LIBRARY OF CONGRESS

IN THE MATTER OF:               )
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UNITED STATES COPYRIGHT OFFICE )
SECTION 1201 PUBLIC HEARINGS )
)                        
Remote Roundtable
Suite 206
Heritage Reporting
Corporation
1220 L Street, N.W.
Washington, D.C.

Monday,
April 5, 2021

The parties met remotely, pursuant to notice,
at 10:32 a.m.

PARTICIPANTS:

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    Copyright Office
NICK BARTELT, U.S. Copyright Office
ANNA CHAUVET, U.S. Copyright Office
STACY CHENEY, National Telecommunications and
    Information Administration
MARK GRAY, U.S. Copyright Office
MELINDA KERN, U.S. Copyright Office

Panelists:
JONATHAN BAND, Library Copyright Alliance
SCOTT A. GOODSTEIN, Samuelson-Glushko Technology
    Law & Policy Clinic at Colorado Law
DAKOTAH HAMILTON, Samuelson-Glushko Technology
    Law & Policy Clinic at Colorado Law
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PARTICIPANTS: (Cont'd)

Panelists: (Cont'd)

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DEAN MARKS, AACS LA
BLAKE REID, Samuelson-Glushko Technology Law & Policy Clinic at Colorado Law
CLARK RACHFAL, American Council of the Blind
MARK RICHERT, Association for Education and Rehabilitation of the Blind and Visually Impaired
HOWARD ROSENBLUM, National Association of the Deaf
DAVID J. TAYLOR, DVD CCA
CHRISTIAN VOGLER, Gallaudet University Technology Access Program
J. MATTHEW WILLIAMS, Joint Creators and Copyright Owners
MS. SMITH: All right. Well, good morning. Thank you for being here with us virtually. My name is Regan Smith. I'm General Counsel of the United States Copyright Office, and this is the first day, the first session of our hearings for the § 1201 rulemaking.

I think, first, we will start with introducing ourselves from the Copyright Office side along with NTIA. So, Ms. Chauvet?

MS. CHAUVET: Good morning. My name is Anna Chauvet. I serve as Associate General Counsel.

MS. SMITH: Mr. Gray?

MR. GRAY: Hi, everyone. I'm Mark Gray. I'm an Attorney-Advisor here at the Office of General Counsel.

MS. SMITH: Ms. Kern?

MS. KERN: Melinda Kern, Ringer Fellow.

MS. SMITH: Thank you. Mr. Cheney?

MR. CHENEY: Good morning. Stacy Cheney, Office of Chief Counsel at NTIA.

MS. SMITH: And we'll introduce the panelists in a second, but, first, I wanted to sort of explain our format now that we are all virtual, as
well as the hearings. I think many of you have participated in a § 1201 rulemaking before, but I will go over how it will work since not everyone has been here.

The goal of our hearings is to analyze and further develop the administrative record in relation to proposed exemptions to the anti-circumvention provisions in § 1201 of the Copyright Act. We are focused on clarifying and honing in on issues which were surfaced in the written comments, particularly the areas of dispute or where the record may be a bit patchy.

So this first session will focus on proposed adjustments to the exemption that currently permits circumvention of technological protection measures protecting motion pictures for disability service professionals and educational settings to create an accessible version.

So a couple logistics. The Copyright Office and NTIA will be moderating it. We can pose questions and call on you to respond either verbally, but you may also use the Zoom feature of "Raise Hand," or you may physically wave, and we'll try to get to you. If you can please try to keep your response relatively brief and to the question posed, I think we'll have
time to air out all of the issues.

Secondly, there's three sessions today. They can all be accessed by the same Zoom link we're using now for those who are watching. So there's no need to -- you can stay clicked-on all day. Anyone having technical difficulties, you can type in the Q&A or the chat, and someone from the Copyright Office will respond and help.

And, finally, I wanted to let people know that our last session of the week is an audience participation session where members of the public may provide comments for the record or perhaps panelists who did not sign up for a particular session. There will be a link in the chat to a SurveyMonkey where you can indicate what you would like to speak on. And we're asking people to limit comments to around three minutes on any of the topics at issue in the study.

So, next, let's call on the participants. If you could please just explain your name and your affiliation, we'll start with some broad questions and then move from there. So I think, to start, Mr. Band?

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

MS. SMITH: Thank you. Professor Reid?

MR. REID: Thanks, Ms. Smith. Blake Reid,
Director of the Samuelson-Glushko Technology Law & Policy Clinic at Colorado Law. We're here representing the Association of Transcribers and Speech-to-Text Providers, ATSP. Thanks very much.

MS. SMITH: Thank you. Would you like to have your student attorneys introduce themselves too?

MR. REID: Yeah, that'd be great. If we could go with Ms. Hamilton and Ms. Goodstein -- or Mr. Goodstein, excuse me.

MS. HAMILTON: Good morning. My name's Dakotah Hamilton, and I'm also part of the Samuelson-Glushko Technology Law & Policy Clinic under Professor Reid.

MR. GOODSTEIN: Good morning. My name is Scott A. Goodstein, and I am a student attorney at the Samuelson-Glushko Technology Law & Policy Clinic with Professor Reid.

MS. SMITH: Thank you, both of you, for being here. We appreciate it. Now Mr. Marks, please?

MR. MARKS: Thank you. Good morning. My name is Dean Marks, and I'm outside counsel to AACS LA and DVD CCA. Thanks.

MS. SMITH: Thank you. Mr. Kapcala? I'm not sure if I'm saying that correctly.

MR. KAPCALA: Hi, thanks. My name's Jason
Kapcala. I'm the Assistant Director of Captioning and Interpreting at West Virginia University and past-President of the Association of Transcribers and Speech-to-Text Providers.

MS. SMITH: Thank you. Mr. Williams?

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

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

MR. TAYLOR: Good morning. David Taylor representing DVD Copy Control Association and AACS LA, Licensing Administrator.

MR. REID: Ms. Smith, I'm not sure if it's just me, but I think we may have lost your audio.

MS. SMITH: Oh, it was not just you. Apologies. So I'll remind everyone to please speak slowly and clearly, including myself, for the benefit of the captioners and to make sure your audio is not muted.

I think, before we dig into all of the details, I wondered if, Professor Reid, you wanted to explain from the perspective of the requestors what are the key features we should focus on for the hearing because I think there is a -- we have found through the briefings there's been a lot of
commonalities and areas that are not in dispute. What do you think are the remaining areas to focus on?

MR. REID: If it's okay with you, Ms. Smith, I may hand it off to Ms. Hamilton to take that on.

MS. HAMILTON: Good morning. So, from the commentors -- response comments that we received, we believe that there are two main areas that still need to be discussed. These include the proactive remediation expansion and the accessible versions of sufficient quality expansion. So we are hoping with the proactive remediation expansion, we are hoping to explicitly include any exemption that disability services professionals may proactively remediate videos that they expect to be used in classrooms and additionally, that when videos have captions that are of insufficient quality, they can remediate those as well.

MR. REID: And perhaps before we dive in, I just wanted to extend our appreciation to Mr. Williams, Mr. Taylor, Mr. Marks. It seems like a lot of the requests were agreeable, and we appreciate the understanding. And I think the clarifying questions and the comments were helpful.

And hopefully we can get to the bottom of -- it seems like there are some fairly minor differences
and minor miscommunications, but I think we can get through all of them today. So appreciate the spirit of cooperation on this one.

MS. SMITH: So I see some nodding. Mr. Williams perhaps? Would you like to -- do you agree with Ms. Hamilton? Is there anything you would like to say as an opening?

MR. WILLIAMS: Yes, thank you, and thanks to Blake for that acknowledgement. We did want to try to reach agreement on as many of these proposals as possible, and we did, I think, basically achieve that, with the exception of the two that Ms. Hamilton mentioned. My clients definitely take these issues seriously, and so we appreciate the opportunity here to talk through the points of clarification that we asked for.

On the proactive remediation issue, I think Ms. Hamilton described it as works that they do anticipate using in the classroom, and so I think that might get us close to what we proposed, which is, essentially, if it's something that's on a course syllabus or something where the school already knows that it's going to be used in a class, that it was used the prior semester, for example, we're okay with the proactive remediation there, even though it's
arguably not required by the disability statutes.

What, you know, we were concerned about is more of an exemption that basically allows for the entire library catalogue to be circumvented in advance so that when something is added to a class, it can be rendered accessible or, basically, the whole catalogue is in advance rendered accessible.

And some of our concerns with that relate to the fact that there is a market check requirement here, and there are some other parts to the existing exemption that would perhaps be read out of the exemption if the proactive remediation went too broadly. So that’s our primary concern on that issue.

And I will say that in one of the written statements that was submitted -- I believe it was the one under an anonymous name -- there was a mention of school guidelines that sometimes require captioning on every single video that is shown to a class, even if there’s no disabled student or faculty member in that class. So I do have some questions about exactly how broad this may go, but I do think we’re pretty close to agreement on it.

And with the sufficient quality, as you know, we were just hoping to come up with some reasonable objective standard that we could point to.
The proponents have, you know, kind of questioned whether the FCC standards would be the right place to look, and we're open to considering other standards, including some of the ones the FCC is looking at in their processes, but we would just like the regulation to have some contours beyond just sufficient quality.

MS. SMITH: Well, thank you both. I think the Office really appreciates everyone coming here to the roundtables in a constructive manner ready to dig into the issues. I think I will now turn it over to Ms. Chauvet.

MS. CHAUVET: Thank you, Ms. Smith. One other area where there does seem to be some disagreement is about whether the exemption should be expanded to cover Advanced Access Content System technology, also known as AACS2 technology. For the proponents, your reply comments note that in the last rulemaking, the Office declined to extend the exemption to AACS2 technology because of the lack of record at that time.

So, for this rulemaking, do you have any evidence to support a finding that AACS2 technology is adversely affecting non-infringing uses or that it is sufficiently similar to AACS1 technology to be covered under the current exemption?
MR. REID: I --

MS. CHAUVET: Mr. Reid? And, I'm sorry, if you could please just wait for us to call on you, just for the purpose of the captioner and the court reporter? So please go ahead, Mr. Reid.

MR. REID: Absolutely. Apologies for butting in, Ms. Chauvet. If I could turn it over to Mr. Goodstein for this one?

MS. CHAUVET: Mr. Goodstein, go ahead.

MR. GOODSTEIN: Thank you. We weren't explicit in our comment regarding AACS2 because we feel that there is no real distinction in principle between captioning a video that is in AACS format and captioning a video that's in AACS2 format. And teachers certainly aren't choosing their classroom videos based on whether a video is in AACS format or AACS2 format. The statute is -- or the exemption is concerned with the rights of users. So we feel that it doesn't make sense to try to divide the extension up by marginal differences in format.

MR. REID: If I could, Ms. Chauvet, just to add, you know, with that, we understand that the Office declined to draw or to accept an argument along those lines in the previous rulemaking. And in consulting with our clients and disability services
professionals, it doesn't sound like there is a strong need to circumvent AACS2 videos. That hasn't been a significant number of requests into disability services offices.

We would urge the Office to consider the likelihood of changed circumstances over the next three-year period. You know, I don't think anyone expected the uptake in the use of videos that has occurred over the last year as learning has shifted online as a result of the pandemic.

And so the modalities of what instructors and faculty are using in the classroom has changed dramatically in the last year. And Mr. Kapcala can speak to the immense increase in the number of videos that need to be captioned. We'd urge the Office to consider whether to draw fine-grain distinctions like the version number of a particular DRM when it's considering all the equities that are at play in this exemption.

Given that the needs are likely to shift over time and, indeed, to avoid the sort of incremental need to come back and relitigate aspects of the exemption as facts on the ground change, the existing class, which covers streaming video, DVD in AACS, one of the really nice features of that class is
that it has been broadly scoped and has avoided these sorts of fights about particular DRM schemes and the extent to which they proliferate in the market.

But, you know, we wanted to be straightforward about that, you know, AACS2.0 and 2.1 have not been a significant factor at this point for disability services folks.

MS. CHAUVET: Mr. Marks and Mr. Taylor -- Mr. Taylor, you have your hand raised. Why don't you go ahead and respond, please.

MR. TAYLOR: Thanks. I do think that the record actually matters in this case because the exemption that we're talking about, we're talking about modifications. And the record that has been built has been presented on DVDs and Blu-ray discs and whether or not the captioning and audio description in those products are sufficient or need to be circumvented for the purposes of making captioning more readily accessible.

And in this case, the record just simply, as Mr. Reid has indicated, has not indicated that there is a big need in this area. Maybe it's probably because the titles that come out on UHD Blu-ray are more of the big blockbuster hits that you would expect the content providers to already have captioning in
and audio description in, and, therefore, you don't see a big request in the Student Services Offices to assist with captioning those products.

MS. CHAUVET: Thank you. Mr. Marks?

MR. MARKS: Thank you very much. Just to add onto that that it actually is for a different format, the ultra-high-definition format of the film, and as Mr. Taylor said, because it's a newer format, I'm not aware of titles that don't have closed captioning or audio descriptions in that format.

And so that's another reason why we felt that there wasn't a justification to circumvent that particular technology. It really is -- an ultra-high-definition disc encrypted with AACS2 won't play on a standard DVD or Blu-ray player. And so it really isn't like, oh, well, it's just operating on the same technology. It's really a different product.

I do, though, want to also say how much we appreciate the collaborative work and the comments, both oral and written, from Mr. Reid and others to work towards consensus in this area, and it's really much appreciated, and I feel like this is what this rulemaking is all about. So thank you.

MS. CHAUVET: Thank you. So moving to an area where there was agreement about permitting
re-use. So, proponents, you proposed expanding the
exemption to allow re-use of accessible materials that
have been created by using the exemption. Opponents
did not object to this expansion. Very briefly, just
for purposes of the record, will you explain why this
expansion is necessary?

MR. REID: I might actually defer --

MS. CHAUVET: Mr. Reid, I'm sorry, I just

need to call on you for the court reporter. Please go

ahead, Mr. Reid.

MR. REID: Thank you. I apologize. I'll do

my best to stop stepping in like that. I wonder if I

might call on Mr. Kapcala to speak to the need for

re-use and the need to or the desire among disability

services offices to not re-caption, re-describe

materials?

MS. CHAUVET: And just to expand on that,

so, if the existing exemption were not expanded to

include re-use, would it adversely affect

non-infringing uses, Mr. Reid?

MR. REID: Yes, I think that's correct. And

I think what Mr. Kapcala can speak to is that,
basically, without that expansion, what disability

services offices are encountering is the need to

basically go and re-do captions -- basically, throw
away captioned versions of video and do them again when they're -- when a video is re-used in a subsequent semester in a class that uses video repeatedly. But Mr. Kapcala's better positioned to speak to that than I am.

MS. CHAUVET: Mr. Kapcala, do you have anything briefly to add?

MR. KAPCALA: Yeah. So, as Mr. Reid pointed out, you know, we do have a high volume of videos that we receive for accommodation captioning, and that has really gone up since the pandemic over the last year.

Just to kind of provide a context for that, in a normal year, we might expect to see 75 videos per semester as far as requests go for captioning. And this past fall, we received 749 videos, and we are at 593 now with four weeks left in this semester. So the pandemic really has pushed things online. We do see a lot more video being used and created. You know, quite a bit of it is whiteboard video and lecture.

And so, in that kind of new environment, we're having to find ways to meet that demand, and we do expect that some of that will be here to stay even after the pandemic kind of passes. And so, in that scenario, when you have a class like Psychology 101, for instance, that has perhaps 20 sections and they
have a standard curriculum across those 20 sections and that curriculum stays the same or stays fairly consistent from year to year, if we were to caption that video over and over and over again or caption it and then destroy it and then have to re-caption it the next semester and continue to do that, that would represent a significant amount of time that really doesn't make a whole lot of sense and really kind of stands in the way of our providers doing other captioning or their other work.

Their primary duty is not to be closed captioners. It's to be live transcribers in classes, and that takes up about 80 percent of their time. So we wouldn't have to shift resources away from that as much if we were able to use and re-use and store securely the captioning that we've done.

MS. CHAUVET: Great, thank you. Ms. Kern, I believe you have a question relating to the expansion to faculty and staff?

MS. KERN: Yes, thank you, Ms. Chauvet. So I have a quick question. So the proponents propose expanding the existing exemption to allow circumvention to provide accessibility services for faculty and staff in addition to students.

This was an aspect of the proposed expansion
that the opponents didn't object to. So, if the proponents could briefly explain why this expansion is necessary, and if the proposed exemption isn't expanded to include faculty and staff, would that have an adverse effect on non-infringing uses?

MS. CHAUVET: Mr. Reid, did you want to respond?

MR. REID: If I could, I'll turn it to Ms. Hamilton for this one.

MS. CHAUVET: Ms. Hamilton, please go ahead.

MS. HAMILTON: Hi, thank you. So the root of this exemption is that, first, there are many instances where drawing the line between instructor, faculty, staff, aren't super clear-cut, and expanding this exemption this way, we don't see any downside necessarily.

And, additionally, there are circumstances where faculty and staff need something like a training video, for example, that will go through disability services offices and be used in an educational context that we don't think is necessary to limit with this exemption.

MS. CHAUVET: Okay, thank you. So one other thing I wanted to ask for the proponents is about the removal of the reference to disability laws in the
existing exemption. Your class eliminates references
to, like, the American Disabilities Act, which is just
one of the disability laws referenced in the existing
exemption. And instead, your proposed language says,
"students, faculty, or staff with disabilities." So
why should the reference to disability laws be
removed, and, more importantly, like, why is that
necessary? Mr. Reid?

MR. REID: Yeah, I'll be happy to take that
one. I think that was part of the mechanical change
that we suggested for allowing proactive remediation.
And I think this gets to comments that Mr. Williams
raised in his opening, and perhaps it would be helpful
for us to sort of move there at this point.

Obviously, there are a lot of circumstances.
A student comes in, makes an accommodation request
where captioning or description is very clearly
required, and the contours of it are very clearly
required by disability law. There are also a number
of areas where the state of disability law and the
extent to which it applies to a circumstance.

So think about proactive remediation, as an
example, where the extent to which disability law
binds the university is not clear and might actually
be -- sort of diverging opinions on that within the
university.

So, just to give you an example, there may be university counsel taking a fairly narrow view of that question to try to avoid liability. There may be folks involved in setting the university's accessibility policy that take a broader view of that. There may be faculty governance boards that take yet a third view of that question.

That view may change over time, for example, as the Department of Justice, as it often does, engages in settlements within an institution, and, as part of the settlement, a university may agree to take a more proactive approach.

So what we're trying to get at there is basically so that disability services offices don't have to, when they are faced with a request from a faculty member or something comes into their workstream, that they don't have to then engage university counsel and say, is it okay for us to caption this, is it okay for us to describe this, that if it's within their judgment, it's within a request that's come in pursuant to a university's policy perhaps, that they can say, yeah, we've got a legitimate reason to go about captioning or describing this and that we don't have to sort of ask fine-grain
questions about the extent to which disability law applies and, you know, creating this sort of additional headache of engaging with university counsel for a disability services office to figure out if it's okay in a particular circumstance.

MS. CHAUVET: Thank you, Mr. Reid. I guess, so the existing exemption from the last rulemaking exists because disability laws create an obligation for disability services offices to create accessible versions. So I guess my question is then, why, if that's the reason for the exemption, why is it unreasonable to eliminate the -- or to keep the reference to the disability laws in the exemption?

Mr. Reid?

MR. REID: So I think the reason that we eliminated those specific references in our proposed language was just to accommodate the insertion of the proactive possibility. I think if the Office were to recommend language that included a reference to those laws but otherwise were able to accommodate proactive remediation to the extent we've requested, I don't think we would object to the continued inclusion of the reference to the ADA and IDEA, and I think § 504 is in there as well.

I don't think anyone is concerned about
those. We just want to make sure that that doesn't -
that those aren't read to preclude, for example,
proactive remediation or, to the other point that Mr.
Williams raised, that they're not read to preclude the
improvement of quality, you know, and quality is
another area where the extent to which disability law
can be a lens to determine whether quality is
sufficient enough, a really difficult problem.

And so we just want to make sure that the
inclusion of those references to disability law aren't
read as restrictions on the ability of disability
services professionals to exercise their judgment and
comply with university policies and so forth.

MS. SMITH: Can I ask, do you think that's
something the Office can clarify in the preamble? Is
there -- yeah, that's my question.

MS. CHAUVET: Mr. Reid?

MR. REID: Can I ask, Ms. Smith, by the
preamble, do you mean the preamble to the exemption
language itself in the C.F.R. or in the order?

MS. SMITH: I guess I mean the register's
recommendation --

MR. REID: Yeah.

MS. SMITH: -- or the librarian's preamble
in the Federal Register rule.
MR. REID: Yeah, I think that clarification is always helpful, and in particular, as we reviewed with disability services professionals this exemption in particular, many of the clarifications in the record last time -- or, sorry, in the final recommendation last time around, for example, around the commercial availability requirement were quite helpful. So I think that would be a great place to do it. You know, there are a lot of different ways to get there, and, you know, that could make sense.

MS. CHAUVE: Thank you. Mr. Band, you've had your hand raised. Would you like to add to that?

MR. BAND: Just very briefly. I just wanted to amplify what Blake was saying and say also just because, you know, the language of the references to the ADA and the other disability statutes shouldn't in any way be limiting, you know, the whole point is to make -- I mean, the goal here is accessibility, and, you know, there's no reason to limit that in any way.

And there's no reason for those other statutes to be seen as a ceiling. And so, you know, it seems that everyone is on the same wavelength here. So there's no reason to have artificial limitations.

MS. CHAUVE: Thank you. So, if the Office were to eliminate the reference to the ADA and other
disability laws in the existing exemption, how then should disabilities be defined? And this is really more so that people who want to circumvent know that the exemption can apply to their circumstances. Mr. Reid?

MR. REID: So I think a broad-based reference to captioning and description to serve faculty and staff with disabilities, accompanied by a clarification perhaps in the final rule or in the register's recommendation that it's intended to take an expansive view of the particular disabilities that are served by captions, which, by the way -- and descriptions, which, by the way, may be quite extensive.

They may be what we would typically think of, people with hearing disabilities that would rely on captions, students who are blind or visually impaired who might rely on description, but might also be folks with intellectual and cognitive disabilities who rely on captioning for basically educational purposes to help make the content more accessible.

So I think a broad-based reference, coupled with the fact that the exemption is focused on disability services professionals, I think the people that you have executing the use here are going to be
very well-suited to understand what the scope -- the reasonable scope of disabilities is.

And I think some language, like I say, in the surrounding orders that suggest that it's not intended to be a narrow conception of disabilities but whatever in the judgment of a disability services professional sort of counts there, I think that would be a workable approach.

Alternatively, if the Office feels uncomfortable with that, making some reference to the scope of disabilities in the Americans with Disabilities Act might be -- obviously, coupled with the Americans with Disabilities Amendments Act, that would be another, I think, satisfactory way to encompass the relevant scope.

MS. CHAUVET: Thank you, Mr. Reid. Mr. Williams, I see your hand is raised.

MR. WILLIAMS: Yes, thank you for that. I think the Office is right to ask these questions given that the real heart of the fair use analysis in the last cycle was based on the need to comply with these other statutes. So I do think it's worth considering finding a way to keep them as referenced in the exemption or to rely on them in the recommendation.

We, after reviewing the filings, did not
feel it was appropriate for us to take the position that they must basically prove that they would be violating those statutes in order to do something like proactive remediation. The current exemption could be read that way to say unless you're violating the law, then you can't engage in this good work.

So we took the position that we're okay with that, even though, arguably, some of these things may not be required by the disability statutes. But, that said, I do think it's worth continuing to use them as a benchmark of sorts to speak to the type of conduct and the type of disabilities that we're really thinking about here.

We just don't want there to be some technical error committed by a disability services officer who's trying to do good work but accidentally did something that doesn't comply with the statute. We don't feel like that should cause them to lose the benefit of the exemption.

So that's where we were coming from on that issue, and we can speak, hopefully, again later about the sufficient quality point.

MS. CHAUVET: Yes, we'll definitely get to that later. Mr. Marks, I see your hand is raised.

MR. MARKS: Thank you very much. Just to
follow up with Mr. Williams, we agree with that, and I
feel that Mr. Reid has already articulated some really
good potential paths forward. We're talking about
disability services officers and professionals, and I
think we have confidence in their good-faith judgment.

And the notion that -- I don't think any of
us were thinking that a disability service office
would need to consult with the general counsel of a
university or institution every time they sought to,
you know, do remediation. So I think the notion of
the sort of, like, judgment of the disability services
offices is that they're engaging in these activities,
and referencing the laws could possibly be a path
forward. And, again, I want to thank Mr. Reid for,
you know, this whole collaborative approach.

MS. CHAUVET: Thank you. So, proponents,
your initial comments stated about one-third of
disabilities on our campus request accommodation, but
that does not obviate our responsibility to provide
equal access to the other two-thirds who choose not to
self-identify.

So, under the existing exemption, wouldn't
the student or faculty member obtain the remediated
version from the disability services office? How does
the proposed exemption address individuals who do not
self-identify? Mr. Reid?

MR. REID: So I think, you know, when we're talking about remediated materials, you know, that's a typical path, obviously, is for a student to request accommodation, work closely with a faculty member, with the disability services office kind of in tandem to make sure that they receive the materials.

But another path is -- and this is increasingly true of faculty members, which I can speak to in my kind of personal capacity -- which is that we're increasingly aware that there may be students with disabilities in our courses who don't self-identify.

And, for example, in a law school, we have a number of students with disabilities who don't self-identify and don't go through the formal accommodations process because it creates significant risk for them, for example, to apply to sit for the bar exam.

So, you know, there's a lot of litigation about the extent to which a disability can be used to bar a student for sitting for the bar. So we have a lot of students who don't go through the formal accommodations process and request it but may reveal to us privately or may come to us and say, listen, I'm
really struggling in class, I think I might need an accommodation of some sort, or it would really help me if the videos that we're showing here, if we could get captions for those.

And at a university like Colorado, I can actually go to -- our disability services office runs a captioning service, and I can go seek captions for the videos that I'm using independent of an accommodation request. So that's just an example of the kinds of informal approaches to accessibility that, for very good reasons, may not run through a formal accommodations process.

I don't know if Mr. Kapcala's got anything to add to that, but may have some additional thoughts.

MS. CHAUVET: Mr. Kapcala?

MR. KAPCALA: Yeah. I would just add that, you know, what we're advocating for is a proactive approach rather than a reactive approach to accessibility. So accommodations are reactive. You know, a student requests an accommodation, and then we provide it.

But, as Mr. Reid pointed out, there are a lot of students who don't do that for whatever reason. Perhaps they don't recognize the extent of their disability. Perhaps they don't feel comfortable, you
know, disclosing and self-advocating, you know, with regard to their disability. And so, if we are taking a stance that video content can and perhaps should be made accessible regardless, then students who are in that class are receiving an accessible experience. They don't have to wait for accommodation, you know. And for that matter also, I would add that there are also scenarios in which we have students who do request accommodation who we know need accommodation semester to semester but just haven't gone through renewing their accommodation for a given semester and won't be able to have the interactive discussion with their faculty member with regards to implementing that accommodation until the first week of the semester.

I would say, if we have 700 videos that need captioning, we'd like to be able to get working on those in the interim periods between semesters knowing that the student is in that class and that the student is going to want those accommodations. We wouldn't want to be restricted or waiting just because they haven't had a chance to have that authorization be processed yet.

MS. CHAUVE: Thank you. I have one follow-up question, and then I see Mr. Cheney has a
question also. So what you were just talking about with students who have not self-identified or who don't want to go through, like, the formal accommodation process, is that the reason why you are proposing to take out the limitation of necessary accommodation? I just want to clarify your position, please. Mr. Reid?

MR. REID: Yeah, I would say it actually goes a -- so that's certainly part of it. But I think you also see -- and let me preface this answer by saying we should have a complicated mental model of how disability services and accessibilities play out in a university context. It's not the same at every university.

There are universities that have very small disability services offices who insist on having a formal accommodation request, basically, to provide any services to a student. There are universities at the other end of the spectrum that are adopting proactive policies that say we want, as a matter of universal design, for all of our courses to be accessible because we'd actually like to advertise that to our students, perhaps because we serve a population of students with disabilities or a significant population of students with disabilities.
And then you've kind of got everything in between.

So I think what we're trying to get at here is to enable disability services offices who are at universities who don't take that sort of bare minimum approach of saying we will only respond to accommodations who say, you know what, we have students in here all the time who fall through the cracks of the accommodation process, but we know them, or we have faculty members who know them. We have things that don't quite fit in.

Or we have a broader campus policy that says we really ought to be proactive because that's a core part of our educational mission and we might actually be getting sort of direction from on high. We want to be able to accommodate all of those different approaches that different disability services professionals have in the context of different universities.

And so I just would urge the Office to consider that there isn't one model for how these services are provided in every single university across the country or every single K through 12 institution. There are a range of factors around resources. There are a range of factors around the philosophy that offices take.
And what this exemption can do with this particular modification is say to them, making sure that your content is accessible to students with disabilities, if that's what you choose to do, is a legitimate exercise, and please go ahead and do it, and don't feel like you have to go consult with counsel to make sure that it's strictly within the bounds of what the most narrow conception of disability law might require.

MS. CHAUVE: Thank you. Mr. Cheney, did you have a question you wanted to pose?

MR. CHENEY: Yeah, if I could. Thank you, Ms. Chauvet. If I could, Mr. Reid, just to follow up and sort of add to what we're talking about -- and you added sort of towards the end there most of our discussion has been about the university-level accommodations.

I don't know if you or your panelists could add more information about the K through 12 process as well and how that perhaps needs to be as flexible as possible as it may take time for a 504 plan to get worked out and for the accommodation to be made while a student can't participate effectively in a class. Can you talk more about that from the K through 12 from the perspective as well that the student may not
be very proactive at all in the first, second, or third grade, for example? Thank you.

MR. REID: So I will have to caveat my response here with our client primarily represents disability services professionals in a higher education context, and so, you know, the bulk of the evidence that we've provided and the suggestions we've offered are geared in that direction.

But I don't think it takes a big stretch to understand that many of these same dynamics and often in worse circumstances occur in K through 12 contexts. When you think about the difficulty that, you know, adult college students may face in seeking accommodation and some of the dynamics that you've just described, extend that in a virtual learning environment to every family of every child in a school, ranging down to kids like my son, who's in kindergarten who's 5 years old.

When I see the quantity of videos that have been used in his class for virtual kindergarten and I think through the immense complexity of, you know, just figuring out who to talk to at our school district, I -- you know, it would take me the better part of a day to track down a person who's nominally responsible for this.
So the difficulties that are facing families that are already on the wrong side of the digital inclusion gap, who are struggling to get internet access, who are struggling to get access to equipment, who are struggling to access virtual learning, who are trying to deal with the burdens of childcare while their -- you know, while their young children are trying to attend virtual school in the middle of the pandemic and then, on the other side, school districts who are facing significant funding shortfalls, significant funding gaps, and trying to do the best they can to drift oftentimes multiple times in the middle of the semester between virtual and in-person environments, shifting in new materials and not.

These sorts of issues, I guarantee, are going to be on the list of school districts across the country this summer as they look forward to how do we do -- hopefully coming out of the pandemic, but we're not sure -- school in the fall, how do we plan better for making sure that our students with disabilities don't get sort of left in the lurch as we shift these modalities, as we do hybrid stuff in the fall.

So I can't speak on behalf of our clients with specificity to the K through 12 context, but I'm fairly confident based on what we're seeing in a
higher education context that those issues are likely to filter down. That's what I see as a parent. And Mr. Kapcala may have some additional thoughts to add there.

MS. CHAUVET: Actually, if it's okay, Mr. Reid, Mr. Marks had his hand raised, and if I could please remind people, if we could try to keep comments to around two minutes just in the interest of time? We still have a lot to get to. Mr. Marks?

MR. MARKS: Thank you very much. I hope folks can hear me now. I understand I was having some audio problems. I just wanted to add one quick clarification that we, in our discussions about proactive remediation and finding a workable compromise, at least from AACS and DVD CCA's perspective, we were not saying that should only be limited to universities. And so we had agreed that for disability services for K through 12 that that was included, and so I wanted to have that clarified in terms of our position here. Thanks.

MS. SMITH: Okay. So, just to wrap up this focus, I think, Mr. Reid, you are suggesting, on K through 12, the school districts, due to a need, may have the same sort of good judgment that you would expect to see at a college or university level, is
MR. REID: I think that's right.

MS. SMITH: Okay. Maybe Mr. Williams, and then I will hand it back to Ms. Chauvet.

MR. WILLIAMS: Sure, thank you. So one thing that we did mention in our comments, and there was some response to it in the reply comments, is just the issue of what exactly is a reasonable level of security for the copies that are created during all of this.

And I understand that it's usually not preferable to specify some individual brand of TPM that must be used or to always get all the way into the weeds and that's why we have a kind of reasonably sufficient standard right now. And I understand why the petitioners would like to keep that somewhat open-ended.

But given the increased number of copies that are likely to be involved and given that perhaps some K through 12 systems will not have a sophisticated understanding of TPMs, what's available, and what they should be using, we do think it would be helpful to provide, you know, some recommendations or best practices at least in the recommendation as to what steps should be taken because, if all that's
done, for example, is the copy is put on a website and the website requires a username and password, there's really no other layers of protection after that. Especially if downloads are enabled, we think it would be helpful that there be some guidance that more than that would be a good standard to use just to try to protect these copies.

And then just very quickly on the proactive remediation and the standards for who should be receiving these, as I mentioned at the outset, I do have a bit of a concern with the notion that pretty much every video shown to any class must always be remediated just because, at some point, that really does overlap with the proposal that we'll deal with tomorrow that BYU made.

And so I'd just like you guys to be cognizant of that as you think these issues through, is that if it really is that broad, which I can understand some services offices wanting to make sure even if someone hasn't self-reported that they're taken care of, I'd just like, you know, for all of us to think about how do we draw some lines here between the different classes.

MS. CHAUVET: Thank you. Mr. Reid, I want to definitely focus on proactive remediation because
we also want to get to questions about sufficient quality and market price. So, if we could please try to keep concise responses, that would be great.

So, for the proponents for proactive remediation, the proposed changes you made to the language of the existing exemption do not expressly allow proactive remediation. So, just for clarification, are you seeking that either the register's recommendation or that the preamble to the final rule make that clarification, or are you asking for specific regulatory language changes? Mr. Reid?

MR. REID: So I wonder if I might call on Mr. Goodstein or Ms. Hamilton to speak to the specific language. Sorry, I'm just tracking it down, if one of you has it right in front of you.

MS. CHAUVET: Ms. Hamilton?

MS. HAMILTON: My apologies. I'm going to pass that one to Mr. Goodstein, please.

MS. CHAUVET: Okay. Mr. Goodstein?

MR. GOODSTEIN: I apologize. The question came a little bit garbled through my speakers. Would you mind please repeating the question?

MS. CHAUVET: Sure. The question is, the proposed regulatory changes that you made to the existing exemption do not include a specific reference
to allow proactive remediation. So my question is,
are you asking for just clarification in the
register's recommendation or the preamble to the final
rule, or are you asking for regulatory changes to
allow proactive remediation? Mr. Reid?

MR. REID: I'm sorry, I've got the language
in front of me now. I apologize for the glitch there.
I don't think that we asked for proactive remediation
to be addressed specifically because of the other
changes that we made to the exemption, including the
removal of the specific call-out to disability law.

We think it's sort of implicit in the
language that we've proposed. And then, obviously,
some accompaniment with something in the
recommendation that made that clear would be great.
If the Office chooses to make a different formulation
that approaches some of the issues we've talked about
today in a different way, then it may be appropriate
to ask -- to include proactive remediation explicitly
in the regulatory language.

And I think we'd defer to the Office as to
how you are formulating the language, how you are
balancing all the issues that we've talked about
today. Depending on what other changes you make, it
may make sense to include that specifically. We just
MS. CHAUVET: Okay, great. I'm so sorry, I have to -- we have to keep moving on. I'm sorry to interrupt. But going to the opponents, you have expressed concerns about proactive remediation. So, if the Office were to adopt DVD CCA's recommended approach that requires instructors to know or reasonably believe his or her course will make use of a particular work, would that be reasonable to address your concerns? Mr. Taylor, I see you have your hand raised. You're muted, Mr. Taylor.

MR. TAYLOR: I've been talking on Zoom for a year now. I still haven't learned to unmute myself before I talk. So I apologize. Absolutely. I mean, I think that is the point here that Mr. Reid was trying to make, that if you, say, at the end of the exemption, to create an accessible version for anticipated classroom use, then I think that kind of puts better contours around the proposed exemption and how it could facilitate the use but, at the same time, make sure that we don't create this blanket license for everything.

MS. CHAUVET: Mr. Williams, I'd like to see if you have a response if that included language about the instructor reasonably believing that the motion
picture would be used in a class, if that would
address your concerns about proactive remediation?

MR. WILLIAMS: Yes. I think, to a large
extent, it would. As I said at the outset, we do
think there should be some parameters to include
something on a class syllabus. I think we're okay
with it if an instructor has a reasonable belief that
something's going to be used in a class.

You know, I assume you would want to go a
little bit beyond that with respect to students
because it might be that a student has a need to use
something in a class presentation or a project of some
kind. So that should probably be covered as well, but
we do think it should stop short of, you know, an
entire school's catalogue of motion pictures being
circumvented in advance without some kind of
expectation of use in an actual class setting or in a
class project.

MS. CHAUVET: Okay. Because the proponents
-- thank you, Mr. Williams -- the proponents do assert
that the market check would still be -- like, is still
part of their proposal. So I assume then the
combination of including that or keeping that and then
having, like, an instructor reasonably believe that
this motion picture would be used and would need an
accessible version, that would meet your concern then,
Mr. Williams?

MR. WILLIAMS: Yes. We think the market
check remains essential, and that is a big helpful
aspect of all of this and makes it easier for us to be
agreeable. And then we just have to get into that
issue of sufficient quality with the market check
approach and what that means.

MS. CHAUVET: Well, let's go ahead and turn
to that. I believe my colleague, Mr. Gray, has some
questions about the sufficient quality limitation.

MR. GRAY: Thanks, Anna. So, for Mr. Reid,
your proposed language clarified that circumvention
would be permitted where the accessible version -
where you can't obtain an accessible version of
"sufficient quality at a fair market price."

So could you explain a little bit more just
sort of for the record why this exemption is
necessary? I know, in your initial comments, you
mentioned something about some institutions having
confusion about when and when they cannot circumvent
depending on the quality of the captions.

And so it would be helpful to have a little
bit more information about kind of how you see this
applying and why there's an adverse effect here.
MR. REID: Thank you, Mr. Gray. So I want
to quickly tag on because I think the answer to the
previous question and the answer to this one are the
same, which is we hope that the exemption would be
formulated with reference to the judgment of the
disability services professional who is making the
use. That's who's eligible for the exemption.

One thing on the previous one, we're not, in
principle, opposed to what Mr. Williams and Mr. Taylor
laid out with respect to an instructor expressing a
need to use this in class. That's a pretty typical
scenario, but we want to leave that judgment in the
hands of the disability services professional, that
there's a reasonable belief that this is going to be
needed for some kind of educational purposes.

Likewise, with respect to quality, the piece
that we'd like to underscore about quality is that
this is not an objective standard, right? This is not
an objective process. I think, as anyone who has gone
through, in the K through 12 context, an IEP plan for
their child, it's a very individualized process.

And this is so true -- also true in a
university context. This is a conversation with a
disability services professional about what a student
needs in class. And so the question about quality is
a video might be getting used in different contexts, right? It might be getting used in a cinema class, where particular nuances about the sound design or the caption -- or the dialogue are very important, and having the utmost care around the quality of the captions is really important.

We've also heard scenarios where someone might look at this and say, gee, this falls way short. The captions on this video are really terrible and are short of what, for example, the FCC might expect if it were aired on broadcast television.

But the student says, no, this is okay, this is actually good enough for me because I'm just hard of hearing, and I'm just using the captions to help kind of fill in some blanks. So, actually, we don't need to remediate this one.

So what we're asking for with respect to quality -- and, Mr. Gray, I apologize, I've diverged from your question a little bit -- is basically to allow the subjective judgment of the -- or the reasonable judgment of the disability services professional to say, with this video with this student with this class or with this particular set of students that might be likely to take this class, that we need to really burnish the captions here and we
really need to make them better.  

Or, alternatively, to say, you know what, for this context, it's actually not necessary for us to do it. So we want to leave that judgment in the hands of the disability services professional.

MR. GRAY: Right. So you mentioned the FCC regulations or the proposal, I think, from the Disability Advisory Committee. I have two questions to follow up on that.

So the first one is, so I understand your position that you kind of want to defer to the judgment of the professionals where we can. If the Office considered maybe being a little bit more explicit and did something like defining insufficient quality as insufficient to fulfill the institution's, ADA obligations or keeping the penumbra of disabilities laws that we discussed earlier, would that be sufficient? Would that be reasonable? Would there be some gaps there?

MR. REID: Yeah, I'd suggest that the Office not do that approach, and the reason I would suggest that is because the disability laws that are referenced, and you sort of point to the penumbra, don't have detailed regulations for the quality of accommodations, right? The Department of Justice
hasn't promulgated, for example, detailed regulations about the quality of descriptions or captions.

I think, if you wanted to make reference to or allusion to the FCC's standards, I think those are the closest thing we have to an objective set of standards for captioning out there.

For description, we've got that Disability Advisory Committee recommendation, which is kind of a start, but I would urge you not to frame it in terms of compliance with those standards because those standards are in significant part recommendations and best practices for captioners.

So, for example, they're just lots of suggestions for people who are creating the descriptions and the captions. They're not the kind of standards that you could sit down and really carefully, after the fact, say, for this context, for this student, for this video, if we sort of put it through the rubric of the standard, it complied or it didn't.

And, actually, if you look at the FCC standards even for broadcast television, they ask questions about, well, were the errors de minimis? Is this part of a pattern of what the station does? Were all the people involved following best practices and
so on and so forth.

So I would just urge you not to peg compliance with those standards as the keystone because it's a very hard question to calculate whether something is compliant or not, right? And I'd urge you to talk to the folks at the FCC about the holes in these standards, and one of the things we've actually asked the FCC to do is to promulgate more objective metrics for evaluating television stations, but that doesn't exist yet. So we've got loose standards that are going to be difficult to apply in context, and that's why we think referring to the judgment of the disability services professional is a better way to approach this.

MR. GRAY: Great. And so I see, Mr. Band, you want to respond. And then, after you do, Mr. Cheney, I'd be happy to talk to you and have you ask any questions you have.

MR. BAND: Yes, thank you. So both this line of questioning and the questions dealing with the preemptive remediation almost seem to suggest that all of these activities by the disability services office are without a cost, like that they could just go ahead and do whatever they want. They have limitless budgets, limitless time, and that they would do more
than the absolute minimum that they need to do to
fulfil their legal obligation, their moral obligation,
to satisfy educational needs.

But that's not the real world. In the real
world, budgets are tight, time is tight, and they just
need -- you know, they're only going to do what they
absolutely need to do. They're not going to remediate
something, you know, when they think, oh, you know,
yeah, the quality isn't quite as good as it could be.

I mean, they're only going to do it if it
really doesn't -- whatever's available doesn't meet
the student's needs. And that's the reality of the
disability services offices, and that's the reality,
you know, that the Office should be bringing to this
situation and make it, you know, the least burdensome
approach, you know, because there is this enormous
burden out there, there's enormous constraint out
there, which is the budgetary constraint that operates
on the DSOs.

MR. GRAY: And so I see we have two more
hands raised. I just want to remind everyone we
technically only have seven minutes left in this
panel, and we haven't gotten to the reasonable
effort/fair price issue. So, very quickly, Mr.
Williams, if you could respond? But I just want to
MR. WILLIAMS: Yes, thank you. So, as we said in our comments, we would prefer some kind of standard here, but we do understand where the other participants are coming from on this, and we certainly don't want to suggest that disability services officers are commonly engaging in improper conduct. And I understand what Jonathan said, but that's certainly not what we're suggesting.

On the other hand, we do think, you know, regulations, for a number of reasons, should have some -- they should be spelled out in a way that people can understand them.

And so the FCC guidelines on captioning, the 47 C.F.R. § 79.1 standards, they do include a lot of what I understand to be the important issues, not in a granular way, but they say, you know, synchronicity is important. Completeness is important. Placement is important. Those kinds of things that I think are commonly understood to -- and accuracy.

And so, you know, my one concern, although I take the issue seriously, is if de minimis errors are a huge problem, I think you could probably find what I would consider to be a de minimis error in potentially every single captioned or described work, and so, you
know, that does really bump into the marketplace check requirement and, depending on someone's point of view, could, you know, undermine that market check requirement. So that's where we're coming from. We'd like to be as reasonable as we can.

MR. GRAY: Great. Mr. Kapcala, would you like to respond quickly?

MR. KAPCALA: Yeah. And I understand that. I actually think the more reasonable approach is probably the opposite in some ways. So, we are -- just to provide a context, this semester was the first semester where we used some third-party remediation, and it cost, to Mr. Band's point, it cost us about two grand to do 15 videos. So we're certainly not looking to caption videos that don't need to be captioned as that becomes an expensive prospect.

But one thing our office does have to do by law is engage in an interactive, individualized process with individuals when they request accommodation, and, as part of that, when it's reasonable to do so and possible to do so, we can adjust accommodations and should adjust accommodations to meet students' needs. And students are given primary consideration under the ADA for determining what is and isn't effective, and so that would include
captioning.

And, so, if there's a blanket standard in place, you know, there may be things for a student, for instance, who's deaf who's using ASL -- ASL is their first language; English is their second language. There may be things that they need that we can do just in the way that we break lines or time captions that would allow that individual to better process the information in the captions that would be not necessarily our standard way of captioning but would still be possible.

It's also a two-way street, right? So, as Mr. Reid mentioned, there are a number of students who will tell us, oh, you know, I don't think I need captions in this context or this class, or they're good enough, don't worry about them.

And we might be looking at them and cringing and thinking these are awful, but we don't twist the student's arm. If the student says they're effective, then they're effective. I think, if there were stricter rules in place, then we would feel obligated to make new captions regardless because we would want the captions to abide by those rules.

But, to Mr. Williams' point, we don't want to caption things. We don't have the resources, the
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personnel, the money, the budgetary considerations to
caption things that don't really need it. So we
wouldn't, of course, go, oh, look, three missing
commas in these captions, better go caption these.
You know, we would only caption things when it served
a specific need or purpose.

MR. GRAY: Great. And then my next
question, I guess, is for Mr. Reid, or if you want to
have your students answer this, you can. You know, in
your written comments, you talked a little bit about
kind of examples of videos that don't have sufficient
quality captions.

Could you just speak a little bit more for
the sake of providing a record here, what sort of
captions, audio descriptions, are we talking about?
Are we talking about items that are represented as
maybe having audio descriptions that aren't? Are we
talking about auto-generated ones on, like, a YouTube
video? You know, what's sort of the library or sort
of the spectrum of works that we're talking about
here?

MR. REID: So, I mean, I think, if your
question, Mr. Gray, is directed at the kinds of
captioning and description errors that we might be
concerned with, I actually think the FCC documents

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that we pointed to give you a pretty good spectrum of
the kinds of problems that can happen.

So, with captions, you know, obviously,
we're not talking about missing captions here because
then we're in the exemption no matter what. But we're
talking about incomplete captions, missing words,
misspellings of proper nouns, lack of punctuation.

If you turn on the closed captions of this
Zoom conference, and the captioner's doing a very nice
job, but they're not synchronous, right? They're
delayed, and so that may impair understanding. There
may be, if we're talking about automatic speech
recognition generated captions, there may be places
where the ASR engine just goes off the rails and
starts captioning not what's being said. Depending on
the context, we may be talking about speaker
identification missing or missing sound effects that
may be really important to understanding and so on and
so forth.

Description, same sort of things that you
might imagine. I always say a picture is worth 1,000
words, and you've got 24 or 30 frames a second worth
of things flying by on the screen, and you've got to
make particular decisions about what to say about
what's happening. And depending on the context, you
may not be getting the most important thing. You may not be speaking in a way that's clear. You may not be identifying key information that's important for a particular context.

So I think those are the kinds of errors that we see, and urge you to just hop onto YouTube and turn on the captions on a given video, and you will probably see the kinds of things that Mr. Kapcala and his colleagues encounter on a daily basis.

And I think, honestly, when we're talking about description, go look on YouTube and see if you can find description. You won't even find a button because most of the videos that you will find on YouTube are not described. So, for the most part, when we're talking about description, we're probably talking about missing descriptions.

But, again, you may have a blind or visually impaired student that needs them for a particular context, and the track that's included, for example, on a disc may not be sufficient because it's missing key information.

MR. GRAY: Great, thank you. So I think we're just going to go over about five minutes so we can ask a few more questions about reasonable effort, and then I want to make sure, I think Mr. Cheney had
his hand raised earlier, and I want to make sure he
has the chance to ask any final questions.

So in your comments, you propose clarifying
the reasonable effort language to specifically
address, you know, when someone buys perhaps a
textbook, and there's an accompanying audiovisual work
that comes with it that may not be captioned. So can
you describe more, you know, is this addressing
uncertainties around digital texts? Is it with media
generally? Is this sort of this one specific
circumstances? You know, if you could give us a
little bit more information to kind of clarify, like,
what the situation looks like and how often it
happens, that would be helpful.

MR. REID: I'm going to go fast here. Ms.
Hamilton, please chime in if I miss anything.

So I think the reasonable market check has
actually been fairly easy for folks to comply with
thanks to the language that the Office included in the
last recommendation for most videos, which is, you
know, you go on Amazon Prime, you go on Netflix, you
go on Hulu, you look for, is this available on a
commercial platform? And the answer is sort of yes,
sort of no.

I think the circumstance that we are a
little bit worried about here, and the feedback that we've gotten from some of ATSP's members on this, is that when they're dealing with videos that are associated with a textbook, that commercial availability search looks different. It means you pick up the phone and you call a publisher, right? Because the kinds of videos that are typically included in a textbook are not the kind of things that would be on Netflix or Hulu or Amazon Prime or that sort of thing. You're going to call the publisher and say, hey, do you have a version of this video that has got captions for it.

And what we are worried about is just having some contours on how that conversation could go and making sure that that conversation can't be, well, we know about this reasonable market search requirement, and we're going to demand from you a higher price than it would cost you to caption it yourself and we'll do it for you, but you need to pay us a premium for it.

I think that's the circumstance that folks are worried about. And so we would welcome any sort of clarification from the Office of just when the reasonable market search is necessarily a conversation and not just searching commercial platforms to see yes or no, is it available, what are the terms of that
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negotiation? What's acceptable for a textbook publisher to charge? And just to make sure that disability services offices aren't stuck in an uncomfortable position of saying, gee, we'd -- because I think Mr. Kapcala would say, if a publisher has the captioned or described version of the video and is willing to hand it over, they will take that 10 times out of 10.

But we want to make sure that the situation doesn't arise where they say it's going to cost you more than what would be a reasonable amount for you to do it yourself. Maybe Mr. Kapcala's got clarification on that.

MR. GRAY: Sure. But quickly, just to kind of follow up on that, could you clarify just a little bit more? You know, is this a situation that has happened and so we're talking about something that we know has happened and may happen again, or are we talking sort of future-looking, we expect this will happen or you expect this will happen?

MR. REID: So I think this was born out of questions from ATSP's members about how to approach these conversations, just to know what is reasonable. Mr. Kapcala may be able to speak more to that.

MR. GRAY: Mr. Kapcala?
MR. KAPCALA: Yeah. So I do think it is, you know, largely forward-looking, although we have had to reach out to textbook publishers to ask that they caption materials. And in those situations, you know, if the student has purchased the textbook and that textbook comes with online video, then that student shouldn't -- it would be discriminatory to ask that student to then pay for, you know, video content that's made available to every other student already just because they have a disability.

And so our position is that the video should have captions on it, and if it doesn't, then we should be allowed to make those captions, and we shouldn't have to pay for that. We're not talking about, from our perspective -- I mean, I've already purchased plenty of movies, you know, off Amazon, you know, sent students, you know, credit on Amazon to watch a movie with captions when the version that the instructor was using didn't have captions or something.

That's not a problem. We're happy to do that if an existing one exists. We would rather pay 2.99 than spend seven hours or 14 hours captioning a two-hour video. That's a good deal for us every time. But if there is a textbook -- and it's also a time matter.
You know, in the case of the textbook publisher that we reached out to, it was going to take them two weeks to get us those captions. Well, by that point, that lesson's over and the student's moved on to something else. We can have those captions done much quicker. And so that would be another, you know, wrinkle to that.

MR. GRAY: Great. And then, Mr. Cheney, would you like to ask any last questions you had?

MR. CHENEY: I think we're over time, and I think my questions have been answered by the panelists in the interim. So I think I'm good.

MS. SMITH: Thank you. We appreciate everyone's participation and also sense of the time. We're going to conclude now, and I just want to explain, since this is our first break, our break is now 55 minutes long. So everyone can, you know -- when we're done, we can turn our videos off, and we can make sure to mute people.

But we will still have a live feed. This live feed will be the same feed for the whole day. And so what we're going to do is in about 25 minutes, so at 12:15 Eastern, anyone who's on the second panel, which is for Class 17, should hop back on. We're going to do an audio check and do a run-through to
make sure that we are fully set up to have an
accessible hearing for the second one of the day.

   So thank you again for the participation.
So everyone now can turn off the video and mute, and
we will reconvene, if you're in the audience, at 12:45
Eastern. And at 12:15, hop back on if you're a
panelist for the next time. Thank you.

   (Whereupon, at 11:50 a.m., the hearing in
the above-entitled matter recessed, to reconvene at
12:45 p.m. this same day, Monday, April 5, 2021.)

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MS. SMITH: Welcome back, everyone. I think -- yes, I see our interpreter has their video on. I have my video on. So this is the second session of the Copyright Office's hearings on the §1201 rulemaking. This is Class 17, which is examining a proposed exemption for all uses for accessibility purposes.

My name is Regan Smith. I'm General Counsel of the Copyright Office, and I think some were listening to the hearing earlier this morning, but just to briefly go through the rules of the road, we are trying to focus on clarifying and honing in on issues raised by the comments and are excited to hear from everyone today.

The questions will be moderated by Copyright Office attorneys or our colleagues at the NTIA. If you wish to speak, we are recommending that you use the "Raise Hand" feature in Zoom, it's a little button on the side, and to please mute your audio to minimize any extraneous noise.

We are also asking for this session that if you are not speaking and you are not the interpreter, you turn off your video to promote accessibility for
this hearing. You can use the chat if you have any questions, and someone from the Copyright Office will answer and try to facilitate any issues.

We are asking, because we have limited time, to please try to limit your responses to the question posed. I think everyone will get a chance to contribute and to dive into the issues.

And then, one last note, this is the same Zoom link for the whole day. So, if you wish to listen in on the last session, which will follow at 2:30 Eastern, just stay on the line.

So now I will call on the government officials to introduce themselves and then the participants, and then we will get started. So, Ms. Chauvet?

MS. CHAUVET: Yes, hello. My name is Anna Chauvet. I serve as Associate General Counsel.

MS. SMITH: Thank you. Mr. Bartelt?

MR. BARTELT: Hi, my name is Nick Bartelt. I'm an Attorney-Advisor with the Office of General Counsel.

MS. SMITH: Thank you. Mr. Gray?

MR. GRAY: Hi, everyone. I'm Mark Gray. I'm also an Attorney-Advisor here in the Office of General Counsel.
MS. SMITH: Thank you. And Mr. Cheney?

MR. CHENEY: Good afternoon. My name is Stacy Cheney. I'm a Senior Attorney-Advisor at the Office of Chief Counsel at NTIA.

MS. SMITH: Thank you. So now I'm going to ask the panelists to introduce each other. I'm going to try to go in alphabetical order. So, Mr. Band?

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

MS. SMITH: Thank you. Mr. Bernard?

MR. BERNARD: Hi, I'm Jack Bernard, and I'm an attorney and faculty member at the University of Michigan.

MS. SMITH: I believe next we have Ms. Charlson?

MS. CHARLSON: Yes, thank you. I'm Kim Charlson. I'm the Executive Director of the Perkins Braille and Talking Book Library in Watertown, Massachusetts.

MS. SMITH: Thank you. I think next is Mr. Rachfal. Hopefully, I'm saying that close.

MR. RACHFAL: Hi, yes. This is Clark Rachfal. I'm the Director of Advocacy and Governmental Affairs for the American Council of the Blind.
MS. SMITH: Thank you. Next, we have Mr. Reid, and if you could please -- I don't know -- introduce any student attorneys with you as well.

MR. REID: Thank you. Blake Reid for the Samuelson-Glushko Technology Law & Policy Clinic at the University of Colorado. We're here representing the American Council of the Blind, and I'm joined by my colleague, Rachel Hersch. Rachel, do you want to chime in?

MS. HERSCH: Hi, my name's Rachel Hersch. I'm a 2L at Colorado Law.

MS. SMITH: Thank you. Mr. Richert?

MR. RICHERT: Hi. Mark Richert, Executive Director of the Association for Education and Rehabilitation of the Blind and Visually Impaired.

MS. SMITH: Thank you. Mr. Rosenblum?

MR. ROSENBLUM: Hello. I am Howard Rosenblum, the CEO and Executive Director of Legal Services at the National Association of the Deaf. I'm happy to be here.

MS. SMITH: Thank you. Mr. Vogler?

DR. VOGLER: Hi, I am Christian Vogler. I am a Professor and Administrator of the Technology Access Program, the Director. Thank you very much.

MS. SMITH: Next, Mr. Marks?
MR. MARKS: Hello. My name is Dean Marks, and I am outside counsel to AACS LA and to DVD Copy Control Association. Thank you very much.

MS. SMITH: Thank you. Mr. Taylor?

MR. TAYLOR: Hello. I'm David Taylor. I represent DVD Copy Control Association and the AACS Licensing Administrator, otherwise known as AACS LA. Thank you.

MS. SMITH: Thank you. And I believe our last panelist is Mr. Williams.

MR. WILLIAMS: Hello, thank you. Matthew Williams from Mitchell, Silberberg, and Knupp. I'm representing the Joint Creators and Copyright Owners.

MS. SMITH: So thank you, everyone, for being here today. We're glad that we were able to convene virtually. I think to start the questioning will be Ms. Chauvet.

MS. CHAUVET: Thank you, Ms. Smith. For the proponents, the proposed exemption would extend to any work protected by a technological protection measure where circumvention is undertaken for the purpose of creating an accessible version for work for people with disabilities, though the proposed language does not define disabilities. So, purposes of the exemption, how should disabilities be defined? Should
the exemption refer to disability laws for a
definition? Mr. Reid, may I start with you, please?

    MR. REID: Thank you for the question, Ms. Chauvet, and I may tag Mr. Bernard to respond to this.

But picking up on the discussion from the earlier
hearing, I think this is one where the Office could
either just promulgate the language as proposed with
some explanatory language in the final recommendation
or the Librarian's final rule explaining that we're
talking about disabilities broadly conceived.

    Alternatively, I think pointing to the
definitions in the Americans with Disabilities Act as
amended could be a workable approach.

    Mr. Bernard, I'm not sure if you have
anything to add on that front?

    MR. BERNARD: All I'll add is that while the
ADA is certainly a good place to point if we're
thinking we want to point to someplace, we should also
be mindful that the public may be constrained by laws
in their own state. And so I think we would want to
leave open the opportunity that somebody who's trying
to comport with a law that defines a person with a
disability more broadly in their own state, that they
would also be able to do that.

    MS. CHAUVE: Thank you. If the exemption
does not reference a specific disability law, how should the Office ensure that the exemption applies only where circumvention is necessary to provide accessible copies of work to those who need them?

MR. REID: Well, I think the terms of --

MS. CHAUVET: Mr. Reid?

MR. REID: I'm sorry, Ms. Chauvet, I'll get my timing down, I swear. I think the language of the exemption as proposed does just that. It ensures that uses that are aimed at accessibility for people with disabilities would be covered.

And I think the court's opinion in HathiTrust is a good exemplar of the ability to figure this out. I think, as we sit here and think about promulgating regulatory language, we can come up with lots of complex hypotheticals. But I think, when faced with actual uses in practice, we don't have a particularly complicated time identifying what accessibility purposes are.

And I think, to the point that Mr. Bernard just made, there are a wide array of circumstances under which either a person with a disability or a third-party seeking to assist them is going to engage in accessibility. And we think including those terms along perhaps with some guidance in the recommendation
is good enough to set the scope.

MS. CHAUVET: Thank you. Mr. Williams, would you like to respond on this issue?

MR. WILLIAMS: Thank you. As we discussed in the last panel a little bit, I do think it would be good to have a reference to the laws in place to try to define the scope of what we're talking about here. That said, we do understand the point being made by the proponents here that that might be overly restrictive. So I think they could be used as guideposts, and it could be emphasized that the fair use analysis as it was conducted three years ago is based in large part on the need to comply with laws such as those that define the term "disabled."

MS. CHAUVET: Thank you. Mr. Reid, I see your hand is raised.

MR. REID: Yeah, and I wonder, Ms. Chauvet, and please tell me if this line of remark is out of scope, but I think it would be helpful to have some discussion about the need for this exemption beyond just the definition of people with disabilities and the definition of accessibility, which, I think, as we explained in our comments, extends quite far beyond the bounds of what disability law requires.

In other words, unlike the previous
exemption we discussed this morning, this exemption is designed to enable accessibility activities by individuals and third parties that may not be bound at all by disability law but are, in fact, on sort of the cutting edge of making copyrighted works accessible. And I wonder if I could tag in Mr. Bernard to speak a little bit to that?

MS. CHAUVET: Mr. Bernard, would you like to add to that?

MR. BERNARD: Sure. So I think one of the concerns that the proposed language is trying to address is the opportunity for people who have disabilities to equitably participate in society, to be able to work, to be able to take care of their children, to shop, to do all the kinds of things that people do.

And when we have a system in place that says to people with disabilities, you can't have access to the same thing that everyone else has access to because it stands behind a kind of digital wall and you will have to wait three years in order to be able to even bring forward a concern, or up to three years, that this is systemically excluding people who the government, the clear public policy of the United States, is to try to include.
And so the reason for a broader scope here looking at all the categories and classes of works is to facilitate the kind of structure that exists already in the United States that is framed by its laws that are both proactive -- so requiring things like the width of a door to be of a certain length or a curb cut -- and responsive so that when someone who needs an accommodation requests it, they can have that accommodation in order to participate in society. And so this is why we're looking at the broader language here, is to enable equitable participation that's consistent with U.S. public policy.

MS. CHAUVET: Thank you. Ms. Smith, before I turn to questions about the scope or the class of works, did you have any further questions?

MS. SMITH: Thank you. You know, I have one question related to the panel we had earlier this morning where there seemed to be some agreement that, since the circumvention would be conducted by disability service professionals or educators, it may be appropriate to make the language a little bit more flexible because they would be able to exercise reasonable and good judgment.

I understand that this request is not, you know, so constrained for reasons that have been
articulated in the record, and I just wonder, does that relate to our understanding of whether a proposed exemption should reference the specific federal or state laws or connect the exemption to specific accessibility uses? I see -- and so, Mr. Bernard, you raised your hand? Thank you.

MR. BERNARD: Yeah, I'll try to address what I think you are asking about, but if I'm confused, that's possible. I got my second COVID shot yesterday, and I appear to be in the group of people who aren't responding well to it. So feel free to nudge me back into place.

But you harkened back to the discussion about the professional judgment of people who help students who have disabilities receive accommodations at educational institutions.

But I think, when we're talking about judgment here, that the fundamental judgment we're thinking about is a person who says, "I bought this service, I bought this technology, I bought this work, and I can't access it because it's inaccessible to me."

And the judgment that I think we're talking about is the judgment to say this is not accessible, and now I want to make it accessible so that I can

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have the same benefits that everyone else has. If the
work is not in a digital format, well, then people who
have disabilities are able to make those kinds of
accommodations for themselves, and people who are
trying to access works that happen to be in digital
format, which is increasingly the case, they would not
be able to feel comfortable making those kinds of
accommodations. Thank you.

MS. CHAUVET: Thank you. Mr. Marks, I see
you had your hand raised. Would you like to add to
that? And then Mr. Reid.

MR. MARKS: Yes, thank you very much, and I
appreciate the remark that Mr. Bernard just made. One
of the issues we were, frankly, having with the
exemption as proposed was that it was so open-ended.
So, for example, Mr. Bernard just mentioned about a
person with disability challenges having acquired a
subscription to a service or lawfully acquired a copy
of the work and not being able to access it.

That is a sort of parameter that I think
would be moving in the right direction to be able to
properly stoke an exemption. But, as written, there's
no qualification that, in fact, a person who's seeking
to circumvent a technological protection measure has
actually lawfully acquired the work.
And so, as we try to balance the issues of copyrights and disability rights, we want to try at least from our perspective of the licensors of the technical customizers to see if we can come to some sort of, you know, equitable balance as we feel we were able to do in the last session last spring.

MS. CHAUVET: Thank you. Mr. Reid?

MR. REID: I wanted to appreciate Mr. Marks' comment about remuneration as an issue that, I think, if we were looking to refine the exemption in some way, would certainly be an issue that we could talk about.

Ms. Smith, to your question, just to tag on to what Mr. Bernard had to say, I would add here that what we are trying to do with the previous exemption and the exemption that we'll discuss later in the day is working very closely within the confines of this proceeding to try and incrementally, to the extent that we can meet the extraordinarily high bar that the Office has chosen to impose on granting exemptions in this space, and we're doing the very best we can to do that with those intentions.

But what we are trying to do with this exemption, what we're urging the Office to do with this exemption is to reconsider where that bar is set
and to consider setting it at a different place
because we are trying to go beyond the bounds of what
disability law specifically requires.

In particular, we're talking about access to
works whose creators, whose distributors have opposed
the extension of disability law in the past, including
some of the organizations represented here today.
What we are trying to get to a place is for those
categories of works where we have faced arguments that
require them to be accessible under disability law,
under the Americans with Disabilities Act, the
Telecommunications Act and its associated regulations
or the panoply of other disabilities laws, where
rightsholders have said please don't make us, we
cannot be made to do this, it will be too expensive.

We've heard arguments that it might violate
their First Amendment rights and so on and so forth to
put into the range of new technologies for what the
application of disability law has faced difficulty in
keeping up and for the kinds of exemptions that we
have discussed with the Office both today and in the
past -- I'm thinking back to the exemption that we
proposed back in 2012 around accessibility research --
to say this incremental process of describing in great
detail before an activity can take place legally
exactly how it is likely to play out, to basically prove that level of -- to raise that level of evidence before the Office in every single circumstance is not tenable for people with disabilities, it's not tenable for the third parties that help them.

And I would point the Office to the fact that it's taken us the better part of 20 years to get to an eBook accessibility exemption that -- and Mr. Richert and others on the call here have participated in -- just to get that refined to recognize what's a pretty uncontroversial point, which is that blind and visually impaired and other people with print disabilities have the right to read. It's taken 20 years and an international treaty and countless hours and countless pages to get us to that result.

And when we think about the wide range of disabilities, the wide range of copyrighted works, and the wide range of techniques that it takes to make those works accessible to all of those communities of people with disabilities, that we need a different approach than the extremely incremental approach that has been adopted so far.

So I think we are keen to discuss issues like the one Mr. Marks raised up about renumeration. That makes sense. But we are asking the Office to
reconsider the approach that it has taken to these issues over the past two decades and put the needs of people with disabilities first. Thanks.

MS. SMITH: Thank you, Mr. Reid. I do want to say as we -- let's turn to that issue about the breadth of the proposed exemption, and I want to say that I don't believe the Office has asked for great detail exactly how circumvention would be used in every single instance. So I do want to sort of point the comments a little bit to our Notice of Inquiry and our proposed rule because I'm not quite sure that's been the standard at which the Office has been evaluating not just for accessibility issues but across the board the various exemptions that have been adopted through this rulemaking.

But I do take your point that you are asking the Office to consider an exemption for all works for a perhaps broader set of instances than we have before. I guess I will bring the question back to you, or if you believe there is another proponent who would be better suited, feel free to redirect.

Could you explain why you think there are adequate commonalities across the various technological protection measures, types of works, as well as effects on the market or adverse effects, to
make this a suitable exemption?

MR. REID: Sure, I'd be happy to jump in here, and I think maybe the best way for us to answer this question is to first turn to Mr. Rosenblum and then turn to Mr. Rachfal after that to speak to the salience of these issues both as they affect the deaf and hard-of-hearing community and as they affect the blind and visually impaired community. If I can call on Mr. Rosenblum first?

MS. CHAUVET: Mr. Rosenblum, please go ahead.

MR. ROSENBLUM: Hello. Thank you so much, Mr. Reid. The Joint Creators and Copyright Owners and others like them seek to keep the status quo, which is to require any accessibility to copyrighted products to only be allowed under the narrow and strict parameters that currently exist.

The current copyright regime is inaccessible and must change. I'll give you a few examples. The NAD has a subsidiary, Described and Captioned Media Program, DCMP, which provides captioning and audio description for educational video content. Their shared content is shared at no cost to schools and students across the country via YouTube.

However, we have had to deal with threats
and actual shutdowns of the DCMP YouTube page because what was thought to be an agreement with the content copyright owner for a single video was later found to be incorrect.

If the provision of captioning or audio description on any copyrighted content were not considered a copyright infringement simply because it is the provision of accessibility, then we would not have this problem.

MS. CHAUVET: Mr. Rosenblum, may I please ask a follow-up question for that? There is the existence --

MR. ROSENBLUM: Oh, actually, I wasn't finished. I'm sorry. I was just reading. Thank you.

MS. CHAUVET: I'm sorry. Please continue.

MR. ROSENBLUM: Perfect. It is not enough to only have a commitment from the Joint Creators and Copyright Owners as there are thousands of content creators who do not provide captioning or audio description. Worse yet, even when there are community volunteers or organizations such as DCMP offering to do the captioning or audio description at no cost, it's nevertheless often a struggle to just get the permission to do so. Captioning and audio description should be a mandate, not an option.
Also, where there have been discriminatory barriers, it's been my pleasure to litigate to bring those unnecessary barriers down, and we have successfully litigated against Netflix, Harvard, and MIT simply because they refused to caption content. They all argued copyright protections were a barrier. Netflix specifically attempted to argue that it was not responsible for or able to provide captioning on content that it did not only merely distribute, but they cited § 1201 as part of this argument. We did get around these arguments, but it took years to complete this litigation and obtain the needed relief.

The bottom line here is that the burden has been on people with disabilities to bring forth examples of barriers as they come up each time under existing and new technologies. This is problematic on so many levels. There's so much content that is not captioned or audio-described, and it's not possible for us to address them all under the current copyright system.

More importantly, a large percent of people with disabilities are underemployed or unemployed, and yet your current system requires these long-oppressed people to secure legal representation to navigate complex legal issues, all of this for everyday people
with disabilities to simply be able to enjoy copyrighted works to the same extent as everyone else.

So what should the policy for copyright be? To make it as difficult for people with disabilities to access works that are available to everyone else? To make people with disabilities bring each specific instance of inaccessibility in a constantly and quickly changing field of technology to the Copyright Office and then wait months and years before they are finally given access?

What's the flip side? Copyright owners having to vigilantly guard against infringing use. But isn't that what they're supposed to do? Shouldn't the burden be on them to stop infringing use rather than on people with disabilities to gain access?

In fact, there's no evidence introduced by anyone that shows preemptive accessibility would lead to an increase in copyright infringement. As a matter of public policy, this choice is easy. The Joint Creators and Copyright Owners are basically saying that people with disabilities must anticipate every technological barrier, seek regulatory review for each and every one of them, and hope for a favorable outcome long after the desired time of access.

This is not tenable, efficient, or
effective. All parties here should agree upon a
system that incorporates accessibility as an inherent
aspect of copyright law and determine how best to best
guard against abuses without putting that burden on
people with disabilities.

History is replete with examples of
oppressed and marginalized groups being denied access
to publicly available programs and services. The
current set of copyright requirements creates barriers
that contribute to this continued oppression and
marginalization for people with disabilities. We ask
that you be on the right side of history and get rid
of an oppressive copyright structure that stands in
the way of accessibility. Thank you.

MS. CHAUVET: Thank you.

Mr. Williams, I think you have perhaps a lot
to respond to. I know, for example, you are here
representing Netflix, so if you would like to speak
specifically on that matter, you can, or the original
question, which I will also pose to you, is whether
you think there is sufficient commonality across uses
of works, or if there's other ways the Office could
approach these very important policy issues from
within the regulatory authority granted to it? Thank
you.
MR. WILLIAMS: Yes, thank you. And, to be clear, one member of my coalition is the Motion Picture Association, and Netflix is a member of that trade association, but I'm not here today appearing directly on behalf of Netflix as an individual company.

And I appreciate the overview that Mr. Rosenblum gave, and I appreciate his passion, but I do think some of what he had to say about our positions are inaccurate. He said, for example, and I'm paraphrasing, that, you know, we're here in this proceeding trying to preserve every restriction that's currently in place with respect to these issues.

And as the panel prior to this one displayed, that's not correct. We agreed to a number of the requests for expansion there. We are not opposing the exemption that would broaden the eBooks exemption to meet the Marrakesh standards. And so we are not trying to take a maximalist approach here.

That said, the immediately proposed exemption is so broad that we did feel that we needed to oppose it, and there's a number of reasons for that. You asked if there are commonalities across all works that would allow you to change the ground rules here and grant an all-works exemption, and to my
knowledge, there are not.

There are different issues with respect to
different categories of works, and that's one reason
why the proceeding was designed the way it was, to try
to focus in on specific classes of works and provide
the Office with some flexibility to address specific
issues that come up without using a blunt instrument
that goes to every issue that might be out there in
the marketplace.

So there's a number of things with this
proposal, in addition to the all-works issue, that
there's just not limitations of the sort we tend to
see in the proceeding. One that we touched on earlier
after Ms. Chauvet's question was there's not really an
identification of who would be the ones engaging in
the circumvention the way there was in Class 3 that we
discussed earlier. There's not a market check
requirement or a requirement that there be no
alternative to circumvention. The focus on how the
copies are obtained is lacking in the proposal. The
security measures that might be implemented to protect
the copies after circumvention are lacking. There's
no use of the sole purpose language that the Office
tends to use. There's not language to address how the
copies would be disseminated and by who.
And so all of those things, while we do want to try to work with folks to address this important issue, are things that give us pause and have caused us to oppose this exemption.

And just my last point on the scope here is that the rulemaking and the way it's structured, this is not the only set of issues that it's designed to deal with, and if you were to start adopting all works proposals, there's a whole range of things that will be proposed and that have been in the past that present lots of different difficult problems.

There could be an all-works for educational purposes, all-works for criticism and comment, all-works for remix, and, ultimately, all-works for any lawful purpose, which is a proposal that's been out there since well before the DMCA was passed and was not included in the statute by Congress. And this rulemaking was instead to try to address specific issues.

So, while we do recognize the import of the issues here, we also feel it's very important to preserve the ground rules here in the proceeding. And I thank you.

MS. SMITH: Thank you. And I know we have a lot of other hands up, but I think I would like to
pose one follow-up question to Mr. Williams before we
get to some others, because I know Joint Creators have
participated in many of these classes, and we'll hear
from you, you know, throughout the week.

When you talk about the potential effect to
other exemptions, is it your client's view that this
would pose issues for the other exemptions? And if
so, why? I mean, do you see all works having
different market effects or different adverse effects?
Could you connect that to the statute? Or is it more
of just a concern about the Office's authority, or
both? Thank you.

MR. WILLIAMS: I would say it is both. I
think the Office has been right to look to the statute
and legislative history in terms of defining the scope
of its authority. But also, the purpose, I think, of
limiting that authority was to create a proceeding
that has the benefit of allowing the Office to
flexibly deal with different issues in different
spaces with respect to different type of works and
actually look through those specifics to determine
what are the needs that are not being met in the
marketplace, what are the problems that are
unresolved, and how can you act in a way that is
contoured to address those specifics.
So I think there was a reason that it was designed the way it is, and I do think it has benefits. I think the expansion in 2006 that you made to what would be considered in the proceeding for being granted, you know, it pushed the outer limits of the statute. It was a new approach from the Office as to how exemptions could be crafted.

But it did ultimately allow you to grant more exemptions rather than fewer exemptions, and I think that's what the Office has acknowledged over time, that the focus on user groups combined with a focus on specific classes of copyrighted works has actually led to more exemptions, not fewer, because you're able to more narrowly tailor them to address specific issues. So that's how I see the way this proceeding was set up and the way it's supposed to work.

MS. SMITH: Thank you, Mr. Williams.

To try to go in order, Mr. Bernard, I think you had your hand up next, and then we will go to Mr. Band. So, Mr. Bernard, if you would like to answer the question about whether you feel that this class has sufficient commonalities, or alternatively, I think my next question is, if the Office felt constrained in its authority, given the statutory

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language, to focus on a particular class of works, could you maybe suggest what classes of works we might be able to consider in this request?

MR. BERNARD: Sure. So I think the commonality is that the works are inaccessible to somebody, that is, that a member of the public is not able to access these works, whatever they are. And this is very difficult to predict. There are hundreds of different kinds of disabilities out there. There are eight categories of works that are protected that fall into smaller units depending upon the line of the Copyright Act you're looking toward, and there are many thousands of different types of technologies that are emerging, all at the same time. So the idea here about looking at the commonality of the works as being the work is inaccessible to a qualified person with a disability, this, I think, is all you need.

When Mr. Williams talks about changing the ground rules, the ground rules in question are within the purview of the Copyright Office to consider adjusting the ground rules so that for this class of individuals, that is, people who have disabilities who are not able to equitably participate in society because they cannot access copyrighted works that just happen to be in a box, a digital box, this is the kind
of constraint that the Copyright Office can actually
address without having to run afoul of § 1201.

The room is in there. 1201 doesn't
prescribe a circumstance where you couldn't identify
all classes of works that meet a certain set of
criteria. And here are the criteria, is that they are
wanting to be used by a person who has a disability in
order to access that work.

So I do think that that is what's at the
heart of the issue here, and I think the Copyright
Office is well-situated to address this fundamental
public policy concern. Thank you.

MS. SMITH: Thank you.

So, Mr. Band, from you next, and, again, I
think, one, to keep us moving on and put a spin as we
call on you, the record suggests that sound recordings
may not have TPMs on them, and, of course, there is an
existing exemption for literary works, which will get
into a hearing later, and audiovisual works.

And I think, without -- you know, this is
not directed at questioning the public policy reasons
behind this request, but is there a need to have an
exemption for sound recordings or literary works? And
if so, you know, please let us know. Mr. Band?

MR. BAND: Sure. So an answer to that
question is even if maybe there are -- generally, sound recordings don't have technological protections, but that doesn't mean that there are no sound recordings without technological protections or that there will be no sound recordings in the next three years that will have technological protections.

But it all goes to the bigger point in terms of the commonality, and the commonality is this, and this is also how it's very different from, you know, Mr. Williams' parade of horribles and the floodgates opening, is these communities are seeking an exemption because the rightsholders have not met their legal obligation to provide all of these works in accessible format, meaning they have a legal obligation to provide everything in an ADA-compliant way and they aren't doing that. And so, because they aren't meeting their legal obligation, this community is seeking the opportunity to self-help because, again, the rightsholders have to do it.

MS. SMITH: Well, can I just ask one question? I mean, is the exemption when there is not an accessible version? Is that, like, a market check to build into that? Because I think starting out the question was, if we're not seeing it for sound recordings and finding that tricky to square with what
you just said now, which is that the rightsholders are failing at their obligation if they're not even using TPMs, is that what's happening? I just wanted to make sure I understand your position.

MR. BAND: Well, certainly, with most sound recordings, there isn't an issue. But that's not the case, certainly not the case for -- you know, all sound recordings are certainly possible that within the next three years this will be an issue with sound recordings, you know, but it's all part of the bigger problem, which is, again, that -- and this is, again, how you distinguish it from all educational uses, because, you know, there is no legal obligation to make everything available for educational uses for all people. And so, you know, there is a common -- my point here is there is a commonality here and there's a way of distinguishing this set of uses from all others.

MS. SMITH: Okay. Thank you.

I think, Mr. Reid, if you would like to respond to some of that and, you know, similarly, I think the question of -- I appreciate the nature of the request, but if you also wanted to address, do you have an opinion, if the Office felt like it needed to delineate, what might be appropriate? And I think, in
particular, literary works or sound recordings, or I think the request referenced sculptural works. And I'm just trying to understand, you know, like, what the use-case is for that. So thank you.

MR. REID: Thanks, Ms. Smith, and I'll try and tee up a couple of directions that we may want to head as we head into the next phase of the hearing. But I wanted to briefly respond to Mr. Williams' comment, which conceptualizes this proceeding as sort of a neutral one, and what I want to underscore is that this is not a neutral proceeding.

The experience of most people when they seek to experience, purchase, access to a copyrighted work or a subscription service that provides access to a copyrighted work is to pay their money and then get access as advertised. And the experience for people with disabilities has long been filtered through a permission structure, and that permission structure comes from copyright, and this is not new. This dates back to the 1930s, when the Pratt-Smoot Act put the Library in the position of distributing braille and other accessible versions of books. There was an insistence from the publishers that they be asked permission.

In the leadup to the 1976 Copyright Act,
publishers appeared before Congress and demanded to be asked permission, which gave us § 710 of the Copyright Act of 1976, which basically required the Copyright Office to promulgate forms strictly for the purpose of asking permission.

And when that permission wasn't provided, that finally led us to the Chafee Amendment, which made that permission compulsory. But you have to understand that that permission structure is far and away more than people without disabilities typically face when they are trying to get access to a work.

People without disabilities who want to access a work don't have to come to the Copyright Office and ask permission to do that. They simply get it. So we're working against this historical permission structure, and we're trying to say, yes, you could be supportive of accessibility, as many folks were in their comments, as the Office was in the Notice of Proposed Rulemaking here.

But actually being supportive of accessibility requires saying that people with disabilities have got a civil right and a human right to access copyrighted works on equal terms. And any place that we impose the permission structure of § 1201 in this proceeding in front of them and say you
have to come and ask and you have to come prove all of the specific types of works that you'd like to access, the particular ways that you want to do them, you're putting them in a different place than people without disabilities.

So I just want to make sure that we have that historical background here. This is not a neutral proceeding. This is one that stacks the deck against people with disabilities, and we're trying to get to one that's a little bit more egalitarian. And I'm happy to move us on here, but I'm happy to yield the floor.

MS. SMITH: Okay, thank you. Mr. Marks, would you like to respond?

MR. MARKS: Thank you very much. I wanted to first say that, you know, I appreciate the frustrations that have been expressed by Mr. Rosenblum and Mr. Reid, and I think it's the advocacy that has pushed disability rights forward. It's very, very important.

I think what we're trying to get at with our opposition here is, is there a place where we can achieve some balance. So even with the Chafee Amendment, right, there are limitations that the works have to be distributed in this specialized form to
enable meeting the challenges of disabled people, and
it shouldn't be distributed beyond disabled people.

Those are the sorts of parameters that I
think that we feel should be in place in order to
serve the purposes that need to be served for disabled
people while still recognizing that the problem with
digital works is that they're so easily infringed in a
digital environment. And so, if we can build in
parameters, not necessarily -- in this, I'm expressing
my personal view of every single possible type of
class of work -- but more happening, the uses will be
limited to disabled people who have legally acquired
access to legally acquire the work, whether they
bought it, they have a subscription to the work, you
know, that there are ways to limit when the TPMs are
circumvented to enable the work to be more accessible
that it's limited to those people who have
disabilities, that it's not made available to the
general public at large.

These are the sorts of issues that I think
are giving us a lot of pause with the proposal as it's
currently been put forward. Thank you.

MS. SMITH: Thank you. I think next I will
call on Mr. Taylor, and then we will start to move on.
And I guess, Mr. Taylor, I would be curious whether
you agree with Mr. Marks? And then, to sort of keep
it moving, I'm asking you two points. Do you agree?
It almost seems to me in this hearing that there is
beginning to be a consensus that legally acquired or
some sort of a renumeration, you know, qualification
is what is intended, part one.

And then, part two, I think part of my
question is, is it helpful to promulgate an exemption
that might be surplusage, or is it not helpful to do
that in light of some of the policy considerations? I
realize you're the person who got called on, although
you may not be the person best suited to answer that.
So, if you wish to, that is my next question. Mr.
Taylor?

MR. TAYLOR: Right. Well, I do agree mostly
with Mr. Marks. Not to throw him under the bus or
anything, but I do have to point out that this is a
rulemaking proceeding, and in the rulemaking
proceeding, an agency only has so much authority, and
you do have to follow the law, and that law says that
you create exemptions for works. And this rulemaking
is supposed to be a fail-safe. So, to the extent that
anybody, any group, any type of uses want to be able
to circumvent, everybody has to come here.

And so, when Congress created this, they
intended that everybody comes here and identifies where it gets in the way. And I think that, in this case, for this group of users, this process is also very helpful because it allows issues to actually boil up that we can respond to.

When disability issues first came into the DVD area, it was making players more accessible, and our immediate response was, how can we do this? And you don't have to rely on the rulemaking to come to talk to us. So every time that we are made aware of an issue, at least DVD CCA and AACS LA, we have tried to do whatever we can to be more responsive and make sure that we come up with an approach that honors the law and makes sure that 1201 and this rulemaking process really reaches an equitable balance between protecting copyrights in the digital marketplace and serving those needs of the communities that make use of those copyrights.

And I'm not sure if I answered your question, Ms. Smith, but if you want to repeat it, I'm happy to try.

MS. SMITH: I think that's okay. I think we'll move on. Thank you, though, Mr. Taylor. And I think next Ms. Chauvet has a question.

MS. CHAUVE: Yes, thank you. I see Mr.
Williams has his hand raised, so I would also like you to please comment on this next question. We talked about the history. So the legislative history, specifically, the House Manager's Report, states that § 102 categories of works are only a starting point for defining a class of works because, for example, books and computer programs may technically both be literary works, but it is exceedingly unlikely that the impact of the prohibition on the circumvention of access-control technologies will be the same for scientific journals as it is for computer operating systems.

So, Mr. Williams, if you could please answer this specific question of, like, how does proponents' approach align or misalign with this legislative history, and then, if you could add on what you were planning to discuss, that would be great. Thank you.

MR. WILLIAMS: Sure, thank you. Yes, so that legislative history, you know, rather than suggesting that the proceeding over time would likely expand to an all-works type of approach for exemptions, it actually suggests that the more likely outcome of marketplace and legal developments would be that the 102 categories of works are unlikely to experience the exact same issues, and, therefore, the
exemptions would usually, maybe not always, be refined even more than just referencing one of the 102 categories of works because there are differences in markets for things like books and for computer operating systems, even though they are both literary works.

And so I don't think that that history that you just pointed to implies that the kind of proposal here is what was intended for the proceeding. I will say there are differences, and one, I think, is maybe highlighted by something that was in the reply comments from the proponents here.

They cited to a YouTube video about an individual who had created his own gaming setup for purposes of enabling him to have a more accessible and enjoyable experience playing a PC game on a Microsoft operating system. And Microsoft has really taken big strides to address these issues, including releasing an adaptive controller that's available in the marketplace, and they've worked extensively with disability advocates and that community to try to address as many of these needs as possible, including by issuing best practices, kind of guidelines for developers to try to make sure that people understand and can anticipate these issues.
And so companies like that, as well as the motion picture studios, have really been investing a lot in trying to address these issues, and there's been some mentions of these companies failing to comply with disabilities laws or their obligations. And my understanding is there is a very large amount of compliance. I do understand that there were prior lawsuits like the one mentioned earlier against Netflix, but these companies have really come a long way and are working very hard, I know, to try to address these issues and really want to address them.

And so I can't speak to the details that Mr. Rosenblum spoke to about the Netflix litigation, but I know they have received awards for their work in this space, that they frequently exceed their legal obligations. So I just didn't want those comments about this widespread failure to comply with legal obligations to go unresponded to.

With respect to the Microsoft controller I mentioned, it actually has ports on it that third-party devices may be plugged into. My understanding is using those unaffiliated devices doesn't require circumvention for people who want to create their own setups, and my understanding is that's probably also true -- although the video that
was included from YouTube didn't provide all the specifics we would need, it's very likely the case that that individual who was able to create his own setup, it didn't look like he had to engage in circumvention to that.

And so I do think that analyzing that issue may be different than analyzing eBooks that don't have a read-aloud function as you have in the past. Those are two different questions with potentially two different answers when it comes to whether circumvention is necessary. And so that's the main point I wanted to make.

MS. CHAUVET: Thank you, Mr. Williams.

I want to give Mr. Reid or Ms. Hersch an opportunity to respond about the legislative history and whether the approach proposed by the proponents aligns with that, but also, in light of the House Manager Report, also seeing a distinction between the types of work where the availability for fair use purposes is unlikely to be affected by laws against circumvention of TPMs in the same way. So, again, how does your approach align with the legislative history? Mr. Reid or Ms. Hersch?

MR. REID: And I'll hand off to Ms. Hersch to address the legislative history. I just wanted to
observe quickly in response to Mr. Taylor and Mr. Williams that, in part, much of the progress that was achieved by the ESA's member companies was spurred by more than a decade-long dispute with the Federal Communications Commission where, as early as 2012, the ESA was filing exemption waivers trying to get out from under the FCC's rules.

I would also note that the Consumer Electronics Association, or what was then the Consumer Electronics Association, opposed regulations by the FCC to extend closed captioning mandates to DVD players and other optical media players after the exemption was narrowly granted but was largely difficult to be used by the Office back in the 2012 rulemaking.

I also just wanted to underscore before we hand it off to Ms. Hersch to talk about the legislative history, I do want to make sure we get a chance for Mr. Rachfal, Mr. Richert, Ms. Charlson, and Mr. Vogler to speak to both the issues that are facing the blind and visually impaired community, to speak to the issues that are facing libraries that work specifically in this space, and to Mr. Vogler to talk about the work that technologists are doing to improve accessibility on this front. But I'll hand it off to
Ms. Hersch to talk about the legislative history.

Thanks.

MS. CHAUVEY: Thank you. Ms. Hersch? And then I would like to also -- I would like to hear from the people you named, Mr. Reid, on their views, and I think it would be helpful to next turn to questions, which I will after Ms. Hersch speaks, about the examples that are currently in the record. So go ahead, Ms. Hersch.

MS. HERSCH: Thank you. So there was a few points that Mr. Williams brought up that I'd like to respond to. I think, most importantly, it's that the legislative history doesn't dictate one exact approach to the rulemaking process. It gives the register the ability to make some decisions.

And so the quote that you brought up from the House Committee Report, there's a quote -- the House Committee Report says that -- they write that they were concerned that the marketplace realities may someday dictate a different outcome, resulting in less access rather than more to copyrighted materials that are important to education, scholarship, and other socially vital endeavors.

And I think what we're seeing here today and what we've been seeing is this exact problem, that the
rulemaking process is ultimately stifling access. It's in many situations cutting off access to copyrighted materials for people with disabilities. And as that quote shows, that was a real fear.

What we see in the 1975 House Judiciary Report speaks further to this fear and, in particular, to the § 102 categories. So the 1975 House Judiciary Committee Report explains that the second sentence of § 102 lists seven broad categories, which the concept of works of authorship is set to include.

The use of the word "include" as defined in § 101 makes clear that the listing is illustrative and not limitive and that the seven categories do not necessarily exhaust the scope of original works of authorship that the bill is intended to protect.

A little bit later, they also say in this --

MS. CHAUVET: Thank you, Ms. Hersch. I'm so sorry. I realize that we just have about 20 minutes left, so I'm going to go ahead and ask some questions. And feel free to answer this first question about the examples that have been provided in the record.

The first is that there's one example including a discussion of video conferencing platforms, such as Zoom, which proponents say have raised significant accessibility issues in a variety
of employment, healthcare, and other contexts. So my question is if you could please explain how this example evidences that the prohibition on circumventing access controls is the cause of the accessibility issues in this example.

MR. REID: I can take a swing at that one, Ms. Chauvet, if that's okay.

MS. CHAUVET: Okay, Mr. Reid. Yes, that would be great, please. If you could please just raise your hand so we can, for the court reporter and interpreters and everyone, follow along? Thank you.

MR. REID: Apologies for that. On the issue of accessible video conferencing, and I think, you know, we've talked about specific examples in the record both of video conferencing, video games, software of various sorts, video -- I mentioned video games -- and the various other examples that we've teed up. What we are trying not to do here is engage in the creation of 10 or 12 or 15 distinct classes of works.

MS. CHAUVET: No, that you, Mr. Reid.

MS. SMITH: I want to make sure -- okay, go ahead, Ms. Chauvet.

MS. CHAUVET: No, thank you. I just want to make sure that we are able to address the specific
examples that you provided.

MR. REID: Yeah.

MS. CHAUVET: So you mentioned Game Guard, which proponents say blocks third-party applications and hardware from accessing the video game. So, again, there wasn't really discussion about how that is evidencing the prohibition on circumventing access control as the cause of the accessibility issues. I see Mr. Richert has had his hand raised, so if he could please address that specific question, that would be great.

MR. RICHERT: Sure. I'd be glad to weigh in at some point. I'm not so sure that I'm best suited to that. Maybe Reid or others can come up with someone better to address that. But remember me. Thanks. Appreciate it.

MS. CHAUVET: So, if someone could please explain how the example of Game Guard is showing how the circumvention of access controls is relevant to that accessibility issue?

MR. REID: If it's okay for me to jump in on that, Ms. Chauvet, I'd be happy to. This is Blake Reid. I'm sorry, Ms. Chauvet, it looked like you were saying something, but you were on mute.

MS. CHAUVET: Thank you. Sure, I just want
to make sure, like, all the proponents are given an opportunity. So, if you could briefly explain that, that would be great, Mr. Reid. Thank you.

MR. REID: So I would say, with the Game Guard example, the accessibility problem is not caused by the TPM itself. The accessibility problem is with the design of the games that Game Guard or similar technologies protect. And the notion there is that if those digital rights management technologies were not in place that technologists like the folks that we discussed in our comment, or like Professor Vogler, could actually design basically retrofitted accessibility features that would come in and enable unique control schemes that would add things like closed captions or description or that might simplify language for people with intellectual disabilities or modify the game in various other ways to make it accessible.

And maybe it would make sense, and I know you want to dig in on video games, but this might be a good opportunity to bring Professor Vogler into the conversation.

MS. CHAUVET: Really quickly, I also wanted to ask since you said that, for the example of the Game Guard, that a TPM is not at issue for the...
accessibility issues. So my other question is the example of Encrypted Media Extensions, or EME technology, which proponents say blocks any authorized alternations to videos, including color shifting to help individuals with color blindness.

So, again, is that an example where the TPM is the cause of the accessibility issues, or is it not the cause of the accessibility issues, similar with the Game Guard technology?

MR. REID: I want to clarify what I said if I could, which is not that the TPM doesn't cause an accessibility problem. Basically, the TPM prevents the interoperability of accessibility features, accessibility tools.

And I think, likewise, with Encrypted Media Extensions, the idea is if you might use a third-party accessibility tool to access the media that's protected by EME, that technology like EME is going to interfere with the operation of that technology.

So it's not that the TPM doesn't cause an accessibility problem, it's that it hinders -- I guess all I was trying to say there is it's not the TPM that's inaccessible, it's the copyrighted work that's inaccessible, and that the TPM prevents interoperation in both of these cases. And I think we can talk --
MS. CHAUVET: Okay. I'm so sorry to be -- I only just have a few minutes left. So I guess my question then as a follow-up, Mr. Reid, is for the circumvention of the Game Guard technology, it's not relevant to all types of copyrighted works, right? And similar with the EME technology?

MR. REID: Correct. We were giving those examples as -- you could certainly fit those into, in the case of video games, sort of a hybrid 102 class of works. We weren't trying to offer those examples as examples of TPMs that literally themselves cover every single category of copyrighted works. We were trying to give you a mosaic of different examples to illustrate how TPMs, like the ones in the examples, apply to copyrighted works across the spectrum of 102a classes in a way that justifies the proposed exemption, which would cut across all of those classes and all of those TPMS. Is that responsive?

MS. CHAUVET: Thank you, Mr. Reid.

Mr. Vogler, would you like to comment?

DR. VOGLER: Okay. I am Dr. Christian Vogler, and I actually would like to respond to a couple of your questions.

First of all, the gaming question, I wanted to clarify that the Game Guard prevents on-screen
typing of words and doesn't work, and that causes accessibility issues.

And, secondly, I was going to talk about audiovisual video conferencing. If the stream is encrypted, that causes issues occasionally, and I can provide some examples from real life. I am having, currently, a family emergency, and it's requiring my sister and I to communicate with each other. My sister's quite stressed because she is the person on site responsible for dealing with this family situation. And we talk, and sometimes it's quick, and the sound environment is bad, the audio is bad, the video is all bad, and it makes it very difficult for me to understand what my sister is talking about.

So I point this situation out because there are options as to how I can work around this. And it would be nice for consumers to have these kind of options, such as artificial intelligence. That's something that could help reduce the noise, improve the signal. Unfortunately, these applications have not been designed for the situation that I'm speaking of. I can't apply the solutions currently as the technology is designed because TPM prevents access to allow me to do so.

And to make a broader point, with new
technologies that are created, there are so many more options that will improve accessibility, and I want to emphasize this point. Accessibility is not a one-size-fits-all option. We're going to figure out how to provide accessible works that are designed for the individual. And this is a new way of looking at the issue. This means it's going to require innovation in the accessibility world from people who are designing and engineering being allowed to use the technology to provide the access necessary.

And if the TPM prevents this accessibility, we are blocking all these ideas that could take off because of this barrier. And this is the situation. This is the environment. We can't wait for three years so we can go through the next exemption process to be promulgated, especially now the situation with masking. There is technology that can help people communicate using masks, but we have to wait three years, and this is the kind of situation in which we cannot wait three years to have resolved. Thank you very much.

MS. CHAUVET: Thank you, Dr. Vogler.

Mr. Marks, I see you've had your hand raised for a little bit, so I wanted to ask if you had any further comment. But also, you know, how should the

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Office consider the availability of accessible works in the market in determining whether a broad class for accessibility use is appropriate? Mr. Marks?

MR. MARKS: Thank you, Ms. Chauvet. If I may, before I try to answer that question, I just wanted to raise one point that Mr. Taylor touched upon, and this goes back really to the 2012 rulemaking where I first met Mr. Reid, and that was when this need was raised about potentially on audiovisual works that were on optical discs protected by CSS and a scramble system and AACS preventing certain uses to make closed captioning or other accessibility to disabled people. We encourage please come to us and work with us, we will offer a free license so that you don't even have to circumvent the TPM. You can have a license to create the sort of assisting tools to help disabled people.

So I do want to raise that as a point because even if a TPM exists, it doesn't always necessitate that it has to be circumvented in order to meet accessibility issues. Sometimes -- I can only speak for AACS LA and DVD Copy Control Association -- the license source of the technical protection measures will be willing to work with the disability community to grant a license to be able to allow that.
And when it comes to the classes of work that you are asking about, Ms. Chauvet, I do think one does need to, like we were talking about in Class 3, this notion of market check of whether already is the copyrighted work available with closed captioning or with audio descriptions that will meet the needs of the disability community such that circumvention is not warranted, and I think that analysis probably needs to -- a market check needs to be more specific to the ones it supports. So I hope that answers your question. Thank you.

MS. CHAUVET: Thank you, Mr. Marks.

I'd like to call on Mr. Bernard next, who's had his hand raised. But also, to ask this specific question of, you know, how and to what extent should the Office think about structuring a broad accessibility exemption to encourage private efforts to increase accessibility so that the burden doesn't fall entirely on individuals with accessibility needs being forced to create them on their own? Mr. Bernard?

MR. BERNARD: I mean, just to answer your question quickly, it would be great if the Copyright Office took that position. I'm not sure that's within the purview of what Congress had in mind here, but I
think, if the Office were to take that approach, that would be great. Probably the best way to take that approach would actually be to promulgate the kind of proposition that we've proposed here today under Class 17. I think this is exactly the kind of thing that will motivate people to make their works more accessible.

What I wanted to say, though, is I think there's a broad misunderstanding here on lots of folks' part, which is it doesn't matter the intention of the people who have made the works available and who are the copyright holders. It doesn't matter if they intended their work to be accessible to people with disabilities or not.

The problem is that either they are accessible or they're not. A company that's gone out of its way to make a work accessible for large populations of people who have disabilities, it doesn't mean that they've made the work accessible for all of the people who have disabilities.

And it's really the people in smaller populations that you don't see in this discussion, right? The groups that are here represent the most powerful constituencies of people with disabilities in the country, and even they are struggling.
But the people whose disabilities exist in smaller numbers, those folks don't have solutions. You can make all the accessible game consoles you want to make, and I would encourage that, and you can make, as Mr. Marks said, come to us and we'll make it more accessible for you.

That's great. We should definitely be encouraging that kind of an approach. But sometimes companies can't make it more accessible or won't make it more accessible or think they have made it accessible enough or there just isn't a financial interest in doing so.

And so I just want to point out the intentions of the copyright holder aren't the problem here. The problem is that for a citizen, a person with a disability who's trying to get access, lawful access -- and I concede let's add that -- that the person is getting lawful access to the work.

But trying to have us pigeonhole each of the kinds of uses that someone is going to make, this is why the disability law is framed the way that it is. That's why there are broad, sweeping strokes in this context, and it's what distinguishes making works accessible to people with disability from the other kinds of classifications that Mr. Williams was worried
about.

So I do think it doesn't matter whether someone was trying to be helpful or not trying to be helpful. Thank you.

MS. CHAUVET: Thank you, Mr. Bernard.

Mr. Taylor, would you care to comment?

MR. TAYLOR: Yeah. I just would like to go back really quick to the fact of it's impossible to do a market check for what's available in the marketplace for all the potential works that would be permissible with this proposed language.

And I think that you have to keep in mind that, as far as individuals are concerned, as Mr. Reid says, they just get it, and whether they lawfully circumvent or unlawfully circumvent, they go ahead and they get it.

But for this proceeding and why this proceeding is important is because it allows the advocates, the larger groups, to come and say this is a problem or this is not a problem. For example, many of the examples that were provided here, I could not say that they were works that are truly protected by 1201. It wasn't clear to me what was the TPM at play, and they certainly are not touching upon the works that we are most concerned with, which are audiovisual
works protected by CSS and AACS. Thank you.

MS. CHAUVET: Thank you. Mr. Marks, would you like to add to that, and specifically, commenting on some of the examples that proponents have provided and building upon what Mr. Taylor's saying, is that they are not necessarily examples where TPMs are the issue for the accessibility issues?

MR. MARKS: Thank you, Ms. Chauvet. I didn't realize that my hand was still raised, but I think Mr. Taylor covered it, and I have nothing else to add. So thanks. I'll make sure I lower my hand. Thank you.

MS. CHAUVET: All right. Thank you.

I see Mr. Cheney has had his hand raised. Mr. Cheney, would you like to ask a question?

MR. CHENEY: Yes. Let me get my video on. Thank you, Ms. Chauvet. I just wanted to probe just a little bit more on this idea that we are talking about here. One of those examples that was talked about in the documents but not addressed here yet are sort of the modification of devices, I think, that were talked about, chairs and other things that may have some inability to access or modify those sort of devices.

Can you talk about maybe why we need that in this example and maybe give some more concrete
examples of that and why perhaps that doesn't fit with
other sort of jailbreaking-type examples that are
already in place and why it might not work to put in
language for accessibility in the jailbreaking
exemption or repair/modification exemptions? Can you
address that?

MS. CHAUVET: Ms. Charlson, you haven't
spoken. Would you like to respond to that question?

MS. CHARLSON: That isn't an area that I
have any expertise in answering, but my hand is raised
to be recognized at some point.

MS. CHAUVET: Why don't you please go ahead
with your comment, and then we'll open it up for those
answering Mr. Cheney's question.

MS. CHARLSON: Okay. All right, thank you.
Oh, let me turn my video on. I apologize. Okay. So,
as I stated when I introduced myself, I'm the
Executive Director of the Perkins Braille and Talking
Book Library, which provides accessible-format
materials to approximately 25,000 people who are blind
or visually impaired, have physical disabilities, or
reading disabilities.

And the point that I really wanted to make
has to deal with helping my borrowers who are trying
to access a format, an accessible, usable format of
material, and I have a case in point that I have been trying to assist a blind attorney for the last 16 months to obtain an electronic copy of a 800-page book that he wanted to read. He initially purchased the book and thought that he would have someone available to read it to him. That did not work out, and so we decided to approach the publisher to acquire files to see if that might be working. The publisher insisted that they had no obligation to provide any kind of accessible files.

So it took me nearly six months of back and forth arguing to then convince them to provide some kind of accessible files. So they sent image files. I'm sure all of you know image files are basically pictures of each and every page in the book that would not work with any of the assistive technology that my borrower had to use.

So we then again said image files will not work, we need files that are electronic that we can put into a device, use assistive technology to access. So several more months passed by, and we finally received an SD card with more files on them that were sent directly to my patron.

He could not access those files. I advised him to send those files to me, which he did a couple
weeks ago. When I received the files, I tried to
access them on my PC, could not. I tried on a braille
notetaker, I could not. I decided to have one of my
staff give it a shot and see if they could open the
files. They were able to open the files. I advised
them to save it under a different name and let me try
again with both of the technologies I was using -- a
screen-reader and my notetaker -- and I was able to
access the files.

So I have since sent that version of the
files to the attorney to see if he can access the
files that we have subsequently received. I don't
know if he has yet because he hasn't received them,
but my point is that it took us nearly 16 months to
get those files for one person.

I serve thousands of people, and how in the
world am I supposed to get the materials they need or
want to read when it takes so long to get the
available materials? Plus, no one solution meets
everybody's needs. I think Professor Vogler said that
as well.

Sometimes my clients are deaf/blind.
Sometimes they have low vision. Sometimes they want
audio files, and that's what works best for them. So,
when I'm trying to provide accessible-format

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materials, it is a very huge challenge for the libraries in the field trying to meet the needs of people with disabilities to provide equitable services, to provide access.

There's no access, there's no equitable service in what we have right now, and I hope this illustrates that we have a severe problem, and it really needs to be addressed. Those are my remarks. I hope you'll take the time to hear from Clark Rachfal and Mark Richert, who represent people who are blind and visually impaired, because they have a story to tell. Thank you.

MS. CHAUVET: Thank you very much. We're actually at the end of the panel, but I would like to go ahead and have Mr. Williams respond. Perhaps you can answer Mr. Cheney's question, and then I'll turn it over to Ms. Smith to conclude the panel. Thank you. Mr. Williams?

MR. WILLIAMS: Yeah, thank you. Quickly, I had raised my hand on your prior question about how to incentivize more accessibility in the marketplace, and, you know, I think my clients already have a lot of incentives, but one way to do it, if you're looking for ways within regulatory language, is to continue in any accessibility exemptions that you adopt to include
the market check requirement that folks look for a
copy at a reasonable price. I think, to the extent
people need incentives, that is something that might
incentivize increased availability.

And to Mr. Cheney's question, which I
believe was about accessibility of devices and
interoperability with devices, I touched on that a
little bit earlier. My understanding is that there
are ports in personal computers and in a number of the
gaming consoles that allow for third-party peripherals
to be connected to the devices such that circumvention
would not be required in many cases to use third-party
devices that can help with accessibility issues.

And I think he also asked about the
jailbreaking exemptions. You know, right now, those
do apply to specific devices, and I think, to the
extent that one of the exemptions covers an
interoperability issue with a third-party device, you
would need to look at the language of the exemption to
determine exactly which programs need to be accessed
through the circumvention and what would need to be
accomplished. And I think he's right that some of
that conduct would already be covered potentially.

MS. CHAUVET: Thank you, Mr. Williams.

I'm realizing, Mr. Rachfal, you haven't
really had a chance to comment. Would you like to briefy have the last word, and then we'll have Ms. Smith conclude the panel?

MR. RACHFAL: Thank you so much. This is Clark Rachfal. Just on behalf of the American Council of the Blind, I would just like to point out there are times when ports and peripheral devices are available, and there are times when materials are configured in a way that work with those devices.

And, again, that's designed to meet specific needs, but it is not always the case that those specific use cases and designs meet the needs for all people with disabilities. And in the cases where accessibility does not meet the needs of the individual, that is when an exemption like this would provide value to our members at the American Council of the Blind, to the library users that Ms. Charlson spoke of, in a reasonable and timely manner.

If we have to play whack-a-mole with every company, copyright holder, that is not equal access. That is not meaningful access. That is a lack of integration in our community and a lack of accessibility for any of us, which equals a lack of accessibility for all of us. Thank you.

MS. SMITH: Thank you, Mr. Rachfal, and for
everyone who has participated in this class hearing
today. I think that will conclude it. Again, we
appreciate everyone's participation. We are going to
take an 11-minute recess, and then we will convene
again for Class 8, which is a specific existing
exemption for literary works and accessibility. So,
if you are remaining on for the next panel, just keep
your video off, and we will convene again in 10
minutes. And otherwise, thank you very much.

(Whereupon, a brief recess was taken.)

MS. SMITH: Hello, everybody. Welcome back.
If you are a panelist for this session, which is Class
8, could you please turn your video on? Okay. I
think we are waiting for Mr. Rachfal. And, meanwhile,
we will go ahead and introduce ourselves. And we just
had him for the last panel, so I have no doubt he will
be back.

But we will start from the government's
side. So I'm Regan Smith, General Counsel at the
Copyright Office. And now I will ask my colleagues --
and to keep time short because we are a little
pressed, we will go Ms. Chauvet, Mr. Gray, then Mr.
Bartelt -- to please introduce yourself.

MS. CHAUVET: Hello. I'm Anna Chauvet. I
serve as Associate General Counsel.
MR. GRAY: Hi, everyone. I'm Mark Gray.

I'm an Attorney-Advisor here in the Office of General Counsel.

MR. BARTELT: Nick Bartelt, also an Attorney-Advisor in the Office of General Counsel.

MS. SMITH: Thank you. Mr. Cheney?

MR. CHENEY: Stacy Cheney, Senior Attorney-Advisor at NTIA.

MS. SMITH: Thank you. And now we will ask those who filed in support of the exemption. So, going alphabetically, Mr. Band, Mr. Lennon, and then Mr. Reid. And when Mr. Rachfal joins us, we will acknowledge him too.

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

MR. LENNON: Hi, my name is Gabriel Lennon. I'm a second-year law student with the CU Law Samuelson-Glushko Technology Law & Policy Clinic, working with Professor Reid.

MR. REID: And Blake Reid for the Clinic. We're here on behalf of ACB. Doing our best to track down where Clark went, but I think, given the issues that are at play, we can proceed. And before we do, just wanted to extend our thanks to Rachel Counts and Megan and the others in the Copyright Office and
Library staff for all of their help in organizing the hearings today.

MS. SMITH: Thank you. I should second that. I think I'm very proud of the work that Rachel and Megan and others on our team did but also our Office of Public Information and Education as well as in the broader Library. So thank you for recognizing them because there's a lot that is unseen that goes into this.

So, Ms. Castillo, could you please introduce yourself?

MS. CASTILLO: Yes. My name is Sofia Castillo, and I'm with Mitchell, Silberberg, and Knupp, and I'm here representing the Joint Creators and Copyright Owners.

MS. SMITH: Okay. So I think with Mr. Reid's suggestion that we'll be okay to start and, you know, this is the last hearing, so if Mr. Rachfal joins a little bit late and we have to go a little bit over, we'll be able to make sure we hear from him. We will get started. And I think it is you, Mr. Gray, with the first question?

MR. GRAY: Yes, that's right. So my first question is for Mr. Reid. There was some conversation in the comments about using the term "phonorecords" in
the text of this exemption for the modification. And
the direct copyright owners comment wanted
clarification about whether this would cover sound
recordings of performances of musical work.

And our understanding from your reply is
that you were just trying to track the changes to §
121. So, if we at the Office, for example, thought
that regulatory text actually stated, for purposes of
the exemption phonorecords as a term does not include
sound recordings of performances of musical works,
would that be a reasonable thing to include in the
regulatory text?

MR. REID: Thank you, Mr. Gray. If I could,
I'll defer to Mr. Lennon on this one.

MR. LENNON: Thank you for the question. So
it is our understanding that the inclusion of the term
"phonorecords" in § 121 and 121a does primarily aim to
clarify that audiobooks and similar oral recordings of
covered literary works and musical notation can be
remediated into accessible formats and distributed
under § 121a and imported and exported under § 121a.

So, from our perspective, given that the
inclusion of the term "phonorecords" is intended to
reflect the Marrakesh Treaty and the driving purpose
behind our interpretation of the term "phonorecords"
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is to clarify that audiobooks and oral renderings of covered works are covered under the exemption, I believe that that would be a reasonable addition.

MR. GRAY: Great. And, Ms. Castillo, would that address the concerns from the Joint Copyright Owners' comment?

MS. CASTILLO: No. I think we are essentially in agreement, but I think that our concern is mainly that the term "phonorecords" is traditionally associated also with sound recordings of musical performances, and so the Marrakesh Treaty does not cover those works. The phonorecords that are covered by the Marrakesh Treaty are those that contain literary works and previously published musical works that have been fixed in the form of text or notation.

So we realize and we agree that the term "phonorecords" does appear in § 121 and 121a as a result of the Marrakesh Treaty Implementation Act, but we believe it is important to make the distinction here that phonorecords containing sound recordings of musical performances is not covered by the exemption because individual eligible persons will rely on this exemption to engage in circumvention, and those individual eligible persons may or may not be fully familiar with the scope of the Marrakesh Treaty and
that it's limited to literary works and musical works in the form of text or notation.

So that is where our concern is coming from and why we think that it is worth including that clarification in the regulatory language.

MR. GRAY: Okay. So --

MS. SMITH: Ms. Castillo?

MR. GRAY: -- to -- yes, sorry, Regan. You can go ahead.

MS. SMITH: Sorry, I just wanted to make sure because I may be less close to the record, but have you provided alternate regulatory language that you do support in your comment?

MS. CASTILLO: We have not specified regulatory language in our comments, but we are happy to provide it in a subsequent letter if that would be helpful.

MS. SMITH: Thank you. I think we will be in touch if we determine that that will be helpful. Thank you. Okay, sorry. Mr. Gray?

MR. GRAY: Thank you. And then, to stay with Ms. Castillo, there was a conversation in the comments about whether or not the import and export of accessible copies under § 121a is sufficiently distinct and attenuated from circumvention activity to
implicate § 1201? So do the Joint Creators have a position on sort of the interpretation of whether the activity from 121a specifically addresses or implicates the § 1201 right?

MS. CASTILLO: We do not have a position, and we are not opposing any of the other proposed changes by -- we're actually not opposing any of the changes proposed by proponents. We are only asking for the clarification about the use of the term "phonorecords" and that it doesn't apply to phonorecords of sound recordings of musical works -- of musical performances, sorry.

MR. GRAY: Right. And so, when you say you aren't opposing any changes, does that mean you don't believe there needs to be a new showing of adverse effects for the modification here or that you don't object to the adverse effects showing in the proponents' submission?

MS. CASTILLO: Can you repeat the last part of your question, please?

MR. GRAY: So does that mean that there are no objections to the adverse effects showing and argument made in the supporting comments for this class?

MS. CASTILLO: Yes. Yeah, we have no

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objections to that.

MR. GRAY: Okay, great. I don't see any
hands raised, so I think we're still good on that.
The next question is for Mr. Reid. You've proposed to
update the beneficial language to just say "eligible
person as defined in § 121." Could you just briefly
explain on top of the written record, why this
expansion is necessary and why the failure to include
that in the new language would create adverse effects
for non-infringing use?

MR. REID: I'll defer to Mr. Lennon on that
one as well. I did want to just quickly respond to
Ms. Castillo on the last one. We took the concern
here to be that there would be circumvention of
digital rights management or that an improperly broad
construction of phonorecords of musical works could be
read to cover audio files from streaming music
services and that sort of thing.

And I did want to clarify I don't think
that's what we were going for in asking for this
exemption. However, we do want to be careful not to
narrow the scope of § 121. Obviously, this exemption
for the last several rulemakings has tracked closely
the scope of 121.

Perhaps Mr. Band or others can speak to the
reason that phonorecords was used in § 121. We do
want to be careful that, when we're thinking about the
expanded scope of 121 to musical works that are in
text, that there may be creative ways that folks use
to make musical scores accessible that don't encompass
a performance of the work that are not sort of a sound
recording of a set of musicians actually performing
the work but nevertheless allow a person who's blind
or visually impaired -- and this sort of thing might
be reading through voiceover or a similar
technology -- a musical notation or a guitar tablature
or something like that.

So we do want to make sure that the
exemption doesn't carve out the ability to make
accessible transformations of musical works that are
reduced to text. I'm sorry, I wanted to make sure I
tagged that before we moved on. I can defer to Mr.
Lennon to respond to your question.

MR. LENNON: Thank you. So we're discussing
the expansion of the term "blind or other person with
a disability" to the new language in the Chafee
Amendment, which is "eligible persons"?

So the personal use portion of the exemption
currently points to a definition of who is covered in
§ 121a that no longer exists. With that update to
eligible persons, we have laid out a more expansive
definition which actually covers more disabilities
than were previously covered under the old
pre-Marrakesh Treaty Implementation Act language.

So now those with disabilities who are
covered are those who are blind or have visual
impairments or perceptual reading disabilities as well
as physical disabilities that affect the ability to
manipulate a book or move or focus the eyes.

So we believe that this expansion is
necessary to not only comply with the updated terms of
the Chafee Amendment but to provide access to those
who maybe previously were not qualified under the old
language of the exemption.

MR. GRAY: Okay. And then I guess the next
question we have is sort of similar. So there's also
a proposal to update the non-dramatic literary works
limitation to now apply to all literary works and
previously published musical works fixed in the form
of text or notation.

Can you also -- kind of the same question --
explain (A) why this is necessary and then (B) why, if
we didn't adopt that language, there would be adverse
effects on non-infringing use?

MR. REID: I'll defer to Mr. Lennon on this
one as well. I just also wanted to add regarding the previous one that the mechanics of certification that were previously required under 121a and its interaction with the Pratt-Smoot Act are no longer operative, and we think the ability for people with disabilities to self-certify as opposed to having to go seek a formal certification from a medical provider and so forth to be eligible for that portion of the exemption is important. I'll hand it off to Mr. Lennon.

MR. LENNON: So, as it stands, § 1201(a)(1)'s prohibition on circumvention is an impediment to access for people with print disabilities to previously unavailable copyrighted works, such as stage plays, screenplays, and notated musical works, which are now within the scope of works contemplated in the post-NTIA language of § 121.

So, under the changes made by the NTIA, the scope of eligible works covered under 121 has been meaningfully expanded. And thanks to the anti-circumvention provisions of 1201, it necessitates that this exemption be revised to provide eligible persons access to these new areas of permitted works.

And I think it's important to consider not only screenplays but, again, sheet music and music
fixed in the form of text or notation as not something previously covered under this exemption. And that is essentially an entirely new area of accessible works, and I think it's important to recognize that opportunity.

MR. GRAY: Ms. Castillo, you have your hand raised?

MS. CASTILLO: Yes. I would like to briefly address Mr. Reid's concern with the potential for narrowing the scope of § 121. So, during the legislative implementation process for the Marrakesh Treaty Implementation Act, back in 2016, the Department of Commerce sent a statement of purpose as part of their legislative implementation documents. They sent a statement of purpose to then-Vice President Joe Biden where they explained what the changes, what the necessary changes would be to the U.S. Copyright Act in order to comply with the Marrakesh Treaty, and in that statement of purpose, they made the express distinction saying that sound recordings of musical performances were not included in the Marrakesh Treaty and were, therefore, not included in the changes made to § 121 and 121a.

MR. GRAY: And then, Mr. Reid, to kind of follow up on that point, you know, you were talking
about creative ways of creating sound recordings that
might be more accessible but not quite be just a pure
recording of musicians performing a work.

But, you know, in the context of this, we're
talking about circumventing a phonorecord. And so is
your concern about narrowing that there might be
preexisting phonorecords that aren't quite sound
recordings of performances that might need to be
circumvented, or are you thinking about sort of
post-circumvention accessibility, like the output of
that process?

MR. REID: I feel like I might need to tap
on Mr. Band as an older copyright hand on the
distinction between reproductions, copies, and
phonorecords here. I guess the concern that we have
is, when we're talking about copies or phonorecords of
the literary work or of a musical notation that's been
reduced to text, we want to make sure that we can get
access to the underlying, either text or the
underlying musical work, and we want to make sure, if
we cut phonorecord out of that -- I understand
"phonorecord" has a quite specialized definition --
but that we're not talking about cutting out the
underlying work if that makes sense.

I don't know. Mr. Band, do you have any
additional thoughts on this one?

MR. BAND: No, it's just that, you know, "copies" by itself was not sufficient for precisely the reasons Mr. Reid indicated, that it's -- you know, the statute does talk about copies and phonorecords, and they each cover different things. And so we need to -- now, obviously, in 121, in 121a, they use "phonorecords," but it's not all phonorecords.

So it sounds like this is just a drafting issue that there's not -- I don't believe there's any disagreement in principle here.

MR. GRAY: So, based on what the proponents have put forward in terms of proposed regulatory text, we wouldn't need to do any sort of additional modifications to address the question of phonorecords beyond maybe the clarification of sound recordings of musical work performances, is that right?

MR. BAND: I think that's right, yeah.

MS. CASTILLO: Yeah, I think so too.

MR. REID: We, three, agree.

MR. GRAY: All right. Well, that's great to have agreement. If no one has any more responses on this question, I do have another. So, for Mr. Reid, you also propose replacing the language about the price of "mainstream copies" to just the market price
of an accessible copy.

You know, we understand your statement in the written comments on why that's necessary, but could you elaborate a little bit more just for the record here on this transcript about why this change is necessary as well?

MR. REID: Thanks, and defer to Mr. Lennon on that one.

MR. LENNON: Thank you. So we believe the Office should recommend the replacement of the phrase "mainstream copy" with more inclusive language, such as, as you say, "inaccessible copy." The term "mainstream copy" reflects a troubling ableist framing that sort of reinforces a damaging and, frankly, offensive conception of people with print disabilities by casting books in formats that are accessible to them as not mainstream.

So that an exemption from copyright law is required for people with print disabilities to legally access accessible literary material that is available to people without print disabilities is essentially a tacit recognition that people with disabilities are routinely treated as second-class citizens, to put it frankly, by the publishers of books.

And the text of the exemption itself...
currently reinforces this ableist notion that people
who have print disabilities are outside of the
"mainstream." And if that language is not updated,
the exemption itself will perpetuate harm even as it
helps those with print disabilities gain access to
accessible works.

MR. REID: I might just add if I could, Mr. Gray?

MR. GRAY: Sure.

MR. REID: I think this is an opportunity
for the Office to convey a vision that indeed a
mainstream copy of a work is an accessible one, not an
inaccessible one. And I think that's a theme that
we've underscored and that the groups that have
advocated for this exemption have underscored in
previous rulemakings, that the goal here is for every
copy of a book, for every copy of a piece of musical
notation, to be accessible and to be born accessible
and that when we're talking about mainstream, we're
actually talking about a version of the work that's
accessible right out of the gates. Thanks.

MR. GRAY: Great. And so that, I think,
especially answers the questions I have. I do want
to give a chance for Mr. Cheney to ask any questions
he has from the NTIA side.
MR. CHENEY: Thank you, Mr. Gray, and I appreciate those questions. Those were great questions for today.

Mr. Reid, I have a question for you, and this goes to the definition of "eligible person." It looks like to me that this sets a parameter that might be not all-inclusive. I know you've expanded the definition from the last time, but can you speak to that? Can this be a floor rather than a ceiling in the definition of what you've set here? So you've set it according to 121, but can we in this proceeding expand that further, and is there room for that in what you guys talked about?

MR. REID: Thanks, Mr. Cheney. I'll take a quick stab at this one, and then, Mr. Lennon, if you have any additional thoughts.

I would say what we've tried to do with this exemption is tack pretty closely to the compromise that's been struck, and going back several rulemakings, to have this exemption tied pretty closely to the machinery of § 121 at least for the authorized entity provisions. And so the reason we scoped the request the way that we did in terms of the types of disabilities that are covered owes to the changes that the Marrakesh Treaty Implementation Act
brought to § 121.

But, to your point, obviously, as we talked about in the last hearing, there are a range of disabilities that go quite far beyond the disabilities that are teed up even in the modified version of § 121. Obviously, we would think the Americans with Disabilities Act sweeps quite a bit broader than that as amended and that other disability laws sweep quite more broadly than that.

And the reason we brought Class 17 and that we proposed Class 17 was to encourage the Office to consider that broader range of disabilities and, frankly, the broader range of copyrighted works to which those categories of people with disabilities that are not represented in this exemption see themselves represented here.

To the extent that the Office sees fit to expand this class of works to accommodate some of the additional classes of disabilities, we think that would certainly be appropriate. We wouldn't have any objection to that. I would just underscore the case that we made in the last hearing, which is that we think there's a much broader class or set of copyrighted works that need to be covered beyond the rather narrow subset that's covered in this exemption.
MS. SMITH: Thank you, Mr. Reid. And to follow up on that and some of the questions from the last hearing, if the Office concluded that it would be less confusing or otherwise beneficial to have just one exemption for literary works for accessibility as opposed to in two places, I hear the suggestion that perhaps, instead of just tracking it to 121, either explicitly including a reference to the ADA, perhaps other state laws, if I'm going to, you know, draw some through-lines throughout the day to testimony. Are there any other specific suggestions that you would offer with respect to this exemption?

MR. REID: Ms. Smith, if I could ask a clarification, do you mean specific questions just on kind of where Mr. Cheney started us off on the class of people with disabilities that are covered?

MS. SMITH: I think it is building on what Mr. Cheney said, as well as just for uses of literary works to make them accessible generally, so that might be a little bit broader than what Mr. Cheney said.

MR. REID: So I will do my best to respond, and I would say I think it's actually somewhat helpful to have the exemption as we have it framed here for eBooks. It's quite specific, and it's narrow in its scope. But it does provide a fair bit of -- just as
121 and 121a are -- their range of specific requirements and limitations attached to it. For the kinds of people with disabilities and the kinds of organizations that are included within § 121 and § 121a, having a specific exemption -- and, by the way, we should point out also that § 121 actually extends, I think, probably beyond the bounds of fair use in its allowance of the provision of works without renumeration to the rightsholder by an authorized entity. And that's obviously kind of a historical feature of the Chafee Amendment that dates back to the Pratt-Smoot Act and the American Printinghouse Act.

It's helpful to have that very specific exemption on which a lot of organizations rely on to sort of make clear that that's a specifically known category of acceptable both circumvention and remediation and import and export. It kind of gives a blueprint, a set of instructions for that.

The reason we ask for the other exemption is to extend out to the bounds of fair use. But we recognize that the bounds of fair use can be a little bit less clear and a little bit less sort of prescriptive and have fewer obvious limitations, you know, that have got to be sorted out by courts after
So I actually think it makes sense to keep the specific exemption in place for this just because it's such a kind of known quantity for the organizations and people that operate in this space and to explore expanding beyond that with a more general exception that looks more towards fair use if that makes any sense. I don't know if Mr. Band has anything he'd add to that one?

MR. BAND: No, I agree. It just reflects the general attention that -- or not necessarily attention -- but that specificity is good and generality is good. So we like 108, and we like 107. And so, you know, they each have their time and place. And so, you know, assuming that there's enough pages in the C.F.R. to accommodation both specific and general, then we would welcome that.

MS. SMITH: Yes, well, as long as we pay for it, there are pages in the C.F.R. But I appreciate that response. I think the Copyright Office, as you know, obviously, we have supported 108 reform independent of looking at 107 and the important work that it does.

So I think those are all of our questions. So we are perhaps able to wrap up a couple minutes
early unless anyone else would like to say another
comment for the record? If you do, please unmute
yourself and I'll just -- yep, go ahead.

MR. REID: I just wanted to convey to Ms. Castillo and her colleagues our appreciation for,
again, the spirit of cooperation on this exemption and
for being amenable to the changes that we've proposed.
Appreciate that.

MS. CASTILLO: Thank you, Mr. Reid. We're happy to work together wherever we can.

MS. SMITH: Okay. So this will conclude today's hearings. I just want to give the audience
members two reminders, as well as, I guess, the panelists for one of them. There will be a different
link tomorrow, which will be Class 1, which is use of audiovisual works, criticism and comment. So that is available on our website if you wish to watch the proceedings tomorrow.

And Secondly, if anyone wishes to sign up for the audience participation session, there will be one this Thursday, as well as one April 21 at the conclusion of all of our hearings. Please go head and fill out the link which I believe has been sent in the chat. Yes, it was sent at 2:30.

So thank you very much, and we will convene
again tomorrow at 10:30 a.m. Eastern. Thank you.

(Whereupon, at 2:58 p.m., the hearing in the
above entitled matter adjourned, to reconvene at 10:30
a.m. the following day, Tuesday, April 6, 2021.)
CERTIFICATE

CASE TITLE: Copyright Office Section 1201 Hearing

DATE: April 5, 2021

LOCATION: Washington, D.C.

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

Date: April 5, 2021

John Gillen
Official Reporter
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U.S. Copyright Office Section 1201 Public Hearings

April 5, 2021

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