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SIXTH TRIENNIAL 1201 RULEMAKING HEARINGS

Thursday, May 28, 2015

Library of Congress

Mumford Room

Washington, D.C.

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Capital Reporting Company

1 P A R T I C I P A N T S

2 United States Copyright Office:

3 Jacqueline C. Charlesworth

Michelle Choe

4 Sy Damle

John Riley

5 Steve Ruwe

Regan Smith

6

National Telecommunication and Information

7 Administration:

8 Stacy Cheney

9 Participants:

10 Aaron Benmark

Bobette Buster

11 Patrick Carey

Jack Lerner

12

Molly Priya McClurg

13 Blake Reid

Sherwin Siy

14 David Jonathan Taylor

Bruce Turnbull

15 Michael Weinberg

J. Matthew Williams

16 Michael Wolfe

17

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

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3 Proposed Class 5: Audiovisual Works-- Derivative
4 Uses--Multimedia E-Books

5 MS. CHARLESWORTH: Good morning,
6 everyone, and welcome to the Sixth Triennial 1201
7 Rulemaking Proceeding. We are going to be
8 considering a couple of classes today, including
9 Proposed Class 5, which is up next, which is
10 titled, "Audiovisual Works--Derivative Uses--
11 Multimedia E-Books."

12 And I want to introduce myself. I'm
13 Jacqueline Charlesworth, General Counsel of the
14 U.S. Copyright Office, and I, along with my
15 colleagues up here, will be presiding over this
16 hearing today. I'm going to ask them each to
17 introduce themselves.

18 MS. CHOE: Michelle Choe, Ringer Fellow.

19 MS. SMITH: Regan Smith, Assistant
20 General Counsel.

21 MR. DAMLE: I'm Sy Damle. I'm Deputy
22 General Counsel.

23 MR. RUWE: Steve Ruwe, Assistant General
24 Counsel.

25 MR. RILEY: John Riley, Attorney

1 Adviser.

2 MR. CHENEY: And Stacy Cheney, Senior
3 Attorney at NTIA, U.S. Department of Commerce.

4 MS. CHARLESWORTH: And as I've said in
5 some of the earlier sessions, the point of these
6 hearings is really to explore areas of the record
7 that we feel are underdeveloped or where there may
8 be a disagreement in terms of the law or the
9 facts. We will be giving you each an opportunity
10 to speak, probably more than one. And we really
11 appreciate if you can focus in on those areas that
12 may be in dispute or that you think we may not
13 understand fully rather than kind of retreading
14 the ground in your written submissions, which
15 we've read. So we appreciate that.

16 The format we've been following, which
17 seems to be working pretty well, is we let
18 everyone have what we call an opening statement
19 and then batter them with questions. Now, you can
20 start speaking and then sometimes we interject
21 questions along the way as you mention things that
22 are of concern or raise an issue for us.

23 Before we get to that, though, I would
24 love for each of you to just quickly for the
25 record introduce yourself, and then if you can

1 explain who it is or what it is you represent for
2 the record, that would be helpful.

3 We'll start with you, yes, Ms. Buster.

4 MS. BUSTER: Hi. I'm Bobette Buster.
5 I'm an adjunct professor at the USC Peter Stark
6 program, and I am here representing multimedia e-
7 books.

8 MR. WOLFE: Hi. My name is Michael
9 Wolfe, and you should probably disregard the blurb
10 on my tag here. I'm actually on behalf of Authors
11 Alliance, the organization for which I am the
12 executive director.

13 MS. CHARLESWORTH: Okay, one thing I
14 forgot to mention, which is a technical concern,
15 is we're only allowed to have four mikes on at a
16 time. So, yes, thank you for when you're not
17 speaking, if you could turn your mike off, that
18 would be great.

19 MR. REID: Good morning. Blake Reid,
20 from the Samuelson-Glushko Tech, Law and Policy
21 Clinic. We're co-counsel to Authors Alliance. And
22 I won't be giving an opening statement this
23 morning, I'm just here for support.

24 MS. CHARLESWORTH: Okay.

25 MR. LERNER: I'm Jack Lerner from the

1 University of California Irvine Intellectual
2 Property, Arts, and Technology Clinic, and like
3 Blake, I'm here to answer questions or provide
4 support and won't be giving an opening statement
5 or anything.

6 MS. CHARLESWORTH: People have scared
7 people off. Okay. (Laughing.)
8 Ms. McClurg?

9 MS. MCCLURG: I'm Molly McClurg. I'm a
10 student at the University of Colorado Law School
11 and the Samuelson-Glushko Technology, Law, and
12 Policy Clinic. And I am representing Authors
13 Alliance and hopefully will defer to my support.

14 MS. CHARLESWORTH: So is any -- who --
15 okay, so, Mr. Wolfe, you're going to be speaking,
16 giving the opening for Authors Alliance?

17 MR. WOLFE: That's correct.

18 MS. CHARLESWORTH: Okay. Just so I --
19 okay.

20 MS. MCCLURG: I'll be giving testimony
21 as well.

22 MS. CHARLESWORTH: Okay.

23 MR. BENMARK: My name is Aaron Benmark.
24 I'm here on the UCI Intellectual Property, Arts,
25 and Technology Clinic's behalf. We're

1 representing Authors Alliance and Bobette Buster,
2 and I'll also be presenting testimony.

3 MS. CHARLESWORTH: Could you just rotate
4 your sign a little bit for me? Oh, and speaking
5 of signs, if you have something to add to the
6 conversation, if you tilt it up, we will call on
7 you.

8 Mr. Turnbull?

9 MR. TURNBULL: Yes. I'm Bruce Turnbull.
10 I'm here representing the Advanced Access Content
11 System Licensing Administrator, LLC.

12 MR. TAYLOR: I'm David Taylor. I
13 represent DVD Copy Control Association.

14 MR. WILLIAMS: Matt Williams for MPAA,
15 ESA, and RIAA.

16 MS. CHARLESWORTH: Okay. Well, let's
17 hear about e-books. Ms. Buster, would you like to
18 go first? And I see that you're approaching the
19 podium. Is this a previously admitted exhibit or
20 it is part of the -- what happened? Excuse me
21 just a moment.

22 MR. RILEY: Exhibit 22.

23 MS. CHARLESWORTH: Okay, so this is
24 going to be I believe a presentation of Exhibit
25 22, Ms. Buster? Is that what's it been marked as?

1 MS. BUSTER: Yes. Is that the number
2 for it? Yes. We have submitted --

3 MS. CHARLESWORTH: Okay, so for the
4 record, we're going to be viewing and hearing
5 Exhibit Number 22.

6

7 MS. BUSTER: All right. So, yes, I'm
8 Bobette Buster, Adjunct Professor at the USC Peter
9 Stark Program. I am also on the guest faculty at
10 Pixar, Disney, Sony, and I lecture in programs all
11 around the world regularly at Catholic University
12 of Milan, La Fémis in Paris, Irish Film Board, et
13 cetera.

14 Now, I have always worked within the
15 ivory tower in exclusive settings. On June 2nd
16 next week, I am finally doing a sold-out event at
17 20th Century Fox Studios, and I've been labeled
18 and hailed as Hollywood's best kept secret.
19 Basically, I have been in the last 3 years
20 publishing. I've done this book which is now in
21 its sixth printing and it's been sold all over the
22 world, and professors are now ordering it for
23 their books, and it's growing in its popularity,
24 but insofar as the enhanced book, e-book, which
25 I've been working on for the last 3 years, I have

1 already commissioned a major award-winning graphic
2 designer because in e-publishing the book really
3 defines the cover, I mean is defined by the cover.
4 And also I've been working with Jack Lerner, his
5 clinic, Michael Donaldson on fair use.

6 My lectures are typically about 6 hours
7 long when I deconstruct a major film, such as The
8 Godfather, Shawshank Redemption, the Pixar films.
9 I have over 50 lectures, but for the e-book, I've
10 reduced it down to 16 clips for the first one that
11 total no more than 13 minutes. I would have to --
12 I've already commissioned and found the right
13 agency to embed this in iBooks Author, and, in
14 fact, for the last 3 years it's been a roiling
15 environment with many different concerns, with the
16 gig size of documents, now iBooks Author is up to
17 2 gigs, easy, downloadable ability.

18 And iBooks Author dominates the roil,
19 there is no other platform like it. Of course,
20 iTunes has this huge market, iPad is the leader,
21 but what we found is, and they promise -- and they
22 have a EULA, End-User Agreement, which has been
23 very threatening in its language that, yes, you
24 have to put it in their format, submit it to them,
25 and then they actually promise you that it will

1 take -- may take longer for them to accept it
2 because it has to be checked by quality control.

3 And the word on the street is they're
4 simply not accepting standard def whatsoever,
5 because why would they? Apple is in the business
6 of creating extraordinary technological wonder in
7 their products, and everything gets better and
8 better every year with Retina, now Retina HD, now
9 their iMacs are 5K. They're simply wanting their
10 consumer to see everything in the best possible
11 environment.

12 MS. CHARLESWORTH: Okay, excuse me, I'm
13 sorry. You say word on the street is that they're
14 accepting everything, but --

15 MS. BUSTER: Well, if you --

16 MS. CHARLESWORTH: Can I just -- I'm
17 sorry, we have to talk one at a time or the court
18 reporter will be very sad.

19 But you're saying that the word on the
20 street is that Apple doesn't accept anything but
21 high def. I take it you've never seen any such
22 policy in writing from them?

23 MS. BUSTER: No, they're not going to
24 say that --

25 MS. CHARLESWORTH: I understand that.

1 I'm just trying to make sure that there is no
2 written policy. And have they ever actually said
3 that to you in the course of the conversation?

4 MS. BUSTER: Well, here's the issue:
5 I've already commissioned a team, and we would
6 have to pay E&O insurance as well. It's a
7 daunting prospect for me to put my own money,
8 which will cost thousands of dollars and 6 to 9
9 months, into a project which could be backwatered.

10 MS. CHARLESWORTH: Yeah, but that's not
11 answering -- my question is just very specific.
12 Have you ever --

13 MS. BUSTER: No, I have not presented
14 this to them yet, but I have put all the players
15 in place.

16 MS. CHARLESWORTH: So you put all the
17 players in place, but, I mean, I'm just wondering
18 if you've ever had a specific conversation with
19 Apple which is clearly --

20 MS. BUSTER: With Apple --

21 MS. CHARLESWORTH: I'm sorry.

22 MS. BUSTER: I'm sorry.

23 MS. CHARLESWORTH: Can I just get the
24 question out for the record? With Apple about
25 whether or not they accept other than -- something

1 other than HD material?

2 MS. BUSTER: They hide behind their
3 agreement and proposal and they say you have to
4 read what their -- the proposal -- what they say,
5 these are the standards by which they accept
6 things for submission, and they'll only say, "You
7 have to read that and we will decide once we see
8 your fully embedded document."

9 MS. CHARLESWORTH: Okay, but the
10 standards -- and the standards just don't
11 particularly address this issue.

12 MS. BUSTER: No.

13 MS. CHARLESWORTH: Okay. Thank you.

14 MS. BUSTER: Okay. So I want to show
15 you a couple of the problems at hand. Now, I
16 showed you the last time I was here 3 years ago
17 clips from Schindler's List, The Godfather, and
18 Toy Story 2. Right now I'm showing you a clip from
19 Shawshank Redemption, one of the most beloved
20 films of all time. You will see in this scene --
21 and this is very important for what I do in
22 cinematic storytelling where we talk about the
23 seven arts. We see a maggot being pulled out of
24 breakfast, Andy Dufresne's first day in prison.
25 It's disgusting and we go, "Ew," and then this old

1 man said, "Are you going to eat that? Ooh, nice
2 and ripe." And we're further disgusted, when
3 suddenly he feeds it to a bird.

4 Now, the bird is the universal symbol of
5 freedom, and Jake (sic) says, "Oh, I'm going to
6 raise Jake until he's ready to fly." Well, in the
7 next scene -- this is like 5, 6 years later in the
8 story -- Andy comes to visit Brooks in the prison
9 basement, and all of a sudden what do we see?
10 Jake. He's been living in the walls of the
11 prison.

12 Now, the point here is in cinema you
13 have to create a visual metaphor for an abstract
14 idea, and this is an abstract idea known as
15 institutionalization. Brooks is free within the
16 walls of the prison. But, now, in the rule of
17 threes, Brooks has just been granted parole, and
18 you cannot see Jake, he is letting Jake go. You
19 can see it in HD, you can see it in broadcast, and
20 you can see it in the theater. This is very
21 important for the storytelling power of this
22 scene. You shouldn't have to be going, "Hey,
23 what's that? Oh, oh, I get it." You should be
24 immersed in the feeling state of that --

25 MS. CHARLESWORTH: I'm sorry. So you're

1 saying in this version, which is SD --

2 MS. BUSTER: Yes.

3 MS. CHARLESWORTH: -- that we're
4 currently watching?

5 MS. BUSTER: Yes.

6 MS. CHARLESWORTH: You -- I mean, you're
7 suggesting you can't see Jake. I was able to see
8 something there, but do you have the comparison
9 that you're going to show us to HD?

10 MS. BUSTER: No, I do not. I don't have
11 the comparison. I can promise you that it does --
12 it has total clarity in the HD -- well, first of
13 all, I can't show that on my computer, I have an
14 older Mac, so I have a -- this is an SD --

15 MS. CHARLESWORTH: I was just asking
16 whether you had it -- whether you had it with you.

17 MS. BUSTER: No, I do not.

18 MS. CHARLESWORTH: Okay.

19 MS. BUSTER: So the point being is that
20 we are setting up the dynamic of the audience's
21 immersive experience in the story, and there are
22 seven arts at play. So it's not just a second-
23 degree experience where you're kind of getting the
24 story. That's not what storytelling is about, and
25 this is the major cultural art form of our times.

1 Now, The King's Speech is another great
2 example, made for \$15 million, went on to make
3 \$400 million worldwide and won the top Oscars.
4 This opening scene, Duke of York is stammering,
5 terribly embarrassed, his first time on live
6 radio, everything is soft muted colors. Okay?
7 Now, Tom Hooper has taken a play and expanded it
8 with the seven arts of cinema in different ways so
9 that you feel the Duke, who becomes the King, his
10 embarrassment. In this scene, for whatever
11 reason, he chose to put the Duke in the Australian
12 speech therapist's office against stripped
13 wallpaper so that you feel his agony and his
14 embarrassment. He's been stripped raw on the
15 world's stage. He stammers, it's humiliating, he
16 has no hope.

17 In fact, this gold line around him is
18 stripped bare. Now, this is a cinematic choice by
19 the art department production design, and what
20 you're about to see is one of my key problems with
21 SD. This is the climax of the film. It's
22 September 3rd, 1939. He has been working, the King
23 -- he is now King -- he has been working with
24 Lionel Logue for 7 years, and on this day, of all
25 days, he's been given the job of delivering a 9-

1 minute speech live to the British empire, and what
2 you should see here -- and we're in Buckingham
3 Palace, in this scene, as the camera dollies in,
4 you should experience the 3D aha experience and
5 basically right above the King's head is a gold
6 line going straight through his skull. It's very
7 impressive in HD, and, no, I do not have an
8 example of it here, so I have to tell you this,
9 but frankly I have to do a lot of description of
10 what you should see when I'm talking in SD. You
11 should be seeing in ideal viewing conditions this
12 idea.

13 MS. CHARLESWORTH: Can you -- would you
14 be able to rewind that so we can look at that
15 dolly-in scene again since you mentioned what it
16 is we should be looking for there?

17 MS. BUSTER: Uh-huh. Okay. This gray
18 tapestry in Buckingham Palace is basically framed
19 in gold, and as the camera dollies in, you should
20 see a gold line going through his head, and you
21 are given this incredible sense of expansion like,
22 can he do this 9-minute speech? And then for the
23 rest of this sequence, you will see the King
24 framed in gold in various settings, which is also
25 a metaphor for His Majesty. And will he be able

1 to do this? Because we saw him in the opening
2 scene fail so miserably. And in the final shot,
3 it is Lionel Logue, and he is framed in gold and
4 white. I promise you in Blu-Ray in HD setting
5 this is crystal clear and quite beautiful, and in
6 this setting it's all fuzzed out a bit. You still
7 get the sense of it, and he's a bit off center
8 because he's been off center in the King's life,
9 but he is the one who has enabled him to discover
10 the courage to become transformed. And the
11 audience is transformed by this because any story
12 that reflects the struggle to discover the courage
13 to be your best person is what wins worldwide.

14 Now, what I have found in doing this
15 series is I have been in the last 3 years
16 producing a major documentary, it will be finished
17 this year, and we were going to distribute it next
18 year, and it's about innovations in storytelling
19 vis-a-vis sound design, and there was a quantum
20 leap in this in 1976 with George Lucas, whom we
21 just interviewed at his Skywalker Ranch in which
22 he says art is technology. And he said that when
23 he started to do Star Wars there was no technology
24 for special effects and nothing for sound design,
25 and he had to invent that, he had to figure it

1 out, and he said, in fact, all art is moved by the
2 fact that you have to push the limits and
3 boundaries of technology in order to move the
4 culture forward. He did this and has created and
5 invested in and created the industry we're in now,
6 and many patents are owned by him, and he's had
7 the financial resources to create the very school
8 where I am an adjunct professor.

9 He also initially financed Pixar, which
10 Steve Jobs bought.

11 And we also interviewed John Lasseter,
12 who said art inspires technology, and technology
13 inspires art, but it all comes down to story,
14 story, story. And I am asked by the major studios
15 to constantly refresh and embolden them in the
16 principles of storytelling from all the seven arts
17 because every frame is advanced by storytelling.
18 And what I feel is being backwatered by the use of
19 SD, the entire industry is now set up on
20 technological wonder with HD, Blu-ray, and
21 progressing to 4K, all these other technologies,
22 but I am being held back, along with the other
23 people, to do this, and we're like the 8-track of
24 the industry.

25 And, besides, this is what I do in

1 inspiring the very creators of the content that
2 drive -- you know, Hollywood is the second largest
3 export in the world. And this is strange to me
4 that I am already being made archival material,
5 and it will not sell as well because people have
6 technology in their hands, whatever smartbook,
7 iPad, smartphone, or whatever, that will make it
8 look decrepit.

9 And, finally, the argument has been
10 said, well, what about up-ressing? Well, up-
11 ressing is a specious argument. People can see on
12 their Retina displays up-ressing. It is just
13 filler, like fattening steers for the market.
14 Your audience wants to see what they saw in the
15 theater, what they can see in broadcast, and
16 broadcast no longer will accept anything under SD.

17 So I'm appealing for the right with fair
18 use, which I'm working with Jack Lerner and
19 Michael Donaldson on, to do this with the highest
20 technology available now.

21 MS. CHARLESWORTH: Okay. Thank you very
22 much.

23 Did you have any questions here?

24 MR. CHENEY: I had one just for
25 clarification. You mentioned that you had 13

1 minutes of clips. Was that a total length or was
2 that a --

3 MS. BUSTER: No, there are 16 clips, a
4 total of like 12 minutes, 53 seconds.

5 MR. CHENEY: Okay, in this e-book.

6 MS. BUSTER: Yeah.

7 MR. CHENEY: Were the clips that we were
8 seeing today, are they going to be in this e-book?

9 MS. BUSTER: Yes. Yes. And the clips
10 that you saw 3 years ago are going to be in the e-
11 book, so --

12 MR. CHENEY: Okay. Thank you.

13 MS. SMITH: I have a couple questions.

14 MS. BUSTER: Yes.

15 MS. SMITH: Do you know if the Kindle
16 requires high def as well or has a requirement or
17 has guidelines on image quality?

18 MS. BUSTER: I didn't hear.

19 MS. SMITH: The Kindle, you said Apple--

20 MS. BUSTER: Kindle is a much more
21 unstable platform and it can't really -- everyone
22 is very concerned with easy, downloadable, and gig
23 size, and so actually when I'm working with the
24 teams that I've talked to, they all say in unison,
25 the only thing that's stable right now and the

1 best is iBook Author.

2 MS. SMITH: So you would not make your
3 book available for Kindle?

4 MS. BUSTER: Not right now, it's not
5 possible. I mean, there are possibilities with
6 apps out there, like Atavist, and there are web
7 streaming, but it's hard to do that with the fair
8 use issues we have now.

9 MS. SMITH: Okay. Are you aware of
10 anyone else who has been told by Apple that their
11 image quality is insufficient for their standards?

12 MS. BUSTER: Well, I've talked to a
13 Digital Collective in Berkeley who said, you know
14 -- and initially they were very interested in
15 working with me on a project, but when they saw
16 the level of embedding, they said, "We're not
17 ready to actually put this out on our platform
18 because of the downloadable issue, the speed of
19 downloading," and so they said, "We really just
20 suggest you go to iBook Author for this project."

21 MS. CHARLESWORTH: So in that case, the
22 platform really couldn't support the HD? Is that
23 what you're saying?

24 MS. BUSTER: Yes. Well, no, I've been
25 asking in SD all along.

1 MS. CHARLESWORTH: No, wait, I'm sorry.

2 Oh, so it couldn't even support SD.

3 MS. BUSTER: Their platform at that
4 time. Well, the number of clips. The fear is that
5 it takes too long to download, you know, and I've
6 tried to reduce this down to the least number of
7 clips. You're actually getting a lot more in my
8 overview than I would be able to do in the clips
9 that you see in my book. I would be writing that
10 and describing that in my book.

11 MS. CHARLESWORTH: And that's a download
12 issue. That's a download issue.

13 MS. BUSTER: Yes.

14 MS. CHARLESWORTH: And isn't it the case
15 that HD, you're transferring more -- you need more
16 bandwidth than you would for SD?

17 MS. BUSTER: Well, apparently iBook
18 Author has now moved up to 2 gigs, and it would be
19 something we would have to experiment with. We
20 would have to see. Is 13 minutes too much or
21 could I move it further? Could I put in more and
22 just use up the 2 gigs? And we would have to then
23 be in the position of, "Oh, how can we expand
24 this? What more can we do?" I mean, I would like
25 to do a series because I have so much material,

1 and I would like to continue expanding this.

2 MS. CHARLESWORTH: So is it fair to say
3 there is sort of a tradeoff between the level of
4 definition and sort of the amount of content you
5 can show in the e-book or include in the e-book?
6 In other words, if you have -- could you have more
7 SD clips, more minutes of SD clips, than HD clips
8 if you are limited by the amount of the download,
9 the full size of the download?

10 MS. BUSTER: Well, my issue is I would
11 like to present the highest quality as was
12 intended by the filmmaker and in which the
13 audience expects to see because I talk about all
14 the elements and whether that's the color, the art
15 direction, the cinematography, the lighting, also
16 the acting and directing and costumes, they all
17 have to be as the filmmaker intended them and as
18 the studio released them. The audience has seen
19 that.

20 And what I also say in e-book, I give
21 direct links where people can buy the full film,
22 and I always say, "See the full film," because I
23 would like to see it within context. So to me, I
24 want people to see the clip as it was best
25 intended at this time.

1 MS. CHARLESWORTH: Okay. So you would
2 rather have maybe potentially fewer clips in HD
3 than more clips in SD.

4 MS. BUSTER: Yes. Right. There is an
5 e-book out there that is a black-and-white book
6 that is students enacting film scenes like from
7 Blade Runner, and that's the only way I guess the
8 people who created this book could see a way of
9 describing how the cinematography works. I just
10 found it a totally inadequate experience, to read
11 the book, watch the clips, because you would much
12 rather just go see Blade Runner and then read a
13 commentary about it.

14 So I think there is a lot of
15 experimentation out there with, how best can we
16 embed clips and engage the audience? And right
17 now there is an engagement problem because the
18 audience expects the highest quality that they
19 know the clips to be in.

20 MS. CHARLESWORTH: Okay. Ms. Smith?

21 MS. SMITH: I just want to make sure I'm
22 understanding. Do you know examples of Apple
23 accepting HD clips?

24 MS. BUSTER: For iBooks Author, I do
25 not. I do know that, you know, in Al Gore's app

1 "Our Choice" there are some excellent clips, and
2 that was a proprietary technology created by
3 Melcher Media, but that is not data that is not
4 owned by the studios, it is --

5 MS. SMITH: Right. Let's assume
6 something is fully licensed. Is there a platform
7 for you to distribute --

8 MS. BUSTER: You can. You could on an
9 app, and there are apps out there that do it, but
10 I have not seen anything that successfully takes
11 clips from movies and does this.

12 MS. SMITH: So it may not even be
13 possible to take the high def distributed in
14 iBooks or -- and it sounds like it is --

15 MS. BUSTER: Well, it's certainly
16 possible for me to create an iBooks Author and it
17 looks good and it plays well and it reads well,
18 it's certainly possible, and if I stay within 2
19 gigs, it would be a very handsome document. For
20 me, it's a 6- to 9-month project I am personally
21 financing, and I found the team to do it and asked
22 all the right questions, but it's a daunting
23 prospect to do it with -- and also it's not up to
24 my standards. You know, I have to explain that
25 you're not seeing this as you should see it.

1 MS. CHARLESWORTH: So you can create it
2 in iBook, but the question is whether Apple will
3 distribute it; is that correct?

4 MS. BUSTER: Yes. Yes. And the
5 question is whether if I did it and they rejected
6 it, would I be legally allowed to truly do this in
7 another platform? Right now, because of all the
8 contention around there, end-user agreement,
9 they're saying, "Yeah, sure," but then, you know,
10 you read Macworld and you read all these other
11 commentaries, like on CNET, and they say there is
12 no assurance that Apple won't come after you, like
13 if I had a bestselling iBook on another platform,
14 they could go back to their -- and their legalese
15 is incredibly dense.

16 MS. CHARLESWORTH: I've seen some of it.
17 I mean, this is a point of curiosity. So you've
18 embarked on an expensive project.

19 MS. BUSTER: Yeah.

20 MS. CHARLESWORTH: And obviously one
21 that requires a lot of care and work. Did it --
22 and you have lawyers working with you. I mean,
23 did it occur to you to kind of have a conversation
24 with Apple? You're a high profile author in this
25 field, in this particular area, and I'm just

1 wondering, you didn't have any conversations with
2 them about whether they would accept --

3 MS. BUSTER: Well, I do know --

4 MS. CHARLESWORTH: -- I'm sorry, if I
5 can just finish the question just so the record is
6 clear --

7 MS. BUSTER: Sorry.

8 MS. CHARLESWORTH: -- whether they would
9 accept and distribute a book with HD clips?

10 MS. BUSTER: They are very formal in any
11 prospect that is presented to them, they simply
12 say, "You have to read our specifications and we
13 will decide." Now, I do know one of the designers
14 of the iPad personally and I asked him about it,
15 and he simply said, you know, it's a closed-door
16 policy that cannot be opened to every individual
17 question on this. They decide behind closed doors
18 what has the quality and the level they want to
19 distribute on iTunes.

20 MS. CHARLESWORTH: Okay. So you
21 attempted to approach them, but you didn't get an
22 answer.

23 MS. BUSTER: Yes.

24 MS. CHARLESWORTH: Okay.

25 MS. SMITH: And have you approached

1 publishers? From your submission, it sounded like
2 you were planning on self-publishing the book. Am
3 I understanding that?

4 MS. BUSTER: Well, yes. There is a
5 platform called AirBook Maker. They were
6 initially very excited about this. There is
7 another platform called Atavist, which probably is
8 the most promising for me to work on, but then
9 we're in the issues of fair use on those
10 platforms. There is also the possibility of
11 Vimeo Plus, which I create a private channel, but
12 then frankly I deconstruct major films, and they
13 take 6 hours or more. I go frame-by-frame, but I
14 don't have the ability through fair use to do a
15 full-length film.

16 MS. CHARLESWORTH: Now, I'm -- why would
17 the fair use issues differ platform-to-platform,
18 as between Apple, for example, and an alternative
19 platform?

20 MS. BUSTER: Um, well, we -- Jack, do
21 you want to talk about that?

22 MR. LERNER: Go ahead and answer.

23 MS. BUSTER: Well --

24 MS. CHARLESWORTH: We can also ask
25 Professor Lerner when we go down the road, or if

1 you're uncomfortable, you can pass.

2 MS. BUSTER: The thing that's been
3 daunting to me about that with the other platforms
4 is they have nowhere near the marketability of
5 iTunes. So, yeah, I could put something out
6 there, and then how do I let the audience know
7 about it? It would have to build by word-of-
8 mouth, and I have a fair number of people who know
9 about me, and I am building my profile around the
10 world, but as far as the expense of uploading it,
11 putting it up there, you know, I would be in a
12 different market universe doing it on my own, and
13 basically I would be advertising it from my own
14 website.

15 MS. CHARLESWORTH: Right. I guess my
16 question went to -- you had sort of suggested that
17 there was some fair use distinction as between
18 Apple and --

19 MS. BUSTER: No, I --

20 MS. CHARLESWORTH: -- other platforms,
21 and I just wanted to make sure I understood, or
22 maybe I misunderstood, what you were saying. I
23 mean, are you claiming that there's a difference
24 in the way you would analyze the fair use question
25 if you're distributing through Apple versus an

1 alternative Apple-based platform?

2 MS. BUSTER: Jack, do you want to answer
3 that?

4 MR. LERNER: I think what Bobette is
5 saying is that the exemption only permits short
6 portions. So if she had to scrap the e-book idea
7 and do essentially a documentary film on Vimeo,
8 the current exemption would only allow her to use
9 short portions, and so she wouldn't be able to do
10 as extensive of a presentation as she would like
11 is what her fear is.

12 MS. CHARLESWORTH: Okay. And so then
13 that leads, of course, to the question of whether
14 the longer portions would be fair use.

15 MR. LERNER: Well, I mean, I don't --

16 MS. CHARLESWORTH: I mean, it raises a
17 more significant fair use issue because she would
18 be using longer portions that may -- are less
19 likely to be fair use. Would you agree with that?

20 MR. LERNER: I see what you're saying
21 and, of course, the amount and substantiality
22 taken is one of the four fair use factors, but I
23 think there is a very reasonable scenario in which
24 she could discuss a huge portion of a film if she
25 is analyzing it clip-by-clip and presenting a

1 commentary and analysis of that clip that would
2 easily pass muster as transformative use and would
3 outweigh the amount and substantiality factor. So
4 I think that given the extensive analysis that she
5 does frame-by-frame, even if she used a large
6 portion of the work, it would very likely still be
7 frankly a slam-dunk fair use. So that's what I'm
8 saying.

9 MS. CHARLESWORTH: Okay. So -- but
10 there would still be -- she would still be using
11 short clips, you're just saying she would be using
12 a lot of short clips. Is that correct?

13 MS. BUSTER: Well, actually, I can take
14 a film like The Godfather, which is over 2-1/2
15 hours, and as I said, take about 6 hours, and I'm
16 going literally image-by-image, sequence-by-
17 sequence. So I could argue that I'm doing it all
18 in fair use, but Jack Lerner and his team have
19 seen several of my lectures, and that's why he's
20 saying it's a slam-dunk use of fair use, but right
21 now the exemption only allows for short clips.
22 Now, maybe I would create a lecture that is sort
23 of sequences from The Godfather in order to
24 comply.

25 MS. CHARLESWORTH: Are you saying you

1 would put 6 hours of The Godfather into an e-book
2 and --

3 MS. BUSTER: No, no. This is -- we're
4 off the e-book thing. We're talking about
5 something like -- because there is nothing right
6 now that could support that anyway in gig and
7 downloadability. I'm talking about something like
8 Vimeo Plus. That's a whole separate issue, and
9 that would be a logical place for me to go and do
10 my lectures for -- see, I'm in the ivory tower
11 right now. At most, maybe 500 people a year get
12 my lectures. What I'm trying to do is democratize
13 this so more people get access to it.

14 MS. CHARLESWORTH: Okay. But we're
15 focused here -- I guess we're trying to focus on
16 the e-book question --

17 MS. BUSTER: Right.

18 MS. CHARLESWORTH: -- and your proposed
19 exemption. So I'm trying to understand what the
20 uses would be in an e-book, and in an e-book,
21 would you be using individual clips, even if they
22 were from the same movie, would you be using
23 individual clips that you would not consider to be
24 short clips?

25 MS. BUSTER: I would use them as it's

1 determined by the four uses of fair use by Jack
2 Lerner and the IDA and Michael Donaldson and that
3 agreement, and I have examples I've shown before
4 and now where I will take from a movie, say, three
5 or four moments from a movie, like Schindler's
6 List, and some of those clips are like 8 seconds
7 or 17 seconds, one of them is 1-1/2 minutes, and
8 I'm framing it because it all pays off to the same
9 overarching idea in terms of cinema language.
10 They all relate to a teachable moment that is
11 important in understanding the dimensions and uses
12 of cinematic enchantment.

13 MS. CHARLESWORTH: Okay. So in that
14 example, you said I think an 8-second clip, a 17-
15 second clip, and a minute-and-a-half long clip --

16 MS. BUSTER: For --

17 MS. CHARLESWORTH: -- those are examples
18 that you might use in an e-book?

19 MS. BUSTER: Yes, for one film. And, in
20 fact, in the 16 clips that I have for my beta
21 book, I have a clip as short as 3 to 5 seconds,
22 and I think in The Godfather there are several
23 clips that are just under 10 seconds, and then it
24 pays off to a 2-1/2 minute clip at the climax,
25 because what those other small clips have done has

1 set up the climax, and then you see the cord of
2 all the threads of the plots playing off in that
3 moment. What I do when I'm teaching live is I'm
4 showing how that is -- that's a process called
5 setup and payoff, and I'm showing how it's been
6 set up by the filmmaker to pay off in this climax.

7 MS. CHARLESWORTH: Okay. And so in
8 that, what you were just discussing there, the
9 longest clip was 2-1/2 minutes from The Godfather?

10 MS. BUSTER: Yeah, for the e-book, yeah.

11 MS. CHARLESWORTH: Okay. And then in
12 the one where you have -- the one that you planned
13 for Apple, the 16 clips totaling 13 minutes, what's
14 the longest of those clips?

15 MS. BUSTER: Well, it would be The
16 Godfather one.

17 MS. CHARLESWORTH: The 2-1/2-minute one?

18 MS. BUSTER: Yeah.

19 MS. CHARLESWORTH: Okay. Thank you.

20 MS. SMITH: I just want to make sure my
21 question earlier was answered. For the book that
22 you're planning that would be distributed on
23 iBooks, it sounds like using a publisher to get
24 onto iBooks is something that you're no longer
25 pursuing because of the expressed concerns about

1 the fair use nature of your book? Is that right?

2 MS. BUSTER: The publishers are simply
3 not interested. They see it as a very financially
4 daunting thing to create the e-book in and of
5 itself, and there is no assurance that Apple will
6 allow it to be done. So it's a self-financed
7 proposition, or I guess I could go and kick-start
8 it and --

9 MS. SMITH: Right. So those concerns
10 are based on whether or not the project is fair
11 use, not whether or not there is a DMCA issue?

12 MS. BUSTER: I'm not sure I understand.
13 The subject -- they would -- everybody would
14 require me to prove fair use for all my clips, and
15 I would have to have E&O insurance. That's a done
16 deal. But the issue then is the expense of
17 creating the iBook and then the possibility of it
18 being turned down because the technology is
19 inferior.

20 MS. SMITH: Okay. On a different topic,
21 I had a question about the sound quality of high
22 definition. And we've heard a lot about
23 specifically the image quality and the different
24 levels of resolution, and I know we have the
25 affidavit from Mark Berger, but is there any type

1 of specific metrics we can put on the level of
2 sound quality of HD versus SD that we might see in
3 an e-book?

4 MS. BUSTER: Yes. I mean, basically
5 what you're dealing with SD is an inferior product
6 to what the audience is used to now, what they're
7 absolutely used to. First of all, these films
8 have been mixed with either 5.1, 7.1, or, at most,
9 surround sound. HD promises the right levels of
10 mixture of that, and what I see with SD is that
11 it's sort of generically mixed and some levels are
12 too high, some are too low, and, yes, of course,
13 I'm talking about sound design. I'm doing a major
14 documentary about it, and I've interviewed all the
15 major sound designers, including Mark Berger and
16 Ben Burtt, who created Star Wars with George
17 Lucas, and they all lament the fact that the older
18 technology has nowhere near the levels, and
19 they've gone back in to remaster the films so that
20 they are the best sound quality possible.

21 So I'm essentially an expert on sound
22 design, and I want people to hear the levels, and
23 I'm often -- for example, in The Godfather, it has
24 incredibly -- it was the groundbreaker in sound
25 design -- I'm often saying what you should hear

1 here and go see it on the film are children
2 laughing in the background. This is a very
3 critical emotive device in the scene that we're
4 seeing, there are children laughing, but you often
5 see a murder in the next scene. So I have to
6 describe what the sound design is.

7 MS. SMITH: Okay, because you can hear
8 the children laughing in HD but not SD?

9 MS. BUSTER: Yes. Mm-hmm.

10 MS. SMITH: Okay. Thank you.

11 MS. CHARLESWORTH: Excuse me on that
12 last one, is there anything in the record that
13 illustrates that, anything you've submitted to
14 illustrate that point?

15 MS. BUSTER: With sound design?

16 MS. CHARLESWORTH: With the children
17 laughing or sound that --

18 MS. BUSTER: No, I mean, I have a clip
19 on my -- I could show you a clip, but I can also
20 show you, um --

21 MS. CHARLESWORTH: Well, that
22 illustrates sort of the loss of sound quality as
23 between HD and SD.

24

25 MS. BUSTER: Well, I don't have before

1 and after. I'm sorry.

2 MS. CHARLESWORTH: Okay. All right.

3 Ms. Buster, were you -- had you completed your
4 opening remarks?

5 MS. BUSTER: I have. Anything else?

6 MS. CHARLESWORTH: Thank you very much.
7 Very interesting.

8 Mr. Wolfe, I think we're going to turn
9 to you.

10 MR. WOLFE: Great. Thank you. I am
11 going to try to be relatively brief. I think much
12 of what Authors Alliance's interest is in the
13 exemption has been well represented by our
14 attorneys in the comment.

15 I wanted to do three things very quickly
16 here today. First, I want to provide a little bit
17 more of an introduction and background into our
18 organization, who we are and what we are about. I
19 want to talk a little bit about why we are
20 invested in this exemption and why we think it's
21 significant. And, finally, I want to talk a little
22 bit about a couple of changes in the publishing
23 landscape that we think are relevant to the
24 consideration of the exemption.

25 So first about us. Authors Alliance is

1 a relatively new membership-supported nonprofit.
2 We launched a year ago, actually yesterday to the
3 date. We're composed of authors, who are members,
4 who -- and we work to further their interests and
5 seeing their works widely disseminated and
6 preserved, and with those goals, the public
7 interest in having broad, enduring access whether
8 or not the access is open or paid to knowledge and
9 culture.

10 So to highlight what our membership is
11 about, the authors that we think are going to be
12 taking advantage of this exemption, we currently
13 have about 600 members who are all authors of
14 creative works, they're creators, they're
15 copyright holders. And of those, the overwhelming
16 majority are academics. So we are primarily
17 composed of academic authors who are interested
18 primarily in communicating knowledge and advancing
19 their fields. And these are not slouches. Our
20 advisory board has two Nobel laureates, a poet
21 laureate of the United States, leaders in their
22 fields.

23 Now, most of what our work is on a day-
24 to- day basis is providing information and
25 resources that assist these authors. Often what

1 this means is helping authors take advantage of
2 new opportunities enabled by technological
3 advance. We're here today because we think
4 multimedia e-books present a significant
5 opportunity to enable our community to do the
6 valuable work they're already doing on a day-to-
7 day basis to advance knowledge. We want to be
8 sure the new medium can fulfill its potential by
9 making sure that any circumvention measures allow
10 room for the fair use that is essential and has
11 always been essential to their creative endeavors.

12 So obviously the majority of our members
13 are academics.

14 I'm going to move on to my second point,
15 which is talking about the significance of this
16 exemption for them.

17 Scholars of all sorts have cause
18 regularly to make fair or to comment on, to
19 criticize, and to educate about information that's
20 represented and communicated in film. So this is
21 not just a film studies exemption. Sociologists,
22 historians, legal scholars, as our comment noted,
23 Pamela Samuelson, who is actually a director of
24 our organization and a founder of it, as well as,
25 you probably know, a leading copyright scholar,

1 provides the example of something she would like
2 to do with regards to copyright education. One of
3 continuing tricky subject in copyright law is
4 where a copyright rests in characters and how the
5 idea/expression dichotomy breaks down with
6 regard specifically to characters in creative
7 works.

8 MS. CHARLESWORTH: Can I just ask you, I
9 think I recall from the submissions that she was
10 looking to analyze questions relating to James
11 Bond, the character James Bond?

12 MR. WOLFE: That's correct. Yes.

13 MS. CHARLESWORTH: So she would be --
14 that would involve looking at film clips, I
15 assume. Is that correct?

16 MR. WOLFE: That's correct. Yes.

17 MS. CHARLESWORTH: Okay. Thank you.

18 MR. WOLFE: So with regard to the
19 specific James Bond example, there are a number of
20 things about the character that are represented --
21 well, obviously film is an audiovisual medium.
22 Anytime that's being transposed into text,
23 something is being lost. In order to capture the
24 -- to try to go after the essence of what the idea
25 of James Bond is and what the protectable

1 expression is, the best way of communicating that,
2 from her perspective as an author and as an
3 educator, is to provide visual examples of the
4 specific things she is talking about.

5 Now, this is not a unique use case.
6 Academics are very used to specifically
7 referencing things to the best of their ability.
8 When it comes to text, it's not overly difficult.
9 They work primarily in text and have been doing so
10 for a very long time. When it --

11 MS. CHARLESWORTH: So I'm sorry, I just
12 want to make sure. So her project would be to
13 analyze the character James Bond as James Bond
14 appears in film clips.

15 MR. WOLFE: Well, I think her project
16 would probably also incorporate Ian Fleming's
17 novels as they are relevant to the copyright in
18 question or the copyrights in question --

19 MS. CHARLESWORTH: Okay. And then --

20 MR. WOLFE: -- but specifically here
21 film.

22 MS. CHARLESWORTH: I'm sorry. And then
23 she would -- but the ultimate goal would be to
24 publish those as an e-book?

25 MR. WOLFE: Indeed, yes.

1 MS. CHARLESWORTH: Okay.

2 MR. WOLFE: Pardon me for one second, as

3 I lost my train of thought.

4 MS. CHARLESWORTH: I'm sorry.

5 MR. WOLFE: Oh, no, it's really no

6 problem.

7 Oh, when making use of -- the academic
8 endeavor is necessarily cumulative, it builds on
9 what's come before, oftentimes it's dealing with
10 or analyzing something -- another resource. In
11 the process of that, inevitably other works are
12 cited. It might be a historian examining the
13 historical significance of a film or the
14 representation of history in a film, or it might
15 be a scholar in any field engaging with a
16 documentary of relevance to his or her work. When
17 doing so, accuracy and integrity are of the utmost
18 importance to the academic project.

19 Generally, citations, references,
20 paraphrase can suffice, but not always, when an
21 argument is most specific or often the most
22 damaging to present, to maintain the integrity of
23 the argument, oftentimes specific examples,
24 quotations, excerpts have to be used. Asking for
25 the right to do the same thing with copyrighted

1 film is really not so extraordinary.

2 Now, I would like to point out that
3 there is another part of our mission, which is to
4 see works preserved so that they can continue to
5 teach for more than just the moment at which
6 they're made. People write not just to be read
7 this year or next year, but for a very long time.
8 Now, embedding film when it is an important aspect
9 of a work, as for the very uses described in the
10 comment, ensures that when the work is archived,
11 preserved, and stored, later generations who
12 access it will be able to make full use of the
13 knowledge contained within the text. Moreover,
14 that same feature, the preservation, ties directly
15 into the quality issues that we were just recently
16 discussing.

17 MS. CHARLESWORTH: Okay, but we have now
18 seemed to have strayed a little bit outside the
19 proposed exemption here. This is -- unless -- is
20 this tying back to the e-book question --

21 MR. WOLFE: This is directly relevant to
22 the e-book question.

23 MS. CHARLESWORTH: Okay.

24 MR. WOLFE: When you write an e-book,
25 part of our interest in seeing these things made,

1 part of the reason it's so important that the fair
2 uses are enabled for using audiovisual works in e-
3 books, is that it can continue to teach, and for
4 that, quality has to be future proved, it can't be
5 what is mediocre today. To use an analogy, it
6 would be as if an archival sound recording would
7 have to be done on an inferior technology in order
8 to be used in the future. It doesn't -- well --

9 MS. CHARLESWORTH: Well, actually, I
10 mean, that's -- I don't want to get too far afield
11 here, but that's a significant issue, is digital
12 preservation because the platforms may disappear,
13 and how to maintain things for the future, but I
14 think that is very, very beyond anything we can
15 figure out today.

16 MR. WOLFE: I do agree.

17 MS. CHARLESWORTH: But I appreciate your
18 point that you want to have the high quality,
19 you're saying, in the e-books, for as long as that
20 would be available.

21 MR. WOLFE: Thank you. And, finally, I
22 just want to flag a few salient features in
23 contemporary publishing, as I think has been made
24 clear from the discussions of all of the
25 platforms, from Kindle to iBooks Author to others.

1 Things are different now than they were 10 years
2 ago by a significant margin. Self-publishing is
3 larger than it has ever been before. In 2013,
4 there were more than 450,000 titles self-
5 published, as judged by the registration of ISBNs,
6 which, in truth, likely underestimates the total
7 number, as not all self-published texts have
8 ISBNs. This is an increasingly disintermediated
9 and independent publishing economy.

10 When it comes to making -- putting
11 together works of the sort that rely on third
12 party copyrighted content, the idea of being able
13 to even engage in, say, a licensing discussion as
14 an individual in a disintermediated economy is
15 overwhelming and threatens the project right from
16 the outset.

17 MR. CHENEY: Can you tell us, Mr. Wolfe,
18 how many of those 450,000 were e-books? Were
19 those all primarily just regular texts? I assume.
20 And then was there a certain percentage of those
21 that were e-books? Are you aware of that?

22 MR. WOLFE: I wish I had the figures on
23 the percentages. I do know that the
24 overwhelming majority were electronic, not
25 necessarily exclusively electronic. Print on

1 demand enables books that are not digital first
2 and digital only, but increasingly particularly
3 when we're dealing with books that are made to be
4 multimedia e-books where the multimedia book may
5 in fact be the definitive edition, the canonical
6 edition, those have a higher chance of being only
7 available digitally or at the very least we can
8 say about them that they're the ones that, say,
9 Authors Alliance members would want to see
10 preserved.

11 MR. CHENEY: I think part of the
12 interest here is to find out how much this
13 exemption has been used already, and are folks
14 taking advantage of the exemption as it exists and
15 has there been some success in using it to date?

16 MR. WOLFE: Now, our contention as --
17 and I will lean on my counsel with regard to the
18 prior exemption -- a large portion of Authors
19 Alliance's interest in this rulemaking cycle is
20 seeing the exemption opened up to authors who fall
21 outside the relatively narrow band of film
22 criticism and film scholars.

23 MS. CHARLESWORTH: How do you -- in what
24 ways do you want to expand the exemption
25 specifically?

1 MR. WOLFE: Well, in particular, we're
2 looking to have it be available for all kinds of
3 authors who make a fair use that relies on third
4 party copyrighted multimedia content. Now, to be
5 pragmatic about it --

6 MS. CHARLESWORTH: When you say all
7 kinds of authors, do you mean -- what do you mean
8 by -- any author who wants to, say, use a motion
9 picture as part of an e-book regardless of what
10 their purpose or what --

11 MR. WOLFE: Well, not --

12 MS. CHARLESWORTH: It's not limited
13 today to any particular author other than authors
14 of e-books.

15 MR. WOLFE: That's not right is it?

16 UNIDENTIFIED FEMALE SPEAKER: (Off
17 microphone.)

18 MS. CHARLESWORTH: Well, that's not a
19 limitation.

20 MR. WOLFE: Fair use. Well, (off
21 microphone). What about the (off microphone).
22 Not limited to any kind of (off microphone) that's
23 prior rule? Because the prior rule is limited to
24 -- sorry, we're just --

25 Well, in any case, the purpose is not

1 any purpose, the purpose is for fair use.

2 MS. CHARLESWORTH: Right. I mean,
3 that's what -- so you want to expand it beyond the
4 current exemption, which says for purposes of film
5 analysis. That's what the current one says?

6 MR. WOLFE: Is that language verbatim?

7 MS. CHARLESWORTH: We can give you the
8 verbatim language.

9 MR. WOLFE: I'm going to defer to Jack.

10 MR. DAMLE: So the language now talks
11 about -- it says in nonfiction, it has the sort of
12 chapeau which talks about what you can circumvent,
13 and it says in nonfiction multimedia e-books
14 offering film analysis.

15 MR. WOLFE: So is it the film analysis
16 part that is constraining you? So --

17 MS. CHARLESWORTH: Professor Lerner,
18 would you like to comment on this particular
19 issue?

20 MR. LERNER: Sure, yeah. So the film
21 analysis limitation has we think definitely
22 affected how many people can use this work. Now,
23 our understanding is that a number of film
24 scholars have been working on e-books, and we have
25 some material on the record about that. Frankly,

1 a lot of folks are not really finding the
2 exemption very useful because they feel that they
3 need HD and they don't feel they have a way of
4 getting that under the current exemption. So this
5 is in response to Mr. Cheney's question.

6 In response to the question about film
7 analysis, that are many other types of uses
8 besides, quote/unquote, offering film analysis
9 that could and would be -- we think would be --
10 used if the exemption didn't have that limitation.
11 So for --

12 MS. CHARLESWORTH: Okay. Can -- oh,
13 yeah, that's what I was going to ask.

14 MR. LERNER: So, for example, Professor
15 Samuelson is using film clips to explore copyright
16 law. It's not quite the same as what Ms. Buster
17 is doing. If you consider that film analysis,
18 then that's fine.

19 MS. CHARLESWORTH: So a clarification
20 that like examining films to comment or criticize
21 them might be helpful in this area? Is that what
22 you're saying?

23 MR. LERNER: Sure. Use of audiovisual
24 clips for purposes of fair use or if you wanted to
25 do criticism and commentary -- we had a

1 conversation last week about that -- we think fair
2 use would be more appropriate and would actually
3 fit folks' needs better, but that's another story.

4 But, you know, there are museums that
5 are creating catalogs that have multimedia
6 content, people are analyzing things like gaming,
7 which wouldn't be film analysis, and we talked
8 about Professor Steve Anderson of USC who is doing
9 that. So there are a number of uses out there
10 that probably wouldn't qualify as offering film
11 analysis that folks might want to use.

12 MS. CHARLESWORTH: Okay. On the gaming
13 issue, tell me more about that concern. How would
14 that be incorporated into an e-book?

15 MR. LERNER: Well, so, for example, you
16 might have a scholar who says, "Let's look at how
17 gaming is affecting youth and how youth use games
18 and what kinds of messages games are sending," and
19 there is actually a huge controversy about that
20 right now in terms of how games, videogames,
21 portray women and about criticism of game culture.
22 Right? And so you could have a scholar doing an
23 e-book about that where the scholar wished to
24 embed clips that would -- of a game that would
25 sort of elucidate or explore that type of

1 analysis. Our concern is that that would not
2 qualify as offering film analysis.

3 MS. CHARLESWORTH: Okay. But are there
4 specific examples of scholars who have sought to
5 do that or is that just sort of a potential
6 example you're offering?

7 MR. LERNER: I do know that one person
8 we discussed, my former colleague Steve Anderson
9 at USC, has done extensive scholarship that
10 involves media but also involves gaming. I can't
11 speak specifically to what he has done, but I'm
12 happy to follow up with specific examples if you
13 wish.

14 MS. CHARLESWORTH: We'll take that under
15 advisement. Thank you.

16 So with the film analysis, the concern
17 sounds like people think it needs to be something
18 like what's Ms. Buster is doing where you're really
19 just looking at, for example, Hollywood films and
20 talking about how they're put together as opposed
21 to the Samuelson example, where you're looking at
22 Hollywood films to examine some of the ways -- you
23 know, the cultural references or how they are
24 socially constructed or whatever she would be
25 saying. So in both cases, though, you're using

1 the film as a focal point of discussion. Is that
2 correct?

3 MR. LERNER: I would say that's correct,
4 and if it said something like offering analysis
5 that involved films as the focus of discussion or
6 something along those lines, that would probably
7 be clearer, but, you know, again I think this goes
8 to the question of whether the exemption should
9 say something like "for the purposes of fair use
10 in the creation of multimedia e-books" because
11 then we don't have to worry about interpreting
12 what offering film analysis means and we can rely
13 on 30 years of judicial decisions to give us
14 guidance.

15 MS. CHARLESWORTH: Which is very clear.
16 Fair use is very easy to understand from judicial
17 decisions.

18 MR. LERNER: Well --

19 MS. CHARLESWORTH: I'm being a little --
20 but, I mean, we've had this conversation many
21 times in the past --

22 MR. LERNER: Correct.

23 MS. CHARLESWORTH: -- week, which is we
24 are tasked with creating, you know, sort of
25 targeted and narrower exemptions. I mean, the

1 DMCA, the language and legislative history talks
2 about specificity and things of that nature, and
3 simply saying something is a fair use doesn't
4 really give a lot of guidance. So that's why in
5 the history of this proceeding and based on our
6 interpretation of what Congress was after here, we
7 try to build in some guideposts so that people
8 understand really what's intended or what the
9 general case is. That's not to say there is never
10 a case where you can use a full-length picture in
11 any context, but we're looking for substantial
12 adverse effects where there are a lot of uses that
13 are being sort of undermined by the prohibition on
14 circumvention, which is why we try to, as I said,
15 sort of put some guidance into the exemption.

16 So it sounds like -- I mean, obviously
17 there's an existing exemption for this, so that's
18 why it's very helpful to explore kind of what the
19 actual -- you know, what the use case is and how
20 if we're going to refine it, how we might refine
21 it in a way that doesn't simply say for fair use,
22 and so anything you can add on that, to that
23 discussion, any of you, would be helpful.

24 MR. LERNER: I appreciate your
25 explanation, and thank you for that. The only

1 response I would have is that I actually don't
2 agree that -- you said that fair use is easy to
3 figure out from the judicial decisions?

4 MS. CHARLESWORTH: I was being --

5 MR. LERNER: Facetious?

6 MS. CHARLESWORTH: Yes.

7 MR. LERNER: Facetious or making a joke.
8 And I understand that in the past it has appeared
9 very indeterminate, but at this point, for
10 nonfiction authors, it's actually not that
11 difficult at all, it's actually quite clear, and
12 if you look at the article "Refuge from the Storm"
13 by Michael Donaldson, and if you look at the
14 "Documentary Filmmakers' Statement of Best
15 Practices in Fair Use" and other best practices,
16 we think it's actually quite clear, and that's why
17 you have insurers who routinely and frankly often
18 blithely issue policies that cover this because
19 it's actually quite determinate in the context of
20 this type of scholarship. So I think that it is
21 easy to rely on fair use, and that's all I would
22 like to say in response to that.

23 And I know Mike wanted to say something
24 as well.

25 MR. CHENEY: And I had another question,

1 I'm sorry, just to clarify. You said something
2 about nonfiction in the last statement you made,
3 but there was a little bit of disconnect here
4 because there was some suggestion that it was all
5 authors. But are you looking for nonfiction
6 authors primarily?

7 MR. LERNER: I did say nonfiction
8 because that was what Michael Donaldson's article
9 referred to.

10 MR. CHENEY: Right.

11 MR. LERNER: But I think in the context
12 of authorship at this point, it's actually fairly
13 clear. I think it's much clearer with nonfiction,
14 but I think it's clear with fictional authors,
15 too, and we think that there would be zero
16 problems, zero harm, zero adverse effects, if an
17 exemption simply said multimedia e-book authorship
18 fair use and if that included fictional authors.
19 So we think that it would have zero effect, as
20 none of these exemptions have had, on piracy,
21 copyright infringement or really any harm. So
22 that's my answer to that question.

23 MR. CHENEY: Right. Let me counter you
24 just a little bit. If it's not being used, then
25 there is not going to be much abuse of it, I would

1 assume. So an incremental expansion seems easier
2 to understand. If you sort of draw a line in the
3 sand and say perhaps nonfiction, it's more likely
4 to be a fair use if it's a nonfiction author than
5 all authors, and I haven't seen in the record
6 other authors other than nonfiction being
7 demonstrated here, so perhaps we need to talk more
8 about what you are thinking about with other
9 authors other than nonfiction. But at this point,
10 it seems like that you've put more on the record
11 regarding nonfiction authors, and that seems to be
12 an easier line to draw in the sand to be more
13 likely to be fair use.

14 So what do you think about that approach
15 and that thought? Or do you have more examples of
16 fictional authors that would be using this other
17 than perhaps the examples you've given already?

18 MR. LERNER: We don't have any examples
19 offhand that can speak directly to that, but -- or
20 on hand to speak directly to that, but I think
21 that I'm not sure it makes sense to have an
22 incremental approach when there has been no
23 evidence of any harm that has come from any of
24 these exemptions. You said, well, that's because
25 it hasn't been used, but many of the exemptions

1 have been used extensively, including the
2 documentary filmmakers exemption, and that hasn't
3 led to even an allegation, much less evidence, of
4 any harm.

5 So I would say we have presented quite a
6 bit of evidence that people want to do this, that
7 they want to be able to access Blu-ray, that it's
8 causing them an adverse effect, and as I
9 understand from notice of inquiry, the burden now
10 shifts to any opponent of the comment. I'm not
11 aware of any allegation that this would actually
12 lead to any harm or much less evidence of that.

13 So my thinking is that it doesn't need
14 to -- we don't have to take an incremental
15 approach if there is no evidence or allegation of
16 any harm based on what we're asking for.

17 MS. CHARLESWORTH: Okay. Thank you.

18 Mr. Wolfe, did you have something you
19 wish to add before we move on to I think Ms.
20 McClurg?

21 MR. WOLFE: Very, very briefly two quick
22 things to tack on. One is about the current state
23 of using this exemption, and while -- and it's
24 great to hear that it sounds like a clarification
25 of the film criticism might be a possibility.

1 In the broader sense, there is quite a
2 significant amount of use of multimedia writing of
3 serious rigorous and academic multimedia writing
4 that relies on the inclusion of third party
5 copyrighted content, and this takes place largely
6 in the more informal sphere of blogging. And,
7 now, academic blogs in the last 10 years have
8 become incredibly important. Some universities
9 have started to consider them as published
10 material in tenure committees, but it's a
11 different sphere of writing, and it doesn't have
12 the sense of either completeness nor the sense of
13 legacy building in the way of writing a book does.

14 Now, this tool that's proven useful time
15 and time again on academic blogs would be something
16 that doubtless people would take advantage of when
17 writing more formal books, if only they had the
18 opportunity to do so. It's Section 512 and third
19 party video hosts who enable current embedded uses
20 of media in most writing. So somebody else takes
21 the risk essentially and it's embedded on a
22 website. Bringing that possibility to the medium
23 of books rather than blogs would be a tremendous
24 service to the people who are already doing this
25 in their writing.

1 One final thing, regarding the state of
2 publishing, which is that we talked in the
3 previous inquiry with Bobette, we talked -- you
4 discussed a little bit about the current state of
5 availability of multimedia e-book services. I
6 wanted to point out that 3 years really is an
7 eternity when it comes to these technologies. The
8 Kindle itself was only developed in 2007. The
9 iPad was released in 2010. Over the course of 3
10 years, knowing that not only are the major players
11 -- Amazon, Apple, et cetera -- working on further
12 developing and rolling out this kind of
13 technology, there are also a shocking number of
14 startups and small businesses that are interested
15 in making multimedia e-book writing more
16 accessible to more authors. We are incredibly
17 excited to see this take shape and believe it
18 could do so easily over the course of the next cycle.
19 So it's only becoming more and more accessible all
20 the time if only sort of the legal infrastructure
21 were in place. So looking forward to seeing that
22 develop.

23 Thank you for your time.

24 MS. CHARLESWORTH: Thank you, Mr. Wolfe.

25 Professor Reid, before we get to Ms.

1 McClurg, did you have something to add?

2 MR. REID: Thank you. I just wanted to
3 make a very quick interjection on the last point
4 that Mike raised. I don't even think we're being
5 speculative about the likelihood that these
6 technical improvements are going to result. So
7 just for example, Apple's App Store, which is not
8 the store through which they sell books, but they
9 sell applications, has had a similar 2-gig size
10 limit since it came out, and it just recently
11 doubled it to 4 gig. So I think it's very likely
12 we'll see that in the near future.

13 I would also note, you know, Moore's Law
14 is at play here, and some of the constraints that
15 are governing this now are things like the
16 capacity of sizes on devices like iPads where
17 people consume this content, the broadband speeds
18 through which people consume this, and we're
19 seeing monumental increases in those. So, for
20 example, there is an order of magnitude increase
21 in size, in storage size, of the flash memory on
22 an iPad from the very first version to what's
23 available now. I was just thinking about my mom
24 back in Longmont, Colorado. She just jumped from
25 a 10 megabyte broadband connection to the city has

1 now just rolled out a 1 gigabyte municipal fiber
2 connection, and those are the factors that are
3 driving these sort of limitations, and I think
4 those are going to disappear in the next 3-year
5 period for enough people to make this an
6 economically viable point.

7 And the only other point that I wanted
8 to quickly address, to Ms. Smith's questions to
9 Bobette about dealing with Apple and consulting
10 with a publisher and all that sort of stuff. And
11 we take those questions in the spirit that many
12 authors will be able to engage and have those
13 discussions, but many, many more will not. That's
14 not an option that's available to folks who are
15 trying to do self-publishing, who are going out
16 without an agent, who don't know how to negotiate
17 the industry, and even for someone like Ms.
18 Buster, that's a very difficult proposition. For
19 lots of other authors, that's a nonstarter. And I
20 don't think it's fair to expect as a condition of
21 the exemption for someone to have to go through
22 that level of negotiation. So I just wanted to
23 throw in that point.

24 And, Professor Lerner, do you have
25 anything to add before Molly speaks?

1 MR. LERNER: Thank you. Just that we
2 are aware, just to answer another question that
3 was posed to Ms. Buster -- we are aware that
4 iBooks does have HD titles, that have HD (off
5 microphone).

6 MR. REID: Excuse me. I forgot to
7 mention that. So I was just doing some searching
8 while we were talking. In the iBooks store, for
9 example, there is a book called Beginner Blues
10 Guitar Solos with audio and video, which I'm
11 looking forward to checking out later, that
12 contains over 53 minutes of HD video instruction.
13 So this is something that the instructor has
14 filmed by himself, it's just him playing blues
15 guitar licks. So where the source material is
16 something original that's not being derived from a
17 film, people are actually able to use the platform
18 for the purposes that Ms. Buster described. So I
19 think the point is that the inability to
20 circumvent and get content from the sources that
21 Ms. Buster is looking to get at is a
22 differentiating factor.

23 MS. BUSTER: Yes, there are other
24 materials, such as cook books, that have great
25 illustrations that are HD, but I was answering the

1 question vis-a-vis the use in my field of
2 underlying copyrighted material.

3 MS. CHARLESWORTH: Yeah, I mean, well, I
4 think we're sort of blending copyright with a
5 technological discussion here. I think the record
6 is a little murky, it seems to me, whether or not
7 Apple would accommodate Ms. Buster's book, but you
8 are suggesting you just looked up -- this is one
9 of the interesting parts about this hearing, is
10 it's in real time, the evidence comes in as people
11 submit it, you know, research their computers or
12 the commentary comes in, but you're suggesting
13 that Apple may be able to accommodate HD content
14 in its iBook platform?

15 MR. REID: I just downloaded a sample of
16 the book, and only for a very short moment I was
17 paying attention --

18 MS. CHARLESWORTH: Are you going to
19 start playing guitar for us?

20 MR. REID: I did not bring it, but next
21 time I promise.

22 (Laughter.)

23 MS. CHARLESWORTH: Okay. I want to move
24 along a little bit, Professor Lerner, because I
25 want to make sure we have time for the other end

1 of the table here. Did you have something to add?

2 MR. LERNER: I have a very, very, very
3 minor addition to something that Mr. Wolfe said,
4 and that is that it's not just Authors Alliance,
5 which has several hundred members, who are very
6 keenly interested in this issue. The American
7 Association of University Professors is also one
8 of the proponents of this exemption, which is
9 47,000 university professors who are coming
10 forward and saying we're really interested in
11 doing this kind of thing, and so we think it has
12 many educational possibilities as well. And I
13 just wanted to point out that this is a very, very
14 large group of folks who has come forward to say
15 we think this is important. Thank you.

16 MS. CHARLESWORTH: Okay. Ms. McClurg,
17 you have been very patient. Please proceed.

18 MS. MCCLURG: Thank you so much and
19 thanks again for your time this morning.

20 So I've already introduced myself. A
21 quick roadmap of what I'm going to go over today.
22 I would like to cover five points if there's time,
23 but three if not. I would like to do a quick
24 overview of multimedia e-book authors outside of
25 Bobette just to give you a little flavor of who

1 else is in this field. I would like to talk a
2 little more about the state of the e-book industry
3 and the changes in technology. And then I would
4 like to again reiterate the need for high quality,
5 high resolution content.

6 So first of all, I would like to really
7 emphasize that the authors that we're working with
8 are content creators and rights holders
9 themselves. So this exemption really seeks to in
10 many respects pay homage to the underlying work
11 and seeks to respect the underlying copyright. We
12 just wanted to reiterate that again for the record
13 we're the good guys, we're the content creators.
14 (Laughing.) I would also like to reiterate that
15 authors do have a long track record of doing this
16 responsibly.

17 Moving on to the technology and the
18 rapid changes in the marketplace. I think it's
19 really apropos that Michael noted that the Kindle
20 only came out in 2007. Just in the past couple of
21 years we've seen new versions of a lot of e-
22 publishing software, including EPUB Version 3,
23 Amazon's Kindle Format 8, and Apple's iBook
24 Version 2. This represents the lion's share of
25 the e-books marketplace, and all of these envision

1 multimedia content being embedded.

2 So --

3 MS. CHARLESWORTH: Can I interrupt you
4 there? We've had a lot of discussion about Apple
5 and whether they can accept HD. What about the
6 other platforms that you just mentioned? I think
7 you mentioned two others.

8 MS. MCCLURG: I apologize. I don't know
9 if they're accepting only SD or SD and HD. But I
10 would say that the transitions in the marketplace
11 envision HD content, especially when you look at
12 the devices that people are using to access the
13 content that these platforms provide. So when you
14 look at the Kindle, when you look at an iPad,
15 there is a clear trajectory and a clear trend
16 towards increasing the pixel size, increasing the
17 level of HD visibility. I think all of that would
18 indicate a trend towards HD becoming the norm and
19 the minimum standard.

20 So while Apple and others may also allow
21 for SD content, that's certainly not the norm for
22 what readers are expecting. And I would argue
23 that it's also not the norm of the underlying
24 authors of the original work. If I created the
25 underlying work, I wouldn't want it to be

1 represented in any less than its full quality.

2 MS. CHARLESWORTH: Okay. Thank you.

3 MS. MCCLURG: So just since we touched
4 on the devices, I thought I would run through a
5 few. The Surface Pro 3, which you see here, you
6 can run a 4K pixel monitor if you just plug it
7 into this. Similarly, the iPhone 6 is HD, the iPad
8 Third Generation is 1.5 times HD. The Kindle Fire
9 HDX is double HD. I think all of this
10 demonstrates that increasingly SD won't cut it,
11 not for authors, not for readers, and not for the
12 underlying content creators.

13 I would like to talk a little bit more
14 about the underlying fair use arguments and the
15 authorship. We've talked about sort of whether SD
16 is a good conception or whether that would be
17 enough, and I think especially when you look at
18 Professor Samuelson's work, we're looking at the
19 evolution of a character at a granular level.

20 MS. CHARLESWORTH: Is any of her actual
21 work in the record? I mean, I know I saw it
22 described. Do we have that, the actual clips
23 she's seeking to use or an illustration of why SD
24 wouldn't be sufficient for her purposes?

25 MS. MCCLURG: We have a description of

1 why SD would be insufficient, but I think that
2 your question really highlights the problem.
3 Warner Brothers v. X One X specifically tells us
4 that character copyrights are much more clearly
5 delineated in film than in description. So if we
6 had HD content of the film to show James Bond's
7 watch and the scuffmarks on his watch throughout
8 the film, that would clearly be the ideal
9 situation rather than having only the
10 descriptions, which we've got, and which --

11 MS. CHARLESWORTH: But what about SD?
12 Can you see the scuffs in SD? I mean, that's the
13 question --

14 MS. MCCLURG: Certainly.

15 MS. CHARLESWORTH: -- like that she
16 would be commenting on. I mean, do you know the
17 answer to that?

18 MS. MCCLURG: No, ma'am, I'm sorry, but
19 I do have that she really emphasized the details
20 were the bread and butter of the book, his
21 cufflinks, the scuffs on his watch, and I think
22 you've already seen from Bobette's clips that at
23 least for me the outline of the bird in the last
24 scene was just entirely invisible to me until it
25 came into the light.

1 MS. CHARLESWORTH: Well, yes, we saw the
2 clip, and we'll probably be watching it again.
3 Thank you. Did you have anything else you wanted
4 to add before we move on to Mr. Benmark?

5 MS. MCCLURG: Yes. I would like to
6 again reiterate the point that there has been no
7 harm both to existing authors and rights holders
8 and to those who work on the underlying access
9 control technologies. I think it's important to
10 note that the Blu-ray keys were decrypted many
11 years ago as well as the DVD access control keys.
12 These authors have a clear fear of the law and are
13 not engaging in piracy, and I think that point
14 should also be raised.

15 I would like to again reiterate the
16 points that we made about the scope. While I
17 think there has been an impetus to try and limit
18 this to a certain duration of clips or rather than
19 saying fair use, I think it's our contention that
20 that kind of drafting could further chill the
21 marketplace by cutting out paradigmatic fair use
22 that's on the fringes, which while the DMCA seeks
23 to protect the underlying works, I think the DMCA
24 should not chill even those works at the fringes.

25 So that's everything that I've got.

1 Thank you so much for your time.

2 MS. CHARLESWORTH: Well, thank you.

3 Thank you for being here and for participating.

4 Mr. Benmark.

5 MR. BENMARK: Hi. I'll keep this pretty
6 short because I know we're running pretty low on
7 time here. I just want to talk briefly about the
8 problems with screen capture and why screen
9 capture does not work and is not a viable
10 alternative for multimedia e-book authors.

11 The first major problem with the screen
12 capture programs that the opponents to the
13 exemption presented is that the vast majority of
14 them, I think all but one, do not even represent
15 that they don't bypass TPMs, and there is no way
16 to know even with the one that does represent that
17 that it actually is not decrypting or bypassing
18 the TPM in order to get the footage.

19 Furthermore, we're dealing with authors
20 who do not have technical expertise, these are not
21 engineers, and because of that problem, they're
22 not in a position to make these judgments on their
23 own. They're not going to be able to look at a
24 particular screen capture program and say -- you
25 know, and evaluate how it actually achieves the

1 image and whether it's actually violating the DMCA
2 in the process of doing so. And furthermore, many
3 authors work on Apple computers, which will just
4 flat block any screen capture program from working
5 with a TPM- protected or encrypted disk.

6 The other big problem is just quality.
7 The clips that were presented, particularly the
8 matrix clip that was presented, is not in HD.
9 Without it being in HD, this is not going to get
10 past gatekeepers, you know, based on what we
11 understand of the current market trends. And the
12 matrix clip in particular was presented in 776 by
13 344 pixels. This is basically standard definition
14 quality. It's in the wrong aspect ratio even for
15 standard definition. So it's not as good as
16 authors can even get using the current DVD
17 exemption. This simply is not going to cut it in
18 the modern high definition marketplace.

19 Again, authors do not have the technical
20 expertise to evaluate the software. They also
21 don't have the technical expertise to use the
22 software without creating many of the problems
23 that screen capture is renown for: dropped
24 frames, interlacing problems, doubled images,
25 getting it into the right resolution, getting it

1 into the right frame rate. These are all very,
2 very important to get into the marketplace and to
3 look like a professional product. These are things
4 that require an engineer to deal with, and most
5 authors are not going to have access to that level
6 of expertise.

7 MS. CHARLESWORTH: Can I ask you a
8 question about Apple computers and screen capture?
9 Because this has come up a couple of times in the
10 hearings. Are there earlier operating, Apple
11 operating, systems that allow the use of screen
12 capture? Does the current -- I mean, what -- can
13 you explain more about why you can't use -- you
14 said -- I think I heard you say you can't use any
15 screen capture technology on an Apple computer
16 where there's a TPM-protected work. Is that what
17 you said? Can you explain why that is and whether
18 that's -- you know, the bar is as extensive as you
19 suggested or are there ways, workarounds, for that
20 when you're in an Apple environment?

21 MR. BENMARK: My understanding of how it
22 works -- and this is from interviews with Jim
23 Morissette, who would be much better able than me
24 to answer this question as far as the technical
25 specifications go, but my understanding is that

1 Apple has in its operating system proprietary
2 software that prevents bypass of TPMs. I'm not an
3 engineer, I can't describe exactly how that
4 software works or how that process works, but
5 that's my understanding based on representations
6 from interviews with Jim Morissette.

7 MS. CHARLESWORTH: But, I mean, we're
8 told also that at least some screen capture does
9 not involve circumvention of TPMs. In other
10 words, the work is decrypted before the capturing
11 takes place. So, I mean, that's why I'm asking the
12 question, is there no sort of screen capture that
13 will work on an Apple computer?

14 MR. BENMARK: Again, my understanding is
15 that the Apple proprietary software will not allow
16 most screen capture programs to work with it. The
17 only screen capture program that the opposition
18 presented that makes the representation that it's
19 compliant with the DMCA is WM Capture, which my
20 understanding is a Windows-only program, which
21 wouldn't work with Apple regardless.

22 MS. CHARLESWORTH: Okay. Well, maybe
23 we'll ask Mr. Taylor some of those questions when
24 we get to him.

25 MR. BENMARK: Absolutely. Yeah. And I

1 guess I just kind of want to finish with, you
2 know, why does it matter? You know, again kind of
3 hitting this point of, why do we need this HD
4 footage? And it really comes down to in order to
5 make professional criticism and commentary on a
6 visual image, you need that visual image to look
7 like it was professionally made as well, and the
8 quality of your criticism and commentary as an
9 author is going to be inextricably linked to the
10 quality of the footage that you're commenting on,
11 whether that's fair or not. So if you're
12 commenting on a low quality piece of footage, a
13 piece of footage that's in standard definition,
14 that has dropped frames, that has artifacting
15 effects, interlacing, doubled images, all of the
16 problems that are associated with screen capture
17 technology, your commentary and criticism is going
18 to look -- you know, you're just going to look
19 like you're not a professional in your commentary
20 and criticism either, and that may not be fair,
21 but that's absolutely going to be an effect that's
22 associated with this, and this is a big part of
23 why we're very insistent on being able to get the
24 high definition quality and why the gatekeepers
25 and why the authors are very, very interested in

1 the high definition issue.

2 And if there are no further questions,
3 I'll end there.

4 MS. CHARLESWORTH: Okay. We're going to
5 let you off the hook for now.

6 Mr. Turnbull.

7 MR. TURNBULL: Okay. I will try to
8 respond to a few of the points that have been made
9 in the previous discussion here today, and then
10 I've got a couple points to make sort of from what
11 I had prepared.

12 First, I think, as was evident, the
13 gatekeeping function that we heard about had to do
14 with bandwidth and gigabytes, it did not have to
15 do with HD quality, and, you know, I think the
16 evidence in the record is, as somebody said, very
17 murky on this whole subject, and I don't think
18 that's the basis for making an exemption that
19 would affect the AACS technology and the Blu-ray
20 business in the way that I believe it would.

21 One other point that was made was there
22 was a reference made to Blu-ray keys having been
23 revealed. It's important to understand that Blu-
24 ray and AACS have a very different structure than
25 CSS and DVD did. There are millions of keys. Each

1 individual device has its own key, and those keys,
2 as we've said in previous panels, can be revoked
3 when they are determined to have been revealed,
4 whether published on the Internet or used in a
5 product that was unauthorized, and we do
6 revocations, AACS does revocations every month.

7 We have been able to limit the number of
8 actual circumvention tools to a very restricted
9 number where we're engaged in a bit of battle of
10 the technology with some of the producers of those
11 where they have hidden the keys that they're
12 using, so we don't know what they are. We're
13 engaged right now in developing forensic tools to
14 try to figure that out better than we have, and
15 when we do, we will revoke their keys, but it has
16 been a very limited number and they are all
17 commercial products, most, I believe in previous
18 panels I said all, but I've been corrected. There
19 is one that at least is free. Most are for pay.
20 The ones that are listed on sort of the top 10
21 circumvention sites are all listed for pay. But
22 in any event, they're all commercial products.
23 And so the revelation of keys some years ago is
24 not really relevant to the state of the
25 technology.

1 The discussion in the filings on the
2 need for Blu-ray content is also I think I would
3 describe as murky. They quote various articles
4 saying Blu-ray is going to take over the market,
5 but in fact those same articles -- there was one
6 from Computerworld that was quoted in the filings
7 say that the Blu-ray disk format simply never hit
8 the market levels of the DVD format. It is
9 struggling to survive under the assault of video
10 on demand and downloads, so the state of the
11 market for Blu-ray is not what the state of the
12 market for DVD is.

13 MS. CHARLESWORTH: Mr. Turnbull?

14 MR. TURNBULL: Yeah.

15 MS. CHARLESWORTH: Just on this, I mean,
16 so that's one argument that's made. Another
17 argument is that you just can't see the fine
18 detail in some cases that you're trying to discuss
19 in an analysis of a film, and I was wondering if
20 you could comment on that. I mean, do you --
21 what's your view on that as a reason for needing
22 Blu-ray?

23 MR. TURNBULL: Well, it's difficult
24 because -- you know, I understand the expertise of
25 Ms. Bobette, Bobette Buster, but, honestly, I saw

1 a bird, I saw a gold line, I saw a gold frame, you
2 know. I'm not sure, you know, that in order to
3 point those particular points out that the Blu-ray
4 was necessary, and that, it seems to me that the
5 record is really not clear that this is necessary.
6 Mr. Taylor is going to do some demonstrations here
7 in a couple of minutes where we think that we'll
8 be able to see the kinds of features that have
9 been said to be important.

10 MS. CHARLESWORTH: Okay. Thanks. You
11 can continue.

12 MR. TURNBULL: Yeah, I just have a
13 couple more points.

14 The harm to the Blu-ray market and to
15 AACIS, as the technology provider for the Blu-ray
16 market, has been recently found to be the harm from
17 the distribution of the circumvention tools. In
18 the DVDFab case, Judge Broderick found irreparable
19 harm from the distribution of those tools. These
20 are the tools that would be used if circumvention
21 exemption is granted, and so our concern is that
22 the same situation would occur as a result of the
23 grant of an exemption in this proceeding.

24 And I think in the interest of time and
25 being able to see the demonstrations, I'll stop

1 there. Thanks.

2 MS. CHARLESWORTH: Thank you, Mr.

3 Turnbull.

4 I guess we are going to turn now to Mr.
5 Taylor, who will be presenting I believe what have
6 been marked as, premarked as, Hearing Exhibits 23,
7 24, and 25? Is that correct?

8 MR. TAYLOR: I only have two exhibits
9 for Class 5, which the first will be Exhibit 23,
10 which is identified as "Bond, James Bond," that's
11 the name of the file. And Exhibit 24 will be the
12 InDesign demo.

13 MS. CHARLESWORTH: Okay. So we have two
14 exhibits that you'll be presenting, Exhibits 23
15 and 24.

16 MR. TAYLOR: Yeah.

17 MS. CHARLESWORTH: Thank you for
18 clarifying that.

19 MR. TAYLOR: Good morning. In the
20 interest of time, I am going to try to make this
21 as quick as possible. I am going to show you two
22 clips. The first clip is a compilation of video
23 capture that we used from various James
24 Bond titles, which we had understood was something
25 that the proponents wanted to do. And the second

1 clip is taking that compilation and using it in
2 what they describe as their preferred software
3 system, which is Adobe InDesign. So --

4 MS. SMITH: Can I ask, are either of
5 these clips also submitted with your opposition
6 comments?

7 MR. TAYLOR: I'm sorry. Could you
8 repeat?

9 MS. SMITH: Were either of these clips
10 also submitted with your opposition comments?

11 MR. TAYLOR: No, because the way this is
12 developed -- there was a James Bond clip that was
13 submitted with our initial comments that was much
14 longer, but for this presentation, we've shortened
15 it just to set up the Adobe InDesign.

16 MS. SMITH: Okay. And are the James
17 Bond clips that we're going to see now and the
18 ones that you submitted with the opposition
19 comments, do they use the same technology or
20 different technology?

21 MR. TAYLOR: They use the same
22 technology, which was the Camtasia, and it was
23 used on an older Apple operating system, so the
24 Camtasia screen capture worked at that time on
25 that computer.

1 MS. SMITH: Okay. Thanks.

2 MR. TAYLOR: So I'm going to go ahead
3 and play this.

4 (Playing Exhibit 23.)

5 MR. TAYLOR: Okay. So that basically
6 demonstrated that you could take the video capture
7 and for every DVD that we had, we found those
8 scenes where he introduced himself as James Bond,
9 and you could make your arguments of whether or
10 not the character is copyrightable.

11 The next demo is a demonstration of the
12 use of Adobe InDesign, which I understand -- I
13 don't know much about the product, and I apologize
14 about that, but our point is that the images that
15 were captured by video capture and can be
16 successfully employed with the Adobe InDesign. So
17 I'm going to play this a little bit through.

18 (Playing Exhibit 24. Walks through
19 Adobe InDesign setup.)

20 MR. TAYLOR: So what you're looking at
21 here is basically the interface for the Adobe
22 InDesign, and the clip that we made that you just
23 saw has been loaded already into it, and we're
24 going to create a new publishing that would be
25 something that you could publish on the Internet

1 in a page.

2 So this is where you would create the
3 file, the new, and choose the option here.

4 And right now what's going on is we're
5 choosing the clip and we're going to place that
6 clip in this page.

7 So there we're importing the clip into
8 the page, we placed it in the middle of the page.
9 Up here in the right-hand corner you can see the
10 preview of the clip that's going to be played.

11 And that is indeed the clip that we just
12 finished looking at.

13 MS. SMITH: Can I ask, so these clips,
14 is it -- this has an image resolution that's
15 comparable to DVD? Is that your position?

16 MR. TAYLOR: Our position is, is that
17 the images are of sufficient quality that you can
18 see the details that the proponents suggest that
19 they wanted to see. Are they DVD quality? No,
20 they're not DVD quality because they're not
21 perfect DVDs, but you can make sufficiently good
22 images that you can see the details, and those
23 images can actually be upgraded for different
24 purposes.

25 MS. SMITH: So you might need to up-

1 convert in order to get it to a standard
2 definition format for publication?

3 MR. TAYLOR: It's not only up-convert,
4 but you would have to sharpen the image and do a
5 little bit more processing to it to make it look
6 better. Later this afternoon, we have some images
7 that have been processed in that way so that you
8 can take a look at it, and I'm sorry it was not
9 anticipated for this panel.

10 MS. SMITH: Okay. So this Camtasia
11 clip, I know Mr. Benmark said the matrix clip was
12 776 by 334 pixels. This might be similar, you're
13 not sure, it may be less?

14 MR. TAYLOR: I know that it's not
15 because my understanding is that when you -- if
16 you -- in the Apple world, I think it's DVI, and
17 the way they transfer pixels isn't the same, so if
18 you went and looked at the inspector of the film,
19 it would never show you 720 by 486 or 720 by 480,
20 and I think that's something that's unique to the
21 world of Apple.

22 MS. SMITH: So because it's on Apple, it
23 would be less.

24 MR. TAYLOR: It wouldn't be the same.

25 MS. SMITH: It would be different.

1 MR. TAYLOR: Yes.

2 MS. SMITH: Is it also a different
3 aspect ratio, do you know?

4 MR. TAYLOR: I don't think the -- I
5 don't understand the aspect ratio to change
6 between the different codexes.

7 MS. SMITH: Okay. So this may be the
8 same aspect ratio as if you used a DVD or --

9 MR. TAYLOR: Right. And all the video
10 capture software that I have used, you can set the
11 aspect ratio, you can set the pixel ratio, you can
12 set the frame rate. So it's not that one size
13 fits all. At the time that we submitted our
14 exhibits, we had just recorded and we didn't take
15 in -- we didn't know what the proponents actually
16 wanted each clip to be, so during these
17 presentations we have tried to go back and give
18 you examples of what they say they wanted.

19 MS. SMITH: Okay, got it. So you're
20 saying that this technology could, for example,
21 have the same frame rate that might be required or
22 used in standard definition, but you're not
23 contending that it will be the same frames, but
24 they're making maybe drop frames or filler frames,
25 and you're not saying it's the same frames because

1 it's just capturing what's on the screen, just
2 that this frame rate could be the same.

3 MR. TAYLOR: I think that's accurate,
4 yes.

5 MS. SMITH: Okay. Thank you.

6 MR. TAYLOR: And that's all I have.

7 MR. DAMLE: So I just have one other
8 question. So can you speak a little bit -- you
9 mentioned that this was something that was
10 captured on an older Apple operating system. Can
11 you speak a little bit to the limitations? This
12 goes back to Ms. Charlesworth's question. The
13 limitations that Apple imposes on screen capture
14 and what versions of the operating system does it
15 impose those limitations on?

16 MR. TAYLOR: I actually learned of this
17 change in the operating system yesterday for the
18 first time, so I can't explain it thoroughly. I
19 know that there is in the operating system, if you
20 upgrade your machine to the latest, it will
21 prevent most screen captures from working as they
22 have in the past. But I think that that in itself
23 is not a limitation because content in what we've
24 been working on, I was working on a PC, other
25 people were working on Macs, we exchanged the

1 content back and forth, so the fact that you
2 necessarily can't use the screen capture with your
3 Apple doesn't mean that you can't get to it at
4 all, it just means that you need to borrow the
5 person's next to you machine and use their screen
6 capture and get the content there, and it switches
7 back and forth fairly easily.

8 MS. CHARLESWORTH: Were there any more
9 questions for Mr. Taylor from us?

10 (No audible response.)

11 MS. CHARLESWORTH: No. Okay. Thank
12 you, Mr. Taylor.

13 Mr. Williams.

14 MR. WILLIAMS: Thank you for having me
15 here again today on behalf of MPAA, ESA, and RIAA.
16 As with the filmmaking issues we discussed last
17 week in Los Angeles, my clients are not here to
18 oppose the existing exemption being renewed
19 applicable to nonfiction e-books for film
20 analysis. We are opposed to expanding the class
21 in the five ways that I believe have been
22 proposed. We do not want to do away with the
23 short portions limitation. We do not want to
24 expand this to cover fictional authorship. We do
25 not want to do away with the limitation to

1 criticism and comment and film analysis. We do
2 not want it to cover Blu-ray disks. And we don't
3 want to expand it to cover all audiovisual works
4 such as videogames.

5 As we've discussed previously and as
6 you've noted from the panel, the short portions
7 limitation, for example, really keeps this closer
8 to what is very likely to be fair use, and so we
9 think it's important to retain those types of
10 limitations and agree with the Register's 2012
11 statement that those types of limitations are
12 critical to these types of exemptions.

13 On the expansion to fictional
14 authorship, I don't think we've seen any examples
15 of how exactly that would be done or when it would
16 be necessary. We're not saying that it would never
17 be fair use to use a portion of a motion picture
18 in a fictional e-book, but there is no evidence in
19 the record that that should be granted, and we do
20 think it's important to keep this proceeding
21 focused on the record and on very specific adverse
22 impacts.

23 The Manager's Report on Page 6, for the
24 legislation, Page 639 of the reprint in Copyright
25 Society Journal, it says that at times there could

1 be an exemption granted based upon anticipated rather
2 than actual adverse impacts, but only in
3 extraordinary circumstances, and that that has to
4 involve highly specific, strong, and persuasive
5 evidence. And I don't think we've seen that on
6 fictional authorship.

7 I would also say that while it can be
8 fair use to use quotations of films in fictional
9 authorship, we think it's less likely to be fair
10 than in the nonfiction space, in the film analysis
11 space, and a lot of times someone might use a film
12 clip in fiction just to gain the audience's
13 attention, which is something that the Supreme
14 Court in Campbell and other courts have said
15 really should be licensed. And you heard some
16 testimony from Fox in Los Angeles about their
17 licensing practice and desire to license fictional
18 films, and I think that carries over into this
19 space.

20 One thing we think the exemption could
21 benefit from is kind of a clear definition of what
22 qualifies as nonfiction versus fiction, and we
23 talked some about that in Los Angeles and how it's
24 a little bit of a difficult line sometimes to
25 draw, but, you know, I found pretty quickly a

1 number of definitions that could be played with to
2 try to come up with something that works.
3 Webster's says that fiction is written stories
4 about events that are not real, literature that
5 tells stories which are imagined by the writer.
6 The secondary definition they give is something
7 invented by the imagination or feigned,
8 specifically an invented story. Wikipedia says
9 that fiction is content primarily in a narrative
10 form derived from imagination in addition to or
11 rather than history or fact. And so I think that
12 definition acknowledges that sometimes fiction
13 might be biopic in nature or refer to actual
14 historical events, but there's a creative license
15 and an imagination at issue that goes beyond what
16 we think of as documentary film or nonfiction e-
17 book authorship.

18 I would like to just mention that on
19 this point the case law that the proponents rely
20 on I believe is almost exclusively about
21 nonfiction authors. There's *Rosemont v. Random*
22 *House*, which is use of articles from the Howard
23 Hughes story, which appeared in *Look* magazine in a
24 biography. *Wright v. Warner Books* is also a
25 biography case involving Richard Wright. *Norse v.*

1 Henry Holt is another biography case involving
2 William S. Burroughs. Bill Graham Archives of
3 course involved small reproductions of Grateful
4 Dead concert posters in a nonfiction book. There's
5 a case, Penelope v. Brown, that's really about
6 writing instruction, not a fictional use. I think
7 the only case they might reference that's a work
8 of fiction involves the play Jersey Boys and the
9 use of a clip in that play. So not a books case,
10 but a fictional use.

11 As Bruce said, I don't think there is
12 anything in the record that would justify
13 expanding this to Blu-ray. We give in our
14 comments in Exhibits 1 through 12 and also in the
15 exhibits that we attach with Class 7 examples that
16 show that almost all of the items that they claim
17 are only available in Blu-ray, and their comments
18 are actually available on DVD and in other
19 formats.

20 As I've raised previously, the existing
21 exemption doesn't prevent them from using HD
22 quality, as I read it. There is no limitation to
23 standard definition quality. It does prevent them
24 from using Blu-ray disks, and as I've said before,
25 there are numerous outlets online where you can

1 get HD downloads or HDX downloads, which is even a
2 higher grade of download. And so to the extent
3 that those are already available for their use,
4 expanding this to Blu-ray to me seems even more
5 inappropriate than it would have been in the last
6 cycle.

7 On videogames briefly, since that was
8 mentioned, I don't think there are any specific
9 examples. There were some hypotheticals that Jack
10 gave, but I think again the legislative history
11 says we really need specifics for this proceeding.

12 There is also no explanation really of
13 why circumvention is required to get clips from
14 the videogames or how that would be done, so I
15 think the record is incomplete on that point as it
16 was in 2012.

17 The iTunes license issue that was raised
18 today, there was a vague reference to iTunes
19 having opaque terms in the comments, but there was
20 no submission of the specific terms of service at
21 issue, so I haven't been able to review that. I
22 do think that these gatekeeper issues are not
23 really what we're here to be talking about, and
24 just quickly, I know we're short, but I want to
25 make sure we get some of this legislative history

1 again into the record.

2 And the Manager's Report again at Page 6
3 says that adverse impacts that flow from other
4 sources than the TPMs, including marketplace
5 trends, other technological developments, or
6 changes in the role of libraries, distributors, or
7 other intermediaries are not something that you're
8 supposed to rely on when you're granting
9 exemptions. I think, you know, in the past in
10 this proceeding when it's clear that a proponent
11 can use one device to achieve a goal and some
12 other device might not work as well, that's been
13 ground to deny an exemption, and so I still don't
14 know the answer to the question on why some of the
15 newer Macs might not interoperate with certain
16 devices, but I don't think that that gives grounds
17 to grant an exemption.

18 Just very quickly on the discussion of
19 the Pam Samuelson hypothetical book and the use of
20 the Bond clips, I did look, and I believe all of
21 the James Bond films that come with the 50 years
22 collectors edition can be purchased in HD and HDX
23 quality through VUDU, so you can get those films
24 in HD quality without resorting to the Blu-ray.

25 MR. DAMLE: So just one question about

1 that.

2 MR. WILLIAMS: Yes.

3 MR. DAMLE: I mean, they use that as an
4 example for why the exemption shouldn't be limited
5 to film analysis.

6 MR. WILLIAMS: Right.

7 MR. DAMLE: So could you speak to that
8 for a moment?

9 MR. WILLIAMS: Yes.

10 MR. DAMLE: Do you regard that as
11 falling within it or falling without it?

12 MR. WILLIAMS: Yes. I look back, and I
13 think every example in their comments is about
14 film analysis very clearly, except this one might
15 be on the edge, but I think it arguably is film
16 analysis, and what she is describing is taking the
17 actual films and going through and using imagery
18 from the films, kind of critiquing the character
19 and the development of the character through time.

20 So I think that's arguably film
21 analysis. I don't know what you guys intended
22 that term to mean, but it's certainly something
23 close enough that I'm relatively comfortable with
24 that use.

25 MR. DAMLE: So as I understand it, it's

1 less critiquing the film itself, but using the
2 film to illustrate a point about copyright law,
3 about character copyrights.

4 MR. WILLIAMS: Right.

5 MR. DAMLE: So assuming that my
6 understanding is correct, what's your view there?

7 MR. WILLIAMS: I think sometimes you can
8 do two things at once, and to me, what they're
9 saying is they are -- she would be commenting on
10 the films and also commenting on how the films
11 would be treated under copyright law. So to me,
12 that's different than, for example, just saying I
13 want to show this footage to show you -- to teach
14 you something about history, for example, that's
15 not really about how a film treats history
16 specifically, to comment on the film, but instead
17 just to educate someone about historical
18 occurrences, for example, that would be different
19 to me. And I don't think there are enough
20 examples really any other than this one in the
21 record to expand it beyond film analysis. If
22 there had been specifics, I'm not sure we would
23 have said there is nothing else that should be on
24 the table to discuss, but I don't think we've
25 heard any other examples, and I do think it's

1 important to stay close to the procedural
2 guidelines that Congress gave.

3 I'm not sure that to actually analyze
4 the copyrightability of Bond, some of the detail
5 that they describe as only being available through
6 Blu-ray is really required, whether there's a
7 scuff on the cufflink or not, that would get
8 pretty detailed in terms of a copyrightability
9 analysis, but I do think you can see those things
10 on the HDX copies. I would be very surprised --
11 we didn't see a demonstration, but I would be very
12 surprised if you could see stuff like that in Blu-
13 ray and not see it in an HDX copy.

14 MS. CHARLESWORTH: Mr. Williams, I'm
15 sorry.

16 MR. WILLIAMS: Sure.

17 MS. CHARLESWORTH: Just the legislative
18 history that you -- can you just give us the exact
19 -- the citation for that?

20 MR. WILLIAMS: Yes, absolutely.

21 MS. CHARLESWORTH: Would you mind
22 reading that sentence again?

23 MR. WILLIAMS: Sure. Sure. So this is
24 a reprint of the Manager's Report that was done in
25 the Copyright Society Journal at the time that the

1 legislation was enacted. It's prefaced with
2 remarks from Honorable Henry Hyde, and it goes on,
3 it's titled "Section-by-Section Analysis of H.R.
4 2281 as Passed by the U.S. House of
5 Representatives on August 4, 1998."

6 MS. CHARLESWORTH: So it's a Manager's
7 Report. Okay.

8 MR. WILLIAMS: Correct.

9 MS. CHARLESWORTH: And if you could just
10 read that language again.

11 MR. WILLIAMS: Sure. I read two quotes.
12 The first is at Page 6 of the actual document,
13 which is Page 639 of the Society Journal. It
14 notes that at times you can base an exemption on
15 adverse impacts that are likely to occur during
16 the next 3-year period, and then it says,
17 "However, the determination should be based upon
18 anticipated rather than actual adverse impacts
19 only in extraordinary circumstances in which the
20 evidence of likelihood of future adverse impact
21 during that time period is highly specific,
22 strong, and persuasive. Otherwise, the
23 prohibition could be unduly undermined."

24 The second quote I read about the
25 gatekeeper issue, it starts that paragraph by

1 saying, "The focus of the rulemaking proceeding
2 must remain on whether the prohibition is actually
3 what's causing the anticipated harm." And then
4 the quote that I read was, "Adverse impacts that
5 flow from other sources, including marketplace
6 trends, other technological developments or
7 changes in the roles of libraries, distributors,
8 or other intermediaries or that are not clearly
9 attributable to such a prohibition are outside the
10 scope of the rulemaking, so are mere
11 inconveniences or individual cases that do not
12 rise to the level of the substantial adverse
13 impact."

14 MS. CHARLESWORTH: And that's also on
15 Page 6 of the actual document?

16 MR. WILLIAMS: Correct.

17 MS. CHARLESWORTH: Thank you.

18 MR. DAMLE: So hypothetically, if Apple
19 had a policy saying, "We won't accept any
20 multimedia e- books that are in standard
21 definition, that have clips in standard
22 definition," if they just said -- and that was
23 just like the industry practice, and no one
24 allowed those sorts of clips, are you suggesting
25 that's something that we can't take into account,

1 that that would be irrelevant to our analysis of
2 whether an exemption would be warranted for Blu-
3 ray or for HD content?

4 MR. WILLIAMS: I think the legislative
5 history suggests that that by itself is not enough
6 to grant an exemption, that's correct. It's not
7 that the access controls are actually leading to
8 the adverse impact in that circumstance, it's that
9 a gatekeeper has decided to implement some
10 separate business practices, and those business
11 practices would be causing the adverse impact, not
12 the existence of access controls.

13 MR. DAMLE: Well, they're both causing
14 it in that scenario; right? The fact that you
15 can't -- it's both the fact -- it's a combination
16 of the two that are causing the problem; right?
17 Because it's the fact that there is this business
18 practice out there, but also the fact that there
19 is the TPM. If there wasn't the TPM, you wouldn't
20 have the problem because you would be able to get
21 to the content and the format that's required for
22 the relevant gatekeeper, and so there are sort of
23 dual causes in that -- in my hypothetical
24 scenario.

25 MR. WILLIAMS: I think that's fair.

1 We're here because of the TPMs first and foremost,
2 that's correct.

3 MR. DAMLE: Okay.

4 MS. CHARLESWORTH: Did you have anything
5 else, Mr. Williams?

6 MR. WILLIAMS: No, I think that was all.
7 Thank you very much.

8 MS. CHARLESWORTH: Okay. Before I
9 forget, Ms. Buster, apparently this flash drive
10 with your exhibit on it doesn't actually have the
11 video. I don't know if there was a technological
12 problem. So I don't know if that's something you
13 can fix. We can do it after we shut down, either
14 that or if you need a day or so to get us one. We
15 just want to make sure we have the exhibit so we
16 can include it in the record and consider it.

17 I was curious, Mr. Williams mentioned
18 the HD downloads that are available, and we didn't
19 really discuss those earlier as a potential
20 alternative to Blu-ray, and I was wondering if
21 anyone on the other side of the room could comment
22 on those, and particularly in this context where
23 you're downloading the e-book, and, you know,
24 there are sort of limitations on bandwidth, at
25 least as we currently know it. There is some

1 intuitive appeal to that proposal -- right? --
2 because it means it's content that is already sort
3 of fashioned to be transmitted through a current
4 bandwidth structure, but it's in HD, and I was
5 just wondering if you saw that as a potential
6 alternative to Blu-ray.

7 MR. LERNER: You're referring to the
8 digital downloads on VUDU that Mr. Williams --

9 MS. CHARLESWORTH: Yes, also and he said
10 HD and HDX --

11 MR. LERNER: Right.

12 MS. CHARLESWORTH: -- and we didn't
13 really discuss that and whether that would be
14 useful in the e-book context.

15 MR. LERNER: Right. I mean, one of the
16 reasons why it hasn't been discussed thus far is
17 that it wasn't in the record until these hearings.
18 And we're glad to know that the James Bond films
19 are available on VUDU and I'm a little surprised
20 that Mr. Williams would rather have the proponents
21 circumvent VUDU than Blu-ray, which -- but that's
22 their business. But --

23 MR. CHENEY: Well, let me ask there --
24 I'm sorry.

25 MR. LERNER: Yeah.

1 MR. CHENEY: Let me ask there, are you
2 suggesting that they would have to circumvent
3 something at VUDU in order to download that? Is
4 that what you're suggesting? I don't know that
5 that was what was suggested by Mr. Williams.

6 MR. WILLIAMS: I can speak to that
7 quickly. I'm not suggesting you should be able to
8 circumvent VUDU and acquire a copy without
9 purchase, but if you pay for the copy, you can
10 then download it to your device. There would be,
11 I believe, TPMs on that copy that would need to be
12 circumvented to make the clips; however, my
13 reading of the existing exemption already allows
14 for that type of circumvention. So it's not so
15 much that we're thrilled that that's allowed, but
16 given that it already is and we're not opposing
17 the renewal of the exemption, I think it's a
18 viable alternative to Blu-ray.

19 MR. CHENEY: And let me add to the
20 discussion, is there is a difference between the
21 quality that's on the Blu-ray versus this HD or
22 HDX? Is there a difference in the quality between
23 those two products? And is there anyone that can
24 answer that one for --

25 MR. WILLIAMS: My understanding -- and

1 it's probably not as technical as Bruce -- but the
2 HDX copies are marketed as a 1080p product, so
3 that would be something that's marketed as being
4 very, very close to Blu-ray. The HD copies are
5 generally not quite that high but still crystal
6 clear when I watched them on all of the devices
7 that they've described that come with HD-capable
8 displays.

9 MR. CHENEY: So there are some subtle
10 differences between a Blu-ray version versus an HD
11 or an HDX version of the --

12 MR. WILLIAMS: I can't say that I've
13 ever been able to discern a difference, and during
14 prep for this, I have been playing around with all
15 of these things. I haven't been able to discern a
16 real difference, but there might be a title out
17 there that there is some little discrepancy that
18 you wouldn't see. I just haven't seen any
19 evidence of that.

20 MR. CHENEY: Thank you.

21 Mr. Turnbull, you had your response on
22 that.

23 MR. TURNBULL: Yeah. The 1080p, I mean,
24 to the extent that that is what the quality is,
25 that is what is known as full HD, and that is what

1 is on the Blu-ray itself. So, you know, any given
2 implementation might be better or worse, and
3 that's true that some Blu-rays are better than other
4 Blu-rays, but as far as the baseline quality,
5 1080p is full HD.

6 MR. WILLIAMS: If I could just quickly
7 add also in response to Jack, information about
8 ultraviolet and VUDU and digital downloads is in
9 our comments, so it's been in the record before
10 the hearings.

11 MS. CHARLESWORTH: Okay. Professor
12 Lerner.

13 MR. LERNER: One quick additional
14 response on the HDX. We're delighted to know or
15 are certainly willing to look and see whether HD,
16 these downloads, work for the James Bond example.
17 I do know that offerings on those services are
18 much more limited relative to Blu-ray, and so I
19 don't think that's a full solution.

20 I would also point out that it's
21 actually technically much more difficult to obtain
22 those streams, as Mr. Morissette testified last
23 week. When it's streaming something as opposed to
24 a download, it can be more difficult technically
25 to access. So that would make it more difficult

1 for our clients to actually utilize the exemption,
2 and that's another reason why we think Blu-ray is
3 useful.

4 I know that Professor Reid wanted to say
5 something about the House Manager's Report. And I
6 also just wanted to quickly respond to something
7 that Bruce Turnbull said, which was that he saw
8 the bandwidth and gigabytes being the main barrier
9 here. That's not correct. The main barrier,
10 certainly bandwidth and gigabytes is a limitation,
11 and I think that does speak to the question of
12 whether short portions are appropriate relative to
13 other exemptions that have been proposed, but what
14 we're facing here and one of the main reasons why
15 we think that it's important to have access to HD
16 content, specifically Blu-ray content, is because
17 it's our understanding that Apple's quality
18 control is very strict and that there's a serious
19 and reasonable fear that without HD content, Apple
20 will reject quite a number of books. There is --

21 MS. CHARLESWORTH: I feel like we need
22 to send a subpoena to Apple.

23 (Laughter.)

24 MS. CHARLESWORTH: It would be helpful
25 to have some technical --

1 MR. LERNER: Right.

2 MS. CHARLESWORTH: -- and business
3 practice information from them since they've been
4 a focal point of this discussion, but, alas, I
5 don't think we'll be able to do that, but I think
6 we heard earlier, though, that there is no -- just
7 to clarify, they don't have a written policy in
8 this regard and there is no specific information
9 in the record about whether they would or would
10 not reject something for lack of HD. Isn't that
11 correct?

12 MR. LERNER: That's correct, but it is
13 also -- you do have evidence that we have a fear,
14 and we think it's a reasonable fear, that lower
15 quality SD or screen capture content would do two
16 things. One, it would very likely cause Apple to
17 reject some or many or even all of the e-books
18 that people are going to be submitting. And also,
19 you know, Bobette coined a term that I think is
20 important, which is "backwatered." Right? We
21 don't want to be submitting something that's
22 instantly archival material and that is jarring
23 and disruptive to readers and viewers. And so
24 that's one of the issues that we're dealing with.

25 This is something where, you know, every

1 single device that's being sold now is HD-Plus,
2 not just HD, but HD-Plus, and so then to go back
3 to SD on a device like that is what we would
4 consider not just an adverse effect, which is all
5 the statute requires, but a substantial adverse
6 effect.

7 MS. CHARLESWORTH: Okay. But just, I
8 mean, to play a little devil's advocate here, I
9 mean, certainly you agree that a lot of archival
10 footage, for example, old movies that weren't shot
11 in HD, are going to look older and they're not
12 going to be HD. Do you agree with that?

13 MR. LERNER: Absolutely, but --

14 MS. CHARLESWORTH: So if you're reading
15 an e-book and it's examining an old movie, you may
16 be jarred when you go from the HD to the SD or
17 below or the old analog --

18 MR. LERNER: Right. But old movies were
19 screened in 35-millimeter, so those actually were
20 much higher than HD definition --

21 MS. CHARLESWORTH: Right.

22 MR. LERNER: -- when you're talking
23 about how to analyze something. And I would say,
24 listen, if you're talking about you want to show
25 something that had PBS footage from the 1970s,

1 that's going to be fuzzier and grainier, but
2 audiences understand that because that's how that
3 was experienced in that time as opposed to films
4 and other types of material that weren't. Right?

5 And so audiences are sophisticated, and
6 so are gatekeepers, and as you saw in the
7 documentary filmmaking context and in the
8 narrative filmmaking context, gatekeepers also
9 understand that because they know that it's the
10 limits of the technology at that time, but those
11 limitations weren't there for films that were
12 screened in the theaters.

13 MS. CHARLESWORTH: Okay.

14 Professor Reid?

15 MR. REID: Thank you. I know we're
16 running short on time, so I want to just very
17 briefly preserve for the record, our strenuous
18 objection, and we know it's been used in several
19 proceedings before this one and during this
20 proceeding, but the reliance on the Manager's
21 Report to determine the meaning of words in the
22 statute for which there has been no sufficient
23 identification of an ambiguity that would allow
24 the use of the Manager's Report.

25 We also want to note that the Manager's

1 Report actually came out after the House passed
2 the DMCA, and so I don't claim to be an expert on
3 this branch of law, but I've never heard of
4 relying on legislative history that came out after
5 the law came into effect.

6 So to the extent the Office is relying
7 on the Manager's Report to import doctrines such
8 as the mere inconvenience doctrine and that sort
9 of thing, we strenuously object to the continued
10 use of those doctrines, and we would urge the
11 Office to look to the statute, which just requires
12 a finding of adverse effects.

13 And I think we have established today
14 that to use something like screen capture software
15 essentially requires hiring a lawyer, hiring an
16 engineer, and potentially buying a new computer,
17 and that wherever the line you might draw for
18 adverse effects is set, it's well before you get
19 to the point where you've got to spend that much
20 money and invest that many resources, and we think
21 that's consistent with the plain text of what the
22 exemption process in 1201(a) requires. So I just
23 wanted to preserve that for the record.

24 MS. CHARLESWORTH: Okay. Well, as you
25 know, we have examined the legislative history,

1 including the Manager's Report, and have invoked
2 it on many occasions to try and understand what
3 this proceeding is about because the statute is
4 facially difficult to interpret, but I take your
5 objection for the record.

6 Professor Lerner, it sounds like you
7 wanted to respond --

8 MR. LERNER: Yes, ma'am.

9 MS. CHARLESWORTH: -- directly to
10 something that was just said. And then we'll go
11 to Mr. Wolfe. And then we have a couple here. And
12 then we're going to try and wrap this up.

13 MR. LERNER: Yes, ma'am.

14 MS. CHARLESWORTH: Okay.

15 MR. LERNER: Thank you for your
16 indulgence. I know that we're running low on time.
17 I just also want to point out that the text that
18 Matt read about distributors and intermediaries
19 doesn't saying what he's saying, it says it all,
20 and Mr. Damle's questioning spoke to that a little
21 bit, but I think that's the kind of situation
22 where VHS is no longer available. Now, if VHS had
23 TPMs on it, we wouldn't be able to come here and
24 say we need to be able to -- you know, the reason
25 that we need to be able to circumvent VHS is

1 because distributors don't want it or whatever, in
2 that situation -- it would be because of the --
3 what I'm saying is that if VHS, for example, had
4 TPMs on it, we wouldn't be able to come in here
5 and say, "Well, we need to be able to circumvent
6 the TPMs on VHS because --," and the reason we
7 wouldn't be able to say that is because VHS went
8 away for some other reason unrelated to the TPMs.

9 But there is a direct relationship in
10 our view here between TPMs and the inability to
11 get this in the market and all of the adverse
12 effects. And so I think that's really a
13 misinterpretation of what the House Manager's
14 Report said anyway and I encourage you not to take
15 that interpretation because I think it's specious.

16 MS. CHARLESWORTH: Well, I think Mr.
17 Williams -- well, I can let him respond for
18 himself, but I think he -- why don't you respond
19 just briefly? Because I heard you sort of taking a
20 softer approach to that.

21 MR. WILLIAMS: Sure. I think the Report
22 speaks for itself. You have relied on it in the
23 past, as you said. It can provide guidance. I'm
24 not saying it's the only word on the issue, but it
25 does provide a pretty clear statement about these

1 types of issues. So I don't think it's a specious
2 argument at all. There is certainly a basis to
3 look at the legislative history, and you've done
4 that, and I would encourage you to continue doing
5 that.

6 I failed earlier to give the actual
7 volume citation to the Society reprint, so I'll
8 give you that. It's Volume 46, Number 4, Summer
9 of 1999. And as Blake mentioned, it was published
10 after the statute passed, however, the statute
11 passed on August 4, 1998, and this report came out
12 September 1998, so virtually simultaneous. And as
13 you know, the history of this proceeding during
14 the development of the statute, it changed
15 significantly throughout the process, so the idea
16 that a report would be published at the conclusion
17 that would try to explain some of those changes I
18 don't think is unusual or out of the ordinary and
19 doesn't undermine its value as a resource.

20 Thank you.

21 MS. CHARLESWORTH: Okay. I think we'll
22 go to -- should we -- okay. Professor --

23 Mr. Wolfe, do you yield to Professor
24 Reid or do you want to go first?

25 MR. WOLFE: Yeah. My comments are

1 circling back to film analysis, so I'm happy to
2 yield to this discussion.

3 MR. REID: I will just make a 10-second
4 reply to that, which is that none of the language
5 that Mr. Williams has cited from the Manager's
6 Report appears in the text of Section 1201, and
7 that's a clear manifestation of Congress's intent
8 to include what is in the statute and not what is
9 in the Manager's Report, and to the extent that
10 the Office is importing limitations from the
11 Manager's Report that are not in the statute,
12 that's an impermissible reading of the statute,
13 and again we want to preserve our objection.

14 MS. CHARLESWORTH: Okay. I mean, you
15 have preserved your objection, but the Office has
16 looked at the legislative history and definitely
17 relies on it in some areas for guidance, and I
18 think you're aware of that, and has for a long
19 time.

20 Mr. Wolfe.

21 MR. WOLFE: Very briefly, to circle back
22 to the idea of the film analysis limitation, Mr.
23 Williams made -- argued in favor of maintaining it
24 under the impression that it covers all or at
25 least most of the universe of possible uses that

1 we've discussed.

2 I want to raise just one quick example
3 of ways in which film can play into particularly
4 scholarship, but other works, that is incredibly
5 significant, important, paradigmatic fair use, but
6 is absolutely I think outside the realms of film
7 analysis. There is a clear trend in scholarly
8 communications to focus on the reproducibility of
9 experimental results and to do so by both
10 providing experimentation documentation and tools
11 and insofar as they're available, data, et cetera.
12 The psychological literature is replete with
13 studies that are based on or require film clips in
14 their production.

15 Now, with regards to online publications
16 of these kinds of papers and documents and
17 journals, including the clip via YouTube or
18 something like that might be acceptable, but as
19 we're moving more and more towards digital
20 publishing, being able to point to what you use in
21 your experiment, not as film analysis, but as a
22 fact of your study and how it was done and
23 performed is absolutely essential and falls within
24 the bounds.

25 Thank you.

1 MS. CHARLESWORTH: Okay. Well, we've
2 run a little bit over with this panel. I want to
3 just make sure my colleagues don't have any
4 further questions.

5 Ms. Smith?

6 MS. SMITH: I'll make this quick.
7 First, Professor Reid, you mentioned that some of
8 the uses of screen capture require buying a new
9 computer potentially, but isn't it true that you
10 would also need to switch to a PC if you were
11 going to use a Blu-ray?

12 MR. REID: I'm probably not the best
13 person to speak to this. I believe you can buy an
14 external Blu-ray drive for a Mac and access it
15 that way. I see some folks chiming in on the rest
16 --

17 MS. SMITH: Mr. Turnbull?

18 MR. TURNBULL: There are no licensed
19 players for a Mac.

20 MS. SMITH: Okay. Thanks.

21 And my next question is for Ms. Buster.
22 I'm just wondering, because I think it may be the
23 case that VUDU makes HD or HDX copies of Shawshank
24 Redemption or The King's Speech. I'm wondering if
25 you have explored using that for your projects.

1 It seems like it may be a good alternative, or if
2 not, you know, explaining why it may not be.

3 MS. BUSTER: No, I haven't explored it.

4 MS. SMITH: If you could use the
5 microphone.

6 MS. BUSTER: No, I haven't explored it.
7 I'm interested. I'm actually learning a lot about
8 these workarounds. I was actually just working
9 within the parameters of what I thought were the
10 legal requirements for fair use and exemption.

11 And I'm interested. I've learned a lot. But it
12 would be a hardship for me to go and buy and work
13 with other -- you know, with a Windows computer
14 and work back and forth. I mean, I can work on
15 those issues and try to make that work.

16 MS. SMITH: Well, again, if you needed -
17 - if you can't use Blu-ray on an Apple anyways, it
18 seems like you need to be in the Windows
19 environment, so I think for a relatively nominal
20 fee, you might be able to download these movies
21 and -- you know, the existing exemption, achieve
22 what you're looking to do.

23 MS. BUSTER: Well, didn't -- I'm not
24 sure who said this, but I think it's the second
25 man over there who said that, you know, once you

1 pull the video in any computer, you can exchange
2 it from one to the other. Is that right?

3 MS. CHARLESWORTH: Mr. Taylor?

4 MR. TAYLOR: light's on.

5 MS. CHARLESWORTH: Oh, I'll turn --
6 well.

7 MR. TAYLOR: Okay. My comment was that
8 you could switch between environments and we
9 regularly switched between environments when we
10 were doing this. So the fact that other people I
11 was working with were using Macs and I was using a
12 PC did not pose a hurdle for us to work with each
13 other on the clips.

14 MS. CHARLESWORTH: Okay. We're having a
15 problem, a difficulty, of wrapping this up, but I
16 will allow very brief additional comments.

17 And, Ms. Smith, did you have any other
18 questions before we get to those?

19 MS. SMITH: No, I think Mr. Lerner
20 wanted to respond to my question, but that was it.

21 MR. LERNER: I can actually speak to Ms.
22 Smith's question very directly and very, very
23 quickly, which is I just bought an external Blu-
24 ray player for my Mac recently, and it plays Blu-
25 rays. And so I wasn't aware, I think that that's

1 routinely done.

2 MS. CHARLESWORTH: Okay. I think, Mr.
3 Turnbull.

4 MR. TURNBULL: That may be possible.
5 What I said was that there are no licensed
6 players, and, you know, and that was a choice made
7 by Apple, not by AACCS.

8 MS. CHARLESWORTH: Okay.

9 MS. SMITH: I mean, that was my first
10 question, but the second question is to whether or
11 not you could access this content in a non-screen-
12 captured, you know, 1080p version to online
13 digital. Did you have something to respond to
14 that?

15 MS. CHARLESWORTH: No.

16 MR. LERNER: I'm not sure I understand
17 the question.

18 MS. SMITH: I mean, you use HD
19 downloading or HDX downloading to access the films
20 that Ms. Buster wishes to discuss?

21 MR. LERNER: That may be possible, but
22 one of the issues is that that's a very limited
23 catalog compared to what's out there, and so I
24 don't know if Shawshank and the other films that
25 she wants to use are available online, but when

1 you think about the thousands and thousands of
2 people that want to use the exemption, there is a
3 very strong likelihood that that's not going to
4 cover all of the HD content that people want to
5 access. That has been made available via Blu-ray.

6 MS. SMITH: Okay, but it may work for
7 Ms. Buster.

8 MR. LERNER: It may or may not. I don't
9 know.

10 MS. BUSTER: What I would have to
11 examine is, how easy is it to cut the clips
12 precisely in order to get to the fair use
13 exemption? And that would be the next step of
14 questioning.

15 MS. SMITH: Okay. Thank you.

16 MS. CHARLESWORTH: Okay. Well, thank
17 you. Yet another very stimulating discussion. And
18 we did run over a little bit. I'm thinking we
19 should start our next panel, Proposed Class 26,
20 maybe at 11:25? Does that --?

21 UNIDENTIFIED MALE SPEAKER: A 5-minute
22 break?

23 MS. CHARLESWORTH: Oh, I'm sorry, we ran
24 way over. Okay. 11:30. We'll take a brief break
25 and come back for Proposed Class 26. Thank you

1 very much.

2 (Break.) Proposed Class 26: Software--
3 3D Printers

4 MS. CHARLESWORTH: Could everyone take
5 their seats? We gave you a slightly longer break
6 because we've been sitting a long time, but we
7 certainly do want to get to our 3D Printer class.
8 Once, again, we have some new faces, which is --
9 all new faces on our panel. Oh, no, no, Sherwin,
10 yes. All new faces for D.C.

11 I'm Jacqueline Charlesworth. Welcome to
12 the Section 1201 Rulemaking Proceeding, the Sixth
13 Triennial Rulemaking Proceeding. And I and my
14 colleagues will be presiding over the hearing
15 today. I'm glad to see there is more of us than
16 you. We'll probably have a lot of questions, and
17 we're grateful that you'll be here to answer them.

18 Just really quickly, if my colleagues
19 could introduce themselves for the record.

20 MS. CHOE: Michelle Choe, Ringer Fellow.

21 MS. SMITH: Regan Smith, Assistant
22 General Counsel.

23 MR. DAMLE: I'm Sy Damle. I'm Deputy
24 General Counsel.

25 MR. RUWE: Steve Ruwe, Assistant General

1 Counsel.

2 MR. RILEY: John Riley, Attorney-Advisor.

3 MR. CHENEY: Stacy Cheney, Senior

4 Attorney at NTIA, U.S. Department of Commerce.

5 MS. CHARLESWORTH: Okay. And the goal
6 of the hearing is really to explore areas of the
7 record that aren't particularly clear, areas where
8 there is disagreement between the parties, and
9 sometimes we'll be asking about technical issues
10 and so forth, so it will I'm sure be an engaging
11 discussion.

12 The format we've been following is after
13 you guys introduce yourself, we'll sort of go down
14 the line starting with Sherwin and asking that you
15 make brief opening remarks, and then sometimes we
16 interject questions, and sometimes the remarks
17 become longer than brief, but that is okay, and we
18 don't have that many panelists today, so we look
19 forward to exploring the issues. We try not to
20 talk over one another. There is another sort of
21 technological piece here, which is you can only
22 have four mics on at a time, so when you're done
23 speaking, if you could turn your mic off, that
24 would be helpful. We have a court reporter taking
25 down what you say today. And I think that with

1 that introduction, I'm going to ask you just
2 quickly to again introduce yourself and then we'll
3 go back to Sherwin.

4 MR. SIY: Sherwin Siy, Public Knowledge.

5 MR. WEINBERG: Michael Weinberg,
6 unaffiliated.

7 MS. CHARLESWORTH: Okay. Do you want to
8 --

9 MR. WEINBERG: I can explain that.
10 Yeah, is that easier?

11 MS. CHARLESWORTH: Yeah. And I've asked
12 if you're not representing an organization, can
13 you explain what interest you represent or have in
14 the proceeding?

15 MR. WEINBERG: Sure. So when this
16 proceeding began, I was a Vice President at Public
17 Knowledge, and so I drafted the initial petition
18 and the initial comments. I'm not longer at
19 Public Knowledge, I'm now at a company called
20 Shapeways, but I'm here in my personal capacity.
21 I've been working for the last 5 years or so on 3D
22 printing policy issues, and it's a personal
23 interest of mine, and so I'm here I guess as a 3D
24 printing advocate but not affiliated with any
25 company or organization specifically.

1 MS. CHARLESWORTH: And you're, I would
2 take it, supporting the proposed exemption?

3 MR. WEINBERG: Yes.

4 MS. CHARLESWORTH: Okay.

5 MR. CAREY: And Pat Carey from
6 Stratasys.

7 MS. CHARLESWORTH: Okay. And thank you
8 again for being here.

9 Mr. Siy, do you want to provide your
10 opening remarks?

11 MR. SIY: Sure. And I'm sure that we'll
12 get into a lot of things in the back-and-forth in
13 the question-and-answer. But the thing that I
14 want to emphasize in this as we look at this
15 particular petition and this particular class is
16 to be specific about what the copyrighted work is
17 at issue. That's the software embedded within the
18 printer, it's not anything produced by the
19 printers, it's not even necessarily -- we can
20 discuss the extent to which it's software embedded
21 on the chip, but I think that with -- in the
22 intervening years since the 2003 rulemaking when
23 printers, when 2D printers, came up, the
24 resolution of the Lexmark decision has sort of
25 moved that a bit more out of the arena of the

1 discussion here.

2 I think that also the extent to which
3 consumers can face an actual adverse effect in
4 this, you know, Stratasy's is quite clear about how
5 they view their ability to lock TPMs to particular
6 printers can benefit them, and I think that their
7 incentives in doing that are clear and therefore
8 their incentives in order to continue to do this,
9 to use the exemption in a manner that would
10 restrict usage and therefore have an adverse
11 effect on consumers, is clear.

12 MS. CHARLESWORTH: Okay. Tell me more
13 about the software, as you understand it, that's
14 at issue here.

15 MR. SIY: So we are concerned about
16 whether or not -- so the question is whether or
17 not accessing the software contained within the 3D
18 printer itself, which would likely be a
19 copyrighted work in many, if not most, cases,
20 would constitute access under Section 1201(a).

21 MS. CHARLESWORTH: Okay. So, I mean, I
22 don't know much about the technology of 3D
23 printers, but reading through some of the
24 submissions, it seemed that there is sort of two
25 components here that may be at issue. One is sort

1 of the chip on the cartridge that then locks into
2 the software on the machine, and the other is the
3 software on the machine that's other than what's
4 on the chip. Do you agree with that
5 characterization?

6 MR. SIY: That's right.

7 MS. CHARLESWORTH: And how does your
8 exemption -- I mean, do you want to circumvent the
9 chip, do you want to circumvent the software on
10 the machine, or both?

11 MR. SIY: So I think ultimately what we
12 want to be able to do is to use a chip that was
13 not created by the original manufacturer or to use
14 feedstock attached to a chip in a cartridge where
15 the feedstock was not created by the original
16 manufacturer with that 3D printer.

17 So both programs are involved, however,
18 I believe that the copyrighted work at issue would
19 be the one in the printer.

20 MS. CHARLESWORTH: Okay. And so --

21 MR. SIY: And this is the distinction
22 drawn in the Lexmark case in the Sixth Circuit.

23 MS. CHARLESWORTH: Right. And so what's
24 the -- can you generally describe what the nature
25 of the circumvention is? How do you make the

1 different cartridge work with the software in the
2 printer?

3 MR. SIY: So there could be a number of
4 ways of doing that. One of those would be to make
5 a copy of the data on the software on the chip on
6 the smaller component. Now, that would interface
7 with the computer program on the printer, and in
8 that case, the question of accessing the work is
9 whether or not accessing by using the printer,
10 merely using the printer, and creating any
11 potential RAM copies along the way, whether that
12 creates the -- triggers 1201(a).

13 MS. CHARLESWORTH: Okay. So I'm just --
14 and again forgive my naivete.

15 MR. SIY: Sorry. Oh, yeah --

16 MS. CHARLESWORTH: No, no, no. So if
17 you have a chip, one of the things is to basically
18 provide a substitute chip? Is that what you're
19 saying?

20 MR. SIY: Yes.

21 MS. CHARLESWORTH: You said something, I
22 think you said copy the chip.

23 MR. SIY: Yes. You can provide a
24 substitute chip, copy the instructions on it. You
25 could also attempt to reuse the chip and modify an

1 existing one and use that and refill a cartridge.

2 MS. CHARLESWORTH: And in copying the
3 software, are you saying there is circumvention
4 involved? On the chip we're talking about now.

5 MR. SIY: This is the point in which I
6 don't think that this is the particular
7 circumvention we're discussing because I think
8 that if there is any circumvention, it's likely to
9 access a non- copyrightable, non-copyrighted work,
10 non-copyrighted program.

11 MS. CHARLESWORTH: Well, that's --

12 MR. SIY: To the extent that it's
13 necessary to do that, I think that that would also
14 be -- that should be permissible.

15 MS. CHARLESWORTH: Okay. Setting aside
16 whether the program on the chip is protectable,
17 like I think you're making an argument it's not,
18 is there circumvention involved in accessing that
19 program? And what is it if there is?

20 MR. SIY: That would vary depending upon
21 the nature of the system.

22 MS. CHARLESWORTH: I mean, do you have
23 any specific -- I mean, but is there any --

24 MR. SIY: No, I do not have a specific
25 model in mind with that discussion.

1 MS. CHARLESWORTH: Okay. But, I mean,
2 what's the nature of circumventing a chip? I
3 mean, what kind of TPM is on a chip?

4 MR. SIY: Well, the TPM is protecting
5 the interface between the chip and the printer
6 itself.

7 MS. CHARLESWORTH: Well, there's a TPM
8 on the -- so I understand there's a TPM perhaps on
9 the software. I guess some of the submissions
10 suggest there are a lot of printers that don't
11 have that, but in some cases there's a TPM on the
12 software that's in the printer. But if you're
13 doing stuff to the chip, that's the -- I'm just
14 trying to understand whether there is
15 circumvention, and maybe we can ask the other
16 panelists that question as well, because we're
17 trying to sort -- I'm trying to sort out what the
18 exemption actually would cover here.

19 MR. SIY: Sure. And I think, you know,
20 by analogy, with the Lexmark case, you know, it
21 could or it could not. I think in many cases
22 there is no overt TPM, it's merely a question of
23 accessing the chip itself and being able to read
24 data off of it. In other cases, there is no
25 reason that somebody wouldn't be able to,

1 depending on other variables, whether or not they
2 were willing to invest in that to prevent people
3 from accessing that.

4 MS. CHARLESWORTH: Okay. So on the
5 chip, you're suggesting there might be an asserted
6 copyright issue --

7 MR. SIY: Yes.

8 MS. CHARLESWORTH: -- but not
9 necessarily a circumvention issue.

10 MR. SIY: Yes.

11 MS. CHARLESWORTH: And you're not
12 pointing out any specific examples of chips that
13 need to be circumvented in this context.

14 MR. SIY: That's correct.

15 MS. CHARLESWORTH: Okay. Now let's turn
16 to the software on the machine. So can you
17 explain the nature of the circumvention there?

18 MR. SIY: So the circumvention in this
19 case would be circumventing the measures that
20 require a manufacturer-created chip in the printer
21 in order to operate.

22 MR. WEINBERG: In the cartridge.

23 MR. SIY: Yeah.

24 MS. CHARLESWORTH: Okay.

25 MR. DAMLE: So let me just see if can --

1 maybe I could see if I can help clarify this.

2 MS. CHARLESWORTH: Maybe you can ask
3 better questions.

4 MR. DAMLE: No, I'm not --

5 MS. CHARLESWORTH: He's geek here than I
6 am, so --

7 MR. DAMLE: So is the idea that the TPM
8 really is the -- it's like a lock and key, that
9 the chip is the key and there's like a lock on the
10 software. So the TPM is really making sure that
11 the two match up.

12 MR. SIY: I think the analogy is a
13 little bit inapposite because in that case it's
14 really an authentication mechanism more than an
15 access granting mechanism, but, yeah, I mean, I
16 think the idea is the TPM is --

17 MR. DAMLE: Is a combination of the two.

18 MR. SIY: The TPM controls the
19 combination of the two, that's what it's
20 restricting, yes.

21 MR. DAMLE: And so are you doing
22 anything to the software itself? Are you changing
23 anything in the software itself when you are
24 engaging in the circumvention to put in new
25 feedstock or non- manufacturer approved feedstock?

1 MR. SIY: I think that can vary, but
2 depending upon what the feedstock is that you're
3 using. For instance, if you're trying to use a
4 different sort of material, you might want to
5 change some of the variables in the program
6 itself.

7 MS. CHARLESWORTH: And do you know how
8 extensive those changes would need to be?

9 MR. SIY: It would vary depending upon
10 what material you wanted to use, it would depend
11 upon the model of the machine, and it would depend
12 upon a wide variety of factors.

13 MR. WEINBERG: If I could just hop in
14 for one second, I think that part of the issue
15 here with the specificity of your questions and
16 the kind of general nature of the answers is there
17 are a number of ways -- once you move past a
18 fairly abstract level, which is you have a
19 feedstock container, let's say, and a machine
20 that's verifying that the feedstock container came
21 from the manufacturer or an approved
22 subcontractor, there are a number of different
23 ways technically that you could implement that
24 verification process. You could make a chip on
25 the feedstock container dumb, in which case, it

1 would have very little information and there
2 probably -- there may or may not be copyright
3 protectable works on it, but it would contain not
4 a lot of information and most of the action would
5 be going on, on the software side, where it is
6 looking to see what's in the container on the
7 chip. You could also structure the system where
8 there is much more information in the feedstock
9 container chip, and so it's a more, instead of a
10 kind of look- and-see structure, the two pieces
11 talk to each other in a much more intensive way.
12 And depending on how you implement it, a specific
13 answer to how will it work will vary.

14 I mean, the key thing is that, yeah,
15 you're at a level of traction up. You're in a
16 situation where at a minimum there is software on
17 the printer that is waiting to be used until it
18 can verify that it has approved input, and that
19 software is likely protected by copyright, and so
20 the only way you can access and interface with
21 that is once you have done something to convince
22 it that you have an approved feedstock, and how
23 that is implemented on a technical level can vary
24 from machine to machine, manufacturer to
25 manufacturer, and a number of different ways. I

1 don't know if that's at all helpful.

2 MS. CHARLESWORTH: Yeah. So, I mean,
3 just to follow up because this is sort of a
4 different angle on this, is the chip then --
5 you're saying the TPM is the fact that you need
6 the chip to access the software and make the
7 printer run? What's the -- explain exactly what
8 the TPM is in your scenario.

9 MR. SIY: I think that would be the
10 system in its entirety that requires it and the
11 portions of that system that require the presence
12 of that chip. So whether or not that code is
13 located on the chip or whether it's in -- probably
14 in the more likely case, that code is located on
15 the printer. That system, that software code, is
16 what constitutes the TPM, that specific part of it
17 that requests the authentication.

18 MS. CHARLESWORTH: Okay. And that --

19 MR. WEINBERG: And if it's easier for
20 the purposes of conversation to describe a system
21 that is a dumb chip on a cartridge and a more
22 sophisticated system on the printer, we're happy
23 to have -- or I'm happy to have the conversation
24 kind of at that level, but I want to make sure
25 that it's clear that we aren't restricting our

1 request to that, but it may be easier from a
2 conversational standpoint to use that as our kind
3 of paradigm system in the absence of a specific
4 system that we're asking about. But I'll defer,
5 but --

6 MS. CHARLESWORTH: No, no, no. I'm not
7 trying to get you to exclude anything here, I just
8 am trying to clarify. So when you say a dumb chip,
9 what is that? I mean, what do you mean by that?

10 MR. WEINBERG: Yeah, and so you were
11 talking about a chip that doesn't contain a lot of
12 information. It may be something as simple as an
13 RFID chip or a chip that just has a serial number
14 in it and doesn't have any sort of microprocessor
15 or is doing any work, it just basically has
16 information that it is presenting to be read --

17 MS. CHARLESWORTH: Like a key kind of
18 thing.

19 MR. WEINBERG: Yeah, like a key card, if
20 you have a swipe card to get into the building.
21 Right. Your swipe card has a chip in it that has
22 information. It's not doing any processing, but
23 without your swipe card to get into the building,
24 the TPM that is the locks on the building won't
25 work. You could see a more sophisticated system

1 that worked with a smartphone where the smartphone
2 and the building actually did an exchange and a
3 back-and-forth communication, the result would
4 still be the same. You can't get into the building
5 unless you have the key card that will open the
6 door, but the level of technical sophistication
7 embedded in the key card versus phone is
8 different.

9 MS. CHARLESWORTH: Okay. I think that's
10 helpful. Thank you.

11 Mr. Siy, did you have anything you
12 wanted to add at this point?

13 MR. SIY: Not at this point. Thank you.

14 MS. CHARLESWORTH: And, Mr. Weinberg,
15 you have obviously helped us already, but why
16 don't you give us your further thoughts on this
17 proposed exemption?

18 MR. WEINBERG: Sure. And would it be --
19 I mean, there is a lot of information in the
20 record. Would it be at all helpful to give a kind
21 of 30-second here's how this 3D printing
22 technology works, or do you feel comfortable with
23 it and we can --

24 MS. CHARLESWORTH: I think we're fairly
25 comfortable.

1 MR. WEINBERG: Okay.

2 MS. CHARLESWORTH: We know there are
3 different versions of the technology, so -- I
4 mean, do you guys, would it be helpful down there?
5 Do you know? Mr. Cheney? We're a little --

6 MR. WEINBERG: You're putting him on the
7 spot.

8 (Laughter.)

9 MS. CHARLESWORTH: Well, if it would be
10 helpful to -- at the Copyright Office, we've
11 examined it a little bit over here, but --

12 MR. CHENEY: As have we. The one
13 question I would have in sort of the scope of this
14 is, is this intended primarily for consumer use or
15 is it at the manufacturing level that that's also
16 you're intending this to be expanded to include
17 larger 3D printers at perhaps the manufacturing
18 level? Can you explain that just a little bit?

19 MR. WEINBERG: Sure. I think while this
20 was originally motivated by focus on consumer use,
21 I don't think there is any reason to exclude
22 manufacturing or more sophisticated commercial
23 players. And I think it's worth noting that there
24 may be, and in some cases there very likely are,
25 non-copyright-related restrictions on what owners

1 or possessors are doing with these printers.

2 There may be contractual restrictions. There may
3 be warranty restrictions. The focus of this is
4 really about this copyright part of it, but
5 conceptually I don't see any reason why this
6 shouldn't apply across the board.

7 MR. CHENEY: And a further follow-up
8 question if I might. There is a lot at play here
9 where there is sort of 3D modeling and some other
10 things that are involved, and this is not included
11 in that. This only has to do with the feedstock
12 bypass, is essentially sort of a high level way of
13 explaining it. It doesn't include any of the sort
14 of software that includes reading the 3D modeling
15 or any of that kind of stuff. That's all excluded
16 here; right?

17 MR. WEINBERG: That's exactly correct.
18 There is nothing to do with the models going into
19 the machine or the models coming out of the
20 machine. It has nothing to do, even really with
21 the software that is running the machine except to
22 the extent it's necessary to be able to use the
23 feedstock of your choice.

24 MR. CHENEY: And does that -- breaking
25 the TPM for the feedstock, does it affect the

1 machine's ability to read and process that 3D
2 modeling at all, and when obviously done
3 correctly, does it have any effect on that or does
4 it change sort of that input?

5 MR. WEINBERG: I think it depends on the
6 machine. I don't think there is a technical
7 reason why it has to be. The process that reads
8 and verifies the input does not have to be linked,
9 to my knowledge, to the process that is used to
10 slice the model. So when you have a 3-dimensional
11 model, one of the things that the machine will do
12 is it will slice the model horizontally into a
13 bunch of thin layers and then establish a path
14 within each layer that the machine should travel
15 to be creating it physically, and while the path
16 is determined by the material and the type of
17 material, the path isn't necessarily determined by
18 the origin of that material. And so while it may
19 be on some machine, it's implemented in a way that
20 they are tied, there is nothing that sort of
21 inherently ties them together.

22 MR. CAREY: I would dispute that, well,
23 at least to clarify that the output of the machine
24 is very dependent upon the material and the
25 authenticity of the material, and the knowledge of

1 the input is not, but the output, which is the
2 desired product, is highly dependent on that.

3 MR. WEINBERG: Yeah, absolutely.

4 MR. SIY: Though I would say the output
5 depends on that only insofar as the quality or
6 what ends up, you know, what product you end up
7 with, not necessarily any question of how the
8 software inside or any copyrighted material is
9 affected.

10 MS. CHARLESWORTH: Okay. And this is
11 just -- might there be different TPMs involved,
12 you know, protecting the basic software versus the
13 modeling software, just to pick up on Mr. Cheney's
14 question? Or once you break with the one TPM, you
15 have access to everything?

16 MR. WEINBERG: There is no technical
17 reason why you would have to be a one TPM for all,
18 and so how a manufacturer decides to implement it
19 is entirely up to them, but there is no reason why
20 you couldn't have a TPM that simply governs
21 feedstock source in another one.

22 MS. CHARLESWORTH: Right, but based on
23 your knowledge of the printers out there today, I
24
25 mean, are there multiple TPMs or is it generally
just one where there is a TPM?

1 MR. WEINBERG: I actually don't know
2 mostly because in my experience, no one is
3 particularly interested in making unauthorized
4 copies of the software that runs these machines.
5 It's not very useful absent the machine, and so
6 when people are worrying about these sorts of
7 TPMs, the reason they're worrying about it is
8 because they want to do something, they want to
9 use unapproved feedstock. There is not as much
10 discussion about wanting to access the software so
11 you could copy it or something. So I don't know,
12 but part of the reason I don't know is because
13 there is not as much interest in doing that sort
14 of thing in my experience.

15 MS. CHARLESWORTH: Do you need to copy
16 the software in order to make the modification
17 required for changing your feedstock?

18 MR. WEINBERG: It depends on the
19 software implementation.

20 MS. CHARLESWORTH: Okay. So it seems
21 there is a lot of variation.

22 MR. WEINBERG: Absolutely.

23 MS. CHARLESWORTH: Okay. And this then
24
25 leads into my next set of questions for you guys,

1 which is, what is the legal basis for your
2 exemption? It wasn't discussed at length in your
3 papers. I mean, what are you claiming here as the
4 legal basis to potentially copy and alter the
5 machine's software?

6 MR. WEINBERG: I think
7 fundamentally we're talking about two core harms
8 that result in this sort of blocking, and I think
9 the harms are -- both of the harms flow from I
10 would say a cloud of ambiguity as to whether or
11 not this type of behavior even triggers a 1201
12 analysis.

13 MS. CHARLESWORTH: Right. I think I'm
14 sort of asking a slightly different --

15 MR. WEINBERG: Yeah, sorry. Okay.

16 MS. CHARLESWORTH: What is the non-
17 infringing use here? Like what are you claiming
18 as the reason why this is a non-
19 infringing use of the software? You're sort of
20 making the 1201 argument --

21 MR. WEINBERG: Sure. Yeah, yeah, yeah.

22 MS. CHARLESWORTH: -- but I want to --
23 you know, sometimes people claim 117, fair use,
24 there's a menu of items, I know, but I'm curious
25 to know more about the basis for the claim that

1 it's not infringing.

2 MR. WEINBERG: Yeah, and I think that --
3 and -- Sherwin, do you want to --

4 MR. SIY: Sure. Yeah. So I think that
5 there is -- you know, in addressing that question,
6 we will want to figure out first of all what
7 Section 106 uses are involved in this process
8 because any of the other ways in which the
9 software is being used that are not a reproduction
10 or distribution, public performance, and so on.

11 MS. CHARLESWORTH: Well --

12 MR. SIY: And so the reproductions that
13 might be at issue would be RAM copies made simply
14 in the utilization of the 3D printer itself or any
15 modifications necessary in order to utilize a 3D
16 printer with the new feedstock, and both of these
17 fall within Section 117.

18 MS. CHARLESWORTH: Well, so you're
19 saying you're claiming a 117 exemption. What
20 about the derivative? I mean, if you're altering
21 the software, you might be creating a derivative
22 work.

23 MR. SIY: That's also covered within
24 117.

25 MS. CHARLESWORTH: And walk me through

1 me why 117 applies.

2 MR. SIY: Well, Section 117 allows the
3 making of any copies or adaptations created as an
4 essential step in the utilization of the computer
5 program in conjunction with a machine that's used
6 in no other manner. So any copies or adaptations
7 that are essential to using that embedded software
8 with that machine, and that's the purpose for
9 which this is being put. Those copies and
10 adaptations aren't being made in order to take the
11 software to a different machine, they're not being
12 made in order to distribute that on the open
13 market, they're being used for the use of that
14 machine in which they're embedded.

15 MS. CHARLESWORTH: Okay. Then that
16 leads to the question of, who owns the computer
17 program in the machine?

18 MR. SIY: I think in the vast majority
19 of cases, it will be owned by the person who owns
20 the machine.

21 MS. CHARLESWORTH: And what is the
22 evidentiary -- I mean, why do you say that, and
23 what evidence is there in the record about that?

24 MR. SIY: I think it's entirely possible
25 for the Office to recognize to the extent that

1 that software is owned by the hardware owner, that
2 Section 117 should apply. I think that also in
3 those cases where there might be contracts
4 governing the use of the software, those
5 contracts, as in MDY, were ruled to be covenants
6 when there's a question of whether or not the use
7 of the software is licensed or not.

8 MS. CHARLESWORTH: And you're talking
9 about the two competing multifactor tests in terms
10 of whether you own software or it's under license,
11 the owner and -- is that what you're talking
12 about?

13 MR. SIY: Yes.

14 MS. CHARLESWORTH: So you're saying --
15 is it your testimony that in some cases you
16 believe -- it sounds like you're saying in some
17 cases you believe that the owner of the hardware
18 owns the software. I mean, do you know when you
19 get -- I'm sorry.

20 MR. SIY: Oh, no, no. Sorry.

21 MS. CHARLESWORTH: No, I was just going
22 to ask you whether if I go to wherever I
23 would go to buy a 3D
24 printer, when I open the package, am I going to
25 see something in there that says, "Our software is

1 ours, it's licensed to you," or is there nothing
2 in there to -- I mean, do you know any -- do you
3 have any information about sort of the typical
4 practices of manufacturers in this regard?

5 MR. SIY: Sure. Regardless of the
6 language of that -- of any license that would be
7 included, that license will allow you to use the
8 printer.

9 MS. CHARLESWORTH: Right, but my
10 question is different. Do they even
11 claim let's talk
12 about the consumer type 3D printers, are they even
13 claiming that the software is under a license, or
14 is it just silent on that issue?

15 MR. SIY: And I'm sorry to fall back on
16 this, but it will vary from manufacturer to
17 manufacturer. Some of them will be silent, some
18 of them might explicitly disclaim it, some of them
19 might actually might claim --

20 MS. CHARLESWORTH: But have you actually
21 looked at any of -- I mean, have you seen any of
22 the -- I'm asking for direct evidence here, like I
23 looked at a printer --

24 MR. SIY: So, no, I do not have direct
25 evidence.

1 MS. CHARLESWORTH: So you're just sort
2 of -- and I don't mean this in a mean way --

3 MR. SIY: No --

4 MS. CHARLESWORTH: -- you're kind of
5 speculating about what's in the box in terms of --
6 or what the manufacturers are claiming in terms of
7 whether it's a license.

8 MR. SIY: Yes, because this exemption is
9 meant to apply across all of those potential
10 cases.

11 MS. CHARLESWORTH: I understand that,
12 but I just want to make -- in some other classes
13 we look -- we see examples of what -- you know,
14 the manufacturers' practices. We'll see purported
15 licenses, we'll have evidence that there is no --
16 you know, so that's why I'm asking the question,
17 to try and get a sense of where the manufacturers
18 --

19 MR. SIY: Sure, and --

20 MS. CHARLESWORTH: -- and I know we'll
21 get to Mr. Carey clearly is going to have a point
22 of view on this, but I'm just trying to get your
23 thoughts and your sense of the marketplace on that
24 issue.

25 MR. SIY: Sure.

1 MS. CHARLESWORTH: So you think it could
2 vary, but you don't really have any direct
3 information to share.

4 MR. SIY: No. I mean, I am fairly
5 confident that all three of those cases will be
6 fulfilled in the market, and I think --

7 MS. CHARLESWORTH: Mr. Weinberg, do you
8 have anything to add?

9 MR. WEINBERG: I would just say that
10 especially in the consumer market, while I do not
11 have a study of the licenses that are operated,
12 right now there are probably 70 desktop 3D printer
13 companies that are of, I think it's fair to say,
14 highly variable legal sophistication, and so it
15 would be highly surprising if you did not see
16 almost every version of copyright license theory
17 applied to software in this space, including and
18 probably the majority of which being completely
19 silent on the matter.

20 MS. CHARLESWORTH: Have you seen any
21 purported licenses in this for 3D printers?

22 MR. WEINBERG: I have not. I have not
23 certainly in the context of this proceeding.

24 MS. CHARLESWORTH: And are you aware of
25 any 3D printers that are sold where you could say

1 for sure they're sold without a claimed license?

2 MR. WEINBERG: I can -- there are
3 printers that are sold in an explicitly open way,
4 so their license is a open license, but not to the
5 degree that you're talking about.

6 MS. CHARLESWORTH: Okay.

7 MR. RILEY: There seem to be
8 relatively fewer 3D printers that use these TPMs.
9 Have you looked at those for the licenses?

10 MR. WEINBERG: No.

11 MS. CHARLESWORTH: Okay. I think we'll
12 go on to Mr. Carey, and obviously he is sort of on
13 notice as to what sorts of things we're interested
14 in hearing about, among others.

15 So, Mr. Carey.

16 MR. CAREY: Thank you. I've got some
17 prepared remarks.

18 MS. CHARLESWORTH: Yes. Mm-hmm. Okay.

19 MR. CAREY: So I'll read those. Okay,
20 so good morning. My name is Pat Carey. I am the
21 Vice President for Strategic Accounts at
22 Stratasys, and what that means is I deal with the
23 top 120 manufacturers in the world, so I deal with
24 the high- end companies. If I named all 120, you
25 would probably know who they all are. And my

1 customers are actually doing prototyping and
2 manufacturing of parts.

3 MS. CHARLESWORTH: Okay. So you're not
4 -- are you involved, I mean, at all with sort of
5 consumer, you know, low-end consumer printers as
6 well?

7 MR. CAREY: Yes. Yes. My same
8 customers do buy those, they buy our low-ends,
9 called MakerBot, so we do -- the same customer
10 will buy from the high end to the low end as we go
11 through the design to manufacturing process, so
12 yes.

13 MS. CHARLESWORTH: Okay, so you're
14 familiar with MakerBot. Okay.

15 MR. CAREY: Correct. Correct.

16 MS. CHARLESWORTH: Thank you.

17 MR. WEINBERG: He owns MakerBot.

18 MR. CAREY: Yeah.

19 (Laughter.)

20 MS. CHARLESWORTH: Even better, even
21 better.

22 MR. CAREY: Yes, yes, we own MakerBot.

23 So thank you to the Copyright Office for
24 the time and consideration of this matter. I know
25 that you have opposition as well as the IPO

1 Association opposition to the proposed DMCA
2 exemption for 3D printers to allow non-manufacturer
3 approved feedstock. I will not repeat our arguments
4 this morning.

5 Since this is the first DMCA rulemaking
6 to examine 3D printing, what I want to do is give
7 you a brief introduction to our company,
8 Stratasys, and the 3D printing industry.

9 So Stratasys was founded in 1989 by
10 Scott and Lisa Crump, a husband and wife team from
11 Eden Prairie, Minnesota, where we're still
12 located. Mr. Crump invented and commercialized
13 one of the first rapid prototyping technologies,
14 fused deposition modeling, our trademark, which we
15 call FDM and I'll call FDM in the rest of this.
16 Our FDM printers heat and push plastic filament
17 through an extrusion nozzle and lay down a layer
18 of plastic based on a software file, as we've
19 talked about, that is mathematically sliced and
20 oriented in the build process. Almost all
21 printers go through this same generic process.
22 FDM technology laid the groundwork for the growth
23 of 3D printing by dramatically shortening product
24 development cycles, allowing designers and
25 engineers to make prototypes much faster.

1 The original Crump patents have expired
2 and there are a large number of companies
3 manufacturing 3D printers today using similar
4 technology. The number -- I was in a meeting last
5 week, I heard the number of new 3D printing
6 companies this year is 150.

7 We also offer printers using a second
8 revolutionary technology that we call PolyJet. So
9 we have two core technologies. Our PolyJet
10 printers use inkjet heads to jet and instantly
11 cure tiny droplets of photopolymer. Our software
12 again calculates the placement of photopolymers
13 from a 3D CAD file. We can print three different
14 materials at the same time. Each of these
15 materials may have different properties, including
16 color, opacity, and flexibility.

17 My customers, and Stratasys, in our
18 service bureau business -- so we have a core
19 printer manufacturing business and we also have a
20 service bureau business where we have all
21 technologies and we manufacture parts for
22 customers. We are helping my customers and the
23 industry go to the next revolution, which is
24 direct digital manufacturing, so making of tools
25 and use parts.

1 And the three primary areas that we are
2 focused on is airplanes; cars, automotive;
3 electronics; and medical devices. Those are the
4 areas that my customer set is focused on.

5 I have with me some samples. We made
6 them exhibit numbers. I hopefully won't screw
7 this up. And I brought small ones because I had to
8 put them in my laptop bag.

9 MS. CHARLESWORTH: Okay.

10 MR. CAREY: And I'll briefly go through
11 these. Is that okay?

12 MS. CHARLESWORTH: Yes. And do you know
13 the exhibit numbers?

14 MR. CAREY: Yes.

15 MS. CHARLESWORTH: So if you could
16 reference those, that would be very helpful. And
17 do we get to keep them?

18 MR. CAREY: You do.

19 MS. CHARLESWORTH: That's what I'm told.
20 So there are souvenirs?

21 MR. CAREY: Yeah. Michelle gave me crib
22 notes, yeah. So this is actually -- this was
23 printed on an FDM machine. ABS is the
24 thermoplastic use, and this is actually a full-
25 size engine that we shrunk down. And if you look

1 at it, you can see the extremely fine detail.

2 MS. CHARLESWORTH: Okay. And that would
3 be exhibit --

4 MR. CAREY: That was Exhibit 25.

5 MS. CHARLESWORTH: That was Exhibit 25.

6 MR. CAREY: 25, yeah. Exhibit 26, this
7 is actually again -- I had to shrink down
8 everything -- this is the lid from a drone, engine
9 cover from a drone, and this was printed in ULTEM.
10 So ULTEM is a very high-precision engineering
11 plastic, and this is where the opposition's
12 comments are troubling to my customers. So you
13 may have seen a recent announcement that a large
14 airplane manufacturer is putting 1,000 printed
15 parts on commercial airplanes, it was announced 2
16 weeks ago. It is with this plastic. And we spent
17 millions of dollars and years certifying this
18 plastic to be on a commercial airplane for 25
19 years to get the FAA to approve it. So the highly
20 integrated machine that produces, that takes the
21 material and prints it in an FAA-certified part is
22 extremely important, highly integrated machine,
23 for parts to be on a commercial airplane.

24 MR. RILEY: So, sorry to interrupt, but
25 the people who are making those parts for those

1 machines, are those the airline companies or
2 someone who has a relationship with them? Are
3 they a downstream manufacturer?

4 MR. CAREY: They're down like one to two
5 manufacturers.

6 MR. RILEY: Okay.

7 MR. CAREY: And the airplane -- and the
8 airline company.

9 MS. CHARLESWORTH: And you said your
10 customers were upset. Can you explain the
11 concern?

12 MR. CAREY: When they are putting parts
13 in an automobile or medical device or an airplane,
14 they don't want anybody to be able to get into
15 that integrated system.

16 MS. CHARLESWORTH: Okay. And so they're
17 concerned that --

18 MR. CAREY: They want a reliable part
19 that is exactly what they declared it to be.

20 MS. CHARLESWORTH: Okay. And they think
21 that if people -- I mean, is the suggestion that
22 someone that they're relying on to manufacture
23 parts would violate what I assume would be the
24 terms of the contract and use different --

25 MR. CAREY: Cheaper feedstock.

1 MS. CHARLESWORTH: Feedstock?

2 MR. CAREY: Correct. So these customers
3 are tracing from the feedstock to the end use part
4 that is traceable, and they are liable for keeping
5 that data for years. So as the feedstock goes
6 through the machine, it's influenced as the
7 machine changes it, forms a new product, and it
8 comes out and the part is put on a plane, that is
9 all traced: automotive, medical device,
10 aerospace. It is very important that that
11 integrated system is reliable, no derivative works
12 were created, no other feedstocks were introduced.

13 MS. CHARLESWORTH: Okay. And when you
14 mentioned the FAA, are there specific regulations
15 in place that govern the manufacturer of airline -
16 - airplane parts?

17 MR. CAREY: Yes. And that's --

18 MS. CHARLESWORTH: And where would I
19 find those if I were so inclined?

20 MR. CAREY: All I know -- FAR is all I
21 know. So FAR and FDA. I'm not an expert in that.
22 We have experts in that.

23 MS. CHARLESWORTH: FAR and the --

24 MR. CAREY: FDA does the medical
25 devices. You know, there is a regulation on any

1 material that touches the human body, goes on an
2 airplane, et cetera.

3 MS. CHARLESWORTH: Okay.

4 MR. CAREY: I'm not an expert on that by
5 far.

6 MS. CHARLESWORTH: But are there people
7 in your company who actually study those
8 regulations and --

9 MR. CAREY: Yes.

10 MS. CHARLESWORTH: -- make use of them
11 in designing --

12 MR. CAREY: They help our customers
13 actually certify the material and the part.

14 MS. CHARLESWORTH: Okay.

15 MR. CAREY: So we work with our
16 customers. We spend a considerable amount of money
17 helping our customers certify parts and materials.

18 MS. CHARLESWORTH: Okay. So in other
19 words -- I just want to make sure -- so these
20 would be manufacturing type customers, not people
21 like me, who would buy a MakerBot. This is a more
22 sophisticated type of customer that you have -- is
23 that correct? --

24 MR. CAREY: Correct.

25 MS. CHARLESWORTH: -- who would need to

1 certify something in this way.

2 MR. CAREY: Correct.

3 MS. CHARLESWORTH: And so what they're
4 saying is, "We want to manufacture airplane parts,
5 and, Stratasys, will you help us come in with this
6 process to get our process certified?" Is that
7 correct?

8 MR. CAREY: That's correct.

9 MS. CHARLESWORTH: Okay. Thank you.

10 MR. CHENEY: May I follow up? I'm
11 sorry, Sy. Go ahead.

12 MR. DAMLE: So I just wanted to ask
13 whether, with that example in particular, whether
14 it's possible to test the actual part itself when
15 it comes out to make sure it's used the right
16 material?

17 MR. CAREY: I'm leery of my knowledge.
18 I know they test the part. I don't know if they
19 test the material, but they test the strength, did
20 it come out right?

21 MS. CHARLESWORTH: Who tests it?

22 MR. CAREY: The customer. When they get
23 the part to put on whatever the thing is, they
24 test it. Like they would test any part from any
25 manufacturer. Traditional manufacturing or non-

1 tradition, you know, or additive, they do test the
2 part. Is this the right part? Is it the right
3 size? Does it really fit?

4 MS. CHARLESWORTH: But they don't test
5 every part, right? Or are you saying they do test
6 every part?

7 MR. CAREY: It depends what the part is.

8 MS. CHARLESWORTH: It depends what the
9 part is. Okay. So they may or may not test the
10 individual part before installing it in the
11 airplane, for example.

12 MR. CAREY: Correct.

13 MS. CHARLESWORTH: Okay.

14 MR. CAREY: The last part --

15 MR. CHENEY: Let me ask another question
16 -- I'm sorry -- before you continue. Is part of
17 the fear here is that someone that's not in the
18 normal stream, manufacturing stream, or one of
19 these normal manufacturer that's used to doing
20 this, that goes and goes around the TPM, gets
21 hold of inferior materials, and then tries to put
22 that part into the manufacturing stream and
23 somehow passes it off, is that what the fear is
24 here, is that there is sort of not just a
25 competition issue but that somebody outside of

1 that normal chain inserts an inferior part and
2 that somehow makes it through the process? Is
3 that what the fear is here?

4 MR. CAREY: Correct. That's my
5 customers' fear. So they are getting -- they have
6 multiple tiered suppliers. We have all heard
7 about multiple tiered suppliers supplying
8 counterfeit or cheaper parts, and they fail, and
9 that would affect our brand at Stratasy's, and it
10 would also affect the brand of the manufacturer.

11 MR. CHENEY: And so the fear is that one
12 of these downstream manufacturers, second tier or
13 whatever, that they would somehow break the TPM,
14 install an inferior material into the part, and
15 then it goes up the chain without being tested
16 adequately otherwise.

17 MR. CAREY: Correct. It's falsely
18 represented is what it is.

19 MR. CHENEY: Yeah.

20 MS. CHARLESWORTH: Okay. Mr. Carey,
21 please continue.

22 MR. CAREY: Thank you. The third part
23 is actually a tool. This is from our PolyJet
24 machine.

25 MS. CHARLESWORTH: And this is Exhibit

1 27?

2 MR. CAREY: 27, yes, thank you. And
3 this is a tiny injection mold. So our customers
4 are actually making, manufacturing, tools, and
5 I've actually got a little piece of plastic that
6 they molded in -- not actually in this one, in one
7 that I had to take apart. So this is to represent
8 from PolyJet again this material is a droplet
9 material, not the fused deposition modeling, and
10 customers are creating injection molds. So this
11 becomes a traditional manufacturing tool, it
12 doesn't become an end use part.

13 A lot of what my customers are doing are
14 creating manufacturing tools that again have to be
15 reliable, have to be consistent. They aren't
16 creating end user parts. And my thought is people
17 think about ponies and penguins and cute little
18 Hello Kitty dolls, is what this industry is about,
19 and in our belief, the industrial revolution is
20 not about that, it's about changing the underlying
21 basis of manufacturing, it's not about toys.

22 MS. CHARLESWORTH: Okay. Thank you.

23 MR. CAREY: So I'll keep going with my
24 remarks?

25 MS. CHARLESWORTH: Yes. Mm-hmm.

1 MR. CAREY: Okay. So our printers are
2 fully integrated systems, and I want to emphasize
3 that people apply 2D printing to 3D printing too
4 much. Our machines are very complicated servers.
5 They are not printers. We call them printers.
6 They're servers. They are complicated. They're
7 controlling the filament and also controlling the
8 motion. A CNC machine is a high precision
9 manufacturing machine. We do the same thing a CNC
10 machine does. It's a highly complicated, high-
11 precision engineering tool. These are not
12 printers. I just want to make sure that's clear.
13 We call them 3D printing. Actually, we don't call
14 -- I call it additive manufacturing. It's a
15 manufacturing tool.

16 MS. CHARLESWORTH: Well, although I
17 think you acknowledged you have a range of
18 products, some of which are far more, I assume,
19 sophisticated than the MakerBot.

20 MR. CAREY: Correct. Yes.

21 MS. CHARLESWORTH: But -- okay.

22 MR. CAREY: Correct. But I want to make
23 sure that we're talking -- we're talking about the
24 -- we're not talking about software, we're talking
25 about the operating system here and derivative

1 works.

2 So our systems create high quality parts
3 that have to meet very tight tolerances equivalent
4 to CNC machines. So controlling the feedstock and
5 controlling the slicing is very important. Our
6 systems track lot numbers and enable certification
7 of tracing of parts, which I talked about already.

8 News reports continually emphasize the
9 tremendous promise of 3D printing. Market studies
10 predict a compound annual growth of 29 percent
11 through 2017. Indeed, the latest estimates show
12 that there are now hundreds of manufacturers
13 offering 3D printing systems across the price
14 spectrum. We anticipate that the technology will
15 have a monumental effect on production, shortening
16 the supply chain, and creating new markets for
17 niche and custom products.

18 And I have an interesting statistic
19 here. So inkjet, the same basic technology that's
20 in our PolyJet machine. So inkjet was introduced
21 by Hewlett Packard 30 years ago. As of last year,
22 they've sold 600 million inkjet printers. Our
23 technology was introduced, our FDM technology was
24 introduced, 26 years ago. To date, between
25 PolyJet, FDM, and MakerBot, we've only sold

1 120,000 systems in total, and we've sold more than
2 anybody. So this is a very nascent industry.

3 MS. CHARLESWORTH: Okay. Actually, I
4 have a question. You were discussing your
5 customers, and this is really the same question I
6 asked them. When you sell -- and I would like the
7 answer, if you can, for MakerBot versus maybe a
8 more sophisticated machine that's being sold to a
9 manufacturer, when you sell those machines, how do
10 you handle the software? Is it a license?

11 MR. CAREY: It's a license.

12 MS. CHARLESWORTH: In every case?

13 MR. CAREY: Yes.

14 MS. CHARLESWORTH: With MakerBot?

15 MR. CAREY: Yes.

16 MS. CHARLESWORTH: So is there something
17 in the box of a MakerBot that says,
18 "Congratulations, you have a license for our
19 software"?

20 MR. CAREY: I actually don't know if
21 it's in the box or in a manual, but yes.

22 MS. CHARLESWORTH: Okay, but somewhere
23 you are notified --

24 MR. CAREY: It's clearly licensed
25 software.

1 MS. CHARLESWORTH: And do you provide
2 updates for MakerBot software? Is there an
3 ongoing relationship of some sort?

4 MR. CAREY: Yes, there is an ongoing
5 relationship. In fact, there's a network that
6 people are connected called Thingiverse, and
7 there's a whole community.

8 MR. WEINBERG: Thingiverse doesn't
9 govern the software.

10 MR. CAREY: Correct.

11 MS. CHARLESWORTH: Right. I'm saying
12 like -- let's take the MakerBot example. I buy a
13 MakerBot. Is there ever an occasion when I would
14 be updating my software? First of all, where is
15 the -- and are we talking about the design
16 software or the software that runs the machine? I
17 guess I'm asking a bunch of questions here.

18 MR. CAREY: The design software is
19 separate from what we do. There are CAD vendors
20 that --

21 MS. CHARLESWORTH: Right.

22 MR. CAREY: There are many -- multiple
23 vendors that make the design software. We accept
24 all those files.

25 MS. CHARLESWORTH: Okay. So, yeah,

1 you're compatible and interoperable with a bunch
2 of different design software.

3 MR. CAREY: Correct.

4 MS. CHARLESWORTH: But in terms of the
5 software that actually operates the MakerBot, do
6 you send out, you know, patches?

7 MR. CAREY: I actually don't know on
8 MakerBot. I know on all the rest of the lines we
9 do, do patches and upgrades. I just don't know on
10 MakerBot how it works.

11 MR. WEINBERG: I actually know that I
12 own a no longer supported MakerBot.

13 MS. CHARLESWORTH: And what -- and when
14 you say it's no longer supported, I mean, what do
15 you mean by that?

16 MR. WEINBERG: There are no further
17 patches or upgrades. It's a machine that stands
18 alone in the world that will not get upgrades.

19 MR. CAREY: But there were patches.

20 MS. CHARLESWORTH: Okay. And how were
21 those -- do you just -- when you just plug your
22 MakerBot into your PC, how do you -- is it a
23 wireless thing? How do you get the upgrades, or
24 how would you have gotten the upgrades?

25 MR. WEINBERG: This is an early version,

1 so it was a very cumbersome process of
2 transferring data. The cards, SD cards, and
3 pushing a bunch of buttons and series, but as
4 machines get more sophisticated, I know that at
5 least some that are connected to the internet and
6 it could potentially be a direct download. Again,
7 it depends.

8 MR. CAREY: It depends.

9 (Laughter.)

10 MS. CHARLESWORTH: Yeah. So it's --

11 MR. WEINBERG: But it's certainly
12 conceivable you have a machine that's always
13 connected to the internet or connectable to the
14 internet and you could have an update pushed to
15 it, for some models.

16 MS. CHARLESWORTH: Okay. So in many
17 cases I think what I'm hearing is a 3D printer,
18 even on the sort of consumer, basic consumer,
19 model, you might be receiving upgrades from the
20 manufacturer.

21 MR. WEINBERG: It's certainly possible.
22 Not in all cases, but, yeah, it's possible.

23 MR. CAREY: Okay. I'll keep going.

24 MS. CHARLESWORTH: Yes.

25 MR. RILEY: Can I ask a question? Is

1 that software that runs the printer, is it
2 encrypted? Is it freely readable?

3 MR. CAREY: It's compiled so it can only
4 be run on the software. I mean, I'm sure there
5 are tools that it's readable, but it's compiled to
6 run on the software.

7 MR. RILEY: And what about the chip for
8 the feedstock, is any of the programs on that
9 encrypted?

10 MR. CAREY: The feedstock chip is
11 encrypted, yes.

12 MS. CHARLESWORTH: And, I'm sorry, there
13 are a lot of questions coming at you, but what is
14 your warranty policy if someone modifies their
15 printer?

16 MR. CAREY: It's no longer covered under
17 warranty.

18 MS. CHARLESWORTH: And what's your
19 normal warranty?

20 MR. CAREY: 1 year.

21 MS. CHARLESWORTH: For all kinds --
22 every kind of printer you sell, or just -- or the
23 MakerBots or --

24 MR. CAREY: Just the ones I deal with.
25 I'm only limited to that knowledge.

1 MS. CHARLESWORTH: So you have a 1 year
2 warranty, and then if someone modifies it, the
3 printer --

4 MR. CAREY: It's not covered under
5 warranty.

6 MS. CHARLESWORTH: Okay.

7 MR. CAREY: Kind of standard IT.

8 MR. RILEY: Follow-up on the other
9 question. Those chips, are you asserting that they
10 are copyrightable, the computer programs on the
11 feedstock chips?

12 MR. CAREY: Not today. And I'll address
13 it in the remarks. Not today, but we do
14 anticipate it might be. It's a very simple
15 encryption.

16 MS. CHARLESWORTH: Okay. Why don't you
17 proceed with your remarks.

18 MR. CAREY: Okay. Thank you.

19 So it should not be a surprise that 3D
20 printing is a lot more complicated than 2D
21 printing. Our FDM printers, for example, extrude
22 carefully formulated plastics at specific
23 temperatures to form a 3-dimensional object. Our
24 PolyJet printers jet and instantly cure layers of
25 droplets of proprietary liquid photopolymer.

1 Intellectual property protection is critical to
2 the industry. Without intellectual property
3 protection, investments required for future
4 development will be discouraged.

5 Let me now turn to the DMCA. I'm not a
6 lawyer or an expert on the DMCA. I learned that
7 in the last session. That was very interesting.
8 But I understand that the DMCA was enacted to
9 prevent circumvention of technological protection
10 measures, TPMs, designed to prevent copying of
11 intellectual property, and I understand that
12 exemptions to the DMCA were to be exceptional.
13 They serve as a failsafe mechanism where the
14 DMCA's prohibition on circumvention has caused
15 substantial adverse effects on non-infringing uses
16 of a copyright-protected work.

17 MS. CHARLESWORTH: All right. I'm going
18 to interrupt you again. Is the rest of what you
19 have prepared pretty consistent with what you had
20 put into the record already in writing in your
21 prepared remarks? Because we're running behind,
22 and we have some additional questions.

23 MR. CAREY: I address the opposition's
24 statement next, I would like to do that, and then
25 I have an example, which we've actually talked a

1 lot about the example.

2 MS. CHARLESWORTH: Okay. Yeah. If you
3 could address the opposition, that would be very
4 helpful to us.

5 MR. CAREY: Okay. The petitioner's
6 proposed exemption would deprive the 3D printing
7 industry of a potentially useful tool during a
8 critical period in its development with inadequate
9 proof of support for the exemption. Petitioners
10 are not seeking unlawful access to copyrighted
11 works; instead, they are attempting to misuse the
12 DMCA exemption process to encourage users to
13 bypass controls where the DMCA does not apply and
14 to infringe copyrighted software controls.
15 Petitioners have made only a hypothetical showing
16 of harm and, at most, speculative benefits.

17 MS. CHARLESWORTH: Well, I think they're
18 saying the benefit is they want to use cheaper
19 feedstock, and that's a benefit to them.

20 MR. WEINBERG: And new feedstock.

21 MS. CHARLESWORTH: And different
22 feedstock. I mean, that's the benefit. I mean --

23 MR. CAREY: But today in our machines
24 that's not copyright protected, it's just an
25 encryption chip. We do plan to have it copyright

1 protected because as we get into more high-
2 precision engineering plastics, it is more and
3 more important to have a fully integrated system.

4 MS. CHARLESWORTH: Right. So but you're
5 saying that -- are you saying you don't object if
6 they do something with the chip?

7 MR. CAREY: No, we highly object to
8 counterfeiting the chip, to copy and
9 counterfeiting the chip, and we highly object to
10 the exemption because in a nascent industry, with
11 a 3-year exemption, this could stunt the industry.
12 And as I tell my people, because of all the
13 hype, people believe this is a huge industry.
14 This industry is just starting. My customers are
15 just starting to use this in production, and this
16 will stop it. They will not do medical devices,
17 airplane parts, or car parts if they can be
18 hacked, if the machine can be hacked.

19 MS. CHARLESWORTH: Okay. And I heard
20 you say that, and that was very interesting
21 testimony in terms of the fact that manufacturers
22 have quality controls and need them and so forth.

23 I think on the consumer end, I guess I
24 have a question. If I buy a MakerBot and I want
25 to circumvent and use different feedstock and, you

1 know, break my warranty and all that, I mean, is
2 that -- I mean, what is the harm to you on that
3 end of the spectrum?

4 MR. CAREY: If the part comes out not
5 right, it affects our brand, it affects who we
6 are, because they'll say it's MakerBot's junk. It
7 doesn't work because it was used improperly. So
8 again I think it does do harm to us as a company
9 and to our brand.

10 MS. CHARLESWORTH: Okay. Is there any
11 other -- that's the harm you're speaking of then
12 as sort of your --

13 MR. CAREY: On the low end.

14 MS. CHARLESWORTH: And then on the high
15 end, I assume you have the same concern about your
16 brand?

17 MR. CAREY: I have a much bigger concern
18 because making derivative works of our server
19 operating system is of huge concern. If we
20 consider who our competition is, there are other
21 countries that view 3D printing as a competition
22 to their economy. So opening up all of that for
23 exemption as well as the feedstock, as well as the
24 integrated system now becomes an unintegrated
25 system, it's of severe concern and will stunt the

1 industry and our company.

2 MS. CHARLESWORTH: Okay. And are you
3 familiar with the sort of Lexmark case where the
4 court said you can use a different cartridge in a
5 printer --

6 MR. CAREY: Yes.

7 MS. CHARLESWORTH: -- and that doesn't
8 violate copyright law?

9 MR. CAREY: Yes, but that's a printer,
10 not a manufacturing machine.

11 MS. CHARLESWORTH: Well, it's sort of --
12 and I know you're not a lawyer -- but it's sort of
13 the principle of the thing. I mean, it's a kind
14 of important case in copyright. It's sort of
15 saying you -- you know, I'm just wondering what
16 your -- you're saying you would distinguish your
17 situation from that?

18 MR. CAREY: Yes, because printer toner
19 is basically all the same. We print hundreds of
20 different kinds of plastics, and we print them in
21 different ways. So making a comparison of a
22 commodity versus a commodity to a set of different
23 photo and thermoplastics and photopolymers, it's
24 not even a fair comparison, it's a very different
25 comparison. And we're not printing. So if you're

1 -- we're not printing text, we're making physical
2 objects that people rely on.

3 MS. CHARLESWORTH: Okay. Mr. Siy and
4 Mr. Weinberg, how do you respond to this concern
5 about the, you know, reliance on the integrity of
6 things that are manufactured with these printers?
7 Is that really what the thrust of your exemption
8 is? I got the impression it was more about
9 consumer uses, but maybe you can address that.

10 MR. SIY: Well, I think in both the
11 consumer and the commercial context, the person
12 who would be making use of the exemption is the
13 person who -- I mean, the person who is using the
14 printer is the person making use of the exemption,
15 so they are going to be fully aware that they're
16 the ones using third party feedstock or feedstock
17 that they've made themselves as opposed to
18 manufacturer-approved feedstock. Their knowledge
19 that they're the ones doing this, possibly
20 violating their warranties, certainly in the case
21 of those warranties that Mr. Cheney was referring
22 to, they'll be doing that, they'll be aware that
23 the product that they end up with may well differ,
24 and that's their responsibility and their
25 knowledge, and so it won't -- it doesn't affect

1 the reputation of Stratasys or any other maker.

2 As for the commercial context, those
3 who might later rely upon those parts, the
4 standards for those parts, unless they are
5 contingent upon who made the feedstock, unless the
6 FAA regulations dictate who made the feedstock,
7 then that shouldn't be relevant to the quality of
8 the part. If they are, then the proper
9 enforcement mechanism would be through the
10 revocation of their certification.

11 MS. CHARLESWORTH: Right, but the
12 concern is that you're making it -- I mean, at
13 least the concern, as I understand from Mr. Carey,
14 and just I'm positing it for you, is that this
15 will make it a lot -- it will seem a lot more
16 legitimate to substitute in inferior feedstock,
17 and because, say, it's cheaper, and manufacture
18 parts that really aren't actually meeting the
19 certification, people might not know about
20 it's that line of argument, it's a concern
21 about the integrity of the products that are being
22 certified by I guess regulatory agencies.

23 MR. SIY: And again I think that the
24 question of whether or not -- you know, of the
25 integrity of the product as a functional object is

1 going to be dependent upon the manufacturer and
2 the supplier regardless of where they source the
3 original material. If there are counterfeit
4 parts, there are counterfeit parts. If they fail
5 to meet standards, they fail to meet standards. I
6 think the TPMs at issue here don't solve the
7 problem of unreliable suppliers.

8 MS. CHARLESWORTH: Right. But, I mean,
9 I think the argument is it kind of makes it more
10 likely that you would have suppliers doing the
11 circumvention and using the inferior feedstock.
12 That's the argument. It encourages that.

13 MR. SIY: Yeah. I don't think that
14 there is a significant amount of encouragement
15 that would lead to people violating the standards
16 of their contracts. Plus I want to point out there
17 are plenty of printers in the market -- we've
18 given you a list -- that do support open
19 feedstock. So preventing an exemption hurts us,
20 does not actually open the market up. There are
21 plenty of printers out there that do support any
22 feedstock and have no encryption. So we're not
23 solving a problem here.

24 MR. CAREY: And therefore somebody
25 wanting to produce parts on the cheap could easily

1 do the same thing.

2 MS. CHARLESWORTH: Well, I think that's
3 not -- I mean, what Mr. Carey is saying is the
4 Stratasys manufacturing process is essentially
5 being certified, not any printer's process, and so
6 he's worried about that.

7 I mean, do you have examples, specific
8 examples, in the record of people who want to
9 circumvent commercial or manufacturing type
10 printers as opposed to what we're calling consumer
11 printers?

12 MR. SIY: No.

13 MS. CHARLESWORTH: Okay.

14 MR. WEINBERG: I would like to note that
15 there are companies who are actively developing
16 alternative feedstocks for commercial industrial
17 printers, and for whatever it's worth, I recognize
18 that I don't have them here, and part of the
19 reason I don't have them here is because they see
20 themselves as engaging essentially in an activity
21 that's unrelated to copyright, and so they didn't
22 understand why they should come.

23 But there is an industry that is
24 actively building third party innovative
25 materials. And I think that one of the things

1 that can easily get lost in this is you have this
2 idea of kind of a Lexmark style situation where
3 the primary benefit -- which is a significant
4 benefit -- is lower costs of existing materials,
5 but you also have this industry of people who are
6 trying to bring new materials to existing printers
7 that are owned by people -- for whatever reason
8 they've chosen that printer -- and they're looking
9 at specific printers because those printers are
10 not -- I mean, you're right, printers are not a
11 commodity and the different printers can compete
12 on all sorts of different technical, functional
13 capabilities, and so when someone is looking to
14 develop a new feedstock, they sometimes target to
15 a specific printer because it has that technical
16 capability.

17 MS. CHARLESWORTH: Then why don't they
18 just target it to the open print -- I mean, there
19 are -- I do agree there are quite a few printers
20 that have no TPMs, and they're --

21 MR. WEINBERG: There are in the desktop
22 space, less so in the commercial industrial space,
23 but the reason is because -- sometimes the reason
24 is because only some printers can achieve some
25 technical goal because they're not co-modified,

1 interchangeable, it's not necessarily the
2 situation where if some printers are locked down,
3 you can go to a different printer and you can
4 achieve the same goal. Also --

5 MS. CHARLESWORTH: Can you give me a
6 specific example of a printer that's locked down
7 that does something that no non-locked printer
8 does?

9 MR. WEINBERG: I mean, I'm sure that the
10 Stratasys marked material is rich with examples of
11 things that only Stratasys machines can do and
12 they're probably right from a technical
13 standpoint.

14 MS. CHARLESWORTH: But do you have an
15 example today to offer us in that sense? Or from
16 your experience, that, you know, a locked printer
17 does something that other printers -- no other
18 printer does?

19 MR. WEINBERG: I know that the people
20 who have developed Open Bio 3D printing started
21 with -- they started with a Stratasys machine, and
22 the reason that they started with a Stratasys
23 machine, perhaps in violation of the DMCA, was
24 because that was the machine that had a technical
25 capability that they required in the initial

1 stages of their process. They eventually moved
2 on, but they started with that machine because
3 that was the machine that could do what they
4 needed to do.

5 MR. CAREY: And let me point out that we
6 regularly offer licenses for research and
7 development to universities that we do offer
8 licenses to all aspects of our machine for this
9 exact reason. So we are not a closed system, we
10 offer licenses, but it needs to be in a controlled
11 atmosphere.

12 The other thing I want to point out is,
13 yes, there are a lot of people developing
14 materials. We are the number one material
15 developer and we are working with all the
16 materials developers because it's a requirement
17 for my customers to print new materials. So it's
18 our greatest area of investment, is the new
19 materials development that will work in the
20 machine.

21 MR. RILEY: I had a question. Other
22 than -- you keep making references to the
23 technical abilities of these different printers.
24 Is there anything other than the computer programs
25 that run the printers that you're referring to,

1 the technical abilities?

2 MR. WEINBERG: Yeah, actually I'm
3 primarily talking about not the computer programs
4 that are running the printers, I'm primarily
5 talking about the actual mechanism, the technical
6 physical mechanism they use to print, to create,
7 to manufacture, to create the objects. Within --
8 and there is information in the record on this --
9 within 3D printing there are a bunch of different
10 kind of sub- technologies that are being used, and
11 the primary differentiation are those physical
12 techniques, in many cases, those patented
13 techniques.

14 MR. DAMLE: Sorry, just to confirm, you
15 said that some of those techniques, the physical
16 techniques, are patented?

17 MR. WEINBERG: A great many number of
18 them.

19 MR. DAMLE: And so by definition, they
20 would only be found in the Stratasys printer or
21 the patent holder, they might be licensed, but --

22 MR. WEINBERG: Yeah, they're patented or
23 were once patented. I guess my point is they're
24 functional processes. So, yeah, a great number of
25 them are patented, are still patented. Some of

1 them were once patented, those patents have
2 expired, and so they've found their way into the
3 market, but, yeah, there's 20 years of 3D printing
4 technology that is still protected by patent and
5 is tied to a specific manufacturer.

6 MR. DAMLE: Okay. Thanks.

7 MR. RILEY: For proponents, can you
8 answer me, how useful 1201(f) is or isn't?

9 MR. SIY: So I think 1201(f), I think --
10 and certainly when the Copyright Office last
11 addressed printing in 2003 and raised the issue of
12 1201(f) as an alternative, that was before Lexmark
13 had been decided, and there was an open question
14 as to whether or not the object that was copied,
15 the actual smaller toner loading program on the
16 chip, was the copyrighted issue at work, not
17 necessarily the equivalent here of the printer
18 engine program on the machine itself, and
19 therefore, the question that the Copyright Office
20 was addressing was whether or not that smaller
21 program was copied or reverse engineered, and
22 1201(f) is specifically geared towards reverse
23 engineering and not necessarily the larger
24 questions of interoperability.

25 So to the extent that somebody might

1 actually make a copy of the chip directly as
2 opposed to reverse engineering its functions, I
3 think 1201(f) is an uncertain alternative.

4 MS. CHARLESWORTH: Okay. Do my
5 colleagues have any more questions?

6 MR. RUWE: Is there any more certainty
7 under 1201(f) for use of for recreating the
8 software for reverse engineering software on the
9 printer itself?

10 MR. SIY: So I think the questions are,
11 if we're asking whether 1201(f) applies or whether
12 we need 1201(a), is again, what is the allegedly
13 infringing use? If the act is the reverse
14 engineering, I think 1201(f) will work for that.
15 I think for the use in and of itself, absent
16 reverse engineering, I think 1201(a) would provide
17 additional certainty that 1201(f) does not
18 necessarily provide.

19 MR. RUWE: Could it be an alternative
20 that would obviate the need for a 1201 exemption?

21 MR. SIY: No, it does not obviate the
22 need for an exemption in all cases and across all
23 of the uses necessary, depending upon the case,
24 the particular circumvention, at issue.

25 MR. RUWE: Are you identifying any of

1 those with specificity?

2 MR. SIY: No. I think the issue is,
3 again, there are a wide number of ways in which
4 TPMs can be implemented. Mr. Carey has already
5 said that they are looking into the future for
6 ways of including more sophisticated, potentially
7 copyrightable works on the chip. Therefore, where
8 the circumvention is necessary may change, but
9 also what different uses, what different
10 reproductions or modifications might be made, will
11 also be subject to change.

12 I did want to address one additional
13 thing about the licensing question, and that is
14 Section 117 is one of the ways in which the use by
15 a consumer of a 3D printer with third party
16 feedstock is not infringing. There are other
17 reasons that their use of the programs within that
18 3D printer are non-infringing uses.

19 For example, they are used with
20 permission when they are used. Since there are
21 licenses that come with all of these, even the
22 most restrictive purchase of a machine, the most
23 restrictive license of the software that comes
24 with the purchase of a machine, will provide for
25 the use of that software. Given that, the only way

1 in which use of a third party feedstock could
2 possibly constitute an infringement would be if
3 you were to believe that there was a functional
4 condition of the grant of a license of that
5 software --

6 MS. CHARLESWORTH: Well, but you might
7 be altering the software. Does the license allow
8 you to alter the software?

9 MR. SIY: The license would allow you to
10 use the software as is necessary to operate the
11 machine.

12 MS. CHARLESWORTH: Well, I mean, you're
13 going back to 117, I think, but a license in
14 general doesn't say, "And you may change our
15 software," I mean, in the normal course. I grant
16 you that it said you can use it, but I think the
17 idea is you're using it in its original form.

18 MR. SIY: And I think that -- so, yes.
19 I mean, I wanted to address the question of sort
20 of whether or not you have a condition as in MDY,
21 a condition versus a covenant as an MDY. With
22 regard to the modification question, I think that
23 fair use can cover that modification.

24 MS. CHARLESWORTH: So you are also
25 relying on fair use?

1 MR. SIY: That's correct.

2 MS. CHARLESWORTH: Okay. Anything
3 further?

4 MR. RILEY: I have one last quick
5 question for Mr. Carey.

6 MS. CHARLESWORTH: Okay.

7 MR. RILEY: There was an assertion
8 before that we didn't know how much rewriting of
9 the printer program would be needed to use other
10 feedstock in it because obviously you have to
11 change the temperatures and the rates and things
12 like that. Do you have any statement on how much
13 you would need to change that computer program
14 that controls the feedstock?

15 MR. CAREY: I just know from personal
16 experience of working with customers who desire
17 new feedstock, we take it in and we test and tune
18 the machine, and sometimes it's up to a year
19 before we can get the machine tuned to produce a
20 high number of reliable, consistent parts. So
21 there are many pieces of the machine in the motion
22 control and also the heating, distribution, and
23 layering that's dependent on the feedstock,
24 because my customers are demanding precision parts
25 that will become real things. So up to a year,

1 which you can imagine I, as a sales guy, am
2 putting a tremendous amount of pressure on them to
3 make it go faster. So it's a long onerous
4 process. It's simple clicking a couple things with
5 your mouse and making a machine work differently.

6 MR. RILEY: In terms, though, how much
7 of the code? Would you say it's a small part of
8 the code, even though it takes a lot of testing?

9 MR. CAREY: I don't know. I don't know.

10 MR. RUWE: Mr. Carey, are there any
11 other defining characteristics that distinguish
12 between the low end or high end or the consumer
13 versus commercial printers that you use or the
14 industry uses in general?

15 MR. CAREY: First, I want to
16 distinguish, "consumer" is kind of a vague --

17 MR. RUWE: I know, that's why I'm trying
18 to --

19 (Laughter.)

20 MR. CAREY: Yeah, yeah. So we say "pro-
21 sumer" from our view because it tends to be
22 professionals.

23 MR. RUWE: Okay.

24 MR. CAREY: You know, some people are
25 using these at home. The home market tends to be

1 the actually lower end. We're really focusing on
2 professionals. And so my customers, the
3 professional engineer, will use them on his desk
4 to create -- to get things going and then to
5 create the real product, he'll use it in a
6 production machine. So it's hard, you know,
7 nobody has actually figured this -- the industry
8 is so small, nobody has figured out how to
9 distinguish all this, and people use the same
10 machine to do a prototype and a production part in
11 the same day. So --

12 MS. CHARLESWORTH: Are you guys done?

13 (No audible response.)

14 MS. CHARLESWORTH: Okay. Now we're
15 officially very behind, and I'm sorry about that,
16 but we've had a lot of questions this morning. I
17 think that we can get back on schedule if we
18 reconvene as intended at 1:45, which still gives
19 us close to an hour for lunch. Is that acceptable
20 on our end? Do you want more? They want more.

21 (Laughter.)

22 MS. CHARLESWORTH: Okay. We're going to
23 come back at 2:00 so everyone has ample time for
24 lunch. And we'll be discussing Proposed Class 7:
25 Audiovisual Works. Thank you.

1 (Lunch.)

2 MS. CHARLESWORTH: Hello, everyone. I
3 can tell people had food because it looked like
4 the volume is a lot higher. Thank you and we
5 appreciate your being here this afternoon to
6 discuss Proposed Class 7: Audiovisual works -
7 derivative uses and noncommercial remix videos.
8 That's the proposed class.

9 I'm Jacqueline Charlesworth and I am
10 General Counsel to the Copyright Office. I'll be
11 presiding over the hearing along with my
12 colleagues here, and they will quickly introduce
13 themselves for the record.

14 MS. CHOE: Michelle Choe, Ringer Fellow.

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

17 MS. DAMLE: I'm Sy Damle. I'm Deputy
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 NCIA, Department of Commerce.

25 MS. CHARLESWORTH: Okay. So as I've

1 mentioned earlier, some people have heard this
2 little speech. We're most interested not in so
3 much a review of your written commentary which
4 we've all read but in sort of your honing in on
5 issues that are maybe in dispute or areas of
6 contention. And we'll, of course, have a lot of
7 questions for you.

8 I know we have some -- I think some
9 exhibits we'll be presenting today, so without
10 further -- oh, one more thing. On the -- we are
11 being transcribed here and we try not to talk over
12 each other. If you need to add something or want
13 to add something, just tip your placard up and we
14 will get back to you. We can only have four
15 microphones on at a time and that's actually true.
16 We've tested that and sometimes you -- so -- and
17 people have been very good about turning them off.

18 I guess -- oh, one last thing. We'll
19 have you introduce yourselves for the record and
20 then we'll start over with Ms. McSherry. Who was
21 to be at your -- are we missing someone?

22 MS. McSHERRY: I think Art Neill from
23 New Media Rights was maybe going to come but he
24 wasn't able to make it.

25 MS. CHARLESWORTH: Okay. So he -- okay,

1 he's -- we're not waiting for him then. Okay. So
2 Ms. McSherry, then we'll -- you know, we'll give
3 you the floor and you can proceed with your
4 opening remarks and well have our discussion and
5 we'll go down the line that way. So -- but first
6 let's have you introduce yourselves and explain
7 who you represent or what interest you represent
8 here today.

9 MS. McSHERRY: So my name is Corynne
10 McSherry and I'm the Legal Director for the
11 Electronic Frontier Foundation, and I am here as
12 one of the proponents of proposed class 7.

13 PROF. COPPA: Hi, I'm Francesca Coppa.
14 I'm a Professor of English and Film Studies, and
15 I'm here with the Organization for Transformative
16 Works on behalf of remixers and vidders.

17 PROF. TURK: I'm Tisha Turk. I'm a
18 Professor of English. I am here with the
19 Organization for Transformative Works on behalf of
20 vidders.

21 PROF. TUSHNET: Rebecca Tushnet. I'm a
22 Professor of Law at Georgetown and I'm here as a
23 legal academic and on behalf of the Organization
24 for Transformative Works.

25 MR. TURNBULL: I'm Bruce Turnbull. I'm

1 counsel to the Advanced Access Content System
2 Licensing Administrator, LLC.

3 MR. TAYLOR: I'm David Taylor. I
4 represent DVD Copy Control Association.

5 MR. WILLIAMS: I'm Matt Williams. This
6 is my last panel this year for --

7 (Laughter.)

8 MR. WILLIAMS: -- MPAA, ESA, and RIAA.

9 MS. CHARLESWORTH: Wow. Well, we could
10 create some new ones if you'd like. So anyways,
11 there's still time. Well, again, welcome and Ms.
12 McSherry, if you want to lead us off here, we'd be
13 grateful.

14 MS. McSHERRY: Sure. Thank you. So
15 just as a brief introduction, I'm going to hit a
16 few points. I'm going to actually try to mostly
17 cede the floor to my fellow panelists who are here
18 to provide a ton of really good factual and
19 technical detail for you that -- I'm just a
20 lawyer. I'm not an artist so I can't do as
21 effectively but, of course, I'll answer any
22 questions that you'd like.

23 I want to make just three points. The
24 first point I want to make is that I urge you to
25 look at the actual record of evidence that's been

1 submitted by all sides in this proceeding. And as
2 you said you wanted to do in the notice of
3 proposed rulemaking, you stressed, I think, that
4 you are going to base your findings on the record,
5 on the evidence in the record, and I urge you to
6 do exactly that.

7 So let me just highlight some of the
8 evidence that we've submitted. On the question of
9 fair use, we have submitted many, many examples of
10 the kinds of videos that this exception would help
11 protect and explained why a court would be likely
12 to find them fair. We've explained that remix has
13 become a central part of our culture and provided
14 supporting evidence on that issue.

15 Opponents, on their part with respect to
16 -- have offered very little evidence that our
17 examples aren't fair uses and instead I think the
18 record shows a lot of blanket statements about how
19 remix is generally infringing and pages of case
20 law about the nature of transformativeness but
21 without actually applying them to our examples.
22 So I think our record on fair -- can you hear me?

23 UNIDENTIFIED FEMALE: (Inaudible).

24 MS. McSHERRY: Secondly, let's look at
25 the records on harms and the statutory factors.

1 We've submitted ample evidence in our opening
2 remarks and in our reply that artists are already
3 relying on Blu-ray source. And I'm sorry; I meant
4 to say at the beginning that as far as I can tell,
5 the existing exemption is not controversial, so I
6 plan to focus here on the extension to Blue-ray --

7 MS. CHARLESWORTH: Okay.

8 MS. McSHERRY: -- rather than rehashing
9 what we already know. Sorry, I should have said
10 that up front. So we've submitted evidence that
11 artists are already relying on Blu-ray source and
12 that's likely to consider -- I'm sorry -- to
13 continue. Professor Coppa will have more to say
14 on that as well.

15 Opponents, for their part, have conceded
16 that Blu-ray is a vehicle for bonus features which
17 are exactly the kinds of features that fan vidders
18 and other remix artists might want to comment on.
19 So I think we've actually gotten agreement that
20 Blu-ray is special in a way that remix artists are
21 actually going to care about.

22 We submitted evidence that currently,
23 remix artists are relying on the current exemption
24 to defend themselves against improper takedown
25 claims because they know they can do that as long

1 as they're protected by fair use, they don't have
2 to worry about an additional 1201 risk. Blu-ray -
3 - people who use Blu-ray source, however, don't
4 have that protection and for the most part,
5 they're not going to know until they get a
6 takedown, talk to a lawyer and find out that they
7 can't fight back because they used the wrong
8 source material.

9 MS. CHARLESWORTH: Can I ask you a
10 question?

11 MS. McSHERRY: Sure.

12 MS. CHARLESWORTH: And I know there's an
13 extensive record in this class. Did you provide
14 specific examples of, and if so, how many of uses
15 where the content was only available on Blu-ray
16 and from no other source?

17 MS. McSHERRY: I do think we have some
18 examples of that in particular and I know that we
19 collected over the course of a week, just by
20 issuing a call, a whole collection of examples
21 where people said, "I used Blu-ray."

22 MS. CHARLESWORTH: Well, they may have
23 used it but the question was setting aside the
24 quality issues which I know --

25 MS. McSHERRY: Right.

1 MS. CHARLESWORTH: -- you've also
2 extensively briefed. You were talking about the
3 bonus features and so forth, you know, unique Blu-
4 ray content. Let's call it that. Do you have --
5 you know, how many examples of that are there in
6 the record where vidders, you know, wanted to or
7 did access that to create their -- the video?

8 MS. McSHERRY: So I know we have at
9 least two that we described in some depth and
10 particularly, if you look to Appendix A of -- I
11 believe, right -- of Professor Coppa's declaration
12 and some of the --

13 MS. SMITH: This is in the reply/

14 MS. McSHERRY: -- other things that she
15 did. I'm sorry, in the Reply, Appendix A,
16 Professor Coppa's declaration and there are
17 statements from artists who relied on Blu-ray and
18 they talk about why they did that.

19 MS. CHARLESWORTH: Okay, thank you and
20 continue.

21 MS. McSHERRY: Sure. So as we've said
22 before but it continues to be true, Section 1201,
23 without an exemption, is a trap for the unwary
24 where you have artists who are trying to do the
25 right thing, trying to, you know, lawfully acquire

1 works, make sure the original creators get paid,
2 and trying to, you know, abide by what they
3 understand to be the law and only find themselves
4 tripped up later by something that for an artist
5 is going to be very confusing, which is a message
6 that you totally did the right thing only you used
7 the wrong source material and so now you've done
8 something illegal that you would never expect to
9 have been illegal.

10 Also, I would like to point out what is
11 not in the record. What is not in the record is
12 any evidence whatsoever that the proposed
13 expansion, the current exemption or the proposed
14 expansion could cause any harm whatsoever as to
15 the availability of copyrighted works. The
16 opponents have suggested that copyright owners
17 maybe won't make works available on Blu-ray if you
18 grant the expansion that we're asking for, but
19 they just speculate that. They don't show us
20 anything. They don't give us any reason to
21 believe that that would be true and they also note
22 that Blu- ray is still an emergent business model
23 and I think we can accept that is true.

24 But it's also true that online streaming
25 is an emergent business model and what is also

1 absent from the record here today is any
2 participation by online streaming services. They
3 know the existing exemption and the continued
4 exemption for online streaming hasn't hurt their
5 emerging business model. It has no effect on it.

6 MS. CHARLESWORTH: On the issue of
7 online streaming, do -- and again, recognizing the
8 extensive record and the many examples -- are you
9 aware of situations where vidders have used sort
10 of HD online content, you know, downloaded HD
11 content, and has that been a workable option for
12 some vidders?

13 MS. McSHERRY: I believe that Professor
14 Turk has a fair bit to say --

15 MS. CHARLESWORTH: Okay. So --

16 MS. McSHERRY: -- on exactly this issue
17 if you don't mind my kicking it to her.

18 MS. CHARLESWORTH: Yeah. Did you -- do
19 you want to respond to the question about or do
20 you want to wait? We can -- if you can hold that
21 in your head.

22 MS. McSHERRY: I just need a few more --

23 MS. CHARLESWORTH: Then we can finish
24 with Ms. McSherry and you can speak about it when
25 you're ready. Okay.

1 MS. McSHERRY: Sorry to punt it but I
2 just think speaking from the actual community of
3 artists will make the most sense. So just a
4 couple more points. So opponents have also
5 suggested that allowing circumvention for any
6 purpose might lead to piracy because they'll be
7 copies in the clear, but I think if that were
8 true, we'd have some evidence for that by now with
9 respect to DVDs and online streaming. And as I
10 recall, your office specifically asked for that
11 kind of evidence and you didn't get it, and I
12 think that that absence is telling. Pirates don't
13 need or want this exemption, remix artists do.

14 Finally, very briefly, I want to speak
15 to the existence of alternatives which has clearly
16 been important in this proceeding. The record
17 shows, based on what we have already submitted and
18 what we will submit today, that the technologies
19 that opponents believe might work for remix
20 artists won't. They're simply inadequate for the
21 actual editing that artists need to engage in in
22 order to produce high-quality work that is taken
23 seriously by their community and by the audiences
24 that they are trying to reach.

25 MS. CHARLESWORTH: Okay. I'm sorry; I

1 know I keep interrupting you but you --

2 MS. McSHERRY: Sure.

3 MS. CHARLESWORTH: -- keep saying things
4 that are intriguing.

5 MS. McSHERRY: Sure.

6 MS. CHARLESWORTH: Artists, you keep
7 referring to the class of people who would seek to
8 use this exemption as "artists." And why and how
9 do you define that or how does -- how is that -- I
10 guess we've heard -- the exemption, as it
11 currently exists, doesn't use the word -- does it
12 use the word "artist?" It does not use the word
13 "artist" and I'm just wondering is -- in terms of
14 your pursuit of this exemption, is it mainly to
15 allow for artistic production? Is that the main
16 purpose of this or how do you see that?

17 MS. McSHERRY: So I'm using artists as,
18 frankly, a bit of catch-all for actually a broad
19 array of communities and that's why I want to be
20 very careful in tying this to any particular
21 community. As we discuss in our comments, remix
22 artists, that group includes vidders, fan vidders.
23 It includes political remix artists who are
24 specifically, you know, engaged in political
25 commentary. It includes, you know, professional

1 video makers, more and more who have -- you know,
2 who are professional artists who are having their
3 work displayed in museums around the country and
4 around the world.

5 So I worry a little bit that if we tried
6 to -- I worry a lot that if we tie an exemption
7 to some artistic endeavor, that might end up being
8 confusing for people because there are so many
9 different communities that might identify
10 themselves as remix artists.

11 MS. CHARLESWORTH: Okay.

12 MS. McSHERRY: So if that's where you're
13 going with this, I would take care.

14 MS. CHARLESWORTH: Okay. Well, I was
15 quite curious about your use of the word "artist"
16 and thank you for clarifying that.

17 MS. McSHERRY: Yeah. I mean like I
18 said, we -- I'm using it as a shorthand for a
19 broad array of communities that engage in this
20 kind of activity.

21 MS. CHARLESWORTH: Okay.

22 MS. McSHERRY: Okay. So I'm almost
23 finished because I want to get on to my fellow
24 panelists. So Professors Coppa and Tushnet and
25 Turk are going to show you how important high-

1 quality source material is for the art form -- for
2 the work that folks are engaging in if they want
3 it to be taken seriously.

4 I just want to close though by
5 dispelling a different source of confusion from
6 purely a legal perspective which is this notion
7 we've seen in the papers that fair use doesn't
8 entitle the user to the use of any particular
9 technology. I actually think that the corollary
10 is pretty in opposite to what's at stake here and
11 we present it in our papers. The legal cites seem
12 to make more sense if you want to think about
13 whether artists get to have access to the quality
14 they need for their transformative purpose, and I
15 think the case law is pretty clear that they do.
16 But I would also suggest that that's, in part at
17 least, a red herring because whether artists need
18 the best quality source also speaks to the
19 statutory questions of whether 1201 is having an
20 adverse effect. And if 1201 is impeding their
21 ability to have access to the source material they
22 need for their work, then it is, and putting it at
23 legal risk, then I would submit that that is an
24 adverse effect.

25 MS. CHARLESWORTH: Can I ask you on the

1 case law? I mean what cases would you cite as
2 most supportive of your position that fair use
3 should consider the quality say of the source
4 material or the format?

5 MS. McSHERRY: Sure. So I would point
6 you to the Bill Graham case which found fair use
7 when copying the size and quality necessary for
8 the transformative purpose -- and sorry, I'm
9 looking at my cites from here; Warren Publications
10 Company v. Spurlock which said that high-quality
11 copy images were fair use because they were
12 necessary for the transformative purpose; the
13 Swatch case, I know you all discussed yesterday so
14 we don't need to belabor it here; Sony Computer
15 Entertainment America v. Bleem! which found fair
16 use where real images were necessary for accurate
17 comparisons. So courts have repeatedly taken into
18 account what is necessary for the purpose, and I
19 think we've had ample evidence in the record at
20 this point that high-quality source is exactly
21 what's needed for the transformative purpose that
22 these artists are engaging in.

23 I'll close for now unless you have
24 questions.

25 MS. CHARLESWORTH: No, thank you.

1 Professor Coppa [COP-A].

2 PROF. COPPA: Coppa[CO-PA].

3 MS. CHARLESWORTH: Coppa [CO-PA], yeah.

4 PROF. COPPA: This is my third time
5 testifying here. I'm writing a book right now on
6 vidders as a specific subset of the remix
7 community. But to speak to your question before, I
8 think remixers, in general, think of themselves as
9 artists and cultural critics. That's the kind of
10 identity that they take on and remix is
11 increasingly understood to be an art form with a
12 kind of board practice.

13 I know through my work that
14 noncommercial vidders and remixers are already
15 using Blu-ray or other high definition footage,
16 which I'll get to in a minute, in practice.
17 Whether or not they use Blu-ray or a high
18 definition streaming depends on a number of
19 things, some technical, as my colleague will talk
20 about, but some of it's just geographical, whether
21 or not you have broadband to do high definition
22 streaming. Not everybody does.

23 And remix is practiced primarily by
24 woman but all across the country. And so Blu-ray
25 discs are still a significant source of high-

1 definition footage. I'll explain in a minute why
2 remixers want it but it's still a significant way
3 of getting footage for many people in different
4 parts of the country. And vidders are using high
5 definition for two reasons. First, the discs that
6 they bought and the idea that they can use, you
7 know, one kind of disc legally but not the other
8 when they open up their plastic pack is not
9 intuitive on the ground. But more than that,
10 you'd be asking artists to deliberately choose
11 lower quality footage rather than higher or spend
12 extra money on worse footage which is not, again,
13 an intuitive thing.

14 But second, and more importantly,
15 vidders are using Blu-ray footage because it
16 allows them to make the kinds of transformation of
17 the image that they want to make. If I leave you
18 with one point, it's this: that remixers are not
19 interested in playing back footage. They want to
20 change it and comment on it as artists. They want
21 to edit it, crop it, color it, speed it up, mask
22 out parts of it, layer things on top of it, mash
23 it up with other things. And the more information
24 in the original footage, the better the image will
25 stand up to that kind of heavy digital processing

1 and the more the complex an idea you can
2 articulate visually. And vidding, which is a 40-
3 year-old art form now -- vidders date their own
4 practice from about 1975 and have worked in other
5 media and, in fact, have always been on the kind
6 of cutting edge of media to the point where
7 vidding is actually fairly well-represented in
8 literature on remix because vidders care about the
9 quality of image, so our work is watchable where a
10 lot of work is not watchable because it's
11 pixilated and it falls apart when you project it
12 in a museum -- about which more later but --

13 MS. CHARLESWORTH: Can I ask a quick
14 question about --

15 PROF. COPPA: Absolutely.

16 MS. SMITH: -- the distribution of these
17 remix videos, right, it seems like, from the
18 record, can vary in types of quality, some might
19 be lower quality, some may be a high --

20 PROF. COPPA: Well, especially is it's
21 got a long history, right, I mean --

22 MS. SMITH: Right.

23 PROF. COPPA: -- a video from 1980 is
24 not --

25 MS. SMITH: Right. So I guess I'm

1 wondering, you know, say today if you make
2 something in 2015 and it's going to be distributed
3 into a lower output, can you explain why it
4 matters to have the high input?

5 PROF. COPPA: It typically isn't, even
6 YouTube has a high definition option and many of
7 the remix videos might be seen on a projector
8 being done in a theater style setting in a museum
9 exhibition --

10 MS. SMITH: Sure.

11 PROF. COPPA: -- and certainly on
12 computer screens which high retina -- all of that.
13 And in fact, there's a kind of emerging practice
14 among vidders where they're remastering older vids
15 in Blu-ray. There used to be a practice of
16 remastering VHS into DVD and now DVD is being
17 remastered into Blu-ray to keep the artwork
18 watchable and vibrant, kind of as an artifact in
19 the community, so you see this practice of fans of
20 the art remastering older video with the newest
21 footage because they love it or because they think
22 it's important now and that it is less watchable
23 in its DVD cut than it would be in its Blu-ray
24 cut, so we're seeing Blu-ray cuts of existing kind
25 of canonical artworks.

1 MS. CHARLESWORTH: Can I ask is there
2 like an -- some sort of -- what's the process of
3 remastering standard definition into --

4 PROF. COPPA: Again, I might push that
5 to Tisha but it would be about matching -- in
6 other words, if you're remastering something, the
7 original artist has made the decision about where
8 the clips -- where the cuts come and what it looks
9 like but somebody's essentially just replicating
10 their process, which is not as creative as
11 creating the thing. They are essentially
12 recreating the thing using better quality footage.

13 MS. CHARLESWORTH: So they're actually
14 assembling better quality footage and recreating
15 what they did before?

16 PROF. COPPA: Correct.

17 MS. CHARLESWORTH: It's not a typical --

18 PROF. COPPA: On a shot-by-shot --

19 MS. CHARLESWORTH: -- grade process?

20 PROF. COPPA: Correct.

21 MS. CHARLESWORTH: Okay.

22 PROF. COPPA: I mean Tisha is going
23 to elaborate on some of these technical
24 specifications but I want to talk briefly about
25 the kind of artistic reasons for doing this. If

1 you want to bring a background character to the
2 foreground to argue for their importance in a
3 text, as we saw with the M video that was
4 submitted or in the Captain America vids.

5 To your question about what's only on
6 Blu-ray, for instance we see in the kind of
7 Captain America vids a lot, the (inaudible) was in
8 color is one of them, people using the deleted
9 scenes in order to kind of create critiques of the
10 military industrial complex in Captain America, if
11 you can imagine such a thing, but using additional
12 footage, deleted scenes, this kind of thing. But
13 anyway, if you want to kind of bring background
14 information forward, you can crop -- the bigger
15 the image is, you can crop it or magnify something
16 small and still have a watchable picture.

17 Deleted scenes often also have things
18 that the original editors didn't think were
19 significant enough to make the final cut and those
20 kinds of things are often the sort of thing that a
21 viewer is interested in because viewers are often
22 about re-prioritizing the image. They're
23 essentially having an argument with the editor and
24 the director saying what you thought was important
25 about this is not right. So the kinds of things

1 that were left out are often the kinds of things
2 we want to put back in or see expanded and hence
3 the need for these, you know, kind of special
4 features and things.

5 Another kind of case in terms of "Blu-
6 ray only" content, if you look at the discussion
7 and the materials on telephone, which was a John
8 Carpenter vid, he ended up having -- he was not
9 planning to use Blu-ray but ended up having to use
10 Blu-ray because he was trying to say something
11 about the Jamie Lee Curtis character in the
12 Halloween films over a kind of 30- year period.
13 And the only way he could create a kind of
14 coherent artwork was essentially to kind of use
15 Blu-ray across because otherwise, the difference
16 between Halloween of 1977 and the Halloween H20 of
17 whatever year that was would have been too jarring
18 to the viewer.

19 And so those are kinds of cases where
20 the artistic need really necessitated a "Blu-ray
21 only" thing, and I think the last of the films
22 that he used was only in Blu-ray and so he ended
23 up having to kind of back-go and get all of the
24 Blu-ray in order to make a coherent art object. I
25 mean that's in the literature but just to, you

1 know, because you asked.

2 You know, so again, if he's trying to
3 mash up, you know, you're not just playing this,
4 you're making something. So if you want to mash
5 up multiple visual sources, draw comparisons
6 across films, trace a theme across films, make an
7 argument across films, you need -- you might want
8 to and from a vidder's point of view, you need to
9 match aspect ratio, match color palette so that
10 the eye goes to the argument that the editing is
11 making and is not simply disrupted by putting
12 together clips that look wildly different. And so
13 these are some of the artistic reasons that you
14 would process the images in this way in order to
15 talk visually as it were, to use remix to create
16 art and conversation.

17 Since I last testified, vids and
18 other noncommercial remixes have been featured in
19 major exhibits at the Cleveland Art Gallery, the
20 Museum of the Moving Image, the Vancouver Art
21 Gallery, the EPM Museum in Seattle, the Museum of
22 Image and Sound, the Australian Center of Moving
23 Images. I'm getting more and more people who are
24 interested in putting together shows recognizing
25 vids but also other forms of remix, political

1 remix. There are now starting to be exhibitions
2 of GIFs, graphical image format, about which I
3 talked in my thing but GIFs are becoming -- which
4 are made with Blu-ray and you see people tagging
5 them, you know, Blu-ray GIFs without having any
6 idea that they're doing something that's wrong or
7 could get them into any trouble, but we're
8 starting to see it in museum exhibitions of this
9 too as a significant kind of borderline art form
10 between film and photography.

11 And many of these galleries, the vids
12 are projected on the walls. I gave a talk at the
13 Museum of the Moving Image exhibition and, you
14 know, we were talking about projecting vids, you
15 know, on not quite movie theatre screens but on
16 really large screens and so it matters what these
17 things look like when they're in museum settings
18 or vid shows at universities or galleries, this
19 kind of thing.

20 So remix videos are increasingly
21 appreciated as an art form and as a grassroots
22 form of film and television criticism. Social
23 media sites like Facebook and Tumbler have made
24 it, you know, very easy to share remix video and
25 to make them the kind of centerpiece for

1 discursive arguments about meaning when it comes
2 to popular culture or high culture even.

3 In a recent book on the filmmaker Joseph
4 Cornell, Michael Piggott claimed that vidders are
5 grassroots cinefiles who represent the viewer who
6 spots something latent, hidden or potential in a
7 moving image and who feels the need to reveal it
8 to other viewers to make it prominent and clear.
9 And Blu-ray and high definition footage are
10 crucial to remixer's needs to make the latent
11 thing in the footage prominent and clear to others
12 and so for us, this exemption for Blu-ray is a
13 natural extension of the exemptions we sought in
14 2009 and '15, which is to say that artists who
15 transform naturally want to start with the best
16 most information-dense images because we're going
17 to lose quality in processing and these are,
18 again, fair users who are trying to do the right
19 thing. They know that they have made something.
20 They want to be able to defend what they made if
21 they need to, and they know that they're sort of
22 artists. They're not pirates. They want the right
23 to be able to sort of stand up for what they
24 produced. Thank you.

25 MS. CHARLESWORTH: Thank you, Professor

1 Coppa. I guess we'll move on to Professor Turk
2 now.

3 PROF. TURK: So as I mentioned, I'm a
4 professor in an English department but I'm here
5 today as a vidder, so one artist within the larger
6 remix video community or communities.

7 Since clearly I'm going to get some tech
8 questions kicked to me, I want to emphasize that I
9 am not a film or a TV professional. I am, alas,
10 no Jim Morissette, so I know about digital video
11 because I've been creating digital remix videos
12 for about 15 years now.

13 I want to make two points right now and,
14 of course, I am happy to answer any questions that
15 you guys have. The first one -- the first point I
16 want to make is that quality really matters to
17 video remix, and the distinction here is between
18 what I need as a consumer and what I need as a
19 creator. As a consumer, I don't always need the
20 highest possible quality just for its own sake.
21 When I'm just watching a show, I might stream
22 Netflix on my laptop because it's convenient or I
23 might download a show from iTunes in standard def
24 rather than high def because that's cheaper. But
25 when I'm making a remix video, quality is

1 important. It's really important because as a
2 creator, I need tools that work.

3 The video is not just video. It's
4 something that I am using. It's something that I
5 am doing something with so as Professor Coppa
6 said, the work that vidders do is transformative.
7 A vid transforms genre. It transforms narrative.
8 It transforms meaning.

9 And in order to do that, I have to be
10 able to transform individual clips. I have to be
11 able to manipulate them and, you know, juxtapose
12 them and combine them and high quality clips allow
13 me to do those things without compromising the end
14 effect, without ending up with something that
15 someone will just hit the back button because they
16 don't want to see it in low quality.

17 The second point that I want to make is
18 that alternatives to circumvention don't work and
19 they don't work for multiple reasons. Some of
20 those reasons are aesthetic. Opponents haven't
21 shown that screen capture produces visually
22 acceptable results for Blu-ray and there are
23 reasons for this. A single frame of DVD video --
24 I'm going to pull out numbers now -- a single
25 frame of DVD video has 345,600 pixels, right, 720

1 by 480. A single frame of Blu-ray video has over
2 2 million pixels so six times as many pixels. And
3 screen capture technology can't keep up with that,
4 right. It's just too much information for screen
5 capture to handle very well.

6 MS. SMITH: Excuse me. And so that's
7 true for material you grab online? If it's in --
8 can you speak -- can you incorporate that as well?
9 I know you're focused on Blu-ray but if you use
10 screen capture for material that's streamed
11 online, like from Netflix?

12 PROF. TURK: Yes. I mean it's this
13 -- just in terms of sheer number of pixels. If it
14 is 1080p, so if it's 1920 by 1080, then that is
15 just the number of pixels that it has and if
16 you're capturing it, that's just a lot of pixels
17 that the screen capture software has to deal with.
18 And lots of things affect that, I mean the
19 capabilities of the software, the capabilities of
20 the machine, right. Some machines have more
21 processing power than others, but it's just an
22 awful lot to ask of software that's not designed
23 to do that, right. Screen capture software is
24 designed to let you make a video showing where you
25 move your mouse to click on the thing. That's --

1 you know, that's the kind of thing that it's built
2 for, so

3 MS. CHARLESWORTH: Well, can I ask a
4 question in that regard? I mean you're sort of
5 generalizing. Obviously, we're often speaking in
6 generalities in this proceeding but I mean are you
7 saying that every vidder would necessarily need HD
8 quality or -- Professor Coppa's nodding over
9 there. I mean why -- you're saying there's no
10 vidders who would want to work with -- let's say a
11 beginning vidder, someone who's not that
12 sophisticated or someone who is only going to be
13 showing things to their friends, I mean I guess
14 I'm -- the existing exemption actually says
15 something to the effect that you really need it,
16 to paraphrase. I mean is it your -- so it's your
17 position that every single vidder needs access to
18 Blu-ray content no matter what their purpose is,
19 no matter what their project is?

20 PROF. TURK: I mean what I would say is
21 that vidders have a pretty wide range of needs and
22 backgrounds and access to stuff, right. I mean
23 what I have access to is a 40-year-old professor
24 or who I imagine my audience to be may not be the
25 same audience as say, you know, the younger

1 sibling of one of my 18- year-old students.

2 MS. CHARLESWORTH: Right. I could
3 imagine my daughter doing something like this.
4 She, at least as a beginner, she might not need to
5 be circumventing Blu-ray. She might be able to
6 use screen -- just hypothetically -- use screen
7 capture.

8 PROF. TURK: I mean I think --

9 MS. CHARLESWORTH: It's a very big
10 claim. I mean I'm just trying to suggest that
11 there might be variations and then you need to
12 think your -- are you agreeing with me?

13 PROF. TURK: I would say that there --
14 that variations are possible but what I would also
15 say is that the ceiling is getting higher on that,
16 if you see what I mean. So what someone wants to
17 do at 14, if they're interested and keep doing it,
18 in two years, they might have very different
19 aesthetic needs and they might have a very
20 different sense of who they're communicating with.
21 They might also maybe want to make a different
22 kind of vid that requires far more effects than
23 their sort of initial fooling around an i-movie
24 kind of thing. They might want to focus on a
25 character who's in the background and they might

1 really need to crop something down in a way that
2 if you're only using DVD, you end up with a muddy
3 mess. So I would agree that there is a possible
4 range but I think the high end of that range is
5 very high and is getting higher as more and more
6 people get used to high definition and see that all
7 the time and have bigger TVs and have higher
8 resolution laptop screens. So --

9 MS. SMITH: Can I ask -- I just want to
10 --

11 PROF. TURK: Yes.

12 MS. SMITH: -- make sure I'm
13 understanding how we're using the word "vidder"
14 versus "remixer." I understand vidder to be, you
15 know, a subset of a community and --

16 PROF. TURK: Yes.

17 MS. SMITH: -- perhaps maybe more -- I
18 understand it's more a female but is there also --
19 do they have more of a need to use higher images
20 or does what you just said apply to the remix
21 communities at large or just vidders?

22 PROF. TURK: I would say it applies to
23 the community at large. I mean I think vidders,
24 particularly because we are fans of the things
25 that we are using, our audiences tend to be very

1 familiar with the source, they tend to care very
2 much about the source to know it very well to have
3 it in high quality, and so if someone loves a show
4 or a movie and they've seen it many times and
5 they've seen it in high def and suddenly you're
6 asking them to watch it in, you know, in squinty
7 vision, you know, with pixilation or whatever, I
8 think that would be a turnoff for our community
9 specifically. And that's what I know best so I do
10 think that it applies more broadly.

11 MS. SMITH: So you know -- and this --
12 you may not be the person to ask this but if like
13 the broader remix community, a group of sub
14 communities have internalized the same sort of
15 like pseudo fair use norms that the papers say the
16 vidders have?

17 PROF. TURK: Can I toss that to you
18 because I don't -- I don't know enough to answer
19 that question.

20 PROF. TUSHNET: Right. So in our
21 submission, we cite several studies. Some of them
22 are vidder specific, some of them are cross-
23 cutting, so Casey Fiesler's study, for example,
24 studies a number of different communities online
25 and finds overarching -- I mean there are norms

1 that vary kind of internally but they tend to be
2 not about copyright things. They tend to be about
3 sort of different things that the community cares
4 about, and she does find an emphasis on
5 transformation that is make your own work credit
6 on noncommerciality and on taking portions that
7 are associated with your goal rather than, you
8 know, going on and on, so I won't either.

9 MS. SMITH: Thanks.

10 MS. CHARLESWORTH: Professor Coppa.

11 PROF. COPPA: I just wanted to say
12 quickly that actually, I find younger people are
13 often even more footage conscious than not. A,
14 because they haven't bought their own computers
15 which are better than younger. I mean we're
16 consciously upgrading. They have processing power
17 and they've been living with these big shiny
18 screens their whole lives. And as a film
19 professor, I see students coming in at 17 or 18
20 with unbelievably good video editing chops. We
21 actually just graduated a student who came in as a
22 vidder and four years later left and is working in
23 the industry and kind of that came in running in a
24 way that we didn't see young women coming in to
25 film studies programs. So there is -- I don't

1 even know that it's necessarily -- your younger
2 may teach you.

3 MS. CHARLESWORTH: Well, she's not
4 familiar with circumvention tools --

5 PROF. COPPA: Well --

6 MS. CHARLESWORTH: -- at this point.

7 PROF. COPPA: -- that you know of.

8 MS. CHARLESWORTH: She -- so I can
9 report that.

10 (Laughter.)

11 MS. CHARLESWORTH: Okay, thank you,
12 though. It's helpful commentary.

13 PROF. TURK: So we started to get into
14 the technical but the other thing that I wanted to
15 say is that it's not just aesthetic reasons that
16 alternatives or supposed alternatives don't work.
17 There are technical reasons as well. So video can
18 look good to a casual viewer and not be editable
19 because of the way that it's been encoded or the
20 way that it's been captured. It can be not
21 exportable which, in some ways, is even more
22 frustrating, where you can pull it into your
23 editing program but then you try to export and it
24 crashes, which is actually what happened to me
25 when I was working on the video or what was

1 supposed to be a video that I wanted to submit
2 with the reply comment but I was using captured
3 footage and it wouldn't work with my equipment.

4 So, the whole point of being a remix
5 artist is that we edit stuff. We don't want to
6 capture stuff just to look at it. We need to be
7 able to do something with it. And so when
8 opponents present what they consider to be
9 alternatives, they're thinking about those
10 supposed alternatives from the point of view of
11 viewer, of consumer, and you can see that in the
12 examples in the record and the fact that they
13 don't actually do anything with their clips. They
14 just capture a clip and say "look, we captured
15 it." Well, sure, but did you pull it into Premiere
16 or Final Cut? Did you apply effects to it? Did
17 you actually do what a remix -- you know, what a
18 remixer would do? There's no attempt to transform.
19 There's no attempt to remix.

20 So I have to assess alternatives from
21 the point of view of a creator, not just a viewer,
22 someone who is going to transform and remix clips.
23 And so screen capture may be good enough if all
24 you want to do is watch. It may be good enough
25 if all you want to do is pirate but it's not good

1 enough for someone who's going to create
2 something.

3 That's what I have and I'm happy to
4 answer other questions.

5 MR. DAMLE: So one of the questions that
6 had been kicked down to you was about the
7 alternative of downloads --

8 PROF. TURK: Yes.

9 MR. DAMLE: -- HD downloads for HD
10 streams. There was some talk in the earlier panels
11 about HDX. I don't know if you could speak to that
12 and whether that is a sufficient alternative for
13 your purposes?

14 PROF. TURK: Well, there are two reasons
15 why -- I mean people do use high download -- high
16 defendant downloads. I mean that -- and there are
17 circumstances under which that's extremely useful
18 and there are circumstances under which that
19 works. There are a couple of potential problems
20 with it or reasons why Blu-ray might be necessary.
21 Some of them are, as Professor Coppa suggested,
22 geographical. I say this is as someone who lives
23 in rural Minnesota with intermittent broadband
24 access, that getting definition high def
25 downloads, boy, that's an awful to -- I mean that

1 is a pretty big file to download and being able to
2 get something on Blu-ray is useful.

3 The other thing, though, is that HD
4 downloads and Blu-ray video are not actually the
5 same thing in terms of the way that they're
6 encoded. So they're encoded with different
7 compression algorithms and the reason for that is
8 the Blu-ray comes on a disc and you put the disc
9 in and so there's no need to download it. The
10 file size doesn't -- the file size only has to be
11 small enough to fit on the disc and a Blu-ray disc
12 holds a lot, really a lot of data. But a
13 download, you know, from iTunes or something like
14 that is encoded to produce a smaller file. And
15 this is actually interesting -- if you look at the
16 relative size of a 780 or a 720p download versus a
17 1080p high def download, the file size is actually
18 not that different. It's not as different as you
19 would expect given that there is 2-1/2 times more
20 pixels.

21 The reason is that -- let me -- I'm
22 trying to think of the easiest way to explain this
23 -- okay, so video is encoded using any of a
24 variety of codecs which stands for coder, decoder,
25 right, and there are three different codecs that

1 Blu-ray supports, and it's up to the people
2 encoding the video what codec they want to use but
3 all Blu-ray players and all Blu-ray encoders or
4 recorders have to support each of these three
5 codecs.

6 Now each of those codecs has multiple
7 options in terms of compression algorithms. There
8 are different profiles. There are different
9 levels. So, for example, what is the byte rate.
10 Variable byte rate is a sort of standard encoding
11 thing, right, where if you have a scene that
12 doesn't have a lot of motion, you have lower byte
13 rate and then when something explodes, you have a
14 lot more byte rate, right, to sort of allow for
15 better distribution of the data.

16 Different progression algorithms serve
17 really different purposes. So some progression
18 algorithms maximize sharp detail. So, for
19 example, if you're looking at something animated,
20 that's what you want, right. You want really
21 clear outlines. Some of them maximize smooth
22 motion. That's what they emphasize. Some of them
23 are designed to produce a relatively small file
24 size. You can never have all of the magic things
25 the codec can do for you, right. There's always a

1 tradeoff. If you get really sharp images, you
2 probably aren't going to have as smooth motion;
3 pretty smooth maybe but not as smooth. So you
4 take the original data and you make decisions
5 about what's the most important. And so high def
6 downloads are sort of aggressively compressed in
7 order to make -- I mean it's still a really big
8 file but it's way smaller than what you get if you
9 rip Blu-ray disc and you get the uncompressed --
10 not uncompressed because something has been
11 compressed to be on -- to fit on the Blu-ray disc,
12 but it hasn't been compressed as much as a high
13 def download. Now when you're watching, that
14 makes very little difference actually because the
15 progression algorithms that they use mean that
16 it's a relatively small file, relative to -- you
17 know, compared to the amount of data. But they've
18 chosen to compress it in a way that makes it
19 really watchable which is great and really
20 exciting, especially if you can download it rather
21 than having to stream it.

22 So the compression for distribution
23 doesn't necessarily affect viewing. You get
24 really good watchability and a smaller --
25 relatively smaller file size but it can affect

1 editing. So when you need to do something to that
2 footage, you potentially have pretty unpredictable
3 results depending on what you want to do to the
4 downloaded footage because compression affects the
5 underlying data and here it might be helpful to
6 think about a non-visual example. So if you think
7 about how compression works, let's say I have a
8 string of numbers. I want to have 30 nines in a
9 row, like 9, 9, 9, 9, and so I would need, if it's
10 uncompressed, I need 30 bytes to express that,
11 right, one after the other. When you compress
12 something, you say there's got to be a faster way
13 to represent this. And so instead of 9, 9, 9, 9,
14 9, 9, 9, you say 9 times 30. You have sort of a
15 shortcut, right. You have --

16 MR. DAMLE: But that would be a lossless
17 compression algorithm but I assume you're saying
18 that the Blu-ray, the compression algorithms are
19 lossy as they say, right?

20 PROF. TURK: Yes. Yeah, I mean because
21 anything that will get it that small has to be
22 lossy.

23 MR. DAMLE: Okay.

24 PROF. TURK: But again, you have -- you
25 know, within lossy compression algorithms, you

1 have -- you lose different things, what gets lost
2 in the compression, different algorithms sort of
3 make different choices about what to keep and what
4 to discard from the data.

5 MR. DAMLE: Could you give me a sense of
6 just sort of the sort of scale of compression
7 we're talking about in the different -- sort of
8 starting maybe with the raw file. I don't know
9 what it is in the video context. I'm thinking
10 sort of photography context but the raw file to
11 what -- how much data is in the raw file versus
12 how much is typically in a Blu-ray versus how
13 much is even in a 1080p download?

14 PROF. TURK: That's a really good
15 question and I would have look. I don't know --

16 MR. DAMLE: Give some scale even. No,
17 you don't -- okay.

18 PROF. TURK: Someone can probably Google
19 that as I sit here thinking.

20 MR. DAMLE: I'm just curious whether you
21 knew off --

22 PROF. TURK: Off the top of my head, I
23 don't know.

24 MR. DAMLE: That's fine.

25 PROF. TURK: I mean I know that, you

1 know, the raw file is enormous. It's unmanageably
2 enormous. It would crash your computer to, you
3 know, do anything with it. And then Blu-ray is
4 compressed but not as compressed because again,
5 you -- I mean so if you were to look at, you know,
6 the HD download from iTunes of a particular
7 episode of television and the Blu-ray rip, there
8 would be a really significant size difference,
9 yeah.

10 MR. CHENEY: Could you -- in part of
11 doing this, could you talk about the editing
12 limitations? You've alluded to that and you said
13 that there are limitations with the different
14 versions, the download versus the full Blu-ray.
15 Can you describe what those limitations would be
16 in some detail? And you may have done some of
17 that already in the record but if you could add
18 just a little bit here.

19 PROF. TURK: I mean the one that comes
20 to mind is cropping and resizing that you would
21 probably lose and, you know, I haven't done a
22 side-by-side of this so I am -- I don't have an
23 example to show you. But if you were resizing
24 footage, you might get somewhat different results
25 with Blu-ray than with a high def download. Now

1 both of them would still be a lot better than DVD
2 just because you have more pixels you're starting
3 with, right. Other kinds of things that might be
4 affected, changing something to slow mo might be
5 different. Color, I'm not sure about. That I
6 would have to see. I haven't done enough with
7 that to know. But cropping, zooming, changing of
8 speed, those are all things that I think there
9 could be some differences.

10 PROF. COPPA: Sorry, I just want to say
11 after effects you can often use internal cameras
12 on the computer to move the camera in a computer
13 over a piece of footage and I know those kinds of
14 things take huge amounts of processing power and
15 require like really big underlying images. I
16 wouldn't be surprised if that kind of after
17 effects internal camera work you saw a difference
18 between HD download and Blu-ray.

19 PROF. TURK: Yes. That would make sense
20 to me. I haven't -- I admit I am not that fancy.
21 I have not done that kind of work.

22 MS. CHARLESWORTH: Professor Turk, have
23 you personally worked with -- I mean you're
24 describing what you think would be the case but do
25 you have personal experience dealing with HD

1 download materials and trying to edit them?

2 PROF. TURK: I don't actually because I
3 have not had much time to vid in the last couple
4 of years, so I am a little bit behind the curve on
5 this one I am sorry to say.

6 MS. CHARLESWORTH: Okay. Have either
7 Professor Coppa, have you worked with those
8 materials, with HD?

9 PROF. COPPA: No, not myself but the
10 vidders that I've been interviewing for my book
11 have, so this is where, for instance, I've learned
12 myself. I find it hard to get my head around the
13 idea of like internal -- you know, vidders using
14 internal cameras in programs like After Effects to
15 process footage and how difficult, how much
16 processing power that is. But -- so I've -- I can
17 give you anecdotal examples but I have -- I don't
18 -- I'm a film studies professor. I don't have that
19 level of --

20 MS. CHARLESWORTH: Professor Turk is an
21 English professor but I never learned any of that
22 in English.

23 PROF. COPPA: It's true.

24 MS. CHARLESWORTH: I have to tell you,
25 this is pretty detailed technical information.

1 But are they reporting -- so is that -- what you
2 just talked about, the internal -- you spoke of
3 the internal cameras. Is that reported as a
4 deficiency in the HD download?

5 PROF. COPPA: No.

6 MS. CHARLESWORTH: -- or an editing
7 issue or is it just a --

8 PROF. COPPA: What it is is actually an
9 exciting -- in other words, increasingly the
10 software has gotten -- digital editing software of
11 Final Cut, Premiere but also After Effects has
12 gotten sophisticated. A lot of vidders are
13 working with After Effects which is kind of three-
14 dimensional Photoshop or also even integrating
15 footage that they're making themselves in with
16 other kinds of footage. I mean it's a really
17 exciting time for the art form, which I know is
18 not your primary thing, but I do know that the
19 people who are working with these kinds of tools
20 often are starting with very, very high-quality
21 source because they're doing unbelievable amounts
22 of processing. One vidder I interviewed for my
23 book literally melted the graphics card on her
24 computer in the making of a four-minute video.
25 You're often setting renders that go 26 hours to

1 render a clip that is going to be integrated into
2 -- I mean just to give you a sense of what people
3 are doing. And again, often it's not just old
4 people like us. It's young people. It's people
5 who are increasingly just getting these amazingly
6 souped-up machines and making incredibly
7 expressive works of art.

8 MS. CHARLESWORTH: Okay, thank you.

9 PROF. TURK: So --

10 MS. CHARLESWORTH: Professor Tushnet --
11 oh, I'm sorry.

12 PROF. TURK: -- I was going to return to
13 the -- because there had been a question about
14 VUDU HDX and so I did a quick look into that and
15 here is what I found. This is a direct quote from
16 digitaldigest.com which had some info about this.
17 So VUDU's HDX streaming service brings down the
18 average byte rate of 1080p video from Blu-ray's
19 dizzying 35 mbps to a more manageable 12 mbps. So
20 that's great in terms of streaming, right, and
21 downloading but it's not great for editing.

22 MS. CHARLESWORTH: And explain exactly
23 why that is?

24 PROF. TURK: Because it's less data.

25 MS. CHARLESWORTH: It's just -- so you

1 have less to work with?

2 PROF. TURK: Right.

3 MS. CHARLESWORTH: Okay.

4 PROF. TURK: Exactly. You're starting
5 from here when, you know, you could be starting
6 from here.

7 MS. CHARLESWORTH: Okay. Professor
8 Tushnet?

9 PROF. TUSHNET: Yeah. So I just wanted
10 to remind you that the record is actually
11 extensive on this and among other places in our
12 reply, on pages 9 and 10, we quote 5 or 6
13 different people who report on their experiences
14 working with different downloads and say it's like
15 working with -- let's see, I think she says a
16 blowing up an old photo to twice its size. So
17 even if we can't get them, you know, in our heads
18 right in the moment, it's in the record. Just --

19 MS. CHARLESWORTH: Okay. Yeah. And I
20 know the record, as I said, is extensive and we'll
21 be going back through it again. I think it's your
22 turn actually to speak, make your so-called
23 opening remarks. And I think you are presenting
24 some exhibits that we've premarked.

25 PROF. TUSHNET: I am and hopefully this

1 will work again. Okay. Give me one moment to
2 dismiss this. Great. So first, I do want to
3 thank you. This is often a quite thankless task
4 and thank you for your hard work.

5 I want to emphasize a couple of things.
6 First the wide variety of fair uses involved here.
7 So a lot of the people that we talk, including the
8 people who litigated and won their fair use cases
9 like the anti-abortion group and Jonathan Autry,
10 weren't remixers until they found something that
11 they really needed to talk about. And at that
12 point, they said, okay, I have a message; I need
13 to get it out. And they went and they did what
14 they thought made the most sense. They made the
15 best message they could under the circumstances
16 using the best footage they could find. And the
17 record actually, in Northland, is quite clear
18 about this where they say every detail in that
19 video is there for a reason, and that is actually
20 a litigated fair use outcome.

21 Jonathan Autry, they ended up even not
22 pursuing the claims against his remix but he also
23 won fair use on the pure copying videos that he
24 did and he just says he was a divinity student and
25 then he found -- you know, he had something to say

1 and that turned out to be a quite important thing
2 to say about a guy who was going around being a
3 fraud.

4 The Native Americans protesting
5 Washington's football team, again, when I
6 contacted them, they had no idea that they were --
7 that they had fortunately been protected by the
8 exemption because what they thought they were
9 doing was intervening in a political debate.

10 So, you know, there's just a wide
11 variety of people here, film criticism from Tony
12 Zhou, soda_jerk, vidders like Jan Giandujakiss and
13 others. And just to give you a sense of what we
14 mean when we say they were editing, I wanted to
15 show you an example. And here's the thing.
16 Unless you're a big fan of the show Supernatural,
17 I'm going to have to tell you what has been done
18 here because you won't know. But in fact, every
19 frame of this has been extensively edited and I'll
20 try to point out a few of these and we'll try not
21 to go very long.

22 MS. CHARLESWORTH: Professor, do you
23 know which Exhibit you're now showing us?

24 PROF. TUSHNET: This is Exhibit 28.

25 MS. CHARLESWORTH: Okay, Exhibit 28.

1 (Whereupon, Hearing Exhibit Number 28
2 was marked for identification and the
3 video exhibit was played.)

4 PROF. TUSHNET: Okay. So Exhibit 28,
5 just so you know, after this effect, all of the
6 effects you see will have been added to the
7 footage by the vidder. None of the text you see is
8 in the original so that nomad is new. There have
9 been color changes, timing changes. Sorry.

10 Okay, see that. She's taken away the
11 background now. Sorry, I keep hitting it
12 accidentally. That's added, the effect on his
13 face. That's added, the effect on his face. The
14 text again. The text again. The background has
15 been swapped. The background swapped again.

16 So these are the kinds of things we're
17 actually talking about. They require really high
18 quality to start with and you do get degradation
19 no matter what when you start the operation, but
20 in order to get something that's watchable at
21 output, you need to start with really high quality
22 on the input. So -- and I actually encourage you
23 to watch the end where you see a fantastic the
24 vidder has created on person's arm, just it was
25 not there in the source at all.

1 Second point I want to make is we've
2 submitted evidence that a substantial number of
3 remixes made using circumvention are likely to be
4 non- infringing. We have satisfied the statutory
5 demand for adverse effect in our ability to make
6 non- infringing uses. The question your
7 confronted with is how to word the exemption for
8 which we concededly qualify and which is
9 unopposed, at least in its renewal.

10 Under our formulation, requiring fair
11 use more than satisfies the requirement of
12 substantial likelihood; in fact, it ensures it.
13 You can even say in the exemption that it's more
14 likely to be fair use if it's a short clip.
15 That's the standard given by the law. But a
16 contrary formulation presupposes that some fair
17 uses ought to be excluded which is not what the
18 statute says.

19 And I just would encourage the Office to
20 recognize that there are two concepts here that
21 are not the same. Limited more than fair use
22 limits is not the same as providing guidance.
23 Most of the non fair use based limits the Office
24 has imposed in the past have been unclear and
25 we've heard that in every single panel that, oh,

1 there's a reasonable dispute about what that
2 means. That's not guidance.

3 Third thing, opponents didn't offer
4 evidence about the quality of Blu-ray screen
5 capture. Since Blu-ray is the only exemption
6 they're opposing, that silence speaks volumes.
7 Even screen capture applied to DVD produces bad
8 results and I want to show you what screen capture
9 applied to Blu-ray does. So this is The Lucky
10 One. She actually got it to work. So that's what
11 screen cap does to Blu-ray because of that 2-1/2
12 times as much data. You know, the software just
13 can't handle it. So she got lucky.

14 MR. RUWE: Excuse me --

15 PROF. TUSHNET: And also, by the way,
16 this is before editing --

17 MR. RUWE: -- what was the --

18 PROF. TUSHNET: -- and of course,
19 editing -- I'm sorry?

20 MR. RUWE: -- what was the file name for
21 that one?

22 PROF. TUSHNET: This is, sorry, Exhibit
23 29. It's called "Captain America" or Cap 2
24 Sequence."

25 (Whereupon, Hearing Exhibit Number 29

1 was marked for identification and the
2 video exhibit was played.)

3 PROF. TUSHNET: All right. So you can
4 see the processing demands, you know, and this is
5 on a new computer with, you know, not -- probably
6 there are companies that have faster processes but
7 certainly a high-end individual computer.

8 MS. SMITH: Wait. I'm sorry, can you --
9 maybe I just missed it -- but explain how is that
10 one captured or --

11 PROF. TUSHNET: Sure. So it was Snagit
12 on a PC.

13 MS. SMITH: Okay, thank you.

14 PROF. TUSHNET: On a -- yeah.

15 MS. SMITH: And going back to the `
16 clip, it may not be possible because of what was
17 done in the editing but when we go back and look
18 at this clip, we're not going to have the benefit
19 of, you know, you telling us what we're watching,
20 what's been changed.

21 PROF. TUSHNET: Uh-huh.

22 MS. SMITH: Is there a way we can see
23 the original clip to compare it?

24 PROF. TUSHNET: You would have to look
25 at about 40 episodes of Supernatural.

1 MS. SMITH: Right. So it's all sliced
2 and diced from it?

3 PROF. TUSHNET: Yes.

4 MS. SMITH: Okay.

5 PROF. TUSHNET: Sorry. I mean if you
6 want, I'm happy to actually go clip-by-clip. I
7 know Supernatural and I can do it but, you know,
8 if you -- but it would take me some time.

9 MS. SMITH: That's okay, thank you.

10 PROF. TUSHNET: Okay. So that's The
11 Lucky One. Here's what Thuviaarth, who is the
12 one who -- she speaks about using the Captain
13 America deleted footage to make an important point
14 about militarization in the Marvel universe.
15 Here's what she said, I spent an hour with WM
16 Capture which is, by the way, the only software
17 that claims not to be circumvention, and I spent
18 45 minutes with Camtasia Studio -- now I'm
19 actually playing a video.

20 (Whereupon, Hearing Exhibit Number 30
21 was marked for identification and the
22 video exhibit was played.)

23 PROF. TUSHNET: So it's playing on her
24 screen but Camtasia and WM Capture aren't getting
25 it because -- sorry -- yeah, just to show, it is

1 playing on her screen and you can hear -- you can
2 actually hear that in the sound.

3 MS. CHARLESWORTH: Okay. And that --
4 what Exhibit is that for the record?

5 PROF. TUSHNET: That was Exhibit 30.

6 MS. CHARLESWORTH: Okay.

7 PROF. TUSHNET: And so what Camtasia
8 Studio and WM Capture will do on Windows 8.1, so
9 the version that you get if you buy it now, is
10 they record the audio but they have implemented --
11 I don't know if it's the same -- they have
12 implemented technology that produces the same
13 result as you currently get on a Mac. So she said
14 she tried it with two different Blu-rays, same
15 result, so four attempts.

16 MR. RUWE: So which one was that though?

17 PROF. TUSHNET: So this one was WM
18 Capture.

19 MR. RUWE: Using what operating system?

20 PROF. TUSHNET: Using -- was this
21 Avengers or Captain America? It was one of those
22 two Blu-rays.

23 MS. SMITH: What operating system.

24 PROF. TUSHNET: ON -- sorry -- it is
25 actually -- actually, I wrote it down elsewhere.

1 Give me one second. She used -- I'm sorry, can
2 you actually -- when I go back to my seat, would
3 that be okay?

4 MR. RUWE: Sure, thanks.

5 PROF. TUSHNET: Okay. I'll tell you it
6 is -- again, it's Windows 8.1 I believe but I --
7 it's a Dell -- I can't remember the model. I can
8 look it up for you.

9 Okay. So given the evidence that we've
10 submitted of artists actual experience, the burden
11 is on the opponents to provide some evidence that
12 their alternatives work for Blu-ray. They do not.

13 Fourth and relatedly, the exemption
14 process looks at adverse effects in the real
15 world. People are using Blu-ray. Absent
16 exemptions, they risk violating the DMCA
17 regardless of the theoretical alternatives.
18 Giving them the ability to counter notify like
19 other people would be a real lifting of the
20 chilling effect. Remixers shouldn't have to be
21 lawyers.

22 Two more quick points, first, our
23 testimony comes from women, each of whom have more
24 than a decade of editing video. They've won
25 awards. They've been featured in magazines and

1 museums and scholarly articles. It's
2 disconcerting to see men who admittedly don't make
3 or edit video discredit their experiences and
4 insist that there must be some way to do it
5 better. The MPAA has access to real film editors.
6 I respectfully suggest that there's a reason that
7 none of them are here to confirm the opponent's
8 assertions about file quality and editing.

9 Final point on adverse effects, in
10 previous panels, we've heard the opponents suggest
11 that Mac owners go out and find a completely
12 separate computer to do screen cap on and make sure
13 it's old. Pink collar workers, guys like Jonathan
14 Autry who was supporting two children on the
15 salary, or lack thereof, of a divinity student,
16 they can't do that. I know also that the Register
17 previously held, with respect to the print
18 disabled, that having to use multiple devices was
19 itself an adverse impact and I would encourage you
20 to consult that.

21 MR. DAMLE: But one of the points that
22 was made at an earlier panel was that there are no
23 licensed Blu-ray players for the Mac.

24 PROF. TUSHNET: Yes.

25 MR. DAMLE: So if you're using a

1 licensed Blu-ray player, you'd have to buy a PC
2 anyways if you only have a Mac.

3 PROF. TUSHNET: So that's not true if
4 you have a Blu-ray player that's -- you have
5 another device and that you could -- but it is
6 true that -- you're right. I didn't know that
7 either.

8 MR. DAMLE: So it's a question of what
9 multiple devices you need to --

10 PROF. TUSHNET: Yeah. So, no, because,
11 well, a couple of things. It depends on sort of
12 what connections you can make, you know, in your
13 home. So I don't know everybody's setup. It is
14 the case -- I can look up how much the unlicensed
15 players are. Let's put it this way. Vidders
16 definitely will -- if they have the resources,
17 they are interested in having, you know, the best
18 equipment they can. Nobody I know would say, "Oh,
19 I'll go out and buy a new PC." Instead they would
20 say, "Oh, I'll go out and buy a player."
21 Somebody's who really invested in complying with
22 the law didn't know this thing, right, about -- so
23 the people that I counsel, you know, who are
24 artists, they would buy a player and they wouldn't
25 know any more than I did before I got here.

1 Actually, let me leave you with one
2 anecdote which is last -- this happened to me not
3 to long ago. So I am on a discussion list for
4 trademark lawyers who practice before the PTO, and
5 they were discussing submitting video clips to the
6 PTO to support argument about the use of a mark.
7 And I mentioned that they would have to think
8 about DMCA compliance there. And I was told in no
9 uncertain terms that because it was a fair use,
10 they did not have to worry about circumvention
11 liability and like, again, these are practicing
12 lawyers, they're just not copyright lawyers.

13 MS. CHARLESWORTH: They said that over at
14 PTO?

15 PROF. TUSHNET: So it's a --

16 (Laughter.)

17 PROF. TUSHNET: It's actually the --
18 it's called a TTAB listserve so it's a listserve
19 for people who practice in front of.

20 MS. CHARLESWORTH: Okay.

21 PROF. TUSHNET: Okay. And they were --

22 MS. CHARLESWORTH: I don't --

23 PROF. TUSHNET: -- and they were telling
24 me --

25 MS. CHARLESWORTH: It's a PTO's friends,

1 okay.

2 (Laughter.)

3 PROF. TUSHNET: Oh, yeah, and look, the
4 point is, you know, not even lawyers get this
5 right. We should make it easy to get it right.
6 Thank you.

7 MS. CHARLESWORTH: Thank you, Professor.
8 I just wanted to remind you that Steve had an
9 outstanding question. She was going to look
10 something up for him. That's all.

11 PROF. TUSHNET: Yes. Give me one
12 moment.

13 MR. CHENEY: And while she looks that
14 up, I wanted to ask, too, for clarification of the
15 record. It's my understanding that you can buy a
16 external drive that would attach to the Apple and
17 that may -- that drive itself may be licensed that
18 you could then play the Blu-ray on. It's my
19 understanding that that may actually be true. Do
20 you understand if that's true or not?

21 PROF. TUSHNET: I'll have to defer to
22 Mr. Turnbull, I'm sorry.

23 MS. McSHERRY: I've been just handed a
24 device and according to this device and the Google
25 search that led to -- that it reflects, it's

1 actually quite easy to get hold of a Blu-ray
2 device that you can attach to your Mac.

3 MR. CHENEY: And that would be licensed
4 I would assume?

5 MS. McSHERRY: Sure. No, I'm sorry. I
6 don't know the answer to that but it's certainly
7 not hard to acquire. I could buy one right now by
8 clicking a button but I won't.

9 MR. CHENEY: Thank you.

10 MR. DAMLE: Mr. Turnbull, do you --

11 MR. TURNBULL: Well, I don't know what
12 she was looking at so I have -- it's hard to
13 comment. The issue of whether you could connect a
14 stand-alone Blu-ray player through one of its
15 outputs to your Mac for playback purposes, you
16 potentially could. It would be unlikely that -- I
17 think you would have to circumvent something in
18 order to actually be able to capture the video
19 that was being played back through a connection,
20 USB or whatever. The -- attaching a freestanding,
21 simply a Blu-ray drive to your Mac computer, the
22 way the technology works should not authenticate,
23 that drive should not authenticate with an
24 unlicensed player and so it should not play from
25 the drive using a player that's resonant of some

1 piece of software on the Mac.

2 MR. CHENEY: And would that be because
3 of the HDCP robustness --

4 MR. TURNBULL: No.

5 MR. CHENEY: -- rules we talked about
6 before?

7 MR. TURNBULL: That -- what I was just
8 talking about now is an AACS requirement. The
9 external drive that is connected is supposed to
10 authenticate itself to a licensed player, and the
11 licensed player is supposed to authenticate the
12 drive as a licensed drive. If either one isn't
13 licensed, they're not supposed to play together.
14 The licensed one is supposed to refuse to play.

15 The -- when I was talking about a free-
16 standing Blu-ray player, a set-top type Blu-ray
17 player that has an output that you could connect
18 to a PC, which is possible, the output would
19 itself have protection -- that would be HDCP or an
20 alternative -- would have protection that would --
21 that's when I said the first time I was talking
22 about it, yeah, you'd have to crack the HDCP or
23 something else to get the image, to get the
24 content through that kind of connection.

25 MR. CHENEY: And that would be the case

1 for using screen capture software through that
2 mechanism as well?

3 MR. TURNBULL: Screen capture software
4 is -- the -- screen capture software operates on,
5 the kind that my colleague has used, operates on
6 the decrypted video, so it would not actually be
7 attacking either AAC3 or HDCP but it conceivably
8 could be something that has been imposed by the
9 Apple player or a Windows player for Blu-ray.

10 MR. CHENEY: Okay.

11 MS. CHARLESWORTH: Okay. I think --
12 yes, Professor Tushnet.

13 PROF. TUSHNET: Sorry. I just wanted to
14 answer your question. So Windows 8.1, Dell XPS
15 2720, 27-inch screen. It actually has to shift
16 resolution down to play Blu-rays but then again,
17 who cares because you can't see it, so

18 MR. RUWE: And just a quick question. It
19 was only Windows 8.1 that has this problem or were
20 there other

21 PROF. TUSHNET: So, you know, my
22 informants only have one computer each so I don't
23 know. I know that the slightly older computer got
24 the crappy version so presumably, if you went far
25 enough back to get a processor that, you know,

1 can't handle it, you might find others that
2 support it. But, you know, if you bought
3 something today, no.

4 MS. CHARLESWORTH: Professor Turk, you
5 had something to add?

6 PROF. TURK: This is actually backing up
7 a bit but it's back to the question of the size of
8 uncompressed video. So we did a quick bit of
9 searching and uncompressed, 24 frames per second,
10 10 byte Blu-ray-sized video is 667 gigabytes per
11 hour of video. And for 40 minutes of, you know,
12 an iTunes HD download tends to be about 1.75 gigs.
13 So there is a pretty significant size difference.

14 MS. SMITH: Okay. Also on that topic,
15 I'm wondering if maybe Professor Tushnet can also
16 look up in the record, you said pages 9 and 10 was
17 like blowing up a photo, but I think that was
18 talking about DVD instead of HD so I don't know if
19 there's another -- maybe I'm looking at the wrong
20 place?

21 PROF. TUSHNET: So actually -- so
22 there's a couple of them. So the vidder who talks
23 about I've tried screen capture and DVD rips, so
24 she wants -- she's talking actually about why she
25 wants to use Blu-ray, that even DVD isn't pulling

1 off what she wants. She's tried downloads. I
2 think she does say that.

3 MS. SMITH: Where is this? This is robo
4 -- page nine?

5 MS. McSHERRY: This is in the reply just
6 to be clear.

7 PROF. TUSHNET: This is in the reply,
8 I'm sorry.

9 MS. SMITH: I think I'm looking at your
10 reply. I mean I'm on page nine of the reply.

11 PROF. TUSHNET: Right.

12 MS. SMITH: So, okay -- because the --
13 right above it, they say "I would like to use" --

14 PROF. TUSHNET: Right.

15 MS. SMITH: -- either download or Blu-
16 ray so it's not that one. The next one is talking
17 about DVD.

18 PROF. TUSHNET: Right. So I think
19 actually it's the unnamed vidder that asked us to
20 remain anonymous and she's asking specifically for
21 Blu-ray because she's tried the other things. You
22 know, look, I have to say we actually do want high
23 quality downloads, too. In part, because we need
24 them to respond quickly so the Blu-ray -- there is
25 an important function that HD serves which is to

1 respond to something, especially television where
2 there's usually a 9 or 10-month cycle. So it's --
3 I mean it's not the case that these are useless.
4 It's just that, depending on what you want to do,
5 you may need the Blu-ray. But it's certainly the
6 case that, you know, the high quality downloads
7 can be good enough, especially if you want to
8 intervene in the conversation that's going on
9 right now, and we have some examples of that for,
10 say, you know, Supernatural, for Glee, for other
11 things where there's a cultural conversation going
12 on. So, you know, I don't want to say it like
13 they're useless. It's just that there are
14 situations where Blu-ray is better and --

15 MS. COPPA: I think it --

16 MS. McSHERRY: Okay.

17 MS. COPPA: If I may respond? I mean I
18 think it gets back to the basic of fair use
19 analysis, right. You take what you need for your
20 purpose. Sometimes your purpose is speed,
21 commenting on something while it's still happening
22 before your audience has forgotten about it, in
23 which case you might need to use one kind of
24 source. But maybe your purpose you think might
25 end up in a museum someday or as part of an

1 installation, in which case you're going to
2 recalibrate that and think about -- but it's
3 always -- it seems to me, the theme across all of
4 this is people are going to want the best quality
5 they can get within the parameters that they are
6 in.

7 MS. McSHERRY: Right. It also assumes
8 that people may just take the best quality and no
9 tailor it to their purpose because they may not be
10 aware of these slides I think is another stream of
11 what you're saying also, right?

12 MS. McSHERRY: Absolutely. I mean they
13 just won't know and it is really counterintuitive
14 from an artistic perspective but you just -- you
15 guessed wrong in your source and now you've got a
16 legal problem that you didn't have before.

17 MS. CHARLESWORTH: Thank you, Ms.
18 McSherry. Professor Coppa?

19 PROF. COPPA: I just wanted to add two
20 things. One was, you know, when you're reviewing
21 the Supernatural, you know, video, I feel like I'm
22 actually the least technical so in an odd way, I'm
23 most appreciative of the effects of, you know,
24 that. Just to iterate that it was the sort of
25 effects on the body, the fact that the body in the

1 foreground is not the same as the -- is mismatched
2 with the background, that the background was
3 switched on the person in the foreground but also
4 how difficult it is to integrate text so that it
5 looks as if it's in the image. I mean picture
6 that -- if you can imagine -- I don't know if you
7 ever used this kind of screen capture yourself
8 but, you know, I looks like you're writing on a
9 frame, you know, I mean like a typewriter, to
10 actually give something three-dimensionality that
11 it moves with you, that if you move, your arm
12 moves and the text shifts in real time. It looks
13 like nothing but like try it. It's actually
14 incredibly kind of difficult.

15 And, you know, one of the hard things
16 sometimes, you know, for me and having been around
17 these hearings is the fact that if somebody's done
18 their job right, you might often not see it at all
19 because it looks so beautiful and intuitive and
20 like TV looks, you know, ignoring the fact that it
21 was done by a pink collar worker in Mississippi
22 and not by like industrial light and magic in
23 Hollywood with all this processing power.

24 And I'm often very moved by that. We
25 were talking just before the thing about a vid

1 that showed at a convention that we were at where
2 afterward, somebody went "yeah, what's the big
3 deal," and it just turned out that the main
4 character hadn't been in any of those shots and it
5 didn't look like anything. But the people who
6 knew the show were like "that guy wasn't in any of
7 those scenes." She'd actually just put them in.
8 And so sometimes when you're, you know, showing
9 these things to people, it's hard to sort of say
10 like that was hours of work. It was days of work.
11 It was, you know, days just to render.

12 The second thing that I wanted to
13 emphasize is that while certainly not everybody is
14 going to be using Blu-ray all the time, you know,
15 I reiterate my point about sort of younger people
16 who use it even, you know, without thinking. But
17 also, you know, my concern a lot is for the kind
18 of person who's using Blu-ray because they take
19 their voices seriously and who may be the person
20 who ends up defending their work from takedown.
21 You know, I spend a lot of time trying to help OTW
22 educating vidders that if, you know, somebody is -
23 - if they're the victim of an unfair takedown,
24 that they should fill out the form and say, "No,
25 my work is a fair use. This is my speech. This

1 matters," you know. And as a principle to me,
2 it's important to be able to tell people that they
3 should, if they think their work is fair, that
4 they should fill out any process forms that a
5 hosting site or whoever it is, you know, offers.

6 And so I feel like to the extent to
7 which somebody using Blu-ray is taking their
8 speech and their art seriously, that they may
9 exactly be t he person who is in that kind of a
10 dispute and so the very person who I want to have
11 the exemption because, you know, that's the person
12 who's going to fight it, right, where maybe the
13 14-year-old is using Blu-ray but if she gets a
14 takedown and she doesn't think her speech is
15 important -- I'm working on it -- but she may not
16 think her speech is important enough to fight the
17 takedown, and I'm kind of interested in the person
18 who is, you know.

19 MS. CHARLESWORTH: Okay, thank you. I
20 think we're going to turn now Mr. -- are we
21 skipping over you, Mr. Turnbull or --

22 MR. TAYLOR: I'm just standing.

23 MS. CHARLESWORTH: You're just standing.
24 Okay, I don't blame you. Mr. Turnbull, would you
25 like to proceed?

1 MR. TURNBULL: Yes, and I actually won't
2 take a lot of time and will defer to Mr. Taylor
3 here momentarily.

4 Our view is that the evidence in this
5 record establishes that there is a vidder
6 community making all kinds of videos using the
7 existing technologies and the existing exemptions
8 without having the exemption of AAC3 Blu-ray.
9 There are sites, as we -- sites on the internet
10 that, as we indicated in our written submission,
11 that tell vidders how to use screen capture
12 software for their uses.

13 There are HD quality videos that we've
14 talked about that are available through downloaded
15 HD content under the existing exemption and
16 presumably a renewed exemption. I don't know. I
17 wasn't as fast as Professor Turk with figuring out
18 the gigabytes but there are also flavors of HD
19 that are available online and I don't know which
20 flavor she was using. HDX is, I think from what
21 I've seen, likely to be the highest quality and
22 the largest gigabytes. There is some complaint in
23 the early days of its use, that it took a long
24 time to download which suggests that it was a big
25 file. But in any event, there is high quality HD.

1 Some of the quotes, the one that we were just
2 looking at on page nine of the reply from the
3 proponents actually cited the use of HD downloads
4 as a good thing, so we think that there are
5 alternatives.

6 And with regard to content that is
7 available only on Blu-ray, there is a de minimis
8 amount of that. It's also the case that some of
9 the online downloads contain bonus features as
10 well so even further diminishing it.

11 Second point I wanted to make is that as
12 to the case law, it's our view that Corley is good
13 law and, in fact, the most directly relevant law
14 to this proceeding. It was covering the same law
15 that this is operating under. The -- it's using -
16 - it's applying to the same kinds of technologies
17 that we have before us, the same kind of "it is
18 video" that is before us. Some of the other cases
19 that were cited had to do with written transcripts
20 versus audio recordings; they had to do with use
21 of posters. They had to -- they did -- so we
22 believe that Corley is, in fact, good law and
23 highly relevant to this case. And the quote that
24 we've used in a number of the panels is from the
25 direct finding of the court in relation to the

1 relationship of the First Amendment and fair use,
2 and it was one of the three reasons why the court
3 found for the plaintiffs in that case.

4 Finally, in relation to the harm to the
5 markets for the content and for the proprietors of
6 the content protection or technological protection
7 measures, as I've said in other panels, there was
8 a recent case in which the judge, Judge Broderick
9 in the Southern District, found irreparable harm
10 to AACCS from the distribution of tools that were
11 used to circumvent AACCS. It is our view that the
12 enabling of the further distribution of those
13 tools through exemptions, in this proceeding
14 particularly, one that is as broad and sort of
15 amorphous as the one that's proposed here would
16 have the similar irreparable harm to AACCS. The
17 fact that there has not been commentary on any
18 harm from the DVD exemptions is simply a
19 commentary on the differences between DVD and Blu-
20 ray, DVDs hack having been ubiquitous and it being
21 indistinguishable what might have happened from
22 somebody who misused an exemption versus somebody
23 who simply got a hack system or a circumvention
24 tool online. Here we've been able to contain the
25 -- for Blu-ray, we've been able to contain the

1 circumvention tools to at least some degree and
2 the use of those tools in a more widespread
3 context we believe would indeed cause harm to
4 AACS.

5 MS. CHARLESWORTH: Mr. Turnbull, a
6 couple of questions. What do you make of the
7 claim that -- I mean one of the assertions here is
8 that, you know, when you're in the editing process
9 and the kind of complex editing that's going on
10 here, that Blu-ray is a better format to be
11 working with than other formats? I mean do you
12 have a response to that?

13 MR. TURNBULL: The comment that was made
14 that I'm not, in fact, a vidder is correct. I
15 don't have firsthand experience. I take the point
16 as made. On the other hand, I think that people
17 did make, have made perfectly good remix videos
18 using alternative forms of video. The compelling,
19 you know, 5 years ago, 10 years ago, people would
20 have said, you know, this was quite compelling and
21 so I think that it's possible to do it without
22 that. And as we've said, the HD content that's
23 available through the HD download, medium and as
24 Mr. Taylor will show, even using non-Blu-ray
25 content, the editing is possible to do.

1 I would actually add one point that's
2 not directly relevant to your question but it
3 occurred to me and I admit we have not maintained
4 that screen capture of the playback of a Blu-ray
5 is an alternative. In general, our view is that
6 that probably doesn't work in more cases than it
7 does, and so we have not maintained that and so I
8 mean it was useful to see the demonstration but it
9 wasn't in response to anything we had proposed.

10 MS. CHARLESWORTH: Okay. What about the
11 other concern that, you know, as an artist, you
12 may think for aesthetic reasons you need Blu-ray
13 as opposed to any alternative; I mean how do you
14 respond to that?

15 MR. TURNBULL: I think the response is
16 that under our laws, you don't always get what you
17 want, and that the -- you know, and again, going
18 back to the Corley case, you know, the fact that a
19 critic might have had a better piece of criticism
20 if he had been able to take a video camera into
21 the movie theatre and to capture using the video
22 camera in the movie theatre, the clip that
23 demonstrated what he was talking about doesn't
24 mean that it's legal to go in the movie theatre
25 and use a video camera.

1 MS. CHARLESWORTH: And, you know, on
2 that point there are sort of -- I'm just asking
3 you sort of broad, you know, so you can respond
4 for the record these sort of broad themes, you
5 know, that the bar is getting higher and higher in
6 terms of quality and that -- I mean it's true
7 there are, you know, as we saw in LA, you know, we
8 have 4k coming, we have a lot of other -- we have
9 newer formats coming into the market that are even
10 above Blu-ray in terms of their quality and, you
11 know, pixels and so forth. I mean do you agree
12 that in general, the way the market is moving is
13 it's progressing to higher and higher res formats
14 and that that's just sort of an inevitable
15 progression and that --

16 MR. TURNBULL: Well --

17 MS. CHARLESWORTH: -- partly what we're
18 -- I'm sorry to -- that's a long question but
19 partly what we're discussing here is sort of the
20 change, you know, from three years ago or looking
21 a little bit into the next three years, that that
22 bar is -- is that there's that shift going on
23 toward higher res content?

24 MR. TURNBULL: -- well, yes and no. I
25 think that my clients and the people who

1 participate in their -- in the companies who are
2 part of AACS very much hope that, in fact,
3 everybody will rush out this Fall and buy their
4 new ultra-high definition television and ultra-
5 high definition Blu-ray players that are going to
6 be made available this Fall. They really hope
7 that that's the case. Having -- and so to a point
8 that there's no doubt about that.

9 On the other hand, DVD is still the
10 dominant optical media form factor,
11 notwithstanding the fact that Blu-ray has been
12 around for however long, nine years, DVDs vastly
13 outsell Blu-rays every year and have for some time
14 and there's no, you know, indication that that's
15 changing. I mean the -- and the video -- online
16 videos, you know, people are watching all kinds of
17 different resolutions. You know, even when I -- I
18 know as a consumer, when I try to, you know, go to
19 one of my online systems to watch on my big screen
20 TV, it frequently says that, you know, the content
21 may be down resolved in order to deal with
22 bandwidth. So people are watching -- I don't know
23 that it's -- it isn't just, you know, everybody is
24 watching the high definition all the time.

25 MS. CHARLESWORTH: Okay. Ms. McSherry,

1 did you have something you wanted to add?

2 MS. McSHERRY: I do, yes, a couple of
3 things. First of all, just on Corley, this is in
4 our paper so I'm not going to belabor the point
5 but Corley wasn't a fair use case. It was really
6 quite a different case than what's at issue here.
7 We actually have submitted for the record actual
8 fair use cases that think about the fair use
9 analysis and they go the other way.

10 Second thing, harm. So what opponents
11 have cited to is, you know, a court decision
12 that's quite brief saying there is harm,
13 irreparable harm here. Moving on, okay. What they
14 haven't submitted is anything beyond that, any
15 actual evidence. They suggest that there is a
16 distinction because with DVDs, the circumvention
17 tools were widely available and that's different
18 than it is for Blu-ray but I would suggest to you
19 that based on what we're hearing from the vidding
20 community and the remix community, apparently
21 these tools are widely available because people
22 are using them, and we've submitted lots and lots
23 of examples of that in the record. So clearly,
24 they're already available. There isn't really
25 distinction to be made with between DVDs or online

1 distribution or Blu-ray with respect to, you know,
2 that theory of harm. And again, I would remind
3 the Office that there have been many, many
4 opportunities for opponents to submit some
5 evidence that the previous exemptions have caused
6 any harm whatsoever and they have never been able
7 to do that.

8 Finally, I think your question speaks to
9 this so I'll be super brief but, you know, Mr.
10 Turnbull suggested that, well, you know, five
11 years ago, people were perfectly happy with one
12 standard of technology and why should -- and
13 suggesting, I think, that we should have settled
14 for the standard of five years ago but, of course,
15 that standard has evolved. Technology has evolved
16 and I think that many of us aren't thrilled that
17 we all have to do this every three years, but the
18 one benefit of coming back here every three years
19 is that it's an opportunity to look at the
20 exemptions that exist and decide if they need to
21 evolve according to new technologies and practices
22 and that's exactly what we're here to ask for.

23 MS. CHARLESWORTH: Okay. Thank you, Ms.
24 McSherry. Professor Tushnet, did you want to
25 respond as well?

1 PROF. TUSHNET: So super briefly on
2 harm. I'm sorry people don't know about this
3 proceeding. This is in the record. We're the only
4 ones who have empirical evidence about remixers'
5 actual knowledge on the ground, studies both of
6 vidding and other remix communities -- I can't
7 remember the guy's name off the top of his (sic)
8 head -- but it's a 2014 study that they looked
9 across internet users generally. It's the one
10 that found that 2.6 percent of people are making
11 remix. And the thing is it's relevant to both the
12 question of alternatives and the question of
13 alleged harm. It may be unfortunate but there's
14 nothing you can do, deny the exemption, grant the
15 exemption, whatever you do will not affect the
16 prevalence of the circumvention technology. The
17 only thing you can do is get people out of a trap
18 that they walked into that they didn't know about,
19 and this has been true the entire time and, you
20 know, now we have anthropological evidence saying
21 it's been 15 years, people still don't know about
22 this -- sorry, 17 years -- excuse me.

23 MS. CHARLESWORTH: Don't know about the
24 Section 1201 proceeding?

25 PROF. TUSHNET: That's correct.

1 MS. CHARLESWORTH: -- okay.

2 MR. CHENEY: May I ask a question at
3 this point? There's an interesting thing that
4 we're talking here. One of the effects that's
5 often talked about is the chilling effect on
6 vidders and I'm not getting a sense from you that
7 there has been a chilling effect on videos being
8 creative. It sounds like its proliferating. Can
9 you explain a little more about that and maybe I'm
10 misunderstanding what you're saying there?

11 PROF. TUSHNET: We have an exemption
12 for many uses so obviously, it's very hard to show
13 chilling.

14 MR. CHENEY: Let me be more specific
15 then with respect to the Blu-ray.

16 PROF. TUSHNET: Right.

17 MR. CHENEY: It sounds like a lot of
18 folks --

19 PROF. TUSHNET: So --

20 MR. CHENEY: -- are using the Blu-ray
21 when it's not an exemption.

22 PROF. TUSHNET: Right. So in 2009, the
23 finding of harm when there wasn't an exemption was
24 based on the fact that we had to counsel people
25 who wanted to counter notify. That's the only

1 situation in which this comes up, that they get a
2 DMCA takedown and when they come to us saying like
3 "I'd like to fight this. I have something to
4 say." The harm finding was based on that we had
5 to tell them, "Okay, how did you make it and
6 sorry, we agree it's a fair use but it -- you
7 didn't know and it turns out you made it wrong."
8 So we do see those people. Fortunately, not --
9 they're not the largest percentage of the people
10 we see, but we do see them and so again, I want to
11 talk about the American Indians and the Center for
12 Bioethical Reform and, you know, Jonathan Autry,
13 all people who like had no idea of what the rules
14 were until they got sucked into something.

15 MR. CHENEY: So you're suggesting that
16 the chilling effect is that folks after the fact --

17 PROF. TUSHNET: That's correct.

18 MR. CHENEY: -- are learning that they
19 have violated a law potentially or they can have,
20 after the fact, these takedown notices? Now
21 you're saying that's the chilling effect --

22 PROF. TUSHNET: And -- yes --

23 MR. CHENEY: -- not that they're being
24 prevented from making the videos or that because
25 of the law may be murky or unclear, they're not

1 making the videos; that's not the chilling effect?

2 PROF. TUSHNET: That's correct and I
3 just want -- again, in 2009, the Office held that
4 that counted as an adverse effect because these
5 are fair uses. We'd like to litigate them in
6 court. We'd like to counter notify and they go
7 down.

8 MS. CHARLESWORTH: So you're saying the
9 chilling effect is that the -- that people are
10 agreeing to take down what are perceived as fair
11 uses rather than fight it in court?

12 PROF. TUSHNET: That's correct. Or even
13 to counter notification, right.

14 MS. CHARLESWORTH: Well, or -- well,
15 yeah.

16 PROF. TUSHNET: Most counter
17 notifications don't actually end up in court but
18 yes.

19 MS. CHARLESWORTH: Understood, yes.

20 PROF. COPPA: If I could just say and
21 often, these takedowns, they're just algorithms,
22 right. It's not anybody making an actual
23 decision. It's just, you know, some algorithm
24 comes and knocks off a video and certainly, on the
25 -- using the DVD exemption, it's been hugely

1 helpful to be able to say, "No, go on ahead and if
2 you think your use is a fair use, you go and fill
3 out that paperwork." So I do worry, in fact, that
4 I don't know if the -- I mean you may know,
5 Rebecca, if Blu-ray people are coming to you and
6 recognizing like, "oh, well, I was going to
7 counter notify but I didn't because it was Blu-
8 ray." I think they just may not know and so I do
9 worry about that.

10 MS. McSHERRY: And if I might just very
11 quickly? I think also, the other harm we have an
12 increasing number of people incurring legal risk
13 with no idea. So that's not exactly a chilling
14 fact in the traditional sense of chilling effect,
15 like it's chilling, you know, people's speech but
16 it is, I would submit, harm that we have all these
17 people who are just basically waiting for the
18 Sword of Damocles to fall and it can happen at any
19 time and they have no idea. And, you know, that
20 in and of itself -- you know, given that what they
21 are otherwise doing is perfectly lawful is, I
22 think, a harm that this Office should take
23 seriously.

24 MS. SMITH: Ms. McSherry, going back to
25 what you said about technology evolving, I just

1 wanted to be clear. Do you conceive this proposal
2 as potentially encompassing ultra HD Blu-ray if
3 Blu-ray were granted or would that be different?

4 MS. McSHERRY: I'm not sure of the
5 technical difference between ultra-HD, Blu-ray and
6 regular Blu-ray.

7 MS. CHARLESWORTH: One, I mean I think
8 one is HD and one is ultra-HD.

9 MS. McSHERRY: Oh, I see. Okay. Thank
10 you.

11 (Laughter.)

12 MS. CHARLESWORTH: That's my
13 understanding.

14 MS. McSHERRY: All blu -- no, no, then
15 all Blu-ray all the time.

16 MS. CHARLESWORTH: It took me a week to
17 learn that but here I am.

18 MS. McSHERRY: Thank you. I think the
19 way we've crafted is that it covers Blu-ray in all
20 of its forms.

21 MR. TURNBULL: Okay. Let me --

22 MS. McSHERRY: Does that --

23 MS. CHARLESWORTH: Mr. Turnbull.

24 MR. TURNBULL: Thank you. We would
25 object to any inclusion in this proceeding the

1 ultra-HD Blu- ray format. It is a format that is
2 completely different from HD Blu-ray. It is going
3 to be protected using a technology which is based
4 on AACs but is going to itself be very different
5 from the existing AACs technology. There is no
6 evidence in the record whatsoever of harm having
7 to do with ultra-HD Blu-ray.

8 MS. SMITH: Is it out yet?

9 MR. TURNBULL: No.

10 MS. SMITH: Okay.

11 MR. TURNBULL: It's not and so, you
12 know, I hope we can limit the -- and when this was
13 raised in Los Angeles in relation to the
14 documentary and other filmmakers, their answer
15 very quickly was "no, no, no, we're not talking
16 about that" and I would hope that would be the
17 case here.

18 MS. CHARLESWORTH: I mean, Ms. McSherry,
19 can -- I mean Mr. Turnbull's represented there's
20 really nothing in the record on this forthcoming
21 format. I mean do you think -- so that we -- are
22 you willing to concede that at this point, that's
23 not what you mean; when you're talking about Blu-
24 ray, you're talking about the more traditional HD
25 Blu-ray?

1 MS. McSHERRY: Well, I would absolutely
2 concede that we could not have built a record on a
3 technology that is not yet available so, no -- so
4 I will concede that. I mean I think that, you
5 know, look, in an ideal world, you know, we would
6 have a forward-thinking exemption that actually
7 would adapt for that because the same arguments
8 and the same problems that we're talking about
9 here are going to apply. There will not be a
10 distinction but, you know, I suppose if we need to
11 come back in three years and talk about ultra-HD
12 Blu-ray and whatever the next one is and the next
13 one, you know, we can do that.

14 MS. CHARLESWORTH: I think you'll
15 probably be doing that. Professor Coppa.

16 PROF. COPPA: I had just wanted to say
17 about the -- what you implied about the forward-
18 thinkingness that, you know, we're expecting that
19 this exemption covers three years ahead and, you
20 know, technology changes and artistic practice
21 shifts. You know, and when you go on Tumblr and
22 you see written -- really, kids, you know, tagging
23 Blu-ray or apologizing. You see people sort of
24 saying oh, I cut this fast to respond but I'll re-
25 cut it in Blu-ray as soon as the Blu-ray comes

1 out, like -- but -- so don't hate me. Like oh, I
2 put out this crap thing but I'll put out a good
3 thing really fast, you know. And here they are
4 just tagging it in their Tumblrs with no sense at
5 all that there's a trap or that there's
6 potentially some kind of an issue there. And so
7 it would be nice if we, you know, thought a little
8 bit ahead.

9 MS. CHARLESWORTH: Okay. I know -- I
10 think that the -- we have -- two more, I think,
11 opponents need to go. Professor Tushnet, is it
12 something very brief, because we really need to
13 give them some --

14 PROF. TUSHNET: Right. There is
15 something in the record --

16 MS. CHARLESWORTH: -- equal time.

17 PROF. TUSHNET: Sorry. There is
18 something in the record about uses which is that
19 they -- that people use it because they bought it
20 and because they don't want to be pirates. They
21 believe -- and that's in the record that they
22 don't make these distinctions and I believe that's
23 record evidence of relevance to whatever comes on
24 the market.

25 MS. CHARLESWORTH: Okay. Mr. Taylor.

1 MR. TAYLOR: Good afternoon. Today I
2 would like to demonstrate three videos and go
3 through some images on a PowerPoint. The first
4 will be a clip of The Matrix. I'm sure you're
5 tired of The Matrix by now but --

6 MS. CHARLESWORTH: No.

7 MR. TAYLOR: -- it is a different clip
8 than we have shown before in response to the reply
9 comments. The second will be a demo of using that
10 clip with Premiere. I'll go over the Exhibits
11 shortly. And then the third clip will be a
12 comparison of the original screen capture clip
13 versus what we actually produced in Premiere and
14 the edited effects. And then the fourth will be a
15 set of images that have been upgraded or processed
16 that were originally taken from the screen capture
17 sets.

18 So what I believe is going to be Hearing
19 Exhibit 31 --

20 MS. CHARLESWORTH: Okay.

21 MR. TAYLOR: -- is -- the file's name is
22 "Matrix MP4 720 x 486, 23.97 fps" and I'm going to
23 go ahead and get that started right now.

24 (Whereupon, Hearing Exhibit Number 31
25 was marked for identification and

1 played back.)

2 MR. TAYLOR: So this is the video that
3 we went back and recorded with a WM Capture and
4 it's going to be -- it's outputted as an MPEG4.
5 And the reason why we had originally -- our
6 original submission said MPEG2 in it and we
7 learned through the reply process that Adobe
8 Premiere does not handle MPEG2 any longer but it
9 does handle MPEG4, so that's why we went and re-
10 recorded the video.

11 So that was the first video and again,
12 it was made with a WM Capture and it was outputted
13 into an MP4 file. My next --

14 MS. CHARLESWORTH: Can I just ask a
15 question? Did the aspect ratio on that change?

16 MR. TAYLOR: The image size I kept at
17 720 x 486. What we had talked about with the
18 broadcasters, that I couldn't tell from the reply
19 comments what image size that they wanted exactly.
20 There were some competing information in there so
21 I kept it as 720/486 and the aspect ratio should
22 be 4 to 3. MW capture, you can change the aspect
23 ratios that you want to set so if you want 16 to
24 1, you can choose 16:1. There is a whole host of
25 other aspect ratios and 4 to 3 is right there.

1 MS. CHARLESWORTH: Okay. But was it a
2 change from the original material that was
3 captured in terms of the proportion of the aspect
4 ratio?

5 MR. TAYLOR: I do not know what the
6 original aspect ratio was. It was what -- WM
7 Capture has some predetermined aspect ratios. It
8 has some predetermined settings so if it thinks
9 you're going to record something, it's going to
10 record it set for maybe an iPod or an iPad --
11 excuse me -- an iPad or an iPhone. And I am not
12 sure that those aspect ratios are necessarily 4 to
13 3.

14 MS. CHARLESWORTH: Okay, thank you.

15 MR. RUWE: And what operating system, do
16 you know, were you using when you used WM Capture?

17 MR. TAYLOR: Oh, WM Capture was Windows
18 8.1.

19 MR. RUWE: 8.1.

20 MS. SMITH: And Professor Turk talks
21 about the frame size and the frame rate of it and
22 so did you change the frame size? What, it's
23 720:486, so that's not the UT resolution that
24 she's talking about?

25 MR. TAYLOR: I did change it from the

1 original. I'm not sure what the original size was
2 so I did change it to 720:486. You can set it to
3 whatever size you want it to. I did understand
4 that they wanted 23.97 or 24 frames per second so
5 I chose 23.97, so that was recorded at 23.97.

6 MS. SMITH: Well, I think she was saying
7 24 frames per second is film and 29.97 is like the
8 telecine transfer.

9 MR. TAYLOR: I agree.

10 MS. SMITH: Okay. So it was 23.97? Was
11 that --

12 MR. TAYLOR: I think that the popular
13 speech is 24 but there is actual choice between
14 23.97 and 24.

15 MS. SMITH: And we call it 24. Okay.

16 MR. TAYLOR: So right is the interface
17 for Adobe Premiere and what I'm going to show is
18 we're going to import the file that you just so
19 into Adobe Premiere.

20 MR. RUWE: Can you give me the file name
21 again?

22 MR. TAYLOR: Oh, I'm sorry. This is
23 Hearing Exhibit 32 and the name of the file is
24 "Premiere Demo Matrix.

25 (Whereupon, Hearing Exhibit Number 32

1 was marked for identification and
2 viewed.)

3 MR. TAYLOR: And so that is choosing the
4 import and choosing the file, and you're going to
5 see the file pop up in the left-hand corner and
6 there it is. And I've referenced timelines a
7 couple of times into things and over here on the
8 right-hand side of the bottom screen is, in fact,
9 a timeline that's common to video editing
10 software.

11 So I'm going to move it forward. They -
12 - in the reply comments, they talked about they
13 wanted to do two things, zoom and cross-fading.
14 And so I'm going to show you -- take you quickly
15 to a couple of places where we did zoom and cross-
16 facing. And as you see that, you can see that the
17 right preview is moving over to the right and
18 what's going to happen is we're going to actually
19 focus on the short guy in the back who's called
20 "the Keymaker." Okay, so that was the first zoom
21 that we're doing.

22 Now the second zoom and you see the
23 right. And now we're focusing. The zoom is on
24 Morpheus and Neo. And the final is the cross-
25 fades and it's toward the end and it's going to be

1 when Morpheus -- not Morpheus -- when Neo holds up
2 his hand to stop the bullets, you're going to --
3 what we're going to do is layover the guys who are
4 shooting the guns at him so that effect where
5 you saw it go back again over the people, that is
6 the segment of the clip that is going to be cross-
7 faded in the edited product.

8 Now I'm going to go and do a side-by-
9 side comparison of the original video capture clip
10 and what was produced with the Premiere, and it's
11 going to be Hearing Exhibit 33 and the file name
12 is called "Side- by-side Matrix Comparison.

13 (Whereupon, Hearing Exhibit Number 33
14 was marked for identification and
15 viewed.)

16 MR. TAYLOR: So on the left-hand side is
17 the original video capture and on the right-hand
18 side is what we -- is what was rendered through
19 Adobe Premiere. I'm going to let it play through
20 one time and then go back to the same zoom
21 features and cross- fades that we produced.

22 All right. So to show you the editing
23 features that we did do, I'm going to take you to
24 the first one which was -- involved the Keymaker
25 and I'm going to try to stop it so that you can

1 compare the difference. I'm going to let it play
2 through a little bit, and focus on the right-hand
3 side on the right screen and there will be the
4 appearance of the Keymaker. On the original, the
5 Keymaker was never in that part of the clip.

6 All right. So just to show -- so the
7 original clip, he's -- he talked the entire time
8 and never showed the Keymaker but what we did was
9 when he said Keymaker -- all right, so this -- the
10 Keymaker is here and when he references the
11 Keymaker.

12 Moving on to the second clip --

13 MS. SMITH: So I mean you've just
14 spliced a clip into it but you're not saying that
15 you could use the screen capture technology to
16 like add a character into the existing frame the
17 way they were talking about, some of these vids?

18 MR. TAYLOR: What we did was we used
19 screen capture technology as the source material
20 and then with that source material, you can use
21 their preferred software, which was Adobe
22 Premiere, and do the same things with the screen
23 capture material that they said that they wanted
24 to do.

25 MS. SMITH: Okay. But you haven't tried

1 to like insert the Keymaker into the still we're
2 looking at now or anything to see what that does,
3 right?

4 MR. TAYLOR: We did do that.

5 MS. CHARLESWORTH: I think what Ms.
6 Smith is asking about, and I think you may have
7 answered it but maybe not -- maybe if you can sort
8 of explain a little bit -- is could you, say,
9 import -- say take a completely different film,
10 for example, and import an image, a screen
11 captured image from that film into this film that
12 we're watching?

13 MR. TAYLOR: With Adobe --

14 MS. CHARLESWORTH: Using screen capture
15 and Adobe.

16 MR. TAYLOR: Right. And so we created
17 the Adobe Premiere edit from original footage that
18 was made with screen capture software and then
19 this is -- what we outputted was processed. If we
20 -- you could add other clips to it, as many other
21 clips as you wanted to, as much as Adobe Premiere
22 would handle, but Adobe Premiere doesn't treat it
23 any differently.

24 MS. CHARLESWORTH: Does that answer your
25 questions?

1 MS. SMITH: Yes. Okay, thank you.

2 MR. TAYLOR: And so this is the
3 zoom where we actually focus on Morpheus and Neo
4 and Trinity is cut out of the scene. So on the
5 image on the -- the original, you could see
6 Trinity was on the left because we had zoomed in
7 on Morpheus and Neo, the effect of this was to
8 actually cut Trinity out of the scene. And then
9 the final feature, which was the cross-fades, just
10 play that real -- (Whereupon, continue playback of
11 Hearing
12 Exhibit 33.)

13 MR. TAYLOR: And so you can see the
14 cross- fades effect. So in the original, you just
15 see Neo holding up his hand and stopping the
16 bullets. When we put the cross-fades effect, it
17 superimposes the images of the actual shooters on
18 top of Neo, so I think that's what we were able to
19 show.

20 Now I want to go on to the -- all right,
21 so what we have here are --

22 MS. CHARLESWORTH: Is this Exhibit 34?

23 MR. TAYLOR: It's Exhibit 34 and it's a
24 PowerPoint presentation called Family Guy.

25 (Whereupon, Hearing Exhibit Number 34

1 was marked for identification and
2 viewed.)

3 MR. TURNBULL: And what we have a couple
4 of still images. You can call them screen --
5 they're frames from the screen capture video and
6 this is kind of typical of the results and if you
7 process it, you can improve the quality of the
8 image. And so -- and that's really kind of the
9 point in all of this is that any image that you
10 have can be edited and processed so that the image
11 quality is improved.

12 MS. CHARLESWORTH: Okay. How did you
13 process that one?

14 MR. TAYLOR: This is actually upscaled
15 from -- it was -- the original shot was 720 x 46
16 so it was upscaled to 720 x 540, and there's a
17 video editor and it uses an algorithm called
18 nnedi3 [IN-ED-I-3], which is N-N-E-D-I-3 and
19 that's the algorithm. And what it basically does,
20 as I understand it, is it takes the interlaced
21 film frame and it drops -- so an interlaced frame
22 is made up of two fields and it will drop the
23 second field and reproduce the first field to get
24 you a better image when it's changed from -- when
25 it's de- interlaced from interlaced to progressive

1 scan.

2 MS. CHARLESWORTH: Okay.

3 MR. TAYLOR: And so again, similar
4 image; that's the before and here's the after.

5 And you can see the details are much clearer. The
6 lines are clearer. The pixilation has
7 disappeared.

8 MR. RUWE: Is this an image from the
9 same PowerPoint?

10 MR. TAYLOR: It's -- the PowerPoint has
11 --

12 MR. RUWE: These are all -- okay,
13 thanks.

14 MR. TAYLOR: -- each image in it. And
15 so this image is particularly good because you can
16 see how fuzzy it really is or you could call it
17 pixilated. And then once it's been processed, it
18 becomes strikingly clear.

19 MS. SMITH: And say you were going to
20 upscale like a one-minute clip, how long would
21 that take?

22 MR. TAYLOR: I think a one-minute clip
23 probably would take about -- the processing of it
24 would, as I understand it, takes between 20 to 30
25 minutes.

1 MS. SMITH: Okay, thank you.

2 MR. TAYLOR: And that is all I have.

3 MS. CHARLESWORTH: Thank you, Mr.

4 Taylor. Does anyone have any more questions for
5 Mr. Taylor before we get to Mr. Williams, our last
6 witness of the day?

7 (No response.)

8 MS. CHARLESWORTH: Go, tell us what's on
9 your mind, Mr. Williams.

10 MR. WILLIAMS: Okay. Thank you for
11 having me here again on behalf of MPAA, ESA, and
12 RIAA. I wish I could say that I'll be very, very
13 brief, but there is a lot to cover here, so I'll
14 try to be as quick as I can, but I want to make
15 sure that we cover what needs to be covered.

16 As with the e-book issues that we
17 discussed earlier today, my clients are not here
18 opposing the renewal of the existing exemption
19 that's applicable to remix videos. We are opposed
20 to the expansions that have been proposed
21 including uses beyond short portions, coverage of
22 primarily noncommercial videos, coverage of uses
23 other than criticism and comment and film analysis
24 including brays in the scope of the exemption, of
25 course, and coverage of all AV works instead of

1 just motion pictures.

2 Many of those limitations we believe are
3 critical, as the Register said in 2012, to
4 ensuring that the uses at issue here are very
5 likely to be non- infringing. We are not saying
6 that using a portion of a motion picture in a
7 remix video is never a fair use and the coalition
8 that I'm representing did not take the position
9 that remix videos are generally infringing as the
10 reply comments seem to say that we did. We take
11 the work that vidders do seriously and I'm
12 certainly not here to try to criticize it as an
13 art form. That doesn't mean that every remix
14 video is a fair use either and I think that we do
15 have to be able to discuss that fact in this
16 proceeding. So even despite my readily apparent
17 gender limitations, I'm going to try to go through
18 some discussion of the fair use factors.

19 So some online videos do involve the
20 uses of existing content that simply gain an
21 audience's attention by using an entertaining clip
22 from a recognizable film. That's something that
23 has entertainment value of a sort that we think
24 under Campbell and other cases, it needs to be
25 licensed. And as you've heard from studio

1 executive testimony, licensing is an option. I
2 think the online video best practices, which I'm
3 not endorsing across the board, but they do
4 contain some good statements regarding the law. I
5 think acknowledge that these types of uses can be
6 infringing. They say things like "the use should
7 not be so extensive or pervasive that it ceases to
8 function as critique and becomes instead a way of
9 satisfying the audience's taste for the thing or
10 kind of thing that is being quoted. In other
11 words, the new use should not become a market
12 substitute for the work or other works like it."

13 MS. SMITH: And can you point to -- is
14 that in the record and if so, where?

15 MR. WILLIAMS: I believe that is an
16 exhibit to the proponent's comments. I don't have
17 the specific exhibit number.

18 MS. SMITH: An exhibit to their initial
19 comments, does that sound right?

20 MR. WILLIAMS: I believe so. It is the
21 online video statement of best practices that was
22 put out by a number of folks including people
23 working at American University.

24 MS. CHARLESWORTH: Just quickly,
25 proponents, are they in there?

1 MS. McSHERRY: I'm not sure we submitted
2 those but other proponents of other exemptions
3 likely did.

4 MR. WILLIAMS: I could try to find that
5 for you in response to a letter if you want. I'm
6 certain that there is at least a link somewhere in
7 one of the comments to them. They the best
8 practices statements were discussed, for example,
9 at the documentary filmmaking hearing as well.

10 MS. CHARLESWORTH: Does anyone know --

11 MS. McSHERRY: We do think the best
12 practices -- a lot of the best practices and were
13 promulgated are quite nice and helpful guidance
14 for people.

15 MS. CHARLESWORTH: Do you know where I
16 might find them online?

17 PROF. COPPA: American University School
18 of Communications had one. That's Patricia --

19 MR. WILLIAMS: Right, Aufderheide and
20 Peter Jaszi.

21 PROF. COPPA: And Peter Jaszi.

22 MR. WILLIAMS: Right.

23 PROF. COPPA: And isn't the DFF -- isn't
24 there one of remix?

25 MS. McSHERRY: We have a whole other

1 one.

2 MS. CHARLESWORTH: So I just want to be
3 clear about the one you're referring to --

4 MR. WILLIAMS: Sure.

5 MS. CHARLESWORTH: -- Mr. Williams, just
6 in case we want to go take a look at it.

7 You're talking about the Jaszi -- the American
8 University set?

9 MR. WILLIAMS: Correct.

10 MS. CHARLESWORTH: Okay.

11 MR. WILLIAMS: I only had one other
12 quote from that which is that a use -- "where a
13 use is a pretext to exploit the popularity or
14 appear of the copyrighted work employed or where
15 the amount of material used is excessive, fair use
16 should not apply." So we are not saying that
17 entertaining uses can never be fair. As I've said
18 in other panels, my clients rely on fair use
19 including when they're making entertainment, but
20 pure entertainment is not at the heart of fair use
21 like criticism and commentary and film analysis,
22 and so that's why we would prefer that the
23 existing limitations on the exemptions stay in
24 place.

25 MR. DAMLE: Mr. Williams?

1 MR. WILLIAMS: Yes.

2 MR. DAMLE: I'm just sort of curious
3 whether you have an opinion of the Supernatural
4 clip that we saw at this panel. I don't know if
5 you feel comfortable opining on it or -- but I am
6 just curious about --

7 MR. WILLIAMS: You mean whether it's a
8 fair --

9 MR. DAMLE: Yeah, exactly.

10 MR. WILLIAMS: I think I would need to
11 know a little bit more. I'm not familiar with the
12 series. I did see what was pointed out as being
13 added and subtracted. It seemed like there was
14 some significant alteration going on there but I
15 don't know for sure which way I would go. I think
16 I would need to know more about it.

17 MR. DAMLE: Okay, that's fair enough.

18 MR. WILLIAMS: So one thing that's in
19 the proponent's comments is that the opponents are
20 not qualified to evaluate the transformativeness
21 of the videos at issue, and I think that that's
22 incorrect. I am not qualified to opine the
23 qualitative value of these videos certainly and
24 I'm not claiming that I am, but I think that
25 lawyers and judges have to be qualified to apply

1 the fair use factors objectively to the works that
2 are presented to them because otherwise, no one
3 other than a defendant in a case could opine on
4 whether or not the use was a fair use.

5 MS. SMITH: Yes, but have you opined on
6 -- to the specific examples they raised whether or
7 not they're transformative or fair use?

8 MR. WILLIAMS: Sure. We did not try to
9 provide an opinion on every one of the examples
10 and as I've said, we're not claiming that there
11 aren't a significant number of fair uses and for
12 that reason, we're not opposing renewal of the
13 existing exemptions. So my statements today about
14 fair use is more in relation to preserving the
15 limitations that are in place and to point out
16 that not everything out there is not infringing
17 and so some caution, I think, is still called for
18 here. We only, I think, pointed to a couple of
19 videos in our comments that they then responded to
20 with more information about the meaning of the
21 videos that we didn't have access to in advance.
22 You know, I still have some questions about those
23 specific videos, whether I would find them to be
24 fair but, you know, I understand they responded
25 with some explanations that were interesting.

1 So as I said, I don't think that the
2 only person who can have the answer as to whether
3 something is fair or not is the defendant in a
4 lawsuit or the creator of a derivative work or a
5 remix. What the audience of a work takes away
6 from the use is relevant and I think that's
7 becoming more and more the case in recent fair use
8 case law. And it's to only the specific audience
9 that the work might have been intended to or a
10 very small community. It has to be a broader
11 audience, a reasonable observer, so to speak,
12 something the judges can wrap their hands around.

13 And it's relevant what the specific
14 community that something was targeted to would
15 take away from it but that can't be the only
16 question, I think, and one case where I think this
17 comes out is in *Salinger v. Colting*, the Second
18 Circuit opinion there. There the defendant, he
19 wrote an unauthorized sequel; to *Catcher in the Rye*
20 and there was an expert witness there that opined
21 on why the audience for that work would understand
22 that it was really a critique of Salinger and his
23 works. And the Second Circuit disagreed and
24 affirmed the District Court's ruling on the issue
25 and said that from the court's point of view, it

1 sounded more like the explanations were post talk
2 rationalizations employed through vague
3 generalizations about the alleged naivete of the
4 original rather than a reasonably perceivable
5 parody.

6 And so I think judges have to be able to
7 consider this from an objective point of view with
8 the aid, hopefully, of evidence like experts and
9 other testimony about the meaning at issue and
10 what audiences take away. So whether you like
11 that specific decision in that case or not, I
12 think it does show that we have to be able to talk
13 about these issues in this proceeding.

14 The next topic I'd like to cover
15 quickly, and we've discussed this in other panels,
16 is, you know, as I've said, our preference is that
17 the current bundle of exemptions be split apart
18 and that each one be clearly defined so that we
19 know what's at issue. I had said yesterday that I
20 was hoping by today to come up with a good
21 definition of exactly what this exemption that
22 we're talking about covers. I failed in that
23 regard. I can't come up with a perfect definition
24 and I think some of what we heard today was
25 helpful. I think it would probably take some more

1 drafting and consideration but it sounds like
2 there are really remixes and mash-ups that are
3 either parodies or satires at issue. There are
4 kind of traditional core political statements at
5 issue that might not fit into that first category
6 but there are also examples of in the record. And
7 then we also heard some discussion of more art
8 display type presentations. So those are the
9 types of things that I've actually heard discussed
10 and seen in the record, and maybe a combination of
11 some kind of definitional language and a
12 discussion in the recommendation would be helpful
13 to really explain what is at issue with this --

14 MS. CHARLESWORTH: So are you objecting
15 to the term "noncommercial" then which is the
16 current description in the exemption?

17 MR. WILLIAMS: We want that to stay in
18 the exemption but we would like more than just a
19 reference to noncommercial uses for the reasons
20 I've said before, that we're afraid it starts to
21 swallow up other things that I don't think were
22 intended to be swallowed up given the drafting.

23 MS. CHARLESWORTH: And I know that you
24 spoke to this in an earlier panels --

25 MR. WILLIAMS: Sure.

1 MS. CHARLESWORTH: -- but to make the
2 record clear here, I mean what are some examples
3 of things that are getting swallowed up that you
4 think weren't intended under this exemption?

5 MR. WILLIAMS: Right. So one clear one
6 that we focused on yesterday was that currently K
7 through 12 students are not covered by the
8 educational exemption, but there's an argument out
9 there that the noncommercial video exemption would
10 cover everything that they would want to do anyway
11 and so that limitation would be rendered
12 meaningless basically.

13 MS. SMITH: Okay. And the proponents in
14 this case have also used National History Day as
15 an example of something that would qualify as one
16 of their videos; do you think that should be
17 excluded from the scope of the exemption?

18 MR. WILLIAMS: I don't recall that.
19 They did do a great job of putting a lot in the
20 record. I don't recall that specific example but
21 is that students on National History Day creating
22 vids or

23 MS. CHARLESWORTH: Well, it could be a -
24 - I mean in theory -- just again, you know, it
25 could be a remix, some sort of remix video --

1 MR. WILLIAMS: Right.

2 MS. CHARLESWORTH: -- illustrating
3 historical events from films let's say. I mean I
4 don't know that much about National History Day
5 but

6 MR. WILLIAMS: Right. I guess I'm
7 hesitant to speak to that one since I haven't
8 focused on it but I'd be happy to respond to a
9 letter if I could wait to do that.

10 MS. SMITH: I mean are you aware of
11 instances where you feel this -- the prior -- the
12 current exemption has been abused?

13 MR. WILLIAMS: Right. So I have seen on
14 various blogs mention of the fact that there is
15 this lack of clarity and that maybe everything can
16 be done under the noncommercial video exemption.
17 I'm not saying anyone has abused the process based
18 on that, and the other thing that was said earlier
19 that I've commented on before but I'll say again
20 for this panel is, you know, the ability of my
21 clients to collect evidence that someone who was
22 using the exemption then went on to engage in some
23 type of infringement, it's really not possible and
24 I think it's a bit unfair to try to put that
25 burden on us. We just can't collect that kind of

1 evidence. So we are here because we're honestly
2 concerned about the threat of harm and we wouldn't
3 be here if that wasn't true.

4 MS. SMITH: Well, I mean are you seeing
5 an uptake in instances that you perceive to be
6 infringement, like presumably if all of a sudden,
7 you know, the gates were open and it was allowed,
8 apparently you'd see more occurrences of it?

9 MR. WILLIAMS: Right. So there are lots
10 of marketplace factors at issue to take account
11 of. I don't think that I have heard of any study
12 that's been able to show whether the exemptions
13 themselves increased infringement. I have no
14 evidence of that.

15 MS. CHARLESWORTH: I want to get back to
16 the sort of -- and I appreciate that you haven't
17 had time to come up with a definition -- but sort
18 of what the concern -- I guess what the underlying
19 concern is in the sense that forget about whether
20 it overlaps with other exemptions and stuff --

21 MR. WILLIAMS: Right.

22 MS. CHARLESWORTH: -- and how it relates
23 to them, but I mean are you saying that the
24 exemption is overly -- you're concerned it's
25 overly broad and if so, how so?

1 MR. WILLIAMS: Right. So I think there
2 are two pieces to that. One is we do think it's
3 very important that the proceeding lead to
4 exemptions that cover conduct that's been vetted
5 during the process. And so, you know, I was trying
6 to identify the -- what I think are basically
7 three types of conduct that are arguably going to
8 be non-infringing a large portion of the time and,
9 therefore, the proceeding would arguably result in
10 an exemption for those things. That's one piece
11 of it.

12 The other is that I am concerned that
13 just saying noncommercial videos is a very
14 potentially expansive way to describe what's at
15 issue. And, you know, not all noncommercial uses
16 are fair uses and just like we would like to
17 maintain things like short portions or criticism
18 and commentary, we would like to keep the
19 definitions as clear as possible for what each
20 exemption applies to so that basically things that
21 aren't intended to be swept up stay outside of the
22 scope of the exemption.

23 MS. CHARLESWORTH: Okay.

24 MR. WILLIAMS: Okay. I don't have a lot
25 more but I want to run through just a few more

1 things.

2 MS. CHARLESWORTH: That's okay. You've
3 been -- I realize that we're running late. I
4 apologize. The panels, we've been -- it's been a
5 progressive problem all day but I do want to make
6 sure we have the complete discussion here so

7 MR. WILLIAMS: Sure, sure. So just
8 staying on that theme of things potentially
9 getting wrapped up, so one -- I did try to review
10 a large number of the videos that were in the
11 comments, and one thing I found interesting, it's
12 -- there's a link in footnote seven of the opening
13 petition that was filed for this class to a
14 website called "Screen Crave dot com"
15 (screencrave.com), 10 Best YouTube Trailer Remixes
16 Ever," and I think it was originally created in
17 2010, so some of these would be old videos but
18 they were referenced in the opening petition here.
19 Some of them, you know, to me, seemed like pretty
20 clear examples of fair use. Others were quite
21 more questionable. I mean the number 10 video on
22 the list is a video that basically asks the
23 question "what if in the movie Ferris Bueller's
24 Day Off, Ferris actually was sick the whole time?"
25 It's an entertaining video. It's a funny video.

1 It's got over basically 2-1/2 minutes of a pop
2 song as the backdrop to it. I don't see the real
3 criticism and commentary there. Somebody might be
4 able to explain it to me. I don't really see it.

5 There's another one which is number 3.
6 It's basically if the movie Home Alone was really
7 a horror film and the elderly gentleman in the
8 film with the snow shovel really was out to get
9 you. That, again, is entertaining. It's
10 creative. It's on the borderline, I would say, at
11 least.

12 Another one that I found very
13 interesting because I actually recently defended a
14 copyright lawsuit against this director and
15 others, Roland Emmerich. It's the number 2 on the
16 list, the film 2012, which is a disaster movie,
17 and the description of this video is that the
18 genius of this remix is that it doesn't really
19 change the genre but instead cranks it all up to
20 11 in every sense of the phrase. Let's be honest
21 here. You didn't go into 2012 for the plot or
22 characters, you wanted to see things exploding and
23 falling apart and this trailer knows it.
24 Definitely the movie we most wish was made. Now
25 that sounds like it's just trying to show you the

1 most entertaining portions. I could also see it is
2 as potentially a critique of Emmerich's movies,
3 that they're just too much about violence and
4 explosions so, you know, maybe that one goes one
5 way or the other based on kind of how people in a
6 given case perceive it. But it certainly was
7 entertaining and funny and so again, there's a lot
8 out there that's on the border or over the line,
9 and so I think we just need to be cautious in how
10 we craft the exemption.

11 MS. SMITH: And so you see those
12 examples maybe more in line with the cases you've
13 sited, the Harry Potter, Lexicon, or the Seinfeld
14 case; is that how you want us to take that?

15 MR. WILLIAMS: Yeah. I mean I think
16 those cases are specific instances that involved
17 much more extensive copying than what's at issue
18 here. But yes, I think those cases would support
19 taking a cautious approach. I have a few more
20 here but in the interest of time, I'll just cut
21 those out.

22 On the Blu-ray issue, I think that Bruce
23 covered that well. There's really a small sliver
24 of material that's only available on Blu-ray. I
25 was trying to think of the actual examples, that

1 after going through this process, I'm pretty
2 certain are only on Blu-ray. I think I only have
3 in my mind two examples. There might be some more
4 but I think just like in 2012, when the Register
5 decided that it was really an insignificant amount
6 of material that's only available on Blu-ray. I
7 think there's really maybe fewer examples this
8 time than there were last time of things that are
9 actually only on Blu-ray if you go and look for
10 them in other formats. It sounded to me like
11 there might be some issues with products like HDX
12 but that really, you could achieve 99 percent, if
13 not everything, of what needs to be achieved with
14 those products that are already covered by the
15 existing exemptions, so I would oppose any
16 expansion to Blu-ray.

17 MS. SMITH: Can I ask
18 do you feel that the current exemption encaptures
19 streaming material? I mean you've re-raised the
20 (inaudible) transmit and distribute.

21 MR. WILLIAMS: Right.

22 MS. SMITH: Do you object if we were to
23 clarify? I mean I think that others believe that
24 streaming has already been in the exemption.

25 MR. WILLIAMS: Right. So that is a bit

1 of a wrinkle. The current exemption reads
2 "distributed video services," I believe, or
3 "distributed downloads."

4 MS. SMITH: It's "online distribution
5 services acquired by" -- yeah, "online
6 distribution services."

7 MR. WILLIAMS: So you could try to read
8 that narrowly in a copyright sense and say it
9 doesn't cover streaming video. I think, as I said
10 in Los Angeles, in the recommendation, there is
11 language that's much looser and seems to imply
12 that maybe streaming video was supposed to be
13 covered. I think I also said there that as long
14 as a number of these other limiting factors are
15 included in an exemption, I don't think we would
16 be opposed to a clarification of that point that
17 transmitted video is covered. My one real
18 hesitancy there is, especially on this short
19 portions issue, if you haven't paid for access to
20 a full copy of a work and permanent possession of
21 a work, I don't think you should be able to walk
22 away from your streaming video subscription with a
23 bunch of full copies of works, and so that's
24 something that I would be hesitant about but that
25 said, you know, I'm cautiously okay with that type

1 of clarification.

2 I think just two very final points.

3 One, it was raised earlier that there are no
4 streaming service providers here in front of you
5 today. I will just note that MPAA member studios
6 are partners in or investors in streaming services
7 including Hulu and, you know, they certainly are
8 here to say that they're concerned about harm and
9 want cautious approaches to these exemptions.

10 And the other think I would like to say
11 is that I do regret there's no studio business
12 executive witnesses here with us today, but I
13 would like to emphasize that we did produce those
14 types of executives when we were in Los Angeles
15 including the chief technology officer of Disney
16 and so this is important to them. They take it
17 very seriously. Unfortunately, because of
18 scheduling, they elected to appear in Los Angeles.
19 But I hope that you don't take from that that they
20 aren't keeping a very careful eye on this and that
21 they don't take it very seriously. Thank you.

22 MS. CHARLESWORTH: Okay. Thank you, Mr.
23 Williams. All right. We are going to -- I'm
24 going to set a deadline of 10 minutes. We have a
25 couple of really sort of, I think, relatively

1 quick issues that we want -- and, you know, sort
2 of outstanding questions that we have and we'll
3 try and get very targeted responses so we can get
4 you out of here. Ms. Smith.

5 MS. SMITH: Yeah. You know, one is the
6 current exemption includes exemptions for screen
7 capture. Is that something that you're seeking
8 this time around? Do you find it helpful to use,
9 to have available.

10 PROF. TUSHNET: So the answer is there
11 are a few situations, especially for political
12 remix vidders who -- where that screen capture may
13 be their only alternative given the way something
14 is presented. We didn't ask for it in 2012. You
15 gave it to us. You know, it depends on what you
16 write but certainly -- I mean to the extent that
17 we have no idea what screen cap does, obviously we
18 need something to give us some certainty for the
19 circumstances where that's the only thing.

20 MS. CHARLESWORTH: Okay. Very clear
21 answer. Thank you. Next. Do you want --

22 MS. SMITH: Just to clarify, when I look
23 at the, I think it's the initial comments, you're
24 fine with the exemption staying as "motion
25 pictures" as opposed to "audiovisual works" as

1 long as it's clear that "motion pictures" is in
2 the copyright definition that includes television,
3 etcetera, correct?

4 MS. McSHERRY: Yes.

5 MS. CHARLESWORTH: Lots of nodding heads
6 in the affirmative --

7 MS. McSHERRY: Yes.

8 MS. CHARLESWORTH: -- for the record.

9 And last but not least, there's been -- we heard -
10 - I heard Mr. Williams say briefly, you know, want
11 to keep it "noncommercial." I think I saw
12 something in some of the submissions about -- I
13 think this issue came up last time, the
14 "primarily" language which the Copyright Office
15 had some trouble with but we did try to clarify in
16 certain instances, you know, where someone was
17 paying someone just for the service to produce
18 something that -- you know, I don't -- I'm
19 paraphrasing now but we kind of clarified that
20 certain things were still considered noncommercial
21 in our eyes. Is there -- I mean is that an
22 acceptable approach, again, here from your point
23 of view proponents?

24 PROF. TUSHNET: So it is super
25 acceptable and it's actually what I suggest you do

1 with all the qualifications being suggested, that
2 is it was interpretive language saying like
3 usually this will be short clips, by noncommercial
4 we mean, you know, non- profits can do it even if
5 they pay someone for it, right, if there's a
6 museum exhibition that doesn't make it commercial.
7 Thos are the kind of clarifications that make
8 total sense and we absolutely have no objection to
9 using "noncommercial" and then placing the
10 explanatory language so that people like the
11 Center for Bioethical Reform aren't kicked out
12 because they actually paid someone to help.

13 MS. CHARLESWORTH: Okay, another very
14 clear answer. Ms. McSherry?

15 MS. McSHERRY: Just to say not that we
16 want to give you more writing to do, so we're
17 sorry about that.

18 MS. CHARLESWORTH: Well, we'll have
19 plenty of that with or without, yeah. That's a
20 hopeless case. Any of my colleagues? Are we --
21 we're good? Well, thank you all for your patience.
22 I'm sorry we got behind but we had a lot of
23 questions and we appreciate your being here. We
24 have a couple more tomorrow, once again starting
25 at 9 a.m. We will be back for networked to medical

1 devices -- for those of you who are
2 interested in that.

3 PROF. TUSHNET: I'm so sorry, may we
4 have permission to submit a letter in response
5 once we get the exhibits to look at because --

6 MS. CHARLESWORTH: Are you talking about
7 those exhibits you saw today?

8 MS. McSHERRY: Yes, please, because I
9 know we're out of time but I think Tisha has a lot
10 of stuff to say.

11 MS. CHARLESWORTH: And did you -- were -
12 - was there a procedure for you to get those
13 exhibits? I guess we're going to try and put them
14 online.

15 MS. McSHERRY: I'm sure --

16 MS. CHARLESWORTH: You've been copying
17 them?

18 MS. McSHERRY: -- opponents will --
19 yeah, we have copies and we will put them online
20 but --

21 MS. CHARLESWORTH: Okay.

22 PROF. TUSHNET: -- they're not currently
23 available online.

24 MR. TAYLOR: But I looked at exhibits
25 yesterday so

1 MS. CHARLESWORTH: Do you -- do the
2 opponents have any objection with -- it would be
3 like a two-week kind of deadline.

4 MR. TAYLOR: (Inaudible/off mic.)

5 MS. CHARLESWORTH: Okay, so --

6 MS. McSHERRY: Thank you

7 MS. CHARLESWORTH: -- we will allow you
8 to respond within two weeks of our posting the
9 Exhibits online if you have further comments on
10 those.

11 MS. McSHERRY: Thank you.

12 MS. CHARLESWORTH: Okay. Thank you all
13 very much again.

14 (Whereupon, at 4:33 p.m., the hearing
15 was concluded.)

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I, Christine Allen, the officer before whom the foregoing proceeding was taken, do hereby certify that the proceedings were recorded by me and thereafter reduced to typewriting under my direction; that said proceedings are a true and accurate record to the best of my knowledge, skills, and ability; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this was taken; and, further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

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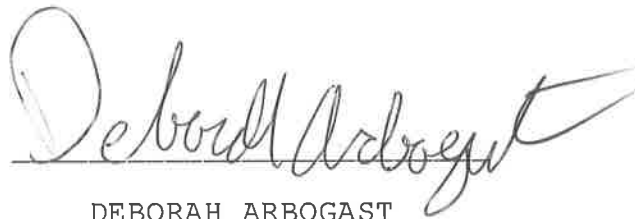


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