESWORTH: Can I break in and  
12 ask a question? And, you know, this may be sort  
13 of a technological question.

14           MR. TURNBULL: Yeah.

15           MS. CHARLESWORTH: But how difficult  
16 would it be to apply a TPM after -- just for the  
17 record, to be clear what I'm asking, you put  
18 together a course. It has some clips of copyright  
19 content within your five-minute video. How hard  
20 is it to attach a TPM to that lecture or those  
21 materials within the lecture?

22           MR. TURNBULL: I mean, I don't think  
23 this is difficult at all. Whether I personally  
24 could do it or not is a different question. But  
25 the ability to make use of encryption, I mean, you

1 can encrypt your email, you know, with a standard  
2 setting. You can encrypt content that you have on  
3 your computer with a standard setting from a  
4 computer program.

5 I mean, these are not rocket science  
6 difficult things. And you can trigger the use of  
7 -- you know, if you're allowing an output, if  
8 you're allowing somebody to receive this on their  
9 laptop and to trigger an output to go to their  
10 big-screen TV or whatever, you can trigger the use  
11 of the HDCP connection over HDMI to the TV. You  
12 don't even have to actually use it on the  
13 particular content. It gets triggered by the  
14 output itself.

15 So, this is not -- I don't think this is  
16 a particularly burdensome thing to put in place.

17 MR. CHENEY: Mr. Turnbull?

18 MR. TURNBULL: Yes.

19 MR. CHENEY: Would it be acceptable  
20 under this 110(2) to just have a password to  
21 access? Or does a TPM need to be on each film  
22 clip in your understanding of this 110(2)?

23 MR. TURNBULL: I think the 110(2)  
24 provision on TPM's is in the transmission of it.  
25 So, it is -- let me -- I had it open here a second

1 ago.

2 MR. CHENEY: So, the transmission needs  
3 to be encrypted, not just that you have to access  
4 it by password?

5 MR. TURNBULL: Yeah. "In the case of a  
6 digital transmission, it applies technological  
7 measures that reasonably prevent retention of the  
8 work in accessible forms by the recipient and  
9 other unauthorized further dissemination of the  
10 work."

11 So, it is a TPM that, as it's  
12 transmitted to the recipient, you know, works in  
13 the same way, frankly, that AAC3 works, that the  
14 HDCP works.

15 I mean, there are a range of these kinds  
16 of methods. A lot of online distribution systems  
17 use these, and these are not -- I don't know that  
18 the individual clip would necessarily have to be  
19 isolated, although you could do it that way if  
20 that was -- you know, if Professor Decherney  
21 didn't care about his own lecture being protected  
22 this way. But the clip internally then would have  
23 to be protected so that it would trigger that  
24 mechanism.

25 MR. CHENEY: Okay. Thank you.

1 MS. CHOE: You mentioned the concerns  
2 with the scope of the definition of MOOC's,  
3 especially as they're proposed by proponents. So  
4 if MOOC's were able to tailor their activities,  
5 and you mentioned in particular the TEACH Act, if  
6 they're able to tailor their activities and  
7 qualify under the TEACH Act, which I know that,  
8 again, proponents find is hard to use, but if they  
9 were able to qualify under the TEACH Act, would  
10 you still be against extending the exemption to  
11 MOOC's?

12 MR. TURNBULL: I think our view is if  
13 they qualify under the TEACH Act, they qualify  
14 under the TEACH Act, and they don't need an  
15 exemption. So that's --

16 MS. CHARLESWORTH: Wait a second. You  
17 would still need an exemption to circumvent, to  
18 include the materials.

19 MR. TURNBULL: Look. I think that if  
20 they were re-protected, we would still be  
21 concerned with the use of the circumvention tool,  
22 as I've testified in other panels. AACCS  
23 particularly is concerned about the promotion of  
24 the use of these unauthorized tools for getting  
25 the clip in the first place. And so I think, at

1 least as far as AACCS is concerned, there would be  
2 a concern about that that would continue.

3 MS. CHARLESWORTH: Meaning the Blu-ray  
4 issue?

5 MR. TURNBULL: Right.

6 MS. CHARLESWORTH: But in terms of --  
7 you know, you didn't object to the -- in the  
8 classroom setting, short clips. In other words, a  
9 continuation of that --

10 MR. TURNBULL: The DVD CCA did not.

11 MS. CHARLESWORTH: Okay.

12 MR. TURNBULL: In relation to DVD's. In  
13 the AACCS context, AACCS didn't really comment on  
14 the continuation of the exemption because it  
15 didn't apply to AACCS.

16 MS. CHARLESWORTH: Okay.

17 MR. TURNBULL: But I think that if you  
18 tailored this in a way that, first of all, did  
19 have the additional protections that the TEACH Act  
20 provides, I can't say that DDVCCA has discussed  
21 this specifically, but I think it would be  
22 consistent with the position that DVD CCA has taken  
23 in the other categories to say, yes, if you have  
24 those kinds of protections involved, then  
25 extending the exemption here would be a reasonable

1 -- would be reasonable in the context of what's  
2 been done over the years.

3 MS. CHARLESWORTH: Okay. Thank you.

4 MR. TURNBULL: But I think that the --  
5 whether you say that the TEACH Act, 110(2),  
6 applies specifically, again the point is that, in  
7 the context of the kinds of exemptions that  
8 they're requesting here, it seems to me it's  
9 incumbent on the requesters to come forward and  
10 say, "Okay, this is how we can analogize to the  
11 requirements that Congress placed."

12 You know, they may not qualify, because  
13 they're not accredited or whatever. But this was  
14 how Congress envisioned online education to work  
15 with regard to the protection of copyrighted  
16 content that may be used in that context.

17 And they haven't come forward with any  
18 of that at all. And so, we think the exemption  
19 should be denied.

20 With regard to the question of DVD, and  
21 I have indeed said that the hack has been  
22 ubiquitous. However, the overall protection system  
23 has been maintained. And as recently as a year  
24 ago, you know, a judge in California found that an  
25 effort to make a movie library was indeed

1 irreparable harm to the DVD CCA licensing system.

2           And the concern that we have with the  
3 kinds of unbounded exemptions, like the MOOC one  
4 that's here, is in fact that it would undermine  
5 the licensing system and would thereby undermine  
6 the copyright owners' trust in the licensing  
7 system and the system of licensed products that  
8 are deployed.

9           I mean, although it is the case that you  
10 can get the circumvention tools if you walk into a  
11 legitimate retail store and buy a Blu-ray or buy a  
12 DVD player, it does conform to the requirements of  
13 the license, and it doesn't do what the  
14 circumvention tools do. And that system has been  
15 maintained throughout, notwithstanding the broad  
16 hack.

17           I think those were the points I wanted  
18 to make particularly. I'm happy to answer any  
19 questions.

20           MS. CHARLESWORTH: Thank you, Mr.  
21 Turnbull.

22           Mr. Williams.

23           MR. WILLIAMS: Thank you for having me,  
24 again for MPAA, ESA, and RIAA.

25           I'd like to start by touching on



1 something Brandon raised, which is that my clients  
2 indeed rely on fair use all the time and we're not  
3 here as the opponents of fair use. We are here to  
4 oppose this exemption, largely for the reasons  
5 that Bruce mentioned, especially the scope and  
6 breadth of the exemption.

7 I think it's gotten potentially even  
8 broader here today, as I'm sitting here listening  
9 to what they're really aiming at. I think it's  
10 pretty close to what we're going to discuss later  
11 today, which is an exemption for all educational  
12 activities by any noncommercial entity. Except  
13 here, it's even broader than that because they  
14 want to cover commercial enterprises in some  
15 respects.

16 So, I think this is really getting  
17 pretty close to a use-based exemption, something  
18 that the Office has repeatedly said is not allowed  
19 for under the Statute. It's basically an  
20 exemption for all educational uses, and if I'm  
21 hearing things right, the only real limitation is  
22 that those uses take place on the Internet, which  
23 doesn't give me a lot of extra comfort about that  
24 limitation. So, you know --

25 MS. CHARLESWORTH: Can I ask you, I

1 mean, just the colloquy we had with Mr. Turnbull  
2 about --

3 MR. WILLIAMS: Right.

4 MS. CHARLESWORTH: -- the idea of taking  
5 exemption for face-to-face activities and maybe  
6 extending it to activities that fall within, say,  
7 110(2).

8 MR. WILLIAMS: Right.

9 MS. CHARLESWORTH: Is that something you  
10 would find objectionable?

11 MR. WILLIAMS: I would like to speak to  
12 my clients about it. But I think that something  
13 that kept all of the restrictions in place for the  
14 existing exemption and maybe even added some of  
15 the things from the TEACH Act would be far  
16 preferable to what's being proposed and quite  
17 possibly something that we would not object to.

18 MS. CHARLESWORTH: Okay.

19 MR. WILLIAMS: Just a few more quick  
20 points. You know, there's a claim in the comments  
21 by the proponents that we're being alarmist. That,  
22 I think, is just inaccurate. I think some of it  
23 may be overly stated rhetoric. It's on the other  
24 side where they say that the current prohibition  
25 is erasing from academic history the most powerful

1 medium of the twentieth century, the moving image.

2 I just don't think that that's true. I  
3 think that movies are a huge part of what gets  
4 taught in education, across the board. And so, I  
5 think that that's really overstating the issue  
6 here.

7 MS. SMITH: Well, you've said that  
8 there's tens of thousands of MOOC courses, but  
9 only, I think, four for film studies. Would you  
10 agree if that's true that there might be an  
11 inhibiting effect because of this?

12 MR. WILLIAMS: Well, I don't know if  
13 that's true. I think that there are a number of  
14 things about MOOC's that might limit the use of  
15 clips as opposed to still images or as opposed to  
16 off-class preparation. First, I would say if  
17 you're going to do something in this area, I would  
18 rather not use the word "MOOC's." The "massive"  
19 part of it and "open" part of it, to me, is the  
20 wrong implication.

21 But, as Professor Decherney was saying,  
22 if you're trying to get this done in five minutes,  
23 I'm not sure you want to incorporate a whole lot  
24 of clips. And that might be one reason that  
25 that's not taking place.

1 MS. SMITH: Does it sound like Professor  
2 Decherney's planned course is objectionable?

3 MR. WILLIAMS: I'd hate to say his  
4 course is objectionable.

5 (Laughter.)

6 MR. WILLIAMS: My concern, I guess,  
7 would be that it sounds like it's being done  
8 instead of by the university directly, through one  
9 of these third- party actors. And my personal  
10 preference would be that each university, if they  
11 were going to have an exemption, basically be the  
12 sponsoring entity, as I think would be required  
13 under the TEACH Act and under the existing  
14 exemption.

15 So, one MOOC that I did watch a number  
16 of, I guess I'll call them episodes, it was  
17 through Coursera. It's "The Language of  
18 Hollywood," which is mentioned in a couple of the  
19 comments. And they used still images there. As  
20 far as I know, no circumvention needed to take  
21 place. And I found it effective.

22 I will note that, in that MOOC, I  
23 believe it's in week five, the professor largely  
24 just sits in front of a webcam like you would see  
25 on a YouTube video or other online videos, and

1 gives the lecture. And in week five, he noted that  
2 in some of the comments that had been posted,  
3 someone said, you know, "Don't sit so close to the  
4 camera, because you're distorting the image of  
5 your face when you do that."

6           So I don't think, at this point at  
7 least, everyone expects perfection when they go to  
8 see a MOOC. So the request for, you know, the  
9 high-quality images here is a little less  
10 compelling than in the classroom context, for that  
11 reason. I don't think there's an anticipation or  
12 expectation of perfection.

13           One more point is just on the harm  
14 issue, because we hear it repeatedly that we've  
15 been unable to prove that any of these exemptions  
16 have led to any harm. And, you know, I would just  
17 say it's virtually impossible for us to collect  
18 that kind of evidence. I mean, for us to know that  
19 a copy of a movie ended up on a peer-to-peer  
20 network or in a cyberlocker because a student at  
21 one point was introduced to circumvention  
22 technology in a classroom, we just would not know  
23 that.

24           So, I think the burden is appropriately  
25 on them on these issues, because that kind of

1 evidence is just very, very difficult, if not  
2 impossible, to collect.

3 I think that's all I have to say. Thank  
4 you very much.

5 MS. CHARLESWORTH: Okay. Professor  
6 Decherney?

7 MR. DECHERNEY: If I could just clarify  
8 a few points. One is, the courses are offered by  
9 universities or other institutions. And Coursera,  
10 edX are the platform; they're not offering the  
11 courses.

12 MS. CHARLESWORTH: And how -- can I just  
13 ask a little bit? I think you said that earlier,  
14 and that was a helpful clarification of the  
15 record. Does, for example, your university have  
16 like a contract then with edX and Coursera,  
17 contracts? Because I guess it sounded like they  
18 had courses on both platforms?

19 MR. DECHERNEY: Exactly, yes.

20 MS. CHARLESWORTH: Okay.

21 MR. DECHERNEY: And we have contracts.  
22 We also are investor in the Coursera company.

23 MS. CHARLESWORTH: Okay. And under that  
24 contractual relationship, is the university paying  
25 for the platform? Is the platform paying the

1 university? How -- you're an investor?

2 MR. DECHERNEY: Yeah.

3 MS. CHARLESWORTH: Explain the economics  
4 of this a little bit, if you can.

5 MR. DECHERNEY: Yeah. So, the Coursera  
6 would collect the money that's paid for  
7 certificates. And then, there's a contract that  
8 allows that -- which the university is paid some  
9 portion of that.

10 MS. CHARLESWORTH: Okay. So it's an  
11 income-sharing kind of arrangement?

12 MR. DECHERNEY: Yes, exactly. The  
13 university still owns all of the IP and the  
14 course. Coursera doesn't own the course. They  
15 couldn't offer the course. Only the University of  
16 Pennsylvania could offer the course through  
17 Coursera.

18 MS. CHARLESWORTH: And who provides the  
19 technology? So, does Coursera actually provide  
20 sort of the website and, it sounds like, the  
21 platform for offering the course?

22 MR. DECHERNEY: Right. So we record the  
23 video ourselves and all of the content. And then  
24 it's made available on their platform. And then  
25 the discussion forum and exams might take place in

1 Coursera or edX.

2 MS. CHARLESWORTH: Okay. And do you  
3 know any reason why Coursera would not be able to  
4 apply encryption to content it offers? Is that --  
5 I mean, do you know one way or the other whether  
6 they can do that?

7 MR. DECHERNEY: I don't know. I haven't  
8 looked at that. I don't know.

9 MS. CHARLESWORTH: Okay. And would you  
10 say the same thing about edX?

11 MR. DECHERNEY: Yeah. I don't know  
12 about the -- I don't know about all that  
13 encrypting the content. It's not something we've  
14 looked into.

15 MS. CHARLESWORTH: Okay. But just to be  
16 clear, UPenn has a relationship with both of those  
17 different -- both of those platforms?

18 MR. DECHERNEY: Right. Exactly.

19 MS. CHARLESWORTH: Okay. And do you  
20 know why that is? Why, since they're an investor  
21 in Coursera, I guess, why they would have a  
22 relationship with a competitor? Or I assume it's  
23 a competitor.

24 MR. DECHERNEY: Yeah. Increasingly,  
25 universities are dual affiliated or use multiple



1 platforms. The platforms tend to be better for  
2 different kinds of courses. edX has been designed  
3 initially by Harvard and MIT. And it's actually  
4 really great for engineering and computer science.

5           There are many other platforms, many  
6 that are developed outside the U.S. And they  
7 reach different kinds of audiences and they have  
8 different functions. But in the same way that  
9 university faculty publish books with many  
10 different publishers, we also work with different  
11 platforms.

12           MS. CHARLESWORTH: Okay.

13           MR. DECHERNEY: We also offer courses  
14 and course material through iTunes University. We  
15 have videos on YouTube. There are many, many ways  
16 that academic research and teaching are available.

17           MS. CHARLESWORTH: Okay. That's  
18 helpful. Thank you.

19           Mr. Butler.

20           MR. BUTLER: I just wanted to -- two  
21 last things. One, I want to share something my  
22 students diligently noted, which is that almost  
23 3,000 people have registered on Coursera since the  
24 panel started. So this is something that's really  
25 vastly growing, and it's a big phenomenon.

1           And that means that if there are adverse  
2 effects, if you agree with us that, you know,  
3 letting people into an ecosystem with no film  
4 classes is a bad thing, and lots of people are  
5 going to that ecosystem to look for learning, then  
6 this is a big bad thing because lots of people are  
7 going and they're not having an opportunity to  
8 take Professor Decherney's course.

9           And then the other point I wanted to  
10 make is the Joint Creators have pointed out in  
11 several of their reply comments that it's really  
12 easy and cheap to find, if you're a consumer, the  
13 movies that you want to watch. And I think that  
14 means that people are going to just go do that  
15 rather than sign up for a MOOC and try to watch  
16 five-minute videos of Peter and capture that video  
17 somehow and put the film back together. You can  
18 get a Netflix subscription for five dollars; why  
19 wouldn't they do that?

20           MS. CHARLESWORTH: Okay. Thank you.

21           MR. CHENEY: May I ask a question? Mr.  
22 Butler, you indicated that the harm largely  
23 revolved around the limitation on film courses.  
24 Are there other limitations that are in that sort  
25 of negative effect on this, other than just

1 offering of film courses?

2 MR. BUTLER: Well, sure, right. I mean,  
3 the analogy to standard courses is apt here. And  
4 so, for example, someone who wants to teach the  
5 course about World War II is going to have the  
6 same problem. The historian is going to have the  
7 same problem. Anyone who wants to teach with media  
8 is going to have the same problem. But, you know,  
9 for methodological reasons, the easiest way to  
10 show that was to show the paucity of film courses.

11 MR. CHENEY: So you have other examples,  
12 more specific examples, other than just sort of  
13 what we can imagine that might be there that  
14 you've talked to other professors or others that  
15 are intending on offering that course, both in  
16 academia and outside? Because you're asking for  
17 both sides.

18 MR. BUTLER: Gosh. None are coming to  
19 mind except that -- and this is -- I've had,  
20 repeatedly, conversations with folks at  
21 universities, saying essentially that they have a  
22 kind of hands-off motion media policy for their  
23 MOOC's, across the board. I can't name -- so  
24 we've talked in generalities about, well, how do  
25 you deal with moving images in a MOOC? And they

1 say, "Well, we just don't. We just categorically  
2 don't."

3           So I can't tell you this course or that  
4 course. But I can tell you that, in general, the  
5 GC's on campuses and the people and even the IT  
6 folks who are often in charge, right -- it's an IT  
7 guy who comes to your office with a camera and a  
8 laptop and says, "I'm going to help you make your  
9 MOOC. Here's what we're going to do." That guy  
10 thinks motion media is just off limits. And it's  
11 off limits for everybody.

12           MR. CHENEY: Let me ask a little further  
13 on that. Is there -- I'm sorry, Mr. Turnbull. Let  
14 me come back to you for a second.

15           Can you distinguish a little bit for me  
16 between the MOOC and the regular online course  
17 that might be offered by the university? Is there  
18 that same limitation on offering the clips in an  
19 online course that's offered directly by the  
20 university, rather than through this sort of  
21 platform environment?

22           MR. BUTLER: No. It's definitely my  
23 impression -- and I've spoken at conferences on  
24 MOOC's. I've been invited to another one. And  
25 when I talk to people that are doing this, and

1 this is why we've asked for this exemption, MOOC's  
2 are considered to be a horse of a different color.

3 Even though we can argue, for the  
4 reasons that we've discussed, maybe some MOOC's  
5 qualify for 110(2). Maybe they're not a horse of  
6 a different color. But they are perceived to be  
7 categorically different. And so they are  
8 subjected to different rules.

9 MR. CHENEY: Mr. Turnbull, I think you  
10 wanted to say something.

11 MR. TURNBULL: Yeah, I actually want to  
12 make comments on both of the last points.

13 First, on the reference to the IT guy  
14 who comes and provides the video for the professor  
15 who's doing the MOOC, it seems to me to underscore  
16 the point that if you have IT guys involved in the  
17 creation of the MOOC's, they can certainly make  
18 use of things like screen-capture software or --  
19 we didn't play this up in what we submitted this  
20 time, but using a high-quality professional camera  
21 to record off of the screen.

22 Again, there are alternatives to  
23 circumvention that can be used in this context and  
24 particularly where you have, you know, IT  
25 departments that are involved.

1           The other point.

2           (Pause.)

3           MR. TURNBULL: Ah. The other point that  
4 I wanted to make was the institution that's  
5 involved here. One of the reasons, from the  
6 DVD CCA standpoint, that some of the other  
7 exemptions have been viewed as acceptable or  
8 workable is that there, in fact, is an institution  
9 that you can say, if there were to be a problem,  
10 here's where we go.

11           It seems to me that the arrangements  
12 here is that there may be, you know, the  
13 University of Pennsylvania would say, "No. We're  
14 not the MOOC. You know, we're just providing some  
15 material for this." And the institution, the  
16 company that has the platform would say, "No,  
17 we're not responsible for any of that." And it  
18 would be much harder for, if there were to be a  
19 problem, to be able to go to an institution and  
20 say, "Look. This has gone off the rails. You  
21 need to do something."

22           And in this case, you know, in the case  
23 of the other exemptions that have been granted,  
24 you can go to the University of Pennsylvania. You  
25 can go to whomever. Here it's much less clear who

1 you would go to and whether they would just point  
2 at each other.

3 MR. BAND: I think that, clearly, it  
4 would be Penn that would be responsible. And I  
5 wouldn't even be surprised if in the agreement  
6 between Penn and edX, Penn assumes all  
7 responsibility and probably even indemnifies edX.  
8 But in any event, certainly under basic principles  
9 of copyright law, and under the Section 1201, it  
10 would be, you know, Penn is violating the  
11 exemption by doing something that's beyond the  
12 scope of the exemption, or if it's the one that's  
13 infringing the copyright, it would be the one  
14 that's liable.

15 And let me just add with respect to the  
16 screen-capture point, I mean, there's a bit of a  
17 circularity, but it gets to our earlier  
18 conversation. I mean, we don't know if screen-  
19 capture involves circumvention or not. And so,  
20 just to say, well -- just to assert that it does,  
21 that it does not involve circumvention, that's  
22 very nice. But because it might involve  
23 circumvention or we don't know if it involves  
24 circumvention, an exemption would be appropriate  
25 even with respect to screen-capture as, you know,

1   problematic as that might be.

2                   And the final point I want to mention  
3   is, we're all worried about the cost of education,  
4   right, and the increasing cost of education. And  
5   MOOC's are seen as one way to lower the cost of  
6   education. And so, you know, this is -- as Peter  
7   indicated, we don't know exactly what a MOOC is  
8   going to look like and what it's going to be in  
9   the future.

10                  But this is the future. And so, we want  
11   to make sure that we're able to have good courses  
12   that aren't just -- I mean, the notion that you're  
13   going to have a film course giving the history of  
14   Hollywood with stills is absurd. And so,  
15   obviously, we want to have the ability to have,  
16   whether it's film history, or again because our  
17   culture is so pervaded by media that for these  
18   online courses that we're able to have high-  
19   quality video as opposed to just stills is clearly  
20   where education needs to be going for.

21                  Again, to the extent that the objective  
22   is to find ways to reduce the cost of education  
23   for students, this is what we need to have happen.

24                  MS. CHARLESWORTH: Mr. Butler?

25                  MR. BUTLER: Sorry. I wanted to -- I



1 did have one particular story that was in our  
2 reply comments, so I'll just point you there. A  
3 German professor at Pennsylvania was talking to  
4 their director of digital learning initiatives  
5 about a German course. And he said, "Oh, you  
6 know, a MOOC about a series of German films would  
7 be a great part of our German curriculum. Could I  
8 do that?" And he was shut down. So it's still a  
9 film course, but it's in a German curriculum.

10 MS. CHARLESWORTH: And I'm not sure --  
11 and maybe I just didn't catch the response to Mr.  
12 Cheney's earlier question. I mean, you said,  
13 anecdotally, MOOC's are thought of differently.  
14 But I mean, how does like the University of  
15 Pennsylvania distinguish between a MOOC and just  
16 an online course offering? And are there  
17 different expectations or treatment of motion  
18 pictures in those offerings?

19 MR. DECHERNEY: So, we do offer some of  
20 the same courses as online courses, as MOOC's.  
21 People apply to get into them. Even if they're  
22 offered as a summer course, you have to. People  
23 apply. You pay. There's a small group. There's  
24 usually more interactivity between the faculty  
25 member and the students.

1           If anything, what MOOC's have done is  
2 help us clarify what it is we offer in live  
3 classes and in the smaller online courses, which  
4 we've been offering for a long time.

5           MS. CHARLESWORTH: The smaller online  
6 courses, do you get course Penn credit?

7           MR. DECHERNEY: Let's see. You get Penn  
8 course credit. You pay. You apply, and you're  
9 accepted.

10          MS. CHARLESWORTH: And do you include  
11 motion picture clips in those, or does the  
12 university? I mean, I don't know. Do you teach  
13 one of those?

14          MR. DECHERNEY: So, I have taught those  
15 classes. Not this particular class, but I've  
16 taught online classes. And I've used clips in  
17 those classes.

18          MS. CHARLESWORTH: And how -- I mean,  
19 how did you do that and how did you achieve a  
20 level of comfort about that?

21          MR. DECHERNEY: So, those aren't  
22 prerecorded videos. They're not. I think  
23 ideally, I mean, I think ultimately, within five  
24 years, six years, however many years, we're not  
25 going to think of MOOC's as being something really

1 novel and different from what universities are  
2 already doing. But right now, they do seem to be a  
3 little bit different, and I think it's worth  
4 addressing them as something novel. So --

5 MS. CHARLESWORTH: But I guess my  
6 question is sort of more specific. It's like, did  
7 you circumvent -- I mean, did that require  
8 circumvention to include clips in your online  
9 course?

10 MR. DECHERNEY: Yes, it did. And I used  
11 clips that I would use in my face-to-face class. I  
12 used them in my online seminars. They weren't  
13 prerecorded lectures by me. They were discussions  
14 with students. I was present the whole time.

15 MS. CHARLESWORTH: So, I just want to --  
16 so, in that context, were they just filming you  
17 playing a clip? Or were you inserting clips into  
18 recorded material that then people could view  
19 later? I'm not understanding.

20 MR. DECHERNEY: Yeah. So the only way  
21 I've taught online courses is that -- it's a  
22 synchronous live setting.

23 MS. CHARLESWORTH: A live setting?

24 MR. DECHERNEY: There are asynchronous  
25 elements. But there's a lecture and discussion,

1 which is a synchronous course. I'm talking.

2 Students respond. And there are ways to show

3 clips so we can all view them at the same time.

4 MS. CHARLESWORTH: So, are you

5 separately showing those clips online through a

6 different -- I mean, explain how that's happening

7 so we can understand.

8 MR. DECHERNEY: Yeah. I know, I know.

9 I'm trying to think of the name of the platform.

10 It's an Adobe platform. But it allows me to show

11 clips so that everyone can view them. And we

12 stop. We can look at a clip and then discuss it.

13 Or I can actually show a clip and talk over it at

14 the same time, or a student can do the same thing

15 if you're doing a presentation.

16 Very much like you would in a live

17 classroom. It would be possible to have

18 prerecorded videos and use MOOC videos in the

19 classroom that incorporated clips.

20 MS. CHARLESWORTH: Right. So the person

21 who's watching on their computer screen is going

22 to see you lecturing. And they say, "Now we're

23 going to go to the clip." And then they're going

24 to see a full-screen clip, right? Because you're

25 using this platform to show them the clip directly

1 on their computer screen. Is that correct?

2 MR. DECHERNEY: Correct.

3 MS. CHARLESWORTH: Okay. Did you  
4 consider that to be a 110(2) activity? I mean,  
5 how did that occur?

6 MR. DECHERNEY: Yeah. Our general  
7 counsel considers it to be fair use.

8 MS. CHARLESWORTH: So, the general  
9 counsel sounds like the most powerful person at  
10 all these universities.

11 (Laughter.)

12 MS. CHARLESWORTH: Considers it to be  
13 fair use? What about the 1201 issue?

14 MR. DECHERNEY: So, it's a course being  
15 offered by the university as part of the  
16 educational context. It seems like it's covered  
17 by the exemption.

18 MS. CHARLESWORTH: Well, do you know  
19 whether that platform encrypted --

20 MR. DECHERNEY: It's not encrypted. We  
21 don't encrypt the output.

22 MS. CHARLESWORTH: Okay.

23 MR. DECHERNEY: As far as I know.  
24 Actually, the platform might do it; I'm not  
25 positive.

1 MS. CHARLESWORTH: Mr. Turnbull?

2 MR. TURNBULL: I don't know the specifics  
3 that he's talking about, but Adobe has one of the  
4 more widely used DRM's that they make available  
5 through, very easily through those kinds of  
6 platforms. Whether that particular one did or not  
7 I don't know. But it could have. It could very  
8 easily have. We're switching roles.

9 (Laughter.)

10 MS. CHARLESWORTH: Well, you're helping  
11 each other. That's the way, ultimately --

12 (Laughter.)

13 MR. TURNBULL: My point was that there  
14 are the platforms available that do the encryption  
15 and that actually employ TPM's, that in that  
16 exemption case, they could have used and would  
17 have complied with 110(2).

18 MS. CHARLESWORTH: So it's possible that  
19 you were complying, I think. According to Mr.  
20 Turnbull, it's possible that that was compliant  
21 with 110(2) with respect to the TPM requirement.  
22 Is that  
23 --

24 MR. DECHERNEY: Yeah, that's possible.

25 MS. CHARLESWORTH: Okay. So maybe your

1 general counsel was giving you good advice.

2 Okay. Mr. Butler.

3 MR. BUTLER: I'm sorry.

4 MS. CHARLESWORTH: You're good?

5 MR. RUWE: Mr. Decherney, in your

6 proposed MOOC, would there be any need for

7 students to be enabled to circumvent as part of

8 that course? And can you explain how?

9 MR. DECHERNEY: Yes. So, I think that

10 would be something that would be great if it were

11 included in the exemption, that students would

12 still be able to do presentations. Students do

13 the same kinds of work in MOOC's that they can do

14 in face-to- face classes and other kinds of online

15 courses. They write essays. They do

16 presentations. They do, you know, audio, video

17 work that can be shared. Yes.

18 This is a major part of student work

19 today. You know, they do a lot of multimedia work

20 in places where they would write essays in the

21 past.

22 MS. SMITH: And in your MOOC, you would

23 require registration, and do you need like a

24 password to access it?

25 MR. DECHERNEY: Yeah. So, in all of our

1 MOOC's, you need to be registered, and the system  
2 would recognize you.

3 MS. SMITH: Okay. And there's no way to  
4 control for the type of reception and the quality  
5 of the MOOC, is there? I mean, you know, if I'm  
6 one of your students, it depends on if I'm  
7 watching on broadband or on Wi-Fi or --

8 MR. DECHERNEY: Right. Right. That's  
9 true. That also can be true in a traditional  
10 online course as well. A student might be on Wi-  
11 Fi far away from a router.

12 We think that quality is really  
13 important. We only put out high-definition quality  
14 videos. It turned out that students in China,  
15 their connections were too slow, and they were  
16 having trouble accessing the videos for our  
17 Coursera courses. So we partnered with a  
18 mirroring site in China so that they had access to  
19 the high-quality images, which we think are really  
20 necessary.

21 MS. SMITH: Right. But if the student  
22 doesn't have a high-quality broadband or whatever  
23 method of delivery, they're seeing the entire MOOC  
24 in a degraded quality, whether it started out as  
25 ultra- HD or, you know, DVD, or something worse.



1           MR. DECHERNEY: No, so that's true. But  
2 in the same way that I'm in the fourth row, I have  
3 trouble seeing what's on the monitor, seeing  
4 strings on the monitor that someone in the front  
5 row might see.

6           MS. SMITH: It's a matter of degree.

7           And then another question, I think, in  
8 the papers, we talked a lot about how there's more  
9 of an acclimation to this HD world, but also that  
10 your students are sort of one click away from  
11 distraction. A lot of those clicks can actually be  
12 lower than the standard definition, right? I  
13 mean, if you're looking at YouTube or Meerkat or  
14 Periscope, I mean, it's less than DVD quality. Is  
15 that your --

16           MR. DECHERNEY: Yeah. So it's even  
17 better if my image is in high-quality high  
18 definition. They're going to look at me instead of  
19 watching this thing streamed over Meerkat. Right.

20           MS. SMITH: Okay. And is there anything  
21 in the record about the need for the circumvention  
22 exemption to send to videogames for MOOC's? Or is  
23 that not part of this proposal?

24           MR. DECHERNEY: I think it's not  
25 something we've suggested.

1 MS. CHARLESWORTH: Mr. Williams.

2 MR. WILLIAMS: Just very quickly. On  
3 the issue of including students, if you were  
4 inclined, in going in the direction of granting  
5 something in this space, we are quite concerned  
6 that the huge number of people that would  
7 potentially qualify as a student of a MOOC would  
8 be something that is potentially threatening and  
9 could lead to some confusion and to some really  
10 unfortunate consequences.

11 And I don't think there were any  
12 examples in the record of instances where students  
13 would need to engage in circumvention. So I would  
14 hope that that wouldn't be part of an exemption in  
15 this area. Thank you.

16 MS. CHARLESWORTH: Okay. We're just  
17 about out of time. I don't know -- do any of my  
18 colleagues have any further questions? I see Mr.  
19 Butler's sign is up.

20 (No audible response.)

21 MS. CHARLESWORTH: Okay. Mr. Butler.

22 MR. BUTLER: Yeah, just one quick  
23 response to Matt's point. The number of college  
24 and university students in 2015 was 21 million.  
25 And so, those folks were all at one time or

1 another potentially eligible for the existing  
2 exemption. And that's more people than have so  
3 far enrolled in a MOOC. I know we think it's  
4 growing. Hard to say how fast it will grow. But  
5 just to say lots of people have already been  
6 eligible for existing exemptions, and that hasn't  
7 been a catastrophe so far.

8 MS. CHARLESWORTH: Thank you.

9 And thank you all for your  
10 participation. I think we'll be seeing at least  
11 some of you back yet again after lunch, at 1:30,  
12 for Proposed Class 2. It's now just about 12:15.  
13 So we'll reconvene at 1:30. Thank you.

14 And as I'm sure you probably know,  
15 there's a big cafeteria on this floor. Or you  
16 probably have time to go out to the food trucks or  
17 something behind the Library, if you prefer. But  
18 we look forward to seeing you back here. Bye-bye.

19 (Whereupon, at 12:16 p.m., Class 3  
20 concluded and a luncheon recess was  
21 taken, to reconvene for Class 2 at 1:33  
22 p.m.)

23  
24  
25

1 AFTERNOON SESSION

2 PROPOSED CLASS 2:

3 AUDIOVISUAL WORKS -- EDUCATIONAL USES --

4 PRIMARY AND SECONDARY

5 SCHOOLS (K-12)

6 MS. CHARLESWORTH: Good afternoon, and  
7 welcome back. And welcome to any newcomers. I  
8 see at least, I think, one at the table.

9 This is the Sixth Triennial 1201 Rulemaking  
10 Proceeding. I'm Jacqueline Charlesworth, General  
11 Counsel of the U.S. Copyright Office. And I,  
12 along with my colleagues up here, will be  
13 presiding over this hearing. I'm going to ask  
14 them to go down the line and introduce themselves  
15 so you know who they are.

16 MS. CHOE: Michelle Choe, Ringer Fellow.

17 MS. SMITH: Regan Smith, Assistant  
18 General Counsel.

19 MR. RUWE: Steve Ruwe, Assistant General  
20 Counsel.

21 MR. RILEY: John Riley, Attorney-  
22 Advisor.

23 MR. CHENEY: Stacy Cheney, Senior  
24 Attorney at NTIA, U.S. Department of Commerce.

25 MS. CHARLESWORTH: Okay. And in this

1 session, we'll be considering Proposed Class 2:  
2 Audiovisual works for educational uses in primary  
3 and secondary schools K-12.

4 And as I've mentioned before, you're  
5 being recorded. Your remarks are being recorded  
6 by a court reporter. We try not to talk over each  
7 other. Sometimes, we do it a little bit and stop.  
8 But we're going to go down the line on your side,  
9 and you can introduce yourselves.

10 And then you'll have an opportunity to  
11 make some opening remarks for the record. And we  
12 often interject questions at that time. So be  
13 prepared for that. If you have something you want  
14 to add to the discussion, if you tilt your placard  
15 up, we will call on you. And we look forward to  
16 another lively discussion.

17 Ms. Hobbs, why don't we start with you,  
18 as you're the proponent or one of the proponents  
19 of the proposed class?

20 MS. HOBBS: Thank you very much. Allow  
21 me to introduce myself. My name is Renee Hobbs.  
22 I'm a professor of communication studies and  
23 Director of the Media Education Lab at the  
24 Harrington School of Communication and Media at  
25 the University of Rhode Island.

1 MS. CHARLESWORTH: Thank you. And I  
2 forgot to -- that was my fault. But Mr. Band and  
3 everyone else, if they could just quickly say who  
4 they are for the record.

5 MR. BAND: Jonathan Band for the Library  
6 Copyright Alliance.

7 MR. TURNBULL: Bruce Turnbull for the  
8 Advanced Access Content System, Licensing  
9 Administrator.

10 MR. TAYLOR: David Taylor for DVD CCA.

11 MR. WILLIAMS: Matt Williams for MPAA,  
12 ESA, and RIAA.

13 MS. CHARLESWORTH: Okay. I apologize  
14 for that.

15 Ms. Hobbs, you may now proceed.

16 MS. HOBBS: Thank you so much.

17 I'm here to attempt to continue the  
18 exemption provided to K-12 teachers in public,  
19 parochial, and private schools, and grant the  
20 exemption to work produced by students in  
21 elementary and secondary schools as part of their  
22 curriculum and learning experience.

23 For the last 30 years, I've been a  
24 teacher- educator, helping develop the field of  
25 media literacy education regionally, nationally,

1 and internationally, developing curriculum  
2 materials and graduate education to educators who  
3 work in K-12 schools in libraries and in nonprofit  
4 organizations.

5           Today I'd like to talk a little bit  
6 about five points that I think are most -- will  
7 create the most lively discussion and represent  
8 the best arguments we have for why the exemption  
9 should be expanded to include K-12 teachers in  
10 elementary schools and their students.

11           First of all, it's obvious to note that  
12 the digital learning tools and the media education  
13 pedagogies are in a rapid state of transformation.  
14 And a narrow interpretation of this law could  
15 discourage innovation precisely when innovation is  
16 most needed.

17           My second point is that student creative  
18 expression is fully subject to the legal  
19 protection of copyright and fair use, and indeed  
20 the best way to learn to respect the law of  
21 copyright is to have the opportunity to discover  
22 how to make something transformative. It promotes  
23 respect for the law, and indeed we think that  
24 media literacy education is a very vital tool in  
25 helping our nation's children understand their

1 rights and responsibilities when it comes to  
2 copyright and fair use.

3 MS. CHARLESWORTH: Can I just interrupt  
4 here? You say it promotes respect for the law. Do  
5 you have any sort of specific evidence to offer on  
6 that point?

7 MS. HOBBS: Absolutely. So, for three  
8 years, I worked in the Russell Byers Charter  
9 School in Philadelphia, Pennsylvania.  
10 We helped children in grades 1 through 6 develop  
11 media literacy education skills. And in one  
12 activity in particular, the assignment went  
13 something like this: Go interview your mom and  
14 dad. These are fourth-grade children. Go  
15 interview your mom and dad about their favorite  
16 music video. Come back and talk about why your  
17 parent liked that music video.

18 The children came back. They had a  
19 conversation about music videos and why people  
20 feel emotionally attached to them. And then the  
21 activity was this. The child had to write three  
22 sentences interpreting the favorite music video of  
23 the parent. And then they had to make a little  
24 video, where they rolled a piece of the music  
25 video, along with their spoken voiceover



1 interpretation about the music video, why  
2 their parent liked it, and what meaning they make  
3 of it in 2013.

4           This activity developed writing skills.  
5 It developed creativity. But most importantly, it  
6 creates a conversation. The teacher asks the  
7 fourth- grade children, "How are you transforming  
8 this music video? You're not just re-transmitting  
9 this music video, are you?" No; the children  
10 understood. How are you repurposing it? And a  
11 fourth-grade child, only 10 years old, is able to  
12 say, "When I add my voiceover, I provide new  
13 meaning and interpretation."

14           And that's a fair use -- that's a  
15 developing, emerging understanding of fair use  
16 even among children as young as 10.

17           MS. CHARLESWORTH: I'm sorry. How long  
18 were the clips of the music, the preexisting  
19 content in that example?

20           MS. HOBBS: Enough for a child to read  
21 three sentences out loud. But as I'll make in my  
22 next point -- so, my fourth point today is that  
23 the current law limits innovative practices of  
24 teaching and learning. And that's a real reason  
25 why rules about length and brevity will limit

1 educational innovation in media literacy.

2           So, let me give you an example of this  
3 along the same lines. Because I'm a teacher-  
4 educator, I ask teachers to do things that then I  
5 expect them to do in the classroom with their own  
6 students. That's the point. So I asked teachers  
7 to analyze a film like Kevin Costner's "Black and  
8 White," (sic) using the five critical questions of  
9 media literacy.

10           MS. CHARLESWORTH: Okay. Just for the  
11 record, Ms. Hobbs is holding up a card that has  
12 been designated as Hearing Exhibit 17. And we're  
13 going to be including that in the record.

14           (Hearing Exhibit No. 17 was presented.)

15           MS. HOBBS: Thanks very much.

16           So, students are asked to work in teams  
17 to watch the film, "Black and White" (sic), with  
18 Kevin Costner, and then answer the key  
19 questions of media literacy: Who's the author and  
20 what's the purpose? What techniques are used to  
21 attract and hold your attention? What lifestyles,  
22 values, and points of view are represented? How  
23 might different people interpret the message  
24 differently? And what is omitted?

25           Learners work in teams to develop their

1 analysis and prepare an oral presentation. And  
2 they select clips of the film to use and talk over  
3 the visuals. But in this case, there might be 27,  
4 28, or 29 children in the class. So, by the time  
5 the teacher hears all of the students deliver  
6 their oral presentation, quite a lot of the film  
7 has been used.

8 MR. RUWE: Ms. Hobbs --

9 MS. CHARLESWORTH: Right. But do you  
10 think, I mean, how do you interpret the existing  
11 exemption? Because it says "short clips." I  
12 mean, it's a plural. I mean, are you saying that  
13 you think that falls outside the existing  
14 exemption?

15 MS. HOBBS: I believe that rules about  
16 length and brevity are limiting educational  
17 innovation, because in this case the, the teacher's  
18 ambiguity about whether that was an appropriate  
19 amount to use is actually discouraging her from  
20 applying this pedagogical technique.

21 MS. CHARLESWORTH: Okay. Just one  
22 moment. Would you mind handing some of the copies  
23 of your Exhibit 17 down so the other members of  
24 the panel could see them?

25 So, but I mean, if there were no

1 ambiguity and "clips" meant clips, you know,  
2 provided they were not used to evade the purpose  
3 of the exemption, but were used for genuine  
4 criticism and commentary of individual students,  
5 why would that be a problem? Are you saying the  
6 students, you want the students to be able to use  
7 very lengthy pieces of film?

8 MS. HOBBS: I'm actually imagining that  
9 the teacher might want to create a compilation  
10 showing all the different student interpretations,  
11 lined up together. Each individual might only use  
12 four minutes. But when we look at the work as a  
13 whole, as in the teacher actually showing to the  
14 parents, "Look at the wide variety of  
15 interpretations we have of this film," then that  
16 work then is -- it creates some ambiguity under  
17 the idea that only short clips are permitted.

18 MS. CHARLESWORTH: Well, couldn't the  
19 teacher present the work as individual videos to  
20 the parents? I mean, that's not the parents who  
21 are being educated.

22 MS. HOBBS: Of course, there's tons of  
23 workarounds. And we have been working around this  
24 law for over 10 years now. What I'm suggesting is  
25 that the rules about length and brevity contribute

1 to confusion. And a lack of copyright clarity is  
2 actually discouraging innovation in the field of  
3 digital learning right now.

4 MS. CHARLESWORTH: Well, so here's a  
5 problem. I know this has come up in a few other  
6 panels. The reason that the exemptions say  
7 "short" now is because it's much more likely that  
8 a short use, which in itself is a term subject to  
9 interpretation, but still conveys the idea that  
10 it's not a very -- a huge or it's not half or it's  
11 not a very large part of, say, a motion picture,  
12 that that's much more likely to be a fair use than  
13 a very lengthy taking from, you know, a  
14 copyrighted work.

15 And so that's the concern.  
16 So, I mean, saying -- we had this discussion in  
17 the last panel. Saying, "Well, it just has to be  
18 fair use" offers no more guidance, I don't think.  
19 I don't see why that offers more guidance.

20 MS. HOBBS: I have a lot of faith,  
21 having taught teachers in K-12 schools for the  
22 last 30 years, I have a lot of faith that they can  
23 understand the law as it was written. And the law  
24 as it was written does not limit fair use to short  
25 clips.

1           The law says, "Context and situation  
2 determine how fair use applies." And I believe  
3 that K-12 teachers are fully able to make a fair  
4 use determination. Sometimes, they'll need to use  
5 a shorter work. Sometimes, they'll need to use a  
6 longer work.

7           MS. CHARLESWORTH: When would they need  
8 to use a longer work? What is that context?

9           MS. HOBBS: I just described that great  
10 example. Here --

11          MS. CHARLESWORTH: Well, no, you  
12 described the use of multiple clips.

13          MS. HOBBS: Yep.

14          MS. CHARLESWORTH: That the individual  
15 students would be looking, using a clip.

16          MS. HOBBS: Yep.

17          MS. CHARLESWORTH: And there were  
18 multiple clips.

19          MS. HOBBS: Put together into one piece.

20          MS. CHARLESWORTH: And then you said  
21 that the teacher might want to compile them --

22          MS. HOBBS: Yes.

23          MS. CHARLESWORTH: -- although that, to  
24 me, I don't know that that's necessarily  
25 educational in the sense of it's to show the

1 parents. It's not really to interact with the  
2 students, is the way you've described it.

3 Are there other examples where you would  
4 actually use -- where you're not looking at  
5 individual clips, but you're using a very long  
6 portion of a motion picture?

7 MS. HOBBS: Okay. So let me just  
8 explain why the example that I just provided is a  
9 really powerful example.

10 One of the key concepts of media  
11 literacy is that people interpret messages  
12 differently based on their life experience, their  
13 background, their social class, whatever -- all  
14 the reasons why we may watch the same movies, but  
15 make different interpretations of it.

16 So in this case, the teacher putting  
17 together the students' multiple interpretations is  
18 not merely to show the parents what was learned in  
19 school. It's actually to deepen the children's  
20 understanding of that key concept of media  
21 literacy. So there's a profoundly educational  
22 purpose.

23 And because lots of clips from a single  
24 movie have been lined up, the teacher might  
25 reasonably be concerned about whether her

1 educational use of media falls within the scope of  
2 this narrowly written exemption.

3 MS. CHARLESWORTH: Applying fair use  
4 law, might the teacher, same teacher be concerned  
5 whether it was a fair use?

6 MS. HOBBS: No. If she were applying  
7 fair use, she'd be very comfortable. It was a  
8 fair use.

9 MS. CHARLESWORTH: Why is that? Because  
10 fair use looks at the substantiality of what was  
11 taken. So if the concern is that you're taking  
12 too much of the film, why would it necessarily be  
13 a fair use? I mean, under your --

14 MS. HOBBS: Well, I think the teacher  
15 might reasonably argue that the children's active  
16 meaning, making, and interpretation process  
17 resulted in transforming the original work. The  
18 original work is a piece of entertainment film. As  
19 the children are using it, they're understanding  
20 how interpretation works, how meaning circulates  
21 in culture. And that's a profound English  
22 language arts benchmark according to the common  
23 core state standards.

24 MS. CHARLESWORTH: So, if it were clear  
25 -- and you know, I'm not trying to interpret the



1 exemption here. But if it were clear that you  
2 could take short clips and put them into a  
3 compilation in the context to show the compilation  
4 to students, and they are individual clips that  
5 each one is being commented on and so forth. But  
6 the idea is you want to put them in a compilation --  
7 if that were clear, would that resolve your issue in  
8 terms of the exemption here?

9 MS. HOBBS: That would make -- that  
10 would represent progress. And I think it's really  
11 important to see over the last 10 years the good  
12 progress that has been made by the Copyright  
13 Office in this.

14 But I return to my first point, that  
15 digital learning tools and media education  
16 learning pedagogies are in a rapid state of  
17 transformation. And a narrow interpretation of the  
18 law will discourage innovation.

19 MS. CHARLESWORTH: Okay. Did you have  
20 anything further you wanted to add?

21 MS. HOBBS: Yeah. Let me just make one  
22 other point about -- we've had earlier  
23 conversations today about the challenges that  
24 screen-casting, the limitation of screen-casting.  
25 So I want to tell you a little bit --

1 MS. CHARLESWORTH: Do you mean screen-  
2 capture?

3 MS. HOBBS: Screen-capture.

4 MS. CHARLESWORTH: I think there may be  
5 different words used for that, but I think we  
6 generally have been using the word "screen-  
7 capture."

8 MS. HOBBS: Very nice. So, I had a  
9 screen- capture experience I'd like to share with  
10 you because I think it's somewhat relevant to your  
11 decision- making.

12 Because I educate teachers, I want to be  
13 able to model techniques that I can use with --  
14 that teachers can use with their own students. And  
15 of course, social studies and English teachers are  
16 all watching the "Wolf Hall" on PBS. So what do  
17 you think I tried to do? Well, we brainstormed, a  
18 group of teachers and I brainstormed an activity  
19 where students would research English history and  
20 create a video remix of "Wolf Hall" to make Thomas  
21 Cromwell look like a villain or a victim instead  
22 of a hero, as he's depicted in the film.

23 So, first I tried to create a screen-  
24 cast clip of "Wolf Hall" as it was streaming on  
25 PBS video; couldn't do it.

1 MS. SMITH: Can I ask how you were  
2 trying, what technology you were using to get the  
3 screen- capture?

4 MS. HOBBS: Yes. I used two  
5 technologies, and I couldn't get either one to  
6 work. Screencast-O- Matic and Camtasia. So now  
7 my --

8 MS. SMITH: Were you using a Mac or a  
9 PC?

10 MS. HOBBS: A Mac.  
11 So now my effort is to buy the DVD  
12 version of "Wolf Hall" and try to screen-cast it.  
13 I hope I'll be able to do that.

14 MS. CHARLESWORTH: Well, could you also  
15 stream it from --

16 MS. HOBBS: It was streaming on PBS, and  
17 I could not make a screen-capture from the PBS  
18 feed.

19 MS. CHARLESWORTH: And do you know  
20 whether that was a problem because of something  
21 specific to PBS or to the technology you were  
22 trying to use?

23 MS. HOBBS: (Shrugged.)

24 MS. CHARLESWORTH: Okay. You don't know  
25 the answer.

1 MS. HOBBS: I am unaware of why I was  
2 unable to make a screen-capture of PBS "Wolf  
3 Hall."

4 MS. CHARLESWORTH: I mean, did you try  
5 capturing other content that wasn't PBS content?

6 MS. HOBBS: Sure.

7 MS. CHARLESWORTH: And were you  
8 successful in doing that?

9 MS. HOBBS: Yes. Of course.

10 MS. CHARLESWORTH: So, there seemed to  
11 be some specific issue with the PBS feed?

12 MS. HOBBS: That's what I experienced,  
13 which was quite troubling.

14 So my next step is now I will have to  
15 buy the "Wolf Hall" DVD.

16 MS. CHARLESWORTH: Well, wait a second,  
17 though. If this problem is specific to the PBS  
18 stream and you streamed the content, I mean, from  
19 an online source, are you sure that wouldn't work?  
20 I mean, why do you have to buy the DVD?

21 MS. HOBBS: So, "Wolf Hall" is only  
22 available as streaming media on a PBS website.

23 MS. CHARLESWORTH: Okay.

24 MS. HOBBS: So that is why I must --

25 (Cross-talk.)

1 MS. CHARLESWORTH: Okay. I don't know,  
2 though, whether it's distributed like on the other

3 MS. HOBBS: No. No.

4 MS. CHARLESWORTH: Okay.

5 MS. HOBBS: So, if I want to use  
6 HandBrake to circumvent the DVD of "Wolf Hall"  
7 that I buy and to make a digital file, I can  
8 actually share that with my teachers, who are  
9 enrolled in a graduate education program in media  
10 literacy education, and we can demonstrate that  
11 activity.

12 But I don't -- it's not responsible for  
13 me as an educator to model instructional practices  
14 that can be used with some learners, like college  
15 students, but can't be used by other learners,  
16 like high school students.

17 And so, in this case I want to be able  
18 to model practices that are lawful. And this is  
19 another example of how the law, as it is currently  
20 written, is inhibiting innovation in a field that  
21 really has a lot to gain from innovative  
22 instructional practices.

23 MS. CHARLESWORTH: Can I ask a question?  
24 I think I saw this in the papers. There is  
25 another exemption for noncommercial videos, and

1 we've heard something about that from Mr.  
2 Williams. But why wouldn't your students be able  
3 to qualify for that, if they qualify?

4 MS. HOBBS: At the first Triennial  
5 Proceedings that I attended, I took solace in  
6 that, and I told K-12 teachers, "Okay, you didn't  
7 win an exemption, but maybe under some  
8 circumstances your uses will qualify for the  
9 noncommercial exemption."

10 I think for many kinds of instructional  
11 practices that teachers are now using with  
12 students, where students are in a one-to-one  
13 laptop classroom, actively involved in taking bits  
14 of copyrighted material and learning to develop an  
15 argument, learning to build comparison-contrast  
16 skills, learning to do close analysis, and  
17 learning to research and find evidence and  
18 information.

19 I don't think that the work products  
20 that would result would qualify appropriately as  
21 noncommercial videos. What they are is artifacts  
22 of student learning. And I wouldn't want to use  
23 legal bypasses to represent those work products as  
24 something that they're really not.

25 MS. CHARLESWORTH: Well, are they

1 noncommercial?

2 MS. HOBBS: Yes.

3 MS. CHARLESWORTH: Are students engaging  
4 in criticism or commentary when they're doing that  
5 activity you're describing?

6 MS. HOBBS: Yes.

7 MS. CHARLESWORTH: Are they short clips?

8 MS. HOBBS: Yes.

9 MS. CHARLESWORTH: So how is it they're  
10 not qualifying?

11 MS. HOBBS: They perhaps might qualify.

12 MS. CHARLESWORTH: Okay.

13 MS. HOBBS: But they wouldn't -- the  
14 phrase "noncommercial video" would not be  
15 understood by an ordinary elementary school,  
16 middle school, or high school teacher, or by a  
17 school leader or technology specialist, as seeming  
18 to be relevant to the instructional practices of  
19 teaching and learning with digital media.

20 MS. CHARLESWORTH: I mean, I'm sorry.  
21 With all due respect, fourth graders need to be --  
22 you need to explain things to them, right, in  
23 terms they can understand. I'm sure probably most  
24 fourth- graders don't have the grasp of Section  
25 1201 either, or why any of this stuff is illegal.

1           But the point of teaching, to me, is you  
2 explain to them, "This is what you can do." And  
3 you say something simple: "This is what the law  
4 allows." And the teacher, obviously, is guiding  
5 this project and hopefully has enough of an  
6 understanding of what the parameters of the law  
7 are to instruct the students appropriately and  
8 make sure that their projects are compliant.

9           And it seems like many student projects  
10 -- I'm not sure Mr. Williams agrees with me down  
11 there. But still, I mean, someone did mention  
12 this. I can't remember, I think it was one of the  
13 opponents. Many student projects might well,  
14 arguably, qualify for the exemption.

15           MS. HOBBS: And many other kinds of  
16 students projects might likely not.

17           MS. CHARLESWORTH: What, though? What  
18 are you talking about?

19           MS. HOBBS: Like, for example, in the  
20 State of Rhode Island, as in the State of  
21 Massachusetts, high school seniors must complete a  
22 portfolio project, an independent learning project  
23 on a topic of their choice.

24           In some communities, a student might,  
25 for example, want to make a critical analysis of a



1 certain popular music band and show the cultural  
2 significance of -- I don't know, let's just say  
3 the Grateful Dead for purposes of a hypothetical  
4 argument. The kid wants to make a documentary  
5 about the cultural history of the Grateful Dead.

6 In fact, it turns out that there's quite  
7 a market among those Grateful Dead fans. They'd  
8 buy a \$79 book, right? And they might actually be  
9 interested in buying a short documentary. This  
10 kid's senior project might be something the  
11 student wants to put into the commercial  
12 marketplace and charge \$1.99 for that work.

13 MS. CHARLESWORTH: Okay.

14 MS. HOBBS: It would be a fair use, but  
15 might not apply under the noncommercial video  
16 standard.

17 MS. CHARLESWORTH: Okay. Well, you  
18 should take a look at the documentary standard,  
19 then, on that one. And number two, I would say to  
20 the extent they're marketing things outside of  
21 school, I'm not getting how that is part of the  
22 educational mission.

23 MS. HOBBS: Okay.

24 MS. CHARLESWORTH: I mean, I think  
25 that's a -- but we do look at uses in the context

1 of documentaries, which are often, you know, for-  
2 profit projects. In fact, we just had a hearing  
3 last week on that. So, I mean, I would advise the  
4 student, if I were advising a student like that,  
5 to take a look at that exemption. If it's a  
6 concern, of course, that all assumes that they  
7 need to circumvent to create the documentary,  
8 which is a whole other question.

9 MS. HOBBS: I wanted to just make one  
10 more point about 110(2). That topic came up a  
11 little bit earlier today. I don't know if now is  
12 the appropriate time to bring that up or we should  
13 wait until later in the discussion.

14 MS. CHARLESWORTH: Well, I think if you  
15 want to add, and then we'll go down the line and  
16 we can come back to discuss it more. But what's  
17 your point?

18 MS. HOBBS: Sure. Earlier in the  
19 morning session, one of the commentators noted  
20 that the Section 110(2) language is essentially  
21 irrelevant. And I wanted to point to one paragraph  
22 of that language that's been very difficult for us  
23 in the digital learning and media education space.  
24 The term "mediated instructional activities, which  
25 with respect to the performance or display of a

1 work by digital transmission under this section  
2 refers to activities that use such work as an  
3 integral part of the class experience controlled  
4 by or under the actual supervision of the  
5 instructor, and analogous to the type of  
6 performance or display that would take place in a  
7 live setting."

8           That is a really problematic phrase,  
9 because right now, the very energy and innovation  
10 that's happening in the digital learning sector is  
11 coming because the learning activities are  
12 precisely not the type of performance or display  
13 that would take place in a live classroom setting.

14           And that digital learning activities are  
15 not analogous to the live classroom setting.  
16 That's the whole point of the innovation that's  
17 occurring in education right now.

18           MS. CHARLESWORTH: Are you saying  
19 there's no role for a teacher? Or what's the --

20           MS. HOBBS: No. I'm saying that many of  
21 the instructional practices happen as students  
22 learn themselves. For example, when I work with  
23 seventh- and eighth-grade students, students  
24 who create videos. But I don't show them how to do  
25 it. They actually figure that out independently on

1 their own.

2           That part of -- when you're surrounded in  
3 a culture with such a wide variety of educational  
4 resources, teacher's role changes. And direct  
5 instruction and the transmission approach that  
6 somehow mediated instructional activities are just  
7 transmitting content through display or  
8 transmission, that's not actually the kind of  
9 pedagogy that we're now using in a classroom where  
10 every kid has her own tablet or laptop.

11           MS. CHARLESWORTH: Well, I mean, but are  
12 you saying that there's no guidance at all from  
13 the teacher?

14           MS. HOBBS: I'm saying that --

15           MS. CHARLESWORTH: I mean, the teacher  
16 is assigning the work. The teacher, hopefully, is  
17 giving some instruction on what's expected. The  
18 teacher is -- I mean, in the past -- I don't want  
19 to get too deeply into the issues of the last  
20 panel. But the idea is you were actually watching  
21 a lecture from the teacher. And then, yes, there  
22 may be a homework assignment where kids are asked  
23 to do things.

24           MS. HOBBS: I'm saying that new  
25 educational uses of media treat media as building

1 blocks in content creation and that the content  
2 creation is a pedagogy for students to demonstrate  
3 their learning.

4 MS. CHARLESWORTH: And it has been for a  
5 long time, because students have been encouraged  
6 to write and make pictures and do other things.  
7 And now we live in a world where they also do  
8 things with media.

9 MS. HOBBS: I think --

10 MS. CHARLESWORTH: So, your point is  
11 taken.

12 MS. HOBBS: I think Section 110(2)'s  
13 language of transmission doesn't reflect the kind  
14 of teaching and learning environments that happen  
15 in 2015.

16 MS. CHARLESWORTH: On screen-capture, we  
17 asked this at the last panel. I mean, what's your  
18 -- assuming that, you know, let's say we renewed  
19 the existing exemption, hypothetically. Do you  
20 still want a screen-capture exemption to deal with  
21 the potential -- you know, some technologies  
22 apparently may involved circumvention, just to  
23 make sure that's still available to you?

24 MS. HOBBS: Screen-capture is vital for  
25 media literacy education. And we couldn't do

1 media literacy education without it.

2 MS. CHARLESWORTH: Okay. Thank you.

3 MS. SMITH: Just one question. Do you  
4 think that teachers and the administrators  
5 generally understand the current exemptions or the  
6 DMCA or 1201 as they are applying it?

7 MS. HOBBS: We're working very hard  
8 toward that. And every year at the International  
9 Society for Technology and Education, I get to  
10 give a talk to 300 or 400 technology directors.  
11 That's a very large conference, 15,000 come up  
12 every year do it. I believe we've made a lot of  
13 progress in helping educators and school leaders  
14 and technology directors understand their rights  
15 under DMCA 1201.

16 MR. CHENEY: Let me ask you a question,  
17 Professor Hobbs. Are you suggesting in this  
18 effort that students, on their home computer or  
19 laptop, purchase or download some of these tools  
20 and do this breaking of encryption at home in  
21 preparation of these homework assignments? Or is  
22 that done in the classroom under some supervision  
23 or in a sort of a computer lab in the school where  
24 there's some supervision by instructors or IT  
25 directors or others that may help them understand

1 the parameters of the law in this case?

2 MS. HOBBS: Right now, all of those  
3 strategies represent how teaching and learning  
4 happen in elementary and secondary schools. So,  
5 all of those practices are normative. It probably  
6 wouldn't be appropriate to too-narrowly limit to  
7 any one of those pedagogies, because I think we  
8 want to respect the choices made by the educators  
9 themselves about which one of those practices is  
10 most appropriate for the particular learner in  
11 question.

12 MR. CHENEY: Thank you.

13 MS. SMITH: One more question. In the  
14 papers, there's an example of a teacher, Rebecca  
15 Hranj who wanted to use a Blu-ray clip, and because  
16 it was prevented, I think she used a DVD clip.

17 Do you have another example of where  
18 Blu-ray was required for the teaching project  
19 that was anticipated?

20 MS. HOBBS: I do not.

21 MS. CHARLESWORTH: Okay. Mr. Band.

22 MR. BAND: Thank you. The opponents do  
23 not oppose renewal of the existing exemption. So  
24 the core issue today is whether the exemption  
25 should be extended to students.

1           The opponents' main argument is that  
2 allowing students to circumvent will open the  
3 floodgates to infringement. As I said this  
4 morning in the context of MOOC's, this argument  
5 ignores reality. We all know that circumvention  
6 tools, particularly for CSS, are widely available  
7 and widely used. Allowing students to use this  
8 exemption for classroom activities will not lead  
9 to an increase in the amount of infringing  
10 activity. The opponents' position sounds like the  
11 argument that sex ed leads to more teenage  
12 pregnancy.

13           Excluding students from the exemption  
14 leads to anomalous results. A college freshman  
15 might be able to engage in circumvention for an  
16 assignment for an art history class. But a high  
17 school senior couldn't circumvent for a similar AP  
18 class. We live in a media-saturated culture, and  
19 the steady use of media is an important part of K-  
20 12 education. It makes no sense to restrict the  
21 ability of students to engage with media because  
22 of a completely speculative fear that doing so  
23 might lead to more infringement.

24           MS. CHARLESWORTH: But can I just ask a  
25 question here? I mean, if you have a teacher



1 saying it's okay to go and use circumvention tools  
2 to circumvent encrypted content, you don't think  
3 that that influences the way students might think  
4 about whether that's a legitimate thing to do?

5 MR. BAND: I think exactly, because it  
6 would be in an educational context. The teacher  
7 would be able to say what is okay and what isn't  
8 okay. The student would be in a better position  
9 to understand not only circumvention but fair use.  
10 Also, the student as a creator now would have more  
11 of an interest in saying, "Well, wait a minute. I  
12 don't want my stuff ripped off. Under what  
13 conditions would it be okay for someone to use my  
14 work?"

15 So, I think yes. I think exactly.  
16 Because if it were part of a supervised project,  
17 it would really be a teachable moment. It would  
18 be much better than what we know is actually  
19 happening, which is kids just going off and doing  
20 everything on their own. Right?

21 And so, that's why having -- knowing  
22 that it's happening anyway, better that you have  
23 some context and some structure where kids  
24 understand what the appropriate parameters for  
25 these activities are.

1 MS. CHARLESWORTH: Is that evidence that  
2 teachers are actually -- I mean, what evidence do  
3 we have that teachers are actually giving that  
4 instruction and giving clear guidelines to  
5 students?

6 MR. BAND: Well, first of all, to  
7 instruct the circumvention, they're not, because  
8 students aren't allowed to circumvent.

9 MS. SMITH: Are teachers ever catching a  
10 student who has circumvented and saying, "Hey, you  
11 shouldn't do that. You should use a DVD or  
12 screen- capture software"?

13 MS. SMITH: Maybe if you used the  
14 microphone.

15 MS. HOBBS: Yes, that happens quite  
16 frequently. At the National Association for Media  
17 Literacy Education Conference, every year we have  
18 dialogs with teachers who talk to us about how  
19 they are trying to help their students to behave  
20 lawfully when it comes to the application of fair  
21 use.

22 MR. BAND: Now, let me just add in  
23 response to the discussion we had a minute about a  
24 noncommercial use and the noncommercial use  
25 exemption. If the Copyright Office, in its

1 recommendation, is willing to say that that  
2 applies to our situation, great. But, you know,  
3 as you indicated before, we know from one of the  
4 previous panels that the MPAA and the RIAA  
5 strongly oppose that view.

6           And so, unless we have some clearer  
7 guidance that the noncommercial use exemption  
8 would apply to students, then I think it would be  
9 pretty risky for schools to encourage students to  
10 engage in those kinds of assignments.

11           MS. CHARLESWORTH: What do you think? I  
12 mean, what's your interpretation, reading the  
13 exemption as it exists today?

14           MR. BAND: Well, I think it's -- you  
15 know, I think arguments could be made either way.  
16 So, on the one hand, certainly taken literally, it  
17 is a noncommercial use, as you would say. And  
18 this would certainly seem to fit into that.

19           On the other hand, given the much more  
20 specific -- given the specificity of the exemption  
21 for K-12 education, meaning that it's limited to  
22 instructors and the other restrictions on it, and  
23 also given the specificity of the exemption with  
24 respect to higher ed, I could see an argument  
25 being made that, in the educational context, the

1 exemption would be limited to what is provided  
2 there in those specific exemptions. Because  
3 otherwise, you could say the noncommercial  
4 exemption swallows the rule.

5               So, you know, I think it's unclear. I  
6 think, again, arguments could be made either way.  
7 But certainly, before educational institutions are  
8 going to start telling students to do this kind of  
9 thing and encouraging instructors to come up with  
10 lesson plans that involve these kinds of projects,  
11 I think that more clarity would be needed on this  
12 issue.

13              MS. CHARLESWORTH: Thank you, Mr. Band.  
14 Did you have anything else you wanted to share  
15 now?

16              MR. BAND: No.

17              MS. CHARLESWORTH: Mr. Turnbull.

18              MR. TURNBULL: Thank you. Again, I'm  
19 Bruce Turnbull, representing the AACSB LA.

20              I have a couple of comments on the  
21 things that came up in the previous discussion,  
22 and then I've got a couple of quick points.

23              First of all, in the "Wolf Hall"  
24 example, what's unfortunate is that you didn't  
25 just try to make a copy direct from the broadcast,

1 because the broadcast is broadcast with -- if I  
2 understand correctly, should be copied freely. And  
3 so you can make a copy in whatever quality your  
4 broadcast comes in, and using an existing DVR or  
5 other form of copying capability. So.

6 MS. SMITH: I think she wanted to get it  
7 from PBS online; is that correct?

8 MR. TURNBULL: I know. But what I'm  
9 saying is that there's an alternative, which is to  
10 take it off of the broadcast.

11 MS. SMITH: Well, if you miss it on  
12 broadcast, are you just out of luck?

13 MR. TURNBULL: Well, okay.

14 MS. HOBBS: What if you threw away your  
15 VHS recording device in 2001?

16 MR. TURNBULL: I didn't -- I didn't --

17 MS. CHARLESWORTH: Well, we're calling  
18 on people. Let's let Mr. Turnbull make his point  
19 here.

20 MR. TURNBULL: I didn't suggest VHS. But  
21 anyway, there are other recording techniques.

22 In any event, the --

23 MS. CHARLESWORTH: Mr. Turnbull, I'm  
24 sorry. As long as we're on this subject, do you  
25 know why -- is there something particular about

1 PBS broadcasts or online that would --

2 MR. TURNBULL: I don't know the online  
3 situation.

4 MS. CHARLESWORTH: So you don't have any  
5 comment on that?

6 MR. TURNBULL: No.

7 MS. CHARLESWORTH: Okay.

8 MR. TURNBULL: On 110(2), I think  
9 that we were just talking apples and oranges here.  
10 Honestly, the discussion in the previous panel had  
11 to do with instruction that was conducted online.  
12 And that's why 110(2) was relevant. I don't think  
13 it was relevant to the points that Ms. Hobbs was  
14 making earlier. So, unless we were talking about  
15 instruction that's conducted online.

16 MS. CHARLESWORTH: I don't think so. Not  
17 in the proposal here.

18 MR. TURNBULL: Yeah. Yeah. Okay.  
19 Beyond that, I would say that representing  
20 AACSLA, LLC, at this panel, I'm  
21 tempted to say they're not actually asking for  
22 circumvention of Blu-ray. In both of the opening  
23 remarks today, the discussion was entirely about  
24 extending the existing exemption only in regards  
25 to extending it to students. That has to do with

1 DVD. It does not have to do with Blu-ray.

2 In the papers that were submitted, I  
3 believe with the exception of the one example that  
4 Ms. Smith indicated earlier, where in fact the  
5 teacher was able to go ahead and use the DVD and  
6 do the project, there were no examples. And Ms.  
7 Hobbs had no other examples this afternoon of  
8 situations where using Blu-ray was important for  
9 the instruction.

10 And so, I'm tempted just to finish at  
11 that point, but let me -- as a lawyer, let me go  
12 on for a minute.

13 MR. TURNBULL: In the reply comments,  
14 they said that our argument was that high-quality  
15 does not qualify for fair use; that was not the  
16 argument.

17 The argument had to do with whether they  
18 were in a fair-use context, entitled to whatever  
19 quality it is that they wanted. And there the  
20 case law, again, the Corley case that I quoted at  
21 some length this morning, is clear that they're  
22 not entitled to whatever quality or whatever  
23 format is convenient or that they may wish for  
24 whatever reason. If they can get it in another  
25 quality and another way, then that is sufficient.

1           And with that, I think I'll conclude my  
2 opening remarks.

3           MS. CHARLESWORTH: Okay. Mr. Taylor,  
4 you're already at the podium; good. And I think  
5 you have some exhibits for us.

6           MS. CHARLESWORTH: And for the record, I  
7 think we're going to be taking a look at what have  
8 been pre-marked as Exhibits 18, 19, and 20.

9           MR. TAYLOR: Good afternoon. David  
10 Taylor.

11           And the exhibit order will be "Chicago"  
12 with subtitles, it's just abbreviated "SUBT," it's  
13 the file name. And that is Hearing Exhibit 18.

14           Hearing Exhibit 19 will be the file  
15 that's named "Matrix Clip." It's an mp4.

16           And Hearing Exhibit 20 will be the file  
17 that's named "Matrix Clip Edited."

18           And I also have a screenshot, which will  
19 be identified as Hearing Exhibit 21.

20           MS. SMITH: Are these clips the same as  
21 submitted in your opposition comments?

22           MR. TAYLOR: No, they were not.

23           MS. SMITH: Okay. What is different  
24 about them?

25           MR. TAYLOR: The "Chicago" -- the first



1 one that I'm going to show is "Chicago," and it  
2 includes the subtitles. That wasn't in the reply  
3 comments that that was something that was  
4 necessary for instructional purposes. The "Matrix  
5 Clip" is the same "Matrix" clip, the original one.  
6 But we've edited it so that you can see what a  
7 student would do with it and how a student could  
8 use the video-capture clip to actually make a  
9 project.

10 MS. SMITH: And so, what software did  
11 you use to capture the "Chicago" clip and edit the  
12 "Matrix" clip?

13 MR. TAYLOR: Both were -- the "Chicago"  
14 clip was recorded with WM Capture 14. And the  
15 same with the "Matrix Clip," was originally  
16 recorded with, in WM Capture. And then I believe  
17 it was processed or edited in either Movie Maker  
18 or Firstcut.

19 MS. SMITH: Okay. And the third clip?

20 MR. TAYLOR: I'm sorry. I just  
21 described the third clip.

22 MS. SMITH: Oh.

23 MR. TAYLOR: The second clip was the  
24 original clip that was recorded in WM Capture.  
25 This is it.

1 MS. SMITH: Okay. Thank you.

2 MR. TAYLOR: So, starting off with  
3 "Chicago."

4 (Hearing Exhibit No. 18 was presented.)

5 MR. TAYLOR: Okay. So, basically, the  
6 video-capture did, as it has done, record whatever  
7 it did in the field. And we had put the  
8 subtitles, included the subtitles and it was  
9 clearly visible in the video-capture.

10 Next, I'm going to show you a clip that  
11 we did submit with our original exhibit. It's  
12 basically a scene that starts off with the wife of  
13 the Frenchman. And I want you to keep in mind her  
14 role at the very beginning of it, because we're  
15 going to do a little editing in the next clip. And  
16 that's the kind of editing, organizing, that we  
17 would probably expect to see a student actually  
18 do. So I'm going to show you the clip as it was  
19 originally done.

20 (Exhibit Nos. 19, 20, and 21 were  
21 presented.)

22 MR. TAYLOR: Okay. And again, that was  
23 the original clip as it was produced the first  
24 time around with WM Capture and as it's actually  
25 shown in the original work.

1           Now what I'm going to show you is the  
2 content from the same clip, but the scenes have  
3 been reorganized. And I just remind you, like the  
4 first time around, we started off with the wife of  
5 the Frenchman. And you can see where she ends up  
6 now.

7           MR. TAYLOR: So, basically, we ended up  
8 in the same spot. But the clip, as it was  
9 reorganized, put the wife of the Frenchman  
10 somewhere in the middle, I think approximately  
11 here. And the scene itself started off at the  
12 very end of the original clip. So it was  
13 basically organized in a different way. And I  
14 believe that, you know, this could be a project  
15 that a student would reasonably be expected to do.  
16 And you could accomplish this with video- capture  
17 software.

18           MS. SMITH: In your papers, you list a  
19 variety of video-capture software. And one of  
20 them is called EZvid, which is apparently  
21 available free, and others require a price. Do  
22 you have any experience with using EZvid compared  
23 to the other screen-capture technologies available  
24 that we have seen throughout these hearings?

25           MR. TAYLOR: I have not used EZvid.

1 We're not endorsing any specific technology. We're  
2 just identifying for the Office that software is  
3 offered at various price points.

4 MS. SMITH: Okay. So there's no  
5 evidence as to whether or not a free version of  
6 the software would enable the same level of  
7 quality to students as these that you're  
8 proposing?

9 MR. TAYLOR: I think that's correct. I  
10 would point out that almost on all software you  
11 get a free trial for sometimes 15 or 30 days. So,  
12 in the course of this project, I have taken  
13 advantage of the free trials.

14 MS. SMITH: Okay. And then after 15 or  
15 30 days, it expires?

16 MR. TAYLOR: Yes.

17 MS. SMITH: Okay. Thank you.

18 MR. TAYLOR: That's all I have.

19 MS. CHARLESWORTH: Thank you, Mr.  
20 Taylor.

21 Mr. Williams.

22 MR. WILLIAMS: Thank you for having me.  
23 Again, I'm here for MPAA, ESA, and RIAA.

24 I'd like to start by emphasizing that,  
25 contrary to what is said in some of the reply

1 comments, we have no intention of trivializing or  
2 being overly critical of K-12 educators. We  
3 understand what they do is vitally important. And  
4 we appreciate that work.

5           We do not oppose renewal of the existing  
6 exemption, as was mentioned earlier. We do oppose  
7 expanding it to allow circumvention by 50 million  
8 elementary and secondary school students, some of  
9 whom will be as young as five years old. We would  
10 also prefer that you retain the limitations to use  
11 of short portions for close analysis and criticism  
12 and commentary. And we oppose the expansion to  
13 Blu-ray.

14           We've discussed, on earlier panels, that  
15 these types of limitations keep the exemption  
16 closer to what is more likely to be fair use --  
17 the short portions, the criticism and commentary -  
18 - and that's why we favor retention of those  
19 limitations.

20           There's an argument in the proponent's  
21 comment that the copyright law just doesn't  
22 warrant the creation of separate rules for  
23 different types of digital media. And I would  
24 just say that, throughout the course of these  
25 proceedings, the history of these proceedings, the

1 types of formats at issue have been used  
2 repeatedly by the Office in order to try to tailor  
3 exemptions in a way that gets people what they  
4 need without going too far in upsetting the  
5 balance that Congress intended to strike.

6           At the risk of being repetitive from  
7 some other panels, I'm just going to say a few  
8 things that I've said previously so that the  
9 record on this class is complete.

10           Blu-ray is a critically important  
11 platform for my clients, and there are plenty of  
12 alternatives to circumventing Blu-ray. There's  
13 nothing in the comments filed on this class that  
14 I'm aware of that shows that there is exclusively  
15 available Blu-ray content that can't be acquired  
16 through other means. I think, as the Register  
17 concluded in 2012, at most under the record across  
18 the board in these proceedings there's only an  
19 insignificant amount of Blu-ray-only content. And  
20 so I don't think that justifies an exemption  
21 anymore than it did in 2012.

22           There's also the option, as I've  
23 mentioned before, of using HD digital copies  
24 acquired online or through the digital service  
25 that we discussed earlier today. And there's also

1 actually using downloaded copies or streamed video  
2 and queuing it up in advance of class to the point  
3 at which you need to start use of the video.

4 I appreciate that the proponents have  
5 acknowledged that not all educational uses are  
6 fair use. And I also appreciate that they are  
7 making efforts to educate themselves and students  
8 about copyright law. I think those are valuable  
9 processes. Unfortunately, I'm not sure they always  
10 work. They point to one website in their  
11 comments, the copyrightconfusion wiki, where  
12 teachers apparently go for fair use advice. And  
13 I'm not trying to be overly critical of that site;  
14 it did seem to have some valuable advice on it.  
15 But a couple of the things that were said there, I  
16 think were far too categorical under the law.

17 There's a statement that says,  
18 "According to best practices code, teachers  
19 can make copies of TV shows and other copyright  
20 works and use them and keep them for their  
21 educational use." Now, there might be instances  
22 where creating complete copies is a fair use, but  
23 that statement implies a scope of copying, to me,  
24 that would not qualify as fair use.

25 It also says on that site that it would

1 be fair use to sell curriculum materials with  
2 copyrighted materials embedded in those curriculum  
3 materials. That again is something where some  
4 instances of that would be fair use, but I think a  
5 lot of those types of commercial uses would not be  
6 fair.

7           On the issue of harm, I think it's an  
8 important one for this particular class, I do  
9 think that this potential overlap between the  
10 noncommercial videos exemption and the educational  
11 uses exemption was unintentional, or at least I  
12 hope that it was, because the educational  
13 exemption is carefully tailored and it does  
14 exclude uses by K-12 students.

15           I think the reason for that -- and you  
16 probably know better than me -- but I think and  
17 I've always believed the reason for that is that  
18 The Office was concerned that allowing K-12  
19 students access to circumvention technologies  
20 could lead to infringement and infringement that  
21 we wouldn't be able to track or necessarily point  
22 to in evidence because we just wouldn't know that  
23 that was the impetus for a student getting started  
24 with that type of technology.

25           So, I would much prefer that we retain



1 some type of limitation in this area and that  
2 there be some clarity made between those two  
3 exemptions that apply to motion pictures. Thank  
4 you.

5 MS. CHARLESWORTH: So, on this issue of  
6 the noncommercial videos, you know, we had a  
7 little discussion over here. I mean, if we re-  
8 adopted that exemption and, let's say Mr. Band  
9 decided he wanted a new pro bono case and was  
10 going to take that issue to court, in terms of  
11 whether the exemption would apply to student uses,  
12 I understand you have an interpretation. But do  
13 you agree that there's an ambiguity there? Do you  
14 think there's overlap?

15 I mean, you sort of said there wasn't.  
16 On its face, that exemption doesn't speak to  
17 students. I'm just curious to know your further  
18 thoughts on that and whether, are you suggesting  
19 that should be limited to exclude students? What's  
20 the thought process?

21 MR. WILLIAMS: Yes. Thank you. I do  
22 agree that it is ambiguous at this point. I think  
23 the record would show if it was brought to a  
24 court's attention that there was an intended  
25 distinction between educational uses and the remix

1 video exemption, because the record was built in  
2 two separate tracks, and the track that focused on  
3 noncommercial videos, what was ultimately called  
4 that, is really focused on what we'll hear about  
5 tomorrow, which is remix videos and mash-up videos  
6 of the specific type.

7           And so, I think, ultimately, that case  
8 would come out and say that there were two  
9 separate exemptions that don't overlap and that  
10 the educational use exemption is not a meaningless  
11 exemption.

12           But the reason we raised it in a couple  
13 of panels are we are concerned that it is  
14 ambiguous. We did try to point this out during  
15 the last cycle of this, as well. I don't think  
16 that the issue gained as much attention at that  
17 point. So we raise it again now.

18           And I'm not sure that the way to go  
19 about it with keeping the educational exemption in  
20 the current contours that it has would be to  
21 specifically exclude students from the  
22 noncommercial video exemption. I think there  
23 might be a way of defining the categories of  
24 videos that that is intended to target more  
25 clearly in a way that would delineate between the

1 two.

2 And I've been considering different  
3 potential definitions of what is at issue in the  
4 remix class, and I haven't come up with a perfect  
5 definition yet, unfortunately. But I think  
6 through the discussion tomorrow, and further  
7 thinking, that it's got to be possible to come up  
8 with a definition that gets at what's actually in  
9 the record.

10 MS. CHARLESWORTH: And I mean, I take it  
11 from your comments that you're opposed to  
12 extending the current exemption to cover any  
13 student uses. The educational one now I'm talking  
14 about.

15 MR. WILLIAMS: Right. We did not oppose  
16 the continuation in the college and university  
17 setting, but we are opposed to expanding the K-12  
18 exemption to cover students in addition to  
19 teachers.

20 MS. CHARLESWORTH: And can you explain  
21 that a little bit more?

22 MR. WILLIAMS: Sure. It was the point I  
23 was trying to get to a second ago, that we are  
24 troubled by the idea of introducing very young  
25 children, in some instances, to circumvention

1 technologies that can certainly be misused and  
2 we're afraid would be misused. And I believe  
3 that's the reason why the exemption is currently  
4 drafted the way it is, to exclude students.

5 MS. CHARLESWORTH: And what about Mr.  
6 Band's suggestion that, if I can summarize it,  
7 they're doing it anyway? It's better to have a  
8 teacher explaining some elements of right-and-  
9 wrong to them.

10 MR. WILLIAMS: Sure. I think that's a  
11 great idea. I think teachers can certainly be  
12 helpful and explain the differences. I'm not sure  
13 that you have to put circumvention technology in  
14 the hands of the students in order to make those  
15 points. I think a teacher could convey what is  
16 legal or illegal without sending the students home  
17 to engage in circumvention.

18 MS. CHARLESWORTH: What about screen-  
19 capture technology for students? What's your view  
20 on that? I know we've had a lot of discussion  
21 about sort of an exemption just to make sure  
22 there's an -- you know, that it's covered. But I  
23 mean, would you object to students being sent home  
24 to use screen- capture technology, at least the  
25 kind that's referenced in the exemption?

1                   MR. WILLIAMS: Sure. So, our position  
2 hasn't changed from the last couple of cycles on  
3 screen-capture. Our understanding is there are  
4 screen-capture products that capture the video  
5 after it has been lawfully decrypted. And in  
6 those events, it would not constitute  
7 circumvention under the statute.

8                   We have not done the kind of testing  
9 that my colleagues have done in the past on the  
10 specific technologies, so we've never spoken to  
11 whether one product versus the other would be  
12 circumvention. But I do think there are screen-  
13 capture technologies on the market that are not  
14 circumvention. We don't oppose the renewal of the  
15 screen-capture exemptions that you granted last  
16 time, either.

17                  MS. CHARLESWORTH: Okay.

18                  MS. SMITH: Do you think students are  
19 appreciating the distinction between using a  
20 screen- capture technology that says it's not  
21 circumventing versus, you know, a six-year-old  
22 knowing, "Okay, this is hacking, but it's okay  
23 because I'm circumventing"? I mean, they're  
24 probably just clicking anyway. Or will they  
25 appreciate that difference?

1                   MR. WILLIAMS: I'm not sure. It's hard  
2 to put myself back in the mind of the six-year-  
3 old. But I doubt that they're always capable of  
4 making those distinctions. I do think, though,  
5 that a lot of the places online to get unlawful  
6 circumvention technologies don't look a lot like  
7 the legitimate marketplaces where you might get  
8 screen-capture technology.

9                   MS. CHARLESWORTH: Maybe Ms. Hobbs. Do  
10 you have any thoughts on that, whether students  
11 could be instructed or guided to use legal screen-  
12 capture technologies or non-circumventing  
13 technologies in their student work?

14                  MS. HOBBS: Yes. I believe that  
15 students are fully capable of appreciating the  
16 difference between screen-capture and  
17 circumvention.

18                  MS. CHARLESWORTH: Okay. But I mean, I  
19 think the question is a little bit more like, in  
20 other words, we're hearing over here from Mr.  
21 Williams that screen-capture, which often, maybe  
22 even typically, doesn't involve circumvention,  
23 might be a good alternative for students who want  
24 to engage in student work.

25                  And I guess some of the question about

1 the exemption, at least as it's currently drafted,  
2 is that there are some versions of screen-capture  
3 that may involve circumvention, but it seems to me  
4 perhaps a teacher could be helpful in that regard  
5 by saying, "Here, kids. Here are the things that  
6 you can -- here are the tools that you can use."  
7 Do you agree with that -- giving them a list or  
8 whatever it is that would be appropriate  
9 in the context?

10 MS. HOBBS: Yes.

11 MS. CHARLESWORTH: Okay.

12 MR. CHENEY: I have a question, Mr.  
13 Williams. Could we perhaps think about drawing a  
14 line in the sand a little bit differently? There  
15 was a comment by Mr. Band earlier that students in  
16 high school often take AP exams that are college-  
17 level exams, would have college-level  
18 requirements. Could we draw the line in the sand  
19 a little bit different than maybe K-12, but maybe  
20 freshmen or high school students, and particularly  
21 those that are taking AP exams?

22 Would you be more comfortable with that?  
23 It would seem they'd be more capable of  
24 understanding the distinctions in the law, those  
25 kinds of things. Would you feel more comfortable

1 with that as a new line in the sand here?

2 MR. WILLIAMS: I would be more  
3 comfortable. I wouldn't be supportive of expanding  
4 it in that way. But certainly, it would be  
5 preferable to expanding it all the way down  
6 through K-12. It is a little easier for me to  
7 remember my high school state of mind than it is  
8 as a six-year-old. And, you know, I think high  
9 schoolers, while many certainly can be trusted,  
10 there is a risk there with introducing them to  
11 circumvention technology.

12 That said, it certainly would be  
13 preferable to going all the way down.

14 MR. CHENEY: Thank you. And any  
15 comments from Ms. Hobbs or Mr. Band?

16 MS. HOBBS: Yes. I think no. If we're  
17 drawing lines in the sand, I think high school  
18 students are -- I can't understand on what grounds  
19 22 million college students can bypass CSS  
20 encryption, but 50 million K-12 students cannot.  
21 We've seen over the last Triennial Rulemaking  
22 Procedures that we haven't had any problems with  
23 22 million college students being able to do that.

24 I do not anticipate that there will be  
25 any problem opening this to teaching and learning



1 in elementary and secondary schools. I can't say  
2 that I anticipate a great volume of this kind of  
3 behavior in elementary schools. I think it is  
4 more likely that students who are doing their  
5 National History Day project will want to have the  
6 highest-quality video because they want to win the  
7 prize.

8           So I do think it's more likely that this  
9 will have direct benefit. If they can use the  
10 highest-quality digital content, it will be more  
11 relevant for high school students than it will be  
12 for elementary children, for sure. But I just  
13 don't understand on what grounds we would want to  
14 be able to slice and dice people's fair use rights  
15 up this way just because they're younger.

16           MS. CHARLESWORTH: Well, they're not --  
17 I mean, just to be fair, the college exemption is  
18 really for courses that require close analysis,  
19 like for example, film studies courses that are  
20 typically not -- typically -- I don't want to say  
21 "never" offered in K-12, but typically aren't in  
22 elementary schools, or at least not at the level  
23 of, you know, you're not studying cinematography  
24 in quite the same way. So, there still has to be  
25 a demonstrated need to circumvent, even at the

1 college level.

2 MS. HOBBS: I just want to clarify that  
3 the common core state standards mandate that all  
4 students in K-12 learning environments learn to be  
5 able to critically analyze the form and content of  
6 media messages in a wide variety of forms --  
7 online, comics, radio, including movies.

8 So that it's not simply an elective  
9 course. These practices aren't being used as  
10 simply in an elective film studies course. These  
11 practices are being used as a normal part of  
12 instruction in English language arts and social  
13 studies instruction.

14 And so, we wouldn't want to misrepresent  
15 this as just a marginal elective that happens for  
16 a few kids. These practices are -- these digital  
17 learning practices are happening more and more as  
18 part of mainstream public education.

19 MS. CHARLESWORTH: Okay. Any further  
20 questions? Yes, Ms. Smith.

21 MS. SMITH: Yes. So, the current  
22 invention in place that's sort of a staggering for  
23 K-12 teachers, as the same as the college and  
24 university level, where you can use a method such  
25 as a screen- capture technology, you know, unless

1 you need -- there's sort of a need for a close  
2 analysis.

3 And can you provide examples that  
4 teachers are appreciating that distinction and  
5 able to navigate between the differences?

6 MS. HOBBS: Yes. Let's use the National  
7 History Day example as a good way to appreciate  
8 the distinction. So, in some communities,  
9 National History Day media production activities  
10 are really a big tradition. I'm working in two  
11 school districts this year, in the Narragansett  
12 public schools and the Newport public schools.

13 And both school districts participate in  
14 National History Day, but one of those districts  
15 takes it very, very seriously. And for those high  
16 school students, the opportunity to get a high-  
17 quality piece of digital content to embed in their  
18 documentary about the history of Ray Kroc, for  
19 example, the guy, the founder of McDonald's,  
20 right, that's a really meaningful choice on the  
21 part of that student.

22 In other situations and for other kinds  
23 of learning experience, screen-capture is  
24 perfectly adequate.

25 MS. SMITH: But I think in that example,

1 you're saying they want a better, you know,  
2 output. But it's not necessarily that the clip of  
3 Ray -- are they analyzing the actual clip of Mr.  
4 Kroc?

5 MS. HOBBS: They may be building a  
6 documentary to make an argument about Ray Kroc in  
7 the context of his entrepreneurial vision for a  
8 fast-food restaurant.

9 MS. SMITH: Right. So, are they  
10 analyzing his vision and his life? Or are they  
11 analyzing the piece of media? You know, like the  
12 lighting behind his interview?

13 MS. HOBBS: That's a really great  
14 observation. Of course, those practices blur  
15 together in the context of teaching and learning.  
16 We always ask, "What's the content of the message?  
17 Do you understand the idea?" We're always looking  
18 at the content.

19 But we're also encouraging teachers to  
20 look at the form and structure of the media. And  
21 teachers are helping students to do that, as well.  
22 So, we always do both-and. We look at the  
23 content, and we look at the critical analysis of  
24 how that content is created.

25 That reflects the key idea, the key

1 concept of media literacy: All messages are  
2 constructed. And in order to be able to use media  
3 messages, you have to understand who made them,  
4 why, and what techniques were used to create them.  
5 Those are fundamental practices of media literacy.  
6 They get embedded in all forms of instruction.

7 MS. SMITH: So --

8 MS. CHARLESWORTH: I'm sorry. I was  
9 just going to add, does the National History Day -  
10 - it's a competition, right? Does it require any  
11 particular grade of content to participate?

12 MS. HOBBS: No. It acknowledges that  
13 educators and students are in the best position to  
14 be able to make the determination about the  
15 selection of materials and resources.

16 MS. CHARLESWORTH: But just to be clear,  
17 they don't suggest that you need to use DVD-level  
18 content?

19 MS. HOBBS: To my knowledge, that is not  
20 specified.

21 MS. CHARLESWORTH: Okay.

22 MS. SMITH: So, do you have an example  
23 of any time where a teacher wanted to use a ripped  
24 clip, but then, you know, stepped back or  
25 administration stepped back and said, "You know,

1 actually, this doesn't fall within the parameters  
2 of the exemption. So I'm just going to use a  
3 screen-capture version," or "I'm going to press  
4 pause and queue up the clip and do it that way.  
5 I'm going to decide not to circumvent, because it  
6 does not fall within the meets and bounds of the  
7 current exemption"?

8 MS. HOBBS: At this point, I can't think  
9 of a particular story that comes to mind. But I  
10 have been asking the media literacy community to  
11 document examples, and I would bet I could go back  
12 into my Google form and see -- I could probably  
13 retrieve some examples of educators who have been  
14 in that situation. But right at this moment, I  
15 can't recall a specific story.

16 MS. SMITH: Do you have familiarity with  
17 the disk-to-digital or UltraViolet technologies  
18 that Mr. Williams was talking about?

19 MS. HOBBS: I am not familiar with  
20 those. And neither do I know how to record  
21 broadcast video since I threw away my VHS. And if  
22 the commenter could elucidate me on that, that  
23 would really be -- I'd be very grateful.

24 MS. CHARLESWORTH: Mr. Williams, do you  
25 -- or Mr. Taylor?

1 MR. TURNBULL: It was me. It was me.

2 MS. CHARLESWORTH: Oh, Mr. Turnbull.

3 Let's try three.

4 MR. TURNBULL: I think I was the one  
5 there. Well, there are two things. One is that  
6 there are DVD recorders that are sold on the  
7 market. There are Blu-ray recorders, although I  
8 think you probably have to get those online  
9 because I think they're mainly in Japan and  
10 Europe. But they are available and can be  
11 purchased.

12 There are DVR's that are supplied by the  
13 local cable company and that you could make a copy  
14 of and then, through an output from that, you  
15 could connect that to a computer and, presumably,  
16 make a copy onto a hard drive or a USB connection.

17 MS. CHARLESWORTH: And can you explain  
18 UltraViolet to Ms. Hobbs in the interest of media  
19 literacy?

20 MR. TURNBULL: There are two systems  
21 that are in existence, UltraViolet and Disney  
22 Movies Anywhere. They are more or less in the  
23 same genre, although Disney had decided to go  
24 their own way and so they're not part of  
25 UltraViolet.

1           Basically, you can buy either through an  
2 online store or you can simply buy a digital copy  
3 of something, and it gives you a right that is  
4 deposited in what they call a locker, so that you  
5 can stream that content to any one of a number of  
6 devices that you may have registered with the  
7 system, all kinds of different devices, whether  
8 it's a pad or a computer or a TV or whatever.

9           You can also get your movie into your  
10 locker by buying a copy of a Blu-ray or a DVD  
11 which has been enabled for that use. And the  
12 testimony last week from the operators of those  
13 systems said, basically, for UltraViolet, for the  
14 studios that are operating, I think that pretty  
15 much every new title and many of the catalog  
16 titles, although we have to go back to the record  
17 to find out exactly; I don't remember precisely.  
18 But it's thousands of titles.

19           For Disney Movies Anywhere, it's aimed -  
20 - as was noted earlier, it's aimed at the sort of  
21 PG audience level and Disney's brand there. So  
22 there are certain titles that come from Disney's  
23 studios that are not enabled for Disney Movies  
24 Anywhere. But it works pretty much the same way.  
25 You can get the right to stream that or get a



1 digital download of it. The other Disney movies  
2 are available in other kinds of download services.

3 Now, the two systems operate through  
4 online retailers. And I think the UltraViolet,  
5 what did they say, nine or ten retailers,  
6 something like that?

7 MS. CHARLESWORTH: Something like that.

8 MR. TURNBULL: Some number in that  
9 range. Disney Movies Anywhere, I don't remember,  
10 but I know that they met at Wal-Mart. So Wal-Mart  
11 actually enables both systems. And so, the VUDU  
12 system that Wal-Mart has, you could use as your  
13 central repository for both of the Disney Movies  
14 Anywhere or UltraViolet.

15 And one of the points that was made here  
16 and was relevant here was that one of the things  
17 that you can do is that you can, like at home in  
18 the evening before class or something, take an  
19 iPad or some other pad and queue up a certain  
20 movie or a certain series of movies and say,  
21 "Okay. I'm going to want to play clips of these  
22 movies in my class tomorrow." And so, you could  
23 go to the place for half-a-dozen movies in these  
24 systems.

25 And then when you go to your class the

1 next day, you could say, "Okay. Now we're going  
2 to do this," and click on each of them and play  
3 whatever clip it was that you wanted to. The  
4 point of that was that it avoids having to boot up  
5 a DVD player or a Blu-ray player or whatever. Does  
6 that --

7 MS. CHARLESWORTH: Thank you. Well,  
8 that was a very nice summary of a lot of last  
9 week.

10 MS. CHARLESWORTH: Okay. So, in terms  
11 of thinking about that, I mean, if you can queue  
12 up clips in a classroom and then just show them in  
13 the classroom, is that a helpful alternative in  
14 some cases?

15 MS. HOBBS: So, I'm here today to talk  
16 about a pedagogy of instruction that puts students  
17 as the authors of media message, not as receivers,  
18 but as critical thinkers through the process of  
19 hands-on manipulation.

20 We don't want to keep -- again, just as  
21 much as --

22 MS. CHARLESWORTH: Excuse me. I'm  
23 sorry. But there's an exemption that you've asked  
24 for for teachers.

25 MS. HOBBS: Um-hm.

1 MS. CHARLESWORTH: So we're talking  
2 about a teacher who wants to present the media  
3 messages to the students for analysis and comment.

4 MS. HOBBS: Absolutely. And after --

5 MS. CHARLESWORTH: So are you saying  
6 that that would not -- I mean, my question is, for  
7 that purpose, I'm not talking about the students  
8 here. For the teachers' pedagogical purpose, might  
9 that not be helpful, to be able to queue up clips  
10 from films and show them as part of a lecture or  
11 discussion in the classroom?

12 MS. HOBBS: Any fee-based service  
13 involving clip compilation is going to be a  
14 obstacle for American teachers who, on average,  
15 you know, are pretty underpaid.

16 MS. CHARLESWORTH: I'm not sure --

17 (Cross-talk.)

18 MR. TURNBULL: Can I? The service  
19 itself is not fee-based in either case. Obviously,  
20 you have to own, or you're supposed to own the  
21 copy of the movie. So, and I think that would be  
22 the case regardless of what system you used.  
23 We're assuming that the teacher or somebody owns a  
24 copy of the movie.

25 And these, with the exception of taking

1 your disk and a disk to what they call disk-to-  
2 digital, there would be a small fee, two dollars  
3 in the case of standard definition, as I recall,  
4 five dollars in the case of taking a standard  
5 definition DVD and getting a high-definition  
6 digital copy that you could then access. So that  
7 would be in addition to the price of the movie.  
8 But the systems themselves are not fee-based.

9 MS. HOBBS: For 40 percent of the  
10 teachers that I work with in under-resourced urban  
11 schools, such a high-tech option, while very  
12 attractive and intriguing, wouldn't likely be a  
13 readily available alternative.

14 MS. CHARLESWORTH: Do they own the --  
15 where's the original copy of the movie coming  
16 from?

17 MS. HOBBS: On the shelf where it's been  
18 for the last three years.

19 MS. CHARLESWORTH: From the school's  
20 shelf? Is that what you're saying?

21 MS. HOBBS: In the teacher's home. No.

22 MS. CHARLESWORTH: In the teacher's  
23 home?

24 MS. HOBBS: Um-hm.

25 MS. CHARLESWORTH: Right. So, okay. I

1 won't belabor the point, but I would urge you to  
2 investigate that as a potential resource, because  
3 it's not a fee-based service. And it's a way to  
4 convert things from hard media into streaming  
5 media, as I understand it.

6 Anything else? Mr. Band.

7 MR. BAND: Yes. Let me just address  
8 that point about the streaming services, and then  
9 go back to something that Bruce mentioned earlier.

10 Two problems, or at least two problems  
11 with these streaming services. Number one is that  
12 the catalog is relatively limited. Number two,  
13 and this gets to what Renee is saying, is that the  
14 streaming service assumes that you have really,  
15 really good broadband, right? And so, that --  
16 some schools have it, some schools don't, and in  
17 some schools it could be very spotty.

18 And, you know, if you're dealing with a  
19 class, I mean, you can't start having spotty  
20 broadband, or you can't start showing a clip and  
21 then have it -- you lose the class, okay? So  
22 that's why having a clip compilation is much more  
23 effective.

24 Moreover, I think what you're -- unless  
25 the technology -- maybe down the road with these

1 streaming services, the technology will be better,  
2 what you're able to do with it in terms of the  
3 manipulation. But one of the things that's great  
4 about these clip compilations is it's easy to have  
5 two or three works side by side and you're able to  
6 go back and forth between the work. I mean,  
7 you're able to do a lot more than you would be  
8 with an online streaming service.

9           What I'd like to do briefly, because  
10 it's been brought up several times, and it's sort  
11 of a recurring theme throughout these hearings, is  
12 the Corley case and its interpretation of fair  
13 use. Now, I must admit it's been awhile since  
14 I've read Corley. But that's because Corley is  
15 kind of an old case. It's at least 15 years old,  
16 maybe longer.

17           I have a feeling if -- I might be wrong  
18 and I'm sure Bruce will correct me if I am wrong -  
19 - but that a lot of -- I mean, the notion of what  
20 fair use applies to and the terms of the format,  
21 that's dicta. And moreover, I have a feeling that  
22 in 2015, if the Second Circuit were to look at the  
23 issue, if that was what was squarely presented --  
24 remember, that was a 1201 case. It wasn't really  
25 a fair use case. I think fair use was sort of a

1 subsidiary issue.

2 I have no doubt that a court in 2015,  
3 certainly the Second Circuit, certainly the court  
4 that decided, you know, the HathiTrust decision,  
5 would clearly say that fair use -- that there's a  
6 difference between digital and analog, and that  
7 fair use would allow you, in appropriate  
8 circumstances, to make a copy in the appropriate  
9 format, the format that's appropriate for your  
10 use. And that you don't have to be using  
11 primitive technology that does not effectively  
12 convey the message or does not effectively serve  
13 the purpose.

14 MS. CHARLESWORTH: Do you have any  
15 actual case law to that effect that you can offer  
16 from any circuit?

17 MR. BAND: Well, certainly, I think you  
18 can sort of intuit that from or derive that from  
19 the HathiTrust decision and the notion that  
20 making, converting -- making digital copies  
21 available for the print-disabled, as opposed to  
22 saying, "Oh, they should all have it -- blind  
23 people should only read Braille."

24 But I would say that even the 11th  
25 Circuit decision in Georgia State, even though it

1 reversed aspects of the lower court decision, but  
2 I think the whole notion there was that still the  
3 11th Circuit decision was talking about having  
4 these e-reserves, I mean, that it has to be  
5 digital, and the fact that the notion that if it's  
6 not available in digital form, if the publisher is  
7 not making the articles available or the chapters  
8 available in digital form, that that could  
9 militate against, in favor of a fair use finding.

10 So I think that that's squarely on  
11 point. And I would get that from the very helpful  
12 Copyright Office Fair Use Index.

13 MS. CHARLESWORTH: Do you like the  
14 index?

15 MR. BAND: Yes. I think it's great.

16 MS. CHARLESWORTH: Good.

17 Mr. Williams.

18 MR. WILLIAMS: Yes, just a couple of  
19 points. First on the George State case, as  
20 Jonathan said, there's a remand there. And I  
21 actually think there's a lot of very cautious  
22 language about taking fair use too far in that  
23 case. They say that -- they refer to fair uses  
24 and unpaid uses as a transactional cost, and they  
25 say that if they allow too much taking, they run



1 the risk of eliminating economic incentive for the  
2 creation of original works. And that that is at  
3 the core of copyright, and that you don't want to  
4 kill the proverbial goose that laid the golden  
5 egg.

6           They say that, as always, care must be  
7 taken not to allow too much educational use lest  
8 we undermine the goals of copyright by eliminating  
9 the incentive for authors. There's a number of  
10 things in that case that I think speak to caution,  
11 not that educational uses are never fair. But you  
12 still have to approach them with caution.

13           On the other issues that were raised  
14 about broadband limitations or other technological  
15 limitations, I understand those things can be an  
16 impediment at times. And we're not saying that  
17 services like UltraViolet or Movies Anywhere or  
18 any particular download service is the be-all and  
19 end-all of the question.

20           On the other hand, we're not opposing  
21 renewal of the existing exemption. And I think  
22 the record on all of these services and the way  
23 they've developed really indicates that, under the  
24 existing exemption, K-12 educators can get  
25 everything that they need to make effective

1 presentations and that you don't have to expand it  
2 to cover Blu-ray, for example. Thank you.

3 MS. CHARLESWORTH: Okay. I think we're  
4 just about out of time. So I'm going to make sure  
5 none of my colleagues has any further questions.

6 Thank you. This was, as usual, very  
7 helpful. We appreciate your commentary, and we  
8 will be returning here for Proposed Class 4 at  
9 3:15. So we'll see some of you again.

10 (Whereupon, at 2:57 p.m., Class 2 was  
11 concluded, to reconvene for Class 4 at 3:15.)

12 PROPOSED CLASS 4:

13 AUDIOVISUAL WORKS -- EDUCATIONAL USES --

14 EDUCATIONAL PROGRAMS OPERATED BY MUSEUMS,

15 LIBRARIES, OR NONPROFITS

16 MS. CHARLESWORTH: Welcome back. We are  
17 now up to Proposed Class 4, which is audiovisual  
18 works -- educational uses -- educational programs  
19 operated by museums, libraries, or nonprofits.

20 You've all been here before. You're  
21 repeat customers, so I'll just have you introduce  
22 yourselves, and then we'll start again, I think,  
23 with Ms. Hobbs for the opening statements.

24 MS. HOBBS: My name is Renee Hobbs. I'm  
25 a professor of communications studies and Director

1 of the Media Education Lab at the Harrington  
2 School of Communication and Media at the  
3 University of Rhode Island.

4 MR. BAND: Jonathan Band, for the  
5 Library Copyright Alliance.

6 MR. TURNBULL: Bruce Turnbull, for both  
7 DVD Copy Control Association and AACS LA.

8 MR. WILLIAMS: Matt Williams, for MPAA,  
9 ESA, and RIAA.

10 MS. CHARLESWORTH: Okay. Ms. Hobbs.

11 MS. HOBBS: I'm here today to request an  
12 exemption for educators and libraries, museums,  
13 and nonprofit organizations for exemption that  
14 supports work produced by teachers and students as  
15 part of their curriculum and learning experiences  
16 in non- school settings.

17 I have four basic arguments to make.  
18 First, there's really no good reason to legally  
19 distinguish between teachers and students in K-12  
20 or higher education, and those who teach and learn  
21 in non-school settings like libraries, museums,  
22 and nonprofit organizations.

23 Secondly, the current lack of an  
24 exemption for digital learning in non-school  
25 settings perpetuates educational inequality, as

1 libraries, museums, and nonprofit organizations  
2 serve the needs of under-resourced people in  
3 communities where this form of learning is valued  
4 and important.

5           And third, I don't think it's useful to  
6 create separate rules for digital media in  
7 different formats. And I think an exemption that  
8 recognizes the educators' and students' ability to  
9 make appropriate choices is a reasonable  
10 expectation.

11           And finally, if potentially, if limiting  
12 language is required to support an exemption for  
13 nonprofit organizations, libraries, and museums,  
14 such limiting language might enable circumvention  
15 for digital and media literacy instructional  
16 practices in informal learning contexts, including  
17 libraries, museums, and nonprofit organizations.  
18 So --

19           MS. SMITH: Just to be clear, are you  
20 sort of seeking an exemption that would include  
21 the phrase "digital and media literacy  
22 instructional practice"?

23           MS. HOBBS: No. I don't think such  
24 limiting language is required.

25           MS. SMITH: Do you have any examples of

1 where the ability to circumvent is needed beyond  
2 examples of digital and media literacy education?

3 MS. HOBBS: Most of the examples that I  
4 have collected include digital and media literacy  
5 education because that is the lens through which I  
6 am operating. So I'm not -- I'm not able to bring  
7 up a example right at this point in time.

8 I do want to talk a little bit about the  
9 incredible work that's been happening in the  
10 library community. The MacArthur Foundation has  
11 invested over \$130 million to support digital  
12 learning in the informal learning sector. And  
13 over the last 10 years of that major financial  
14 investment, informal learning research and  
15 pedagogy has advanced by leaps and bounds.

16 One of the best examples of this is the  
17 YOUmedia program in Chicago at the Washington  
18 Public Library, one of the most ambitious efforts  
19 to introduce digital learning into teen library  
20 services. Thousands of teens and young adults  
21 over the last seven years in that program have  
22 been making media in a wide variety of forms. But  
23 at the present time, they are unable to make use  
24 of circumvention for their creative work products,  
25 unlike the students at the University of

1 Pennsylvania, who are enabled to have the benefit  
2 of that exemption.

3 MS. SMITH: One more question. If an  
4 exemption were granted, would it be limited to  
5 having to be physically present at a facility such  
6 as a museum or a library?

7 MS. HOBBS: Or could it also include  
8 online learning programs sponsored by libraries,  
9 museums, and nonprofit organizations? That's a  
10 really great question, because one of the things -  
11 - I made in my previous comment the observation  
12 that just as there is so much innovation happening  
13 in the technological delivery of digital media  
14 products like, for example, the UltraViolet  
15 example that we talked about earlier. There's a  
16 huge amount of innovation happening in the digital  
17 learning space around the blend of face-to- face  
18 and online learning experiences.

19 Even in libraries, it's pretty common  
20 for a librarian to offer a course in how to make a  
21 blog. And then, of course, learners, they work in  
22 the library to create that blog. But then they  
23 also work, you know, back at home on their blog.  
24 So I don't think the distinction between face-to-  
25 face and online learning should be a limiting

1 factor, because today those practices are  
2 seamless. We are using online learning to support  
3 our learners, and we are using face-to-face  
4 learning experiences in a very fluid and flexible  
5 way.

6 And again, I don't think we would want  
7 narrowly written language to interfere with  
8 innovation in this sphere.

9 I do want to talk a little bit about the  
10 direct harm that is occurring now because of the  
11 lack of an exemption. In my petition, I shared  
12 with you the story of Janine Cook. She's the lead  
13 educator in the media and technology program for  
14 YESPhilly, which is a nonprofit organization that  
15 helps out-of-school African American youth ages 16  
16 to 21 to get their GED. Her students have  
17 negative experiences with schools. And so, an  
18 opportunity to explore digital media for  
19 expression and communication is really valuable.

20 But she can't use encryption. She can't  
21 use circumvention with her students to help them  
22 develop their "I Am" poetry videos. Even though  
23 learners in other college programs have the legal  
24 right for such creative work, her students cannot.  
25 So, sadly, under the current law and through the

1 accident of being born poor and African American,  
2 these learners are not entitled to use the  
3 copyrighted content of their culture in  
4 transformative ways for self-expression and  
5 learning.

6           It's for this reason that I seek an  
7 exemption on behalf of digital learning in  
8 libraries, museums, and nonprofit organizations.

9           MS. CHARLESWORTH: Okay. I have the  
10 same question I had in the last panel, which is  
11 the applicability of the noncommercial video  
12 exemption. I mean, why -- what is your view on  
13 whether that would apply here in terms of what  
14 you're suggesting?

15           MS. HOBBS: I found it very compelling  
16 the comment made by the opponents in the previous  
17 session that, actually when we look historically  
18 at the Triennial Rulemaking Procedures, the  
19 exemptions for K-12 education and the exemptions  
20 for noncommercial video were distinct and  
21 separate.

22           And I do feel that many of the kinds of  
23 creative expression and work products that  
24 students create should not be viewed as identical  
25 to the work of remix video artists. Because



1 they're not designed for that larger purpose.  
2 They're designed as part of -- think about it this  
3 way, strengthening your muscle. This is how you -  
4 - this is how we learn. We give students  
5 exercises that help them get strengthen in their  
6 muscles. Not so much designed for an authentic  
7 audience with a real real-world, you know, wide  
8 distribution. Really designed as a way to help  
9 students learn.

10           So I don't think that, although it's  
11 possible, as we discussed before, that it might  
12 apply, I don't think it makes so much sense to  
13 consider the work that happens in libraries,  
14 museums, and nonprofit organizations around  
15 digital learning to be painted with the same brush  
16 as the work of remix video artists.

17           MR. CHENEY: I have a question here, if  
18 you don't mind, Ms. Hobbs.

19           There are a number of adult education  
20 programs throughout the country. Some are  
21 affiliated, I think, with school districts. Some  
22 have some ties there. Some do them in libraries  
23 and other places. Is this one of those  
24 organizations that you're intending be included in  
25 this? Is this sort of adult education programs

1 where they learn about computers and other things  
2 that are -- or do they go for their GED or other  
3 things? Is that intended to be in this group as  
4 well?

5 MS. HOBBS: Yes, it absolutely is.

6 MR. CHENEY: Do you have examples of  
7 where this might be used or has not been able to  
8 be used, this sort of using of clips and those  
9 kind of things, haven't been able to be used  
10 because of the exemption that is in place?

11 MS. HOBBS: Yes, absolutely. The  
12 organization YESPhilly, which I just described, is  
13 a nonprofit organization. It is located in North  
14 Philadelphia, and it serves the needs of 250 teens  
15 and young adults who have dropped out of school  
16 and who are returning back for their GED.

17 It is not affiliated with the school  
18 district of Philadelphia. It's a nonprofit  
19 organization that offers adult education services.  
20 And the educator in question, Janine Cook, wanted  
21 to be able to have students use clips from  
22 "Selma," and I can't remember the other film --  
23 "Selma" and maybe "Unbroken" -- and was unable to  
24 do so because of the current limitation in terms  
25 of DMC 1201.

1 MS. CHARLESWORTH: How are they  
2 accredited to grant GED's?

3 MS. HOBBS: I believe that the State of  
4 Pennsylvania has offered them accreditation. I'm  
5 not familiar with what the legal mechanism is.

6 MS. CHARLESWORTH: In other words, not  
7 anyone can -- I couldn't set up shop and hand out  
8 GED's. So there's got to be some official  
9 sanction; don't you agree?

10 MS. HOBBS: That's correct.

11 MS. CHOE: Speaking of which, how would  
12 you define educators and learners? Libraries,  
13 museums, and nonprofits often have different  
14 missions, have different sort of sectors of the  
15 community that they serve. So are you talking  
16 about, for example, library patrons as learners?  
17 What do you mean by educators and learners?

18 MS. HOBBS: That's such a very good  
19 question because, of course, teachers and learners  
20 are a little bit blurred in the context of library  
21 programming and services. For instance, at the  
22 Providence Community Library, a media literacy  
23 program might involve a teacher who is, herself, a  
24 college student at the University of Rhode Island,  
25 enrolled in perhaps one of my graduate classes. In

1 that case, the teacher is, herself, a university  
2 student, and the learners might be other teachers  
3 from K-12 schools, other mothers and patrons of  
4 the library, other teens and younger people.

5           So, library programs and services,  
6 because they aim to reach the broadest spectrum of  
7 the more than 300 million Americans, almost always  
8 involve teachers who are drawn from a wide swath  
9 of the American public, and learners who are drawn  
10 from the communities in which the libraries and  
11 programs serve.

12           MS. SMITH: Would it be fair to say  
13 you're envisioning these learners and teachers  
14 participating in a course taught at one of these  
15 institutions, or offered?

16           MS. HOBBS: Yes. The word "course" is,  
17 of course -- the word "course" is not the correct  
18 term. Usually, the term used in libraries,  
19 museums, and nonprofit organizations, the word is  
20 "program." A program may be a short duration,  
21 even a single session like one hour or three  
22 hours. And a program may involve a series of  
23 experiences over a longer period.

24           MS. SMITH: Do you have a way to  
25 differentiate -- I mean, I guess when you say

1 "program," not being as familiar with that world,  
2 one thing that occurs to me is I might be able to  
3 go to the Smithsonian and see, you know, a "Best  
4 of the Oscars" type of presentation or program.  
5 And I would think that there would be a very  
6 robust licensing market for that, and that may not  
7 be something contemplated to fall under the  
8 exemption.

9 MS. HOBBS: That's, of course, a great  
10 point. I don't think we would mean to confuse  
11 exhibition with the fair use of audiovisual  
12 content for learning purposes.

13 MS. SMITH: So, we could exclude  
14 exhibitions to the general public that you might  
15 just walk in and see?

16 MS. HOBBS: Yes.

17 MS. CHARLESWORTH: Okay. Mr. Band.

18 MR. BAND: Thank you. Before I talk  
19 specifically about libraries and museums, I'll  
20 take advantage of being here to talk a little bit  
21 more about what we, the previous panel -- and it's  
22 very helpful to have a copyright law professor  
23 serving as, you know, providing additional  
24 information.

25 And by the way, I don't know if you

1 know, but Rebecca has been doing this great blog  
2 of the hearings in great detail. She brought up a  
3 couple of points I just want to mention. One is,  
4 with what we were talking about before with  
5 UltraViolet, you know, I haven't studied the  
6 license terms. But I would not be surprised if  
7 the UltraViolet license would prohibit public  
8 performance. And so, using it in a classroom  
9 setting could very well violate the license terms.  
10 So I'm sure you don't want to encourage induced  
11 breach of contract.

12 MS. CHARLESWORTH: Well, what about  
13 110(1)?

14 MR. BAND: Oh, right. But that would be  
15 copyright. But that would not take care of the  
16 license problem. The license --

17 (Cross-talk.)

18 MS. CHARLESWORTH: Well, the license is  
19 a copyright.

20 MR. BAND: Unless you want to say that  
21 110(1) preempts the license term, and if you want  
22 to take that position --

23 MS. CHARLESWORTH: I'm not taking any  
24 positions. I haven't seen the license.

25 MS. CHARLESWORTH: But obviously, in

1 some settings, I just -- you know, that 110(1)  
2 enables one to show a copyrighted work in an  
3 educational setting.

4 MR. BAND: Absolutely. Right. Right.  
5 110(1) would take care of the copyright side, but  
6 not necessarily the license side, even though I  
7 personally agree that it should preempt the  
8 contract terms.

9 Also, in terms of, you know, we were  
10 talking about the Corley case and formats and fair  
11 use in different formats. And you know, Rebecca  
12 helpfully mentioned several other cases. They're  
13 all in her blog. But I just want to mention a  
14 couple of them, and they're both in the Bill  
15 Graham Archives case and then the Bill Graham  
16 Archives, the Spurlock case, and then also the  
17 Swatch case.

18 In all those cases, the court  
19 specifically addressed the issue of format. For  
20 example, in the Swatch case, the question is, was  
21 a transcript enough or did they need to have the  
22 audio? And the court found that having the audio,  
23 copying the audio provided additional insight  
24 beyond what the transcript did, and that that was  
25 a fair use.

1           So, moving onto libraries and museums,  
2 libraries and museums sponsor lectures and classes  
3 on a wide variety of topics. And increasingly,  
4 the presenters seek to use film clips and other  
5 media. So, consider the following examples just  
6 over the past six months at the New York Public  
7 Library.

8           Choreographer Alexei Ratmansky used  
9 clips of ballets that inspired him, in which he  
10 performed. Filmmaker Marjane Satrapi used clips  
11 from her film "Persepolis." Singer-songwriter  
12 George Clinton used clips of various performances  
13 that influenced him. Novelist William Gibson used  
14 a clip of a French film that had a powerful impact  
15 upon him. The magician David Blaine used clips  
16 from films about Houdini. Actor RuPaul used clips  
17 from his drag race. Art dealer and curator  
18 Jeffrey Deitch used a clip from a documentary  
19 about him. Ballerina Suzanne Farrell used clips of  
20 her dances.

21           And this kind of activity is not  
22 restricted to New York Public Library. Skokie  
23 Public Library recently hosted a lecture by author  
24 Rob Elder about his book, "Films That Changed My  
25 Life," where he showed clips from some of these



1 films.

2           Now, of course, in all of these  
3 examples, the Library complied with the DMCs  
4 requirements. But it was burdensome to do so. And  
5 the larger point is that audiovisual clips are an  
6 essential part of informal education at museums  
7 and libraries. Allowing circumvention to enable  
8 these uses in no way threatens the interests of  
9 rights-holders.

10           And again, as we said before, if the  
11 noncommercial exemption covers this, great. Again,  
12 I believe that my colleagues to the left will  
13 disagree with that interpretation. But if you  
14 think it does cover it, that would be a very  
15 helpful clarification.

16           As I've said earlier today and in  
17 previous rulemaking cycles, circumvention tools  
18 for audiovisual works are widely available and  
19 widely used for both infringing and non-infringing  
20 purposes. Today we've heard from educators, both  
21 from Renee Hobbs and Peter Decherney, who want to  
22 do the right thing. They want to comply with the  
23 DMCA as well as the Copyright Act. They know that  
24 they could get away with ignoring the DMCA's  
25 requirements. But instead, they have repeatedly

1 gone through this rulemaking process.

2           The rights-holders should be applauding  
3 these educators and doing everything possible to  
4 make it easy for educators to comply with the law.  
5 This is particularly the case because the rights-  
6 owners know that the educational uses under  
7 discussion today will have absolutely no impact on  
8 the level of infringement.

9           Instead, the rights-owners oppose the  
10 educators' permissions or try to make them as  
11 narrow as possible. I understand the rights-  
12 owners' frustration about the infringement that is  
13 occurring out there. But they shouldn't take out  
14 this frustration on educators just because the  
15 DMCA allows them to do so. Thank you.

16           MS. CHARLESWORTH: Thank you, Mr. Band.  
17           Mr. Turnbull.

18           MR. TURNBULL: Thank you. Again, Bruce  
19 Turnbull for DVD CCA and AACS LA.

20           I'm going to make probably four points.  
21 First, particularly from the AACS perspective, I  
22 wanted to note that there's no need for the Blu-  
23 ray quality content that has been demonstrated,  
24 and certainly nothing in the record. We have  
25 vague anecdotal statements not amounting to

1 substantial adverse effects as required for an  
2 exemption.

3           There was no reference at all to Blu-ray  
4 in the initial comments requesting this exemption,  
5 other than simply stating that as a request, but  
6 nothing in terms of examples of harm or  
7 difficulties.

8           In the reply comments, the proponents  
9 have said that we argued that high quality is not  
10 fair use. And as I said in the previous panel,  
11 that was not actually our point. The point was  
12 that fair use does not require that the user have  
13 whatever quality level or format that they wish.

14           MS. CHARLESWORTH: And, Mr. Turnbull,  
15 I'm sorry, but we just heard Mr. Band sort of  
16 dispute the law on this.

17           MR. TURNBULL: Yeah. And he cited two  
18 cases with which I'm not prepared to respond,  
19 frankly.

20           MS. CHARLESWORTH: Okay.

21           MR. TURNBULL: You know, so I'll take a  
22 look, and if I can find the blog, I'll take a look  
23 at the blog and take a look at the cases. But I'm  
24 not on-the-spot prepared to respond on those.

25           MS. CHARLESWORTH: Okay.

1 MR. TURNBULL: I'm not.

2 The reply comments have stated that  
3 "DVD's dominate the marketplace." That was a  
4 direct quote from the reply comment. They argue  
5 that maybe that would change in a few years. But  
6 nevertheless, "DVD's dominate the marketplace,"  
7 was the statement. So, I think as to Blu-ray and  
8 AACs, there's no evidentiary record on which to  
9 base an exemption.

10 More broadly, the categories that are  
11 suggested here are very vague and very broad. It's  
12 all kinds of nonprofits. It's all kinds of  
13 museums, all kinds of libraries. They're not  
14 limited to institutions specific to education, not  
15 limited to activities that are specific to  
16 education. There's no assurance that the  
17 participants would be engaged in educational  
18 activities at all. So it's a very broad, vague  
19 category.

20 Nonprofits, in particular -- well, I  
21 mean, one could create a museum, you know, if they  
22 want and declare that I'm now a museum of my own  
23 copyrighted, my own DVD works. And I'll invite  
24 everybody to come in on Tuesdays from four to  
25 five, and I'm a museum.

1 MR. BAND: What's the address?

2 MR. TURNBULL: Similarly, the nonprofits  
3 -- well, I suppose you might have to go through  
4 the IRS process, which sometimes is challenging.  
5 Having been through that process to create a small  
6 nonprofit, it is possible to create a small  
7 nonprofit for all kinds of purposes. And so, it  
8 seems to me that this is much too broad and much  
9 too vague.

10 MS. SMITH: So, if an exemption were  
11 proposed that was limited to digital and media  
12 literacy instructional practices offered by a  
13 library, museum, or nonprofit with an educational  
14 mission, would you still -- would your clients  
15 still oppose it?

16 MR. TURNBULL: I think, obviously, that  
17 would be better, be preferable, to the unbounded  
18 one that's been requested. I think that we would  
19 want to, as well, look at -- first of all, with  
20 regard to Blu-ray, we would certainly oppose it.  
21 With regard to DVD and CSS, I think that if it  
22 were more in the character of the existing  
23 educational exemptions, I think there was some --  
24 I could --

25 MS. SMITH: I assume it has to be short

1 clips and close analysis.

2 MR. TURNBULL: Right.

3 MS. SMITH: And it's marrying whatever  
4 is currently --

5 MR. TURNBULL: Yeah. And I think that  
6 merely having an educational focus or -- what was  
7 the --

8 MS. SMITH: I said "educational  
9 mission."

10 MR. TURNBULL: "Mission." I think,  
11 again it begins to drift away.

12 I mean, to the extent that it is, in  
13 fact, an education institution accredited, for  
14 example, to grant GED's, which may not be  
15 affiliated with the local school system, but  
16 nevertheless is actually engaging in the same  
17 activity as the local school system, under a  
18 government auspices for granting of the degree,  
19 that strikes me as getting closer to something  
20 that would feel like the other exemption and  
21 therefore be something that we might be willing to  
22 accept, again for DVD.

23 I wanted to spend a minute on  
24 alternatives, because as was demonstrated in the  
25 previous panel, the screen-capture software does

1 in fact allow you to make use of video. So it's  
2 not that you are deprived -- whoever it is is  
3 deprived of the ability to take video clips and  
4 manipulate them. You can, as David Taylor showed,  
5 completely reorder a scene from a movie if you  
6 wanted to. You can, you know, include the  
7 subtitles. You know, all of those kinds of things  
8 that you would want to do, you can do using a  
9 screen-capture software.

10 MS. CHARLESWORTH: So, on that point,  
11 though, because obviously this is, would be a new  
12 exemption in the sense of the parties who would  
13 benefit from it. Are you saying -- and we've had  
14 the discussion about screen-capture before. Are  
15 you saying you wouldn't oppose a screen-capture  
16 sort of safety-net exemption for this class, or  
17 some version of it?

18 MR. TURNBULL: I think if there were a  
19 sufficiently narrowly crafted targeted exemption  
20 that derived from the comments that have been  
21 presented, and then yes. I think a screen-capture  
22 software exemption that would go along with it  
23 would be acceptable.

24 MS. CHARLESWORTH: Okay.

25 MR. TURNBULL: Final point is with regard

1 to the online. Again I would point out, as I did  
2 this morning, that Congress has indicated its  
3 desire as to how online education should be  
4 conveyed in terms of the standards. Whether the  
5 TEACH Act literally applies or not, the point is  
6 that is relevant to the DMCA because they both  
7 talk in terms of technological protection  
8 measures.

9 And so, I think that any online use  
10 would need to adhere to those requirements, and I  
11 don't see any of that in the proposals. Thank  
12 you.

13 MS. CHARLESWORTH: Thank you, Mr.  
14 Turnbull.

15 Mr. Williams.

16 MR. WILLIAMS: Yes. Thank you for  
17 having me, again, on behalf of MPAA, ESA, and  
18 RIAA. I'm going to be very brief since we're  
19 getting close to the end of the day here.

20 Given Jonathan's comment, I just want to  
21 reiterate that my clients are very supportive of  
22 educators and educational activities, and what  
23 we're seeking here is balance. It's not to impose  
24 unnecessary burdens on educators.

25 We are concerned about this proposal



1 primarily because it sweeps in so many  
2 institutions, organizations, people, that we think  
3 it's essentially a user-based exemption, which is  
4 not allowed under the Statute. The Office has  
5 taken some steps toward using references to the  
6 particular user base of an exemption in order to  
7 try to narrow those and grant classes where  
8 necessary. But this essentially would be all  
9 noncommercial uses of motion pictures, and we  
10 would say that it would be both dangerous and  
11 inconsistent with the statutory scheme that we're  
12 operating under here.

13 MS. CHARLESWORTH: Is it your view,  
14 again, that -- just for the record -- the  
15 noncommercial video exemption would not apply to  
16 these uses?

17 MR. WILLIAMS: Yes. As I said  
18 previously, my read of the existing exemptions is  
19 that there is an educational use exemption, and  
20 then there is an exemption that covers the  
21 creation of remix videos or mash-up videos of the  
22 like that are the discussed topic of that class of  
23 works that has evolved over time. And so, I would  
24 separate the two.

25 That said, because this one is so broad,

1 it probably would include some of the types of  
2 things that actually have been at issue in the  
3 remix context. And so, there probably is some  
4 stuff that falls under this class that would also  
5 fall under the existing exemption.

6 MS. CHARLESWORTH: So you think there  
7 might be some overlap, then, based on your  
8 understanding of what's being proposed here?

9 MR. WILLIAMS: Correct, correct. Just  
10 based on the actual language that I've seen in the  
11 proposals, it's broad enough to sweep in a lot of  
12 that if you assume that people working in a  
13 nonprofit are also creating a remix video.

14 MS. CHARLESWORTH: And how do you feel  
15 about the GED example, where there's actually some  
16 sort of government accreditation process in  
17 relation to the use?

18 MR. WILLIAMS: Right. So, I think I  
19 would probably be pretty aligned with Bruce on  
20 that. It's not something I've specifically put in  
21 front of my clients, so I always like to, you  
22 know, retain the right to talk to them and would  
23 appreciate getting a letter on it. I think that's  
24 the kind of targeted thing that we might be okay  
25 with if everything else was drafted properly.

1           And, you know, again, I would reiterate  
2 from the previous panel that there would be some  
3 concern if it extended to students beyond those  
4 covered by the existing exemption.

5           I'm going to go around a little bit of a  
6 haphazard way here just to respond to some things  
7 that have come up. I don't think I caught both of  
8 the cases that Jonathan raised, but I think one  
9 was the Swatch versus Bloomberg case in the Second  
10 Circuit from this past year.

11           I'm not sure how that applies in this  
12 context because my understanding of it or  
13 recollection is that that was a recording of an  
14 entire earnings call that was then posted onto a  
15 news website, and the claim was that they didn't  
16 need to post the entire call and that that was  
17 infringing.

18           And the court ultimately said that, in  
19 that case, the use was a fair use, but they did  
20 say it was also a non-transformative use. So I'm  
21 not sure exactly how it would apply in this  
22 context. And again, we're not saying that there's  
23 never a fair use that involves changing the format  
24 of something. So if that's the point you were  
25 raising it for, we're not saying that that's never

1 a fair use.

2 I think he said, with the impressive  
3 list of use of clips at the New York Public  
4 Library, I think he ultimately said that that was  
5 achievable without circumvention and that that was  
6 cumbersome, but that they did do it. And so, I  
7 would posit that that's something that actually  
8 shows there is not a need for an exemption here  
9 because it can be achieved. And while there are  
10 matters of convenience at issue, that  
11 traditionally has not been grounds for an  
12 exemption.

13 On the harm issue, I'd like to emphasize  
14 that when you're using a circumvention device to  
15 rip a Blu-ray or a DVD, you end up with a complete  
16 in-the-clear copy on your machine at the end of  
17 that process. And that's something that sets it  
18 apart from what most people do with screen-capture  
19 technology, which is grabbing a clip.

20 And so when you're talking about 1.5-  
21 plus million nonprofit organizations, everybody,  
22 you know, under the Statute, under Title 26, that  
23 includes even clubs organized for pleasure,  
24 recreation, and other non-profitable purposes, it's  
25 a threat to us, we think, to have in-the-clear

1 copies that end up on machines. Even if it's not  
2 the initial use that someone might make,  
3 ultimately, unless they go through and delete  
4 things, they end up with a library of accessible  
5 content.

6 MR. CHENEY: If I could ask a question  
7 here, probing a little bit more on the screen-  
8 capture idea. There was a little bit of talk this  
9 morning and earlier about limitation of use of  
10 screen-capture on certain computer systems,  
11 especially Macs, and that may be tied to a DRM  
12 that's in the operating system or tied to the  
13 operating system, and perhaps that's because of a  
14 license from maybe some of your clients.

15 Can you speak a little bit about, is  
16 there a particular license that certain operating  
17 system providers have to -- when they come out  
18 with a new operating system, is there some sort of  
19 agreement between some of your clients to put that  
20 DRM on there to prevent the screen-capture  
21 software from operating on new operating systems?

22 MR. WILLIAMS: I don't know the answer  
23 to that question. When I heard the testimony  
24 earlier today, I wasn't aware that the claim was  
25 that there was an actual TPM that was causing

1 that. I think it was more of an issue of the  
2 interoperability of newer Mac operating systems  
3 with specific screen-capture technologies. I  
4 don't know the answer to why that technology might  
5 not work for some people. We haven't done the  
6 type of testing that our colleagues at AACCS and  
7 DVD CCA have done with the screen-capture  
8 technology.

9           So, we have assumed that the testing  
10 they've done with some specific technologies is  
11 accurate and taken the position that, essentially,  
12 if those technologies do operate in a way that  
13 doesn't unlawfully decrypt the video, but captures  
14 it after it has been lawfully decrypted, then  
15 there's not a circumvention at issue.

16           MR. CHENEY: Mr. Turnbull, if you could  
17 help.

18           MR. TURNBULL: I hesitate to get into  
19 this because it's going to get pretty deep pretty  
20 quickly. I don't know of any licenses that  
21 specifically address screen-capture software. And  
22 in particular, with regard to the Mac, I'm  
23 completely unaware of licenses, because Mac does  
24 not support Blu-ray at this point. And so, I'm  
25 certain that there's no license in the DVD

1 context.

2           And in the Blu-ray context, there is  
3 what is known in the DRM licensing business as  
4 robustness rules. What that means is, basically,  
5 that you can't -- you have to make your system so  
6 that it can't be easily attacked by somebody who  
7 is seeking to circumvent it. And DVD was the  
8 first of these systems and was not as protected  
9 against outside attack as subsequent systems have  
10 been.

11           The AACCS technology has a different set  
12 of robustness rules than the DVD system did. One  
13 of the things that's covered by those robustness  
14 rules is a requirement that the licensee, in  
15 making the product, protect the content from its  
16 point of decryption from AACCS, for example, until  
17 the point of its presentation on the screen.

18           The AACCS does not require the use of any  
19 particular technology to do that. But it does  
20 require that there be a protection from the point  
21 of decryption from AACCS to the point of its  
22 presentation on the screen. And so, it is  
23 possible that in implementing that requirement,  
24 some of the systems have developed technologies  
25 that are not compatible with the screen-capture

1 software that works on the DVD, which has a  
2 different set of robustness rules.

3 Having said all that, going back to the  
4 Mac, since Mac doesn't support Blu-ray, I have no  
5 idea what it is that Mac may have -- the Apple  
6 people may have employed.

7 MR. CHENEY: Thank you. I think that's  
8 helpful.

9 MS. CHARLESWORTH: Mr. Williams, on the  
10 issue of screen-capture, we heard a little bit --  
11 I mean, I heard Mr. Turnbull, I think, say earlier  
12 that screen-capture might be an option for some of  
13 these users. And I'm wondering what your view is  
14 on that.

15 MR. WILLIAMS: It seems like a viable  
16 alternative, to me, for many of these uses. And  
17 to the extent it's not circumvention or to the  
18 extent that current exemption for screen-capture  
19 already covers the uses, then it would already be  
20 not only a viable option, but a lawful option.

21 MS. CHARLESWORTH: Okay. Thank you.

22 MR. WILLIAMS: I only had a couple of  
23 more quick points to wrap up. One is the  
24 proffered, narrower, or attempt at a narrowing of  
25 the class in the reply comments, circumvention for



1 digital and media literacy instructional practices  
2 in informal learning context.

3           It's very vague to me. I don't know  
4 what that means. Part of that might be because  
5 I'm not immersed in media literacy education. But  
6 it sounds very hard to define. So, if there's  
7 anything that's going to be done, I would prefer  
8 it be a much clearer definition than that.

9           One thing that Jonathan raised is terms  
10 of service. And I would just note on that that,  
11 to the extent that any of these uses that we're  
12 discussing would violate the terms of service,  
13 that's the case with the existing exemptions that  
14 allow for circumvention of digital downloads and  
15 DVD's. So that's never stopped people in the  
16 past, it seems. And so I'm not sure that that's a  
17 real argument against or in favor of the  
18 exemption.

19           The only other point I'd like to make, I  
20 think Ms. Smith raised it, some of these uses  
21 quite likely could be licensed uses. And I think  
22 we heard testimony in Los Angeles from Simon Swart  
23 of Fox as to the licensing practices of that  
24 studio. And there's been testimony in the past  
25 from Warner Brothers and others. And so, I do

1 think licensing is often a viable option, as well.

2 Thank you.

3 MS. CHARLESWORTH: Okay. Thank you.

4 Mr. Band, and Professor Hobbs, who wants  
5 to go first?

6 MS. HOBBS: Thank you very much.

7 I do want to emphasize how important it  
8 is that the Copyright Office support media  
9 literacy that occurs in libraries, museums, and  
10 nonprofit organizations that are not government-  
11 sanctioned or officially accredited. I think it's  
12 really important not to put that limitation on  
13 this work.

14 In my written reply, I described the  
15 work of Nuala Cabral, an educator who runs a small  
16 nonprofit organization in Philadelphia called FAAN  
17 Mail. FAAN Mail offers workshops and  
18 presentations around media literacy and social  
19 activism, where she works with members of the  
20 African American community to create learning  
21 experiences where people respond to some of the  
22 misogynistic representations in contemporary media  
23 culture.

24 Cabral wants to be able to create a  
25 learning experience where community members

1 analyze and comment on "Orange Is the New Black"  
2 season 2 on Blu-ray. But she is legally unable to  
3 bypass encryption to access the clips. This is  
4 explicitly educational work. She's not making a  
5 film. She's making a learning experience for  
6 adult learners in the African American community.  
7 So, I don't think the noncommercial video  
8 exemption would be appropriate.

9 MS. CHARLESWORTH: Can I ask you a  
10 question? Because "Orange Is the New Black" is  
11 available to be streamed from -- which is it? --  
12 Netflix, yes. And can you explain, has she tried  
13 screen-capture technology?

14 MS. HOBBS: I'm not aware if she's  
15 tried screen-capture technology. Three years ago,  
16 when I was here for the Triennial Proceedings, I  
17 tried to make a screen-capture of Netflix, and I  
18 was unsuccessful. And I know a lot about how to  
19 use these tools, but since then, I'm not aware  
20 whether --

21 MS. CHARLESWORTH: So you don't know one  
22 way or the other whether you could use screen-  
23 capture to capture "Orange Is the New Black"?

24 MS. HOBBS: In my previous testimony, I  
25 observed that screen-capture doesn't uniformly

1 work on all machines due to certain unknown  
2 technological gaps.

3 MS. CHARLESWORTH: Right. But the  
4 question is, could you find -- I mean, it sounds  
5 like you don't know the answer, which is fine. But  
6 could you potentially find a way to use screen-  
7 capture to capture clips from "Orange Is the New  
8 Black"?

9 MS. HOBBS: Yes.

10 MS. CHARLESWORTH: Yes, you could  
11 potentially do that, is your response? You're  
12 nodding. You need to say something.

13 MS. HOBBS: Yes.

14 MS. CHARLESWORTH: Okay.

15 MS. HOBBS: Again, I want to underline  
16 the point that a narrowly written exemption -- a  
17 limitation that doesn't include the work of  
18 educators like Nuala Cabral, who are working in a  
19 non- government-sanctioned educational community  
20 activism context, will under-serve people who  
21 could most benefit from opportunities to  
22 critically analyze and respond to contemporary  
23 cultural representations like this television  
24 series.

25 MS. CHARLESWORTH: Okay. Thank you.

1 Mr. Band.

2 MR. BAND: Very quickly, Matt uses the  
3 word "balance." That's our word. And I don't  
4 know if we have moral rights or what legal regime  
5 would apply, but again I just want to complain  
6 about your use of the word "balance." I guess  
7 it's some form of misappropriation.

8 MS. CHARLESWORTH: Can he say "chill" or  
9 "innovate"?

10 MS. CHARLESWORTH: That's my question.

11 MR. BAND: I forgot you registered that  
12 word with the Office.

13 MS. CHARLESWORTH: You can say  
14 "exclusive."

15 (Laughter.)

16 MR. BAND: With respect to Swatch, one  
17 of the arguments that Bloomberg uses is that it  
18 would have been sufficient to -- or that Swatch  
19 uses, rather, that the transform would have been  
20 sufficient. And Bloomberg said no, it needed to  
21 be the audio because the tone of voice that was  
22 used made a difference in terms of how people  
23 could analyze the earnings call. And the court  
24 found that persuasive.

25 And also, the court, when it first

1 issued the decision, it said it was non-  
2 transformative, but then when they re-issued the  
3 decision and they found that it was  
4 transformative, they changed their mind.

5           And finally, with respect to the library  
6 example, the point is that those were authorized  
7 uses. But because of the time that it takes, and  
8 often you get -- you know, the speaker might tell  
9 you like the day before or two days before, having  
10 to try to get authorization on very short notice  
11 ends up using fewer clips than you might otherwise  
12 use.

13           So the point is that you might be able  
14 to clear the rights. But a lot of times, you  
15 can't clear the rights or you can't clear all the  
16 rights that you would want to. And so, that's why  
17 it does have an adverse effect.

18           And again, this is just like, you know,  
19 no one used to use PowerPoint, but now --  
20 actually, PowerPoint is out of style. But the  
21 point is it kind of ebbed and flowed. But the use  
22 of clips in presentations is on the rise because  
23 audiences expect that. And so, it's a small  
24 problem now, but we expect it to be a growing  
25 problem. And clearing the rights will just be a

1 challenge, especially on short notice.

2 MR. CHENEY: If I could ask, Mr. Band,  
3 if those examples that you used, how many of those  
4 were educators that would have used those same  
5 presentations perhaps in the university setting in  
6 that presentation they made there before students?

7 MR. BAND: Well, I mean, all these are  
8 examples of artists who were making presentations.  
9 But I imagine if they were to speak on campus, it  
10 would be the same issue. And these weren't  
11 educators per se. But they were artists who were  
12 educating. And so that's why we think it would fit  
13 within the context of what we're trying to do  
14 here.

15 MR. CHENEY: So, the contours of this  
16 include sort of things like lectures, that you're  
17 talking about, perhaps may not be covered with a  
18 current exemption even at the university setting  
19 because it's not perhaps before a class. If a  
20 lecture was given, sort of general-audience  
21 lecture, that may not be a classroom setting, per  
22 se. Those may not be covered under the current  
23 exemption and may need a separate exemption. Is  
24 that one of the things you're sort of suggesting  
25 with that?

1           MR. BAND: That's right. Unless, of  
2 course, the noncommercial exemption covers it, in  
3 which case --

4           MR. CHENEY: Right. Right. With that  
5 debate.

6           MR. CHENEY: But does that make sense?

7           MR. BAND: Yes. That's right.

8           MR. CHENEY: So that the lecture could  
9 be in libraries. It could be museums. It could  
10 be on the public square, wherever that lecture may  
11 occur, lecture, presentation, or program is the  
12 sort of language that you're talking about, right?

13          MR. BAND: Right. I mean, that's what  
14 we're proposing.

15          MR. CHENEY: Okay.

16          MS. CHARLESWORTH: Mr. Turnbull.

17          MR. TURNBULL: Yeah. I just wanted to  
18 comment on what Mr. Band had just said about the  
19 Swatch case and the need for the use of the audio  
20 because of the voice inflections and the like.

21                 And I think that was a part of what  
22 we've been trying to convey with the  
23 demonstrations of the screen-capture software. I  
24 mean, if there's a need to see the wire holding up  
25 the lion's tail in "The Wizard of Oz," the screen-



1 capture was able to get that. If there's a need  
2 to be able to manipulate the clips, you know, with  
3 editing software, we're able to do that with  
4 screen-capture.

5 And so, again, the point we're making is  
6 not that the voice nuance might not be important.  
7 It is that there is an alternative that gets what  
8 has been stated as the need.

9 MS. CHARLESWORTH: Okay. Thank you.

10 Ms. Smith.

11 MS. SMITH: I guess a question for Ms.  
12 Hobbs is similar to the question I asked Mr.  
13 Turnbull, is whether you would also support, you  
14 know, perhaps clarifying the proposed exemption to  
15 narrow it down to institutions or museums,  
16 libraries with educational mission, as opposed to  
17 the world of nonprofits at large?

18 MS. HOBBS: I would support language  
19 that limited to -- if it included nonprofit  
20 organizations with an educational mission. I  
21 would support that.

22 MS. SMITH: Okay. Thank you.

23 MS. CHARLESWORTH: I mean, let me just  
24 follow up on that a little bit; I'm sorry. How do  
25 you define an "educational mission"? I mean, is

1 it just simply offering lectures? Is it having  
2 exhibits? I mean, that's, to me, a very broad  
3 term.

4 MS. HOBBS: A nonprofit organization  
5 that's aiming to reduce HIV infection by providing  
6 health care services might or might not have an  
7 educational mission. So you're right to  
8 acknowledge that many nonprofit organizations have  
9 an educational mission and in addition to another  
10 mission.

11 But I think that only speaks to the  
12 importance of this, what is becoming a normative  
13 practice. And Stacy, you pointed it out. As we  
14 try to reach audiences who are living in an  
15 increasingly crowded media environment with lots  
16 of choices, we use digital media tools as part of  
17 our toolkit for learning. And I wouldn't think we  
18 would want to narrow that down too much, because  
19 actually, the HIV education initiative, that might  
20 be a situation where we could imagine the use of a  
21 Hollywood movie clip being really important to  
22 advance some sexual education or prevention goals.

23 MS. CHARLESWORTH: Okay. It's late in  
24 the day. I want to thank you again for --  
25 especially I mean these repeat panelists who have

1 been here for many hours enlightening us on their  
2 views of the world of copyright and 1201. So,  
3 thank you very much.

4 We're going to be resuming our hearings  
5 tomorrow at 9:00 a.m. with Proposed Class 5, which  
6 is multimedia E-books. And some of you will be  
7 reappearing. So, again thank you. We look  
8 forward to continuing tomorrow. And that  
9 concludes our hearing for today.

10 (Whereupon, at 4:05 p.m., the hearings  
11 were concluded, to reconvene at 9:00 on  
12 Thursday, May 28, 2015.)

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1 CERTIFICATE OF NOTARY PUBLIC

2 I, CHRISTINE ALLEN, the officer before whom the  
3 foregoing proceeding was taken, do hereby certify  
4 that the proceedings were recorded by me and  
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12 the parties hereto, nor financially or otherwise  
13 interested in the outcome of this action.

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A handwritten signature in cursive script that reads "Ellen D. Sanders". The signature is written in dark ink and is positioned to the right of the printed name.

15 June 8, 2015

Ellen Sander

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