Remote Roundtable
Suite 206
Heritage Reporting Corporation
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Tuesday,
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The parties met remotely, pursuant to notice, at
10:30 a.m.

PARTICIPANTS:

Government Representatives:

REGAN SMITH, General Counsel of the U.S. Copyright Office
ANNA CHAUVEY, U.S. Copyright Office
STACY CHENEY, National Telecommunications and Information Administration
DAVID WELKOWITZ, U.S. Copyright Office
JORDANA RUBEL, U.S. Copyright Office

Panelists:

MICHAEL AYERS, AACS LA
SARA RACHEL BENSON, University of Illinois Library
FRANCESCA COPPA, Organization for Transformative Works
PETER DECHERNEY, Joint Educators
WILLIAM J. EVJEN, Swank Motion Pictures
PETER MIDGLEY, Brigham Young University
RYAN MILLER, Brigham Young University
BARBARA NELSON, Swank Motion Pictures
RINA ELSTER PANTALONY, Columbia University & the Association of American Universities
BETSY ROSENBLATT, Organization for Transformative Works
Panelists: (Cont'd)

SHANE STANLEY, Filmmaker
DAVID J. TAYLOR, DVD CCA
TISHA TURK, Organization for Transformative Works
J. MATTHEWS WILLIAMS, Joint Creators and Copyright Owners
NATE WISE, Brigham Young University, Idaho
PROCEEDINGS

(10:30 a.m.)

MS. SMITH: Okay. I'm going to assume we are either all here or very close to having a critical mass. And if anyone else of the panelists has not turned on their video, please do so now because that is what has been making sure you're on the screen for our live feed.

So good morning, everyone. My name is Regan Smith. I am General Counsel of the Copyright Office. And welcome to day two of our hearings in connection with our § 1201 Rulemaking. We really appreciate everyone coming today. We've got a good group, and we're looking forward to a good discussion.

I think many of you have participated in past hearings, but for those who have not, our focus today is really trying to hone in on the comments. We've gotten a lot of thoughtful comments, so, like, please be assured that we've read them, and we're trying to clarify and facilitate discussion where there might be areas of disagreement or a particularly patchy record. Today's session focuses on Class 1, which is proposed adjustments to exemptions for the circumvention of technological protection measures applied to motion pictures for uses of short clips for
criticism and comment, including for educational, documentary, and noncommercial video uses.

Before we dive into the substance, the Zoom rules of the road, which I know we're all pretty much pros with, but just to go over just in case is we will be moderating this by posing questions and calling on particular persons to answer. We realize it's a little bit easier if you can use the "Raise Hand" feature in Zoom, so you should see that up in the top corner of your panel. If that's not working for you for some reason, go ahead and wave in real life. But I think that has become an easier way for us to determine who wishes to contribute or answer to a particular question.

As we all know, please mute yourself if you're not speaking for the benefit of the court reporter. And please try to speak slowly, as I need constant reminders. Also, unmute yourself if you're going to talk. So, if that is an issue you have too, please try to keep that in mind. We ask that you would limit any of your responses to no more than two minutes and try to stick to the specific question because we do have a lot of ground that we hope to cover today.

We do think that everyone will get the
opportunity to speak to all of the issues that have come up in this proposed class. If we need to go a little bit over, we may do that. And if anyone has any technical difficulties either as a panelist or as an audience member, you can comment in the chat or the Q&A and someone from the Copyright Office will assist you.

We have also put in the chat a link to sign up for an audience participation day if anyone is interested. This is going to be on Thursday where someone who has not signed up as a panelist can contribute their thoughts to any of the proposed classes at issue in the rulemaking, and we are asking that any remarks be limited to about three minutes.

So I'm going to introduce everyone today. We will start with the Government's side. So please, Ms. Chauvet, Mr. Welkowitz, and then Ms. Rubel, could you introduce yourselves.

MS. CHAUVET: Hi, good morning. I'm Anna Chauvet. I serve as Associate General Counsel.

MR. WELKOWITZ: Hi, I'm David Welkowitz. I am an Attorney-Advisor with the Office of General Counsel.

MS. RUBEL: And good morning. I'm Jordana Rubel, Assistant General Counsel.
MS. SMITH: Thank you. Mr. Cheney?

MR. CHENEY: Hi, I'm Stacy Cheney. I'm a Senior Attorney-Advisor at the Office of Chief Counsel at NTIA, Department of Commerce. Thanks for having me today.

MS. SMITH: Thank you.

All right. Professor Benson, are you here?

MS. BENSON: Hello. I'm Sara Benson. I'm the copyright librarian at the University of Illinois at Urbana Champagne Library.

MS. SMITH: Thank you. So now I think OTW, we have Dr. Coppa, Professor Rosenblatt, and Professor Turk. Could you please introduce yourselves?

DR. COPPA: Yes, hi. I'm Francesca Coppa. I am Professor of English and Film Studies at Muhlenberg College, and I'm one of the founders of the Organization for Transformative Works.

MS. SMITH: Professor Rosenblatt, I think you're muted.

MS. ROSENBLATT: I'm Betsy Rosenblatt. I'm a professor at University of Tulsa Law School, and I am legal chair of the Organization for Transformative Works.

DR. TURK: I'm Dr. Tisha Turk. I'm the Writing Center Director at Grinnell College, and I'm a
long-time member of the Organization for Transformative Works.

MS. SMITH: Thank you. Professor Decherney.

MR. DECHERNEY: Hi, yes. Peter Decherney.

I'm a professor at the University of Pennsylvania.

MS. SMITH: Thank you.

Mr. Midgley and Mr. Miller?

MR. MIDGLEY: Yes. My name is Peter Midgley. I'm the Director of the Copyright Licensing Office at Brigham Young University.

MR. MILLER: Hi, I'm Ryan Miller. I'm a law student, and I've been working with Peter Midgley.

MS. SMITH: Thank you. Professor Pantalony?

MS. PANTALONIY: Thank you. I'm Rina Elster Pantalony. I'm Director of the Copyright Advisory Office at Columbia University.

MS. SMITH: Thank you.

And Mr. Stanley and Mr. Wise?

MR. STANLEY: Hi, good morning. Shane Stanley, Filmmaker.

MR. WISE: I'm Nate Wise. I'm the Director of the Intellectual Property Office at Brigham Young University, Idaho.

MS. SMITH: Great. Thank you all for being here.
So, next, I think we have Mr. Ayers?

MR. AYERS: Hi, good morning. Yes, I'm Michael Ayers, representing Advanced Access Content System Licensing Administrator, LLC, otherwise known as AACS LA, and DVD Copy Control Association, otherwise known as DVD CCA.

MS. SMITH: Thank you. So Mr. Taylor?

MR. TAYLOR: David Taylor. I too am representing DVD CCA and AACS LA, as Mr. Ayers has spelled it out.

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. SMITH: Thank you. And then we have Swank Motion Pictures, Mr. Evjen and Ms. Nelson.

MR. EVJEN: Yes, Bill Evjen, Vice President and CIO at Swank Motion Pictures.

MS. NELSON: And Barb Nelson, Senior Vice President, Swank Motion Pictures, overseeing studio business relationships.

MS. SMITH: Okay, great. We've got a lot of folks here and we're really happy to dive in, and I think I will turn the questioning to start with Ms. Chauvet.
MS. CHAUVET: Thank you, Ms. Smith.

The first questions that I want to focus on relate to all three groups within this proposed class. Opponents DVD CCA and AACS LA, they raised concerns about expansion of the exemption to cover AACS2 technology, which the current temporary exemption does not cover.

For BYU, Mr. Midgely and Mr. Wise, your initial comments state that your proposed exemption relates to Ultra HD Blu-ray discs, which are protected by AACS2 technology. So my question is, do you have any evidence supporting a finding that AACS2 technology is adversely affecting non-infringing uses or that it is sufficiently similar to AACS1 technology to be covered by the current exemption?

And if you could please use your Zoom raising hands feature, that would be great. So either Mr. Midgely or Mr. Wise? Mr. Midgely?

Oh, and I'm sorry, one other thing, please, if you could just wait for me to please call on you, just for purposes of the captioner and the court reporter, that would be great.

But please, Mr. Midgley, go ahead.

MR. MIDGLEY: Yeah, thank you. So AACS LA2, our contention is that it's very similar to AACS LA
and that the exemption should include media available in that format as well.

MS. CHAUVET: Do you have any evidence suggesting that it's similar to AACS1 technology? Just in the last rulemaking, the register declined to extend it to AACS2 technology because the record did not support that finding, so I just wanted to give you an opportunity to provide additional evidence if you have some, Mr. Midgley.

MR. MIDGLEY: We didn't come today with any specific evidence on AACS2, but if that's something that the office would interested in, we can investigate that further and submit something in post-hearing comments if you like.

MS. CHAUVET: Thank you, Mr. Midgley.

Mr. Ayers, I see you have your hand raised.

MR. AYERS: Yeah. Thank you very much. Appreciate that. Just to clarify that AACS2 is actually a separate technology from AACS. It is not version one and version two. It is a separate technology applied to Ultra High-Def Blu-ray discs and is not backward compatible with regular Blu-ray discs. And so it's actually two different products, two different technologies applied to two different disc formats. So, to the extent that the current exemption
explicitly extends to CSS and AACS, that does not include AACS2, and AACS LA would argue that AACS2 is a separate technology that should be subject to its own evidentiary showing.

MS. CHAUVE: Thank you, Mr. Ayers.

Mr. Taylor, I see you have your hand raised.

MR. TAYLOR: Yes, I would just comment on the suggestion that they can come back with uses of AACS2 or UHD Blu-ray. I mean, I think that's pretty late in the process to introduce that kind of evidence after the initial comments.

MS. CHAUVE: Thank you. Let's move on to screen capture. The office noted in the previous triennial rulemaking that the existing exemption includes a screen capture provision to address the possibility of circumvention when using such technology. So, for all of the Class 1 proponents, my question is why -- you all propose removing the references to screen capture technology, so we're wondering why you wish to eliminate essentially an exemption that would permit circumvention where screen capture is circumventing.

So do you have any evidence suggesting that screen capture technology does not circumvent and thus is not necessary to be referenced in the exemption?
Any proponents? Yes, Professor Rosenblatt?

MS. ROSENBLATT: To be clear, we aren't requesting the removal of screen capture from the exemption. We're requesting removing the requirement of evaluating screen capture. In other words, to the extent that there's an exemption, it would apply to screen capture regardless. Right now, there's an additional barrier to using other circumvention technologies that requires first evaluating the fitness of screen capture before embarking on the use of other circumvention technologies. That's what we're seeking to have clarified and removed from the exemption, is that extra step.

MS. CHAUVET: Just to follow up, Professor Rosenblatt, so the existing exemption permits circumvention when the person engaging in circumvention believes that non-circumventing alternatives are unable to produce the required high level of quality content. OTW's proposed exemption removes this language and instead says where the person engaging in circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use.

So is meeting the high-quality content what you mean by necessary to fulfill the purpose of the
use?

MS. ROSENBLATT: Yes, that's a reasonable interpretation.

MS. CHAUVET: So what -- okay. And so thank you very much. I want to see if anybody had --

MS. SMITH: I'm sorry --

MS. CHAUVET: Go ahead.

MS. SMITH: -- Ms. Chauvet. Are there other interpretations? Are there other changes, or is this a clarification? What else would be --

MS. CHAUVET: This was just a clarification.

MS. SMITH: Is that right, Professor Rosenblatt?

MS. ROSENBLATT: Yes, this is simply a clarification, and I think the difficulty, which my colleagues can speak to, is that use of screen capture or considering use of screen capture doesn't really fit with the way that the users of this exemption would use it. Sometimes they'll use screen capture; sometimes they'll use other methods. The distinction between screen capture and other methods is not meaningful to vidders. And there's no reason to have a limitation that demands capturing the video in any particular point in its travel through the system.

MS. SMITH: I guess I'm confused because the
office has said it might be meaningful depending upon
whether a higher resolution is necessary or not. So
that's why that limitation is there.

MS. ROSENBLATT: I'll turn it over to my
colleagues, particularly, I think, Dr. Turk can speak
to that.

MS. SMITH: Dr. Turk, would you like to add
to that?

DR. TURK: Sure, I can. I guess I would
echo what Professor Rosenblatt said, which is that for
vidders, the distinction between screen capture and
ripping is not one that makes a lot of sense. One of
the arguments that's been put forward in the past is
that screen capture is better -- from the
copyright-holder's point of view, it's better than
ripping because it's possible to capture small
amounts, you know, individual clips. From my point of
view, the problem there is a problem of process. It
doesn't make much sense to say that somebody making
something should know exactly what the materials are
that they need in advance.

I mean, it would be like, you know, saying
to a poet you have to choose all the words that you're
going to use in a poem before you start writing it.
So the --
MS. SMITH: I'm not following. Are you saying you need to capture the entire work? I certainly understand not knowing exactly what you might use when you're making your video, but you do need to select your ingredients when you make your dish, right?

DR. TURK: You do, yeah, but when you do that, right, matters. So, for vidders, often, you know, copying -- I would not say the entire work because often we don't capture the sound, right? You know, we're adding our own soundtrack, so why would we need the sound? But we capture the video or, excuse me, you know, rip the video or I suppose capture the video. Some people use screen capture. And then work with it, you know, within the editing program that we're using.

So quality matters definitely, and, you know, screen capture sometimes provides that and sometimes it doesn't, I suppose. But it's also, you know, what's intuitive, to say to somebody you have to use screen capture, you have to try screen capture before you try other forms of circumvention is just not intuitive, right? I mean, it's like saying to somebody, you know, -- I'll use another analogy, instead of saying, well, I'm going to send you this
document saying I'm going to put the document on my
screen and take a picture of the document and then
send you the picture, right? That's not how we do
things. That's not how people normally use files.

So, if I have a Blu-ray, why would I try to
capture it instead of just decrypting the file, right?

MS. CHAUVET: Well, I guess, though, there's
also --

MS. SMITH: Right. I mean -- well, let
me -- sorry, I'll turn it back to you, Ms.
Chauvet. I think, from the Copyright Office's
perspective, our prior record has shown that sometimes
you do not need to engage in circumvention, which is
one of the statutory reasons. So that would be the
why that we're trying to figure out. If it's no
longer the case, then we might be able to remove it.
But that's where we're directed at. But I will turn
it to you, Ms. Chauvet, and perhaps Mr. Williams, you
know, will be able to also explain if this is still
salient or not.

MS. CHAUVET: Thank you. Just one follow-up
question because your proposed language says the
person engaging in circumvention has reasonable
grounds for believing circumvention is necessary. So
your proposal is still having the person evaluating
whether or not circumvention is necessary. So how is that different than the existing exemption, where you're saying that the evaluation is unreasonable? Professor Rosenblatt?

MS. ROSENBLATT: I think it comes down principally to the fact that no one can say whether screen capture is or is not circumvention, and so there's, as it stands, an ambiguity in that. And, in fact, in recent years, to the extent that anything has changed about screen capture technology, one of the few things that has changed is it started to look more and more like circumvention because, in many circumstances, programs have blocked the ability to engage in screen capture, which means that screen capture, even though some might say it takes advantage of an analog hole, still requires circumvention to accomplish in more and more circumstances. So this is resolving that ambiguity in the favor of being able to use the technology.

I want to speak to an argument that opponents to this made based on the previous evaluation by the office that including this provision can give a user comfort that if they use screen capture, that they're allowed to, that's actually upside-down from the way the exemption is written,
right? If there's an exemption for any time you feel
circumvention is necessary, then you can use screen
capture or you can use other things. That's our
position.

MS. CHAUVET: Thank you.

Doctor -- sorry, Mr. Williams? I'd like to
give the opponents an opportunity to respond.

MR. WILLIAMS: Yeah, I like Dr. Williams,
but I don't deserve the title, but thank you for the
promotion. Yeah, I think Professor Turk put her
finger on why we prefer to keep this language in,
which is that it is preferable from our point of view
for people to be creating short clips over full-length
motion pictures that are in the clear and are prone to
leakage. And I also think it's good to keep the
language in for the reason that just using the word
"necessary" doesn't inform the reader that this is
another option that's out there that should be
considered.

And given that the comments frequently say
that the users aren't aware of the distinction here or
don't know that they should be considering screen
capture, I think it's helpful to keep that language in
instead of just saying "necessary." And I agree with
you that the word "necessary" could imply that screen
capture is still required, but keeping the specific reference in, I think, is helpful. It's true that we may not know for sure whether every technology that calls itself screen capture is a circumvention technology, but the way it's set up right now, it's covered regardless. They're allowed to use it in either event. It's just one requirement that they have to consider.

And in terms of, you know, technologies blocking the use of it, I don't recall seeing a discussion of that in the record. So I haven't been able to assess that, but, again, I think the way it's currently set up, it's a step in the process that needs to be considered. It's preferable because it creates short clips usually instead of full-length perfect-quality copies, and it's an alternative that seems to meet the needs in many of the cases described in the record.

MS. CHAUVET: Thank you.

Dr. Coppa?

DR. COPPA: Hi. I am not a lawyer, but I want to speak just a little bit to the kind of on-the-ground practice, which is to say even just as a film studies professor, I find it surprising. It's not intuitive to me at all that screen capture is somehow
preferable or less circumventing than a DVD. And vidders, you know, really do often try not to be pirates. And the sense that, you know, you bought the DVDs and they're yours and you want to use them feels more intuitive than the idea that you would then play them and kind of copy a screen or copy a stream. That technology is sort of new and is sort of different. And just to say on the ground, there's no sense that that would somehow be a kind of preferable thing.

And in terms of creating perfect copies, I mean, there's no vidder -- I just finished a book on vidding for the University of Michigan which is going to come out hopefully this year. And, I mean, I don't know a vidder who would rip an entire -- who would literally copy an entire file because you would want to -- as Dr. Turk was saying, you'd want to get rid of the audio as quickly as possible just to not have to deal with it.

So you would be dealing, first of all, with images. And then really the need, in terms of a high-quality image, is often that vidders and other noncommercial remixers are kind of looking where they're not supposed to. It's kind of inherent to the art. And I just came back from the Society of Cinema and Media Studies, where there was a panel on vidding
and videographic criticism, and a whole school of visual criticism has sort of come into being in the last five years that is a more formalized practice but, in fact, has a lot of links with vidding, as this panel was exploring.

Eric Faden did a piece of videographic criticism focusing on the work of, like, Jacques Tati and Orson Welles and these incredibly dense frames and talked about how people are looking at pieces of the frame that they wouldn't normally, right? And he was trying to draw our attention to, you know, a random object on a table, you know, where this is the sort of important thing to look at. Vidders have been doing this kind of practice for years.

And so the idea that the --

MS. CHAUVET: I'm sorry, Dr. Coppa, we have to kind of keep responses under two minutes. Okay, go ahead. Just finish up quickly, please.

DR. COPPA: The reason that vidders need dense files is because they're often looking in the wrong place, and they're going to be looking at it in such a way that the thing will reduce quality at the end regardless. And that's the kind of on-the-ground reason for, you know, the kind of nigling over the language.
MS. CHAUVET: Thank you.

Mr. Ayers, very quickly, and then we want to kind of move on off of screen capture.

MR. AYERS: Sure, thank you. Just a quick note that ripping of the disc is usually, by default, involving ripping the entire work. While certainly various ripping tools can focus on the various files, on individual files on the disc, most of them are defaulting to ripping the entire movie, whereas screen capture is very often a much more precise tool in that sense, where as long as the user actually has possession and owns the disc that's being captured, which is required for the exemption to be valid in the first place, it's possible to queue up the video that's desired and actually have a start and stop point that allows for the short clips, the short portions that are explicitly enabled in the current conception.

MS. CHAUVET: Thank you, Mr. Ayers.

Mr. Welkowitz, my colleague, I believe has a question relating to the educational purpose limitation of the existing exemption.

MR. WELKOWITZ: Thank you, Ms. Chauvet.

This question is directed primarily to BYU and the joint educators. In your proposal, in your proposed
regulatory language, you remove the requirement that
the use be for educational purposes. And we'd like
you to explain why that limitation should be removed
from the existing exemption and whether it has an
adverse effect on non-infringing uses.

MS. CHAUVET: Professor Decherney or Mr.
Midgley, I think you raised your hand.

MR. WELKOWITZ: Yeah. Okay.

MR. MIDGLEY: Yes, I'm sorry. My
hand-raising feature doesn't seem to be working
through Zoom, so my apologies. But, yes, the language
of -- our proposed language removes an express
reference to educational purposes because it includes
-- those purposes are inherent given the category of
users to which the proposed exemption applies. It's
limited to circumvention undertaken by college and
university employees and students by limiting the
exemption to that category of users. And then also,
it's further limited by the specific statutory
provisions that are relevant to educational users.

So, you know, our belief is that the most
efficient way to accomplish the purposes of this
rulemaking is to just incorporate by reference the
statutory definitions of non-infringement, and to the
extent that the Office wants to ensure that they're
used for educational purposes, to do that by a
reference to the users who are eligible to use the
exemption.

MR. WELKOWITZ: If I could just follow up,
the second part of my question was whether you felt it
had an -- the inclusion of educational purpose had an
adverse effect on non-infringing uses, if you could
just respond a little bit more specifically to that.

MR. MIDGLEY: The current reference to
educational purposes, we think it's superfluous.
Sorry, I can't say that word correctly. But it's
unnecessary. And so the adverse impact it has is
carried by the ambiguity and the difficulty of people
trying to understand what the exemption covers. So,
if there is a compelling reason to include the
language, that's fine, but anytime we're adding
additional requirements that are not included in the
statute, we think it poses the risk of ambiguity,
which is an adverse impact for the intended
beneficiaries of the exemption.

MR. WELKOWITZ: Thank you.

MS. SMITH: Mr. Midgley, can you provide any
particular examples of confusion? Because I just --
one thing I -- it's been sort of a long-running
exemption. I think the Office has tried to clarify
that educational uses generally are permitted under
this exemption. So, again, if it's a problem, we're
happy to address it, but do you know if there's been
confusion at BYU or in other educational settings?

MR. MIDGLEY: So I would just point -- it's
referenced, it's Footnote 78 in our initial comments,
is a reference to a public statement prepared by
copyright officers at many universities across the
country in the wake of the COVID pandemic, and if you
read the section on circumvention, I think that that
statement, that public statement demonstrates the
confusion among me and my colleagues, who are
copyright officers at our universities, who are
presumably well-positioned to understand what the
exemption is, and if those of us with legal training
and background are having difficulty, and I think that
that letter is good evidence of that, then one can
only imagine what the non-lawyer educators trying to
parse the exemption, you know, what difficulties they
might encounter.

MS. CHAUVET: Professor Decherney?

MR. DECHERNEY: So I actually agree with you
that educational uses should be considered as part of
the language of the exemption. Our exemption is for
educators and preparers of educational material. So
those are the users who are going to be using material
for teaching and education on online learning
platforms. The real distinction between the
exemptions that existed before and the current one
we're proposing is that we want this to apply to a
broader range of educators who teach on online
learning platforms, irrespective of their for-profit
or nonprofit status and regardless of whether or not
they're accredited.

Right now, the musical exemption, for
example, for online education only applies to really
the most elite universities, universities that are
accredited, nonprofit. Education happens just in a
much broader context now. Students are learning
beyond traditional learning experiences. Especially
at a time like now when people are out of work and
want to reskill, there's much more need for access to
a broader range of educational activities. But,
certainly, it should be for educators for educational
purposes through educational institutions.

MS. CHAUVET: Thank you. Professor
Decherney, just since you raised the issue, I'm going
to ask you one question and then I'll have more
questions to kind of clarify the position. But §
110(2) can be invoked only by a governmental body or
an accredited nonprofit educational institution. So
why should the exemption extend to institutions that
are not permitted to be covered by § 110(2), as you
propose?

MR. DECHERNEY: I mean, for the reasons I
just suggested, which are that we don't want to limit
education only to a narrow range of educators and
students. As we've shown, you know, we have lots of
evidence of educational institutions, educators,
learners, who are accessing, you know, a very broad
range of educational opportunities, sites like
Osmosis, one of the members of the coalition, which
works with medical students and patients, medical
physicians, they've been very important over the last
year just, for example, doing podcasts and creating
videos about COVID which have been used very broadly
by a range of healthcare professionals.

And I don't think the exemption should be
limited -- should limit their ability to teach as
effectively as someone at, you know, an ivy league
institution or another accredited nonprofit
organization.

MS. CHAUVET: So thank you.

MR. DECHERNEY: And I'll just add -- I'll
add all of the existing 110(2) restrictions, we think,
should still apply. This should only be for registered users. The learning platform should have copyright policies. They should provide copyright information to educators, preparers, and learners and take steps to prevent further redistribution of the material.

MS. CHAUVET: Thank you. So do you have any specific examples, Professor Decherney, of educators at for-profit educational institutions who want to use short portions and could not because of TPMs on motion pictures?

MR. DECHERNEY: Yeah, I do. So, in addition to the members of the coalition, we've actually spoken to a broad range of institutions. So one is actually LinkedIn Learning, owned by Microsoft, and they told us that they specifically would like to include short portions of videos in their educational material, which is actually licensed by thousands of universities across the country. Also, Drumeo told us this --

MS. CHAUVET: Can I -- I'm sorry.

MR. DECHERNEY: Yes.

MS. CHAUVET: So are they unable to license clips? Like, why is circumvention necessary for them to be able to use short portions of motion pictures in
an online educational course or something like
whatever they want to do?

MR. DECHERNEY: Yeah. So just for example,
the Joint Creators have suggested using the website
movieclips.com as most of the examples we've used
actually are from TV shows and movies that don't show
up on movieclips.com. And licensing generally, we
think, has too much of a barrier. There are, you
know, hundreds of thousands of creators out there. It
would take a tremendous amount of research to have to
license every clip that you'd want to use. It could
take years of work just to be able to obtain a license
to use a clip in one video. It would just be a
tremendous barrier, and it would take a huge number of
resources, money, time. And licensing, ultimately,
could end up as a form of censorship.

MS. CHAUVET: Thank you.

So, Mr. Williams, it would be helpful, I
think, if you could perhaps lay out the opponents'
position on educational licensing. The joint
educators and copyright owners identified a number of
institutions that license for educational purposes.
So do you have anything that you would like to respond
to Professor Decherney?

MR. WILLIAMS: Yes, thank you. And do you
specifically want me to speak to the use of clips right now, or do you also want me to speak to the use of full-length motion pictures?

MS. CHAUVE: I think both clips and motion pictures or full-length motion pictures would be helpful, please.

MR. WILLIAMS: Okay. Great. Thank you. Yes. So just as has been the case during the past several cycles that we've discussed this topic during the studios continue to have readily accessible clip licensing programs on their websites with contact points that are very specific. That continues to be a practice. And we've heard testimony, you know, repeatedly over the years about those. And I actually see links to a lot of them on library websites. University of Michigan library, for example, has a list of the licensing websites that the studios make available.

So, to the extent a for-profit company wants to use clips for motion pictures, that is an available option. We did also point to things like Fandango and YouTube, which make clips available on their websites just because those can be embedded and may cut down on the time issue that Mr. Decherney is talking about. And so, if those websites have something that a

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company wants to use and they're able to work it into a presentation, that's why we listed those sites, but they're certainly not the only option for obtaining clips.

And then, with respect to the full-length motion pictures, which, of course, you know, our legal position and really policy position is that those should not be covered and that 110(2) does not allow for those to be covered, as the Office concluded three years ago, there is a wide variety of services out there that are very easy to locate that provide thousands and thousands of titles, everything from the biggest blockbuster you could think of, very recent releases, all the way down to documentary films of a more obscure nature or arthouse films, things that most people would think of as more obscure at least.

And so I'll run through a few of them. I know we have limited time and I'll refer to our comments, but one important one that hasn't been discussed a lot yet in the written materials is Criterion On-Demand. And so we have the representatives from Swank here, and I'll let them talk about their service, but Criterion On-Demand, it has thousands of titles in its catalog. I believe about 700 of them are currently up for viewing by
licensees. But the entire catalog, additional titles can be requested and added quickly by Criterion.

And they license from 20th Century Fox and Searchlight, which is a Fox brand, as well as National Geographic and some other smaller studios. So, to the extent that Fox titles may not be available on Swank, they're available through Criterion On-Demand, and that's a service that's been available for a long time.

And in addition to Swank, there's also Canopy. There's Alexander Street, Passion River, Roco Films, Collective Eye, and then also services that cover public libraries in addition to schools, like Hoopla and Overdrive. And just very quickly, I will note, in BYU's reply comment, they mentioned one particular motion picture, Wilderpeople, that they said had left Swank's catalog and they could no longer access, but it is available on Canopy as best we can tell by searching that website.

So not each of these platforms would have every title, but if you look at them in the aggregate, they have a very, very large number of titles and they're reasonably priced. Criterion, for example, I was told the average cost is 71 cents per student per year, and then they have maximum pricing too where

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there's a cap. So, if you have a lot of students and
a lot of repeat viewing, they offer capped pricing so
that the school doesn't end up with a huge, huge bill
that's unexpected at the end of the year. So I'm
happy to answer more questions about those.

MS. CHAUVE'T: Thank you.

Ms. Pantalony, you've had your hand raised
and then I know Professor Benson also. If we could go
in that order, please. Ms. Pantalony, I think you're
still muted.

MS. PANTALONY: You are right, I am still
muted. My apologies. Thank you very much. I want to
circle back to the question that you asked initially
of Mr. Midgley from BYU concerning educational uses,
and then I also want to take just a couple minutes or
less to respond to some of the comments being made
about licensing.

It's our position that whether inherent or
not, this education exception should apply to
educational uses. The language, the semantics, the
way the proposed exception has been drafted takes into
account sort of the inherent understanding of what
constitutes educational use of film. And whether it's
inherent or not is an issue that is a drafting issue.
And I appreciate the questions. But, at the end of
the day, the uses that are perceived as currently acceptable for educational purposes are the uses that we're proposing for consideration in this exception.

The issue concerning licensing and all the various licenses and distribution services that are available, being Criterion On-Demand, Swank, Alexander Street Press, you know, Columbia's had a very good relationship with many of these distributors. We do have ongoing current relationships. And yet, still, only about 38 percent of our collection is, in fact, covered by a streaming license.

So what this means is that we collect and provide access to film in an educational context that is fundamentally different than how a commercial service may provide access and create a catalog of film, and it is one of gap analysis and one arguably of market failure, and it is not an issue where we don't think that these services are providing a good service. In fact, we think they are providing a great service, but it is one where they are only able to match or meet so much of the collection that we have that is, in fact, necessary to teach.

And so, from that perspective, particularly since the pandemic has placed us in a position where, at best, we are in a hybrid learning environment, it
becomes very, very difficult to simply tell faculty that, oh, you can't access this film, but try another film in its stead, because that's not how you teach with film, in fact. And we've had entire film lists removed from curricular activity as a result of this change to a hybrid learning environment that happened so quickly from March 2020 to the current day.

MS. CHAUVET: Thank you.

Professor Benson?

MS. BENSON: Thank you. And I want to echo and build on what my colleague, Professor Pantalony, has said. The pandemic has really highlighted one of the big issues for us at Illinois, which is that a large portion of our collection really isn't available streaming. I know, we all know, and I'm on a video listserv where I see these concerns echoed every day, where can you get this, where can you get that. And I'm familiar with all the names, Roco Films and all of that. But there are -- in my experience, I collected data from the fall and spring from our media services, 25 percent of our requests were just not fulfillable at all because there was no streaming license available.

So what we have is a gap that we can't fill. So, in my opinion, if something is not commercially
available, what harm is there to the market? What harm is there if we are circumventing and using it for educational purposes only in a pandemic? The harm is to our students. The harm is to our faculty. The harm is to our ability to educate.

And we need to be prepared because the pandemic is not over, unfortunately. I wish it were, but it's not. And so we really are still in the position where it's an uncertain environment, where we're teaching hybrid, we're teaching online, and we have no access to essential educational materials. So that's what I have to add to this hearing, and thank you for hearing me out.

MS. SMITH: Professor Benson, can I ask a follow-up, which is, if there were not a pandemic, would you have considered that these works needed to be licensed?

MS. BENSON: I think that that depends because, at University of Illinois, we have quite a few online educational programs. I teach in the iSchool, which has what we call a LEAP program, and we routinely teach online. And so, in that environment, I could not reach my students with those very same films. If I were teaching in person, of course, I would show it in person under 110, but we have quite a
few online environments. And so, therefore, that same § 110 exception doesn't help us.

MS. CHAUVET: Mr. Williams, I wanted to give you an opportunity to respond about market harms that were brought up.

MR. WILLIAMS: Yes, thank you. So, as I said, much of the catalogs for the MPA members are available through educational licensing services, but that's not the only way, of course, that a student or a faculty member can watch a motion picture. There's lots of very affordable methods of doing so, all of which are really facilitated by § 1201. It's caused access to be dramatically increased in very affordable ways. So, if there is a title that's not available for educational licensing, it very well may be available for a 48-hour rental at $2.99. It may be available for free if someone already subscribes to a streaming service.

And although, ideally, everything would be available through the educational licensing services, there's a number of different types of classes where students do have to invest something in the materials that they need to for the class. And so, if there are copyright owners who are not yet embracing the educational licensing market, I would say that doesn't
mean that they haven't made their product available at all in a digital format that can be easily accessed at an affordable price.

I would also just say that as a copyright policymaking matter, it may discourage further development of these educational licensing models if schools are able to circumvent things that are not yet available on the licensing platforms. You know, I think that that's going to be a robust practice going forward, educational licensing, but to the extent things are being done for free and people are less inclined to pay for the educational licensing services, that would create market harm and harm, ultimately, to consumers as the services may not develop over time.

And I think that's something you've recognized in other spaces, such as space-shifting more generally on a personal level. You were never able to conclude that 100 percent of titles were available due to disc to digital, for example. But you recognized the market that existed and the potential market that needed to be considered under fair use. And so I think that should be taken into account here as well.

MS. SMITH: Mr. Williams, I'd like to ask a
follow-up because I think your response has drawn distinctions. I want to make sure I'm understanding it correctly between educational licensing and sort of what many of us as consumers may experience for the $2.99 rental or the streaming service. Is it your client's position that if a classroom use, like a virtual teaching use, needs to show something that the subscription or on-demand $2.99 rental will be sufficient for that use?

MR. WILLIAMS: Well, so I think there's a couple of things there. To the extent that the classroom all just needs to watch something before they arrive for the remote learning, then, of course, they can use the $2.99 model. Now streaming a $2.99 rental to the entire classroom, there may be technical difficulties with that and it would likely violate the terms of service depending on which service you use. However, the proposals here also violate the terms of service. Circumvention of the digital transmissions to create copies that can be streamed is also a violation.

And so we've heard that in each cycle, that people are concerned the terms of service may prohibit something, but the exemption itself is prohibited by the terms of service. So the circumvention I don't
see as any better than the other violation.

MS. SMITH: So let me ask it maybe a different way. So Professor Benson said that in the olden days, you know, she could show a movie, pre-pandemic, in her room, in a classroom. And now we are in a virtual situation. If you use the $2.99 model, leaving aside the terms of service, do you think the public performance right is more likely to be implicated, or do you think, given the pandemic conditions, this is seen as permissible by your client?

MR. WILLIAMS: There is, you know, nothing in 110(2) to say that the state of affairs has changed in the current situation. We, of course, as everyone here is, take the pandemic very seriously, of course, and we understand that it's having an impact on educators and students. But the exemption is not limited to the pandemic scenario or to any broader emergency. And our understanding is that really the goal is to have this exist well beyond, and that's why it was also asked for three years ago, when it was denied, so --

MS. SMITH: Sure. But I think the question is whether the pandemic has created a gap in what would have normally had a functioning market. And so
it is, I think, a matter of what is permissible by
licensing, not just 110(2) but also what might be
granted permission for whether educators are able to
make use of the same materials physically as they
might through some virtual stream or whether you think
that still needs to be worked out and is not easily
obtainable or maybe easily is the wrong word, but
whether, as Professor Benson said, it is difficult to
get the same licenses and the virtual environment are
not available?

MR. WILLIAMS: Yes. If they owned the disc
and they were having in-classroom learning under
110.1, they could show the whole class that disc at
one time. I imagine that there are scenarios that
come up where maybe a teacher wants to use something
that isn't currently in their school's library and
where they ask students to go out and try to watch it
in some other fashion.

And so that is similar to the current
scenario, although, of course, there are times when
they own the disc and they're trying to teach remotely
and 110(2) would not expressly allow for the
full-length motion picture to be streamed. That is
the current state of affairs under the Copyright Act.

MS. SMITH: Okay. And are you aware of any

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policies created in response to the pandemic by your clients to facilitate larger uses of materials in a virtual environment?

MR. WILLIAMS: I'm not aware of specific policies. My understanding is that if educational institutions come to the studios and say there's a title that they haven't been able to obtain, that frequently studios will work with them to provide licenses, but I think a lot of the titles that we're discussing here that people are saying are not available through some kind of educational streaming licensing model would not be the titles by the major studios.

Most of the ones -- maybe all of the ones discussed in the comments that people said they were unable to locate were not major studio releases. So that gap may exist less, but, yes, my understanding is the studios are willing to work with educators and also that people like Swank, who we have here today, are able -- if a title is identified for them and it's missing, they're able to contact the studios and do contact the studios to try to get that title into their catalog.

MS. CHAUVE: Thank you, Mr. Williams.

Mr. Wise, you've had your hand raised for a
short time. I would be interested to have your answer
to the next specific question and then you can add on
anything else you were planning to say. But has BYU
attempted to license through any of the institutions
that Mr. Williams and Joint Creators have identified?
And if so, like, what has been the experience?

    MR. WISE: Absolutely. We've licensed
through most of those providers that he's mentioned
there. We have in our catalog over 20,000 different
titles that are licensed full-length videos, and we
leverage that. And so the idea is not to subvert the
existing market, but it is, at the same time, that
said, is we need to be good stewards and be
responsible with the budget that we have in our
institutions. We would love to have everything that's
available, right? But our budgets don't allow that.

    And while we have a large collection here at
BYU Idaho of digital films, we still don't meet the
needs. There are still films that we can't access.
And so coming back to that kind of original question
of where the confusion comes in and the examples of
language that gets confusing is just this conversation
and why we can't tie these exceptions back to the
existing statutory language that allows for these
uses.
We've had professors that have used video in the classroom for 15 years. I had a professor call me the other day because his class is now remote and he had been using a film and using that in class, and now that film is not available. It's not on a major studio, it's not on any of the streaming services. And believe me, we looked and it wasn't there. I did reach out and found the provider, and they were willing to offer a license but at three times what the original disc that they had purchased was for. And so having that at a year-to-year license wasn't going to be something that was going to be sustainable for this class and this situation, where, under the statutory language of 110(1), it was not going to be an issue.

And so that's kind of why we are looking to tie this back to the statutory language, to allow for these uses and to allow for the collections that libraries have built over time to be used in the way that they were intended originally and according to the statute. And then that obviates the confusion in the language because you can refer back to the statute instead of trying to decide are they talking about support portions or are they talking about the third factor in fair use. So where does that confusion come in is when we try to tweak those to make everybody
happy, where, you know, Congress has already done this
in the statutory language and we just need to include
this in that same thing.

MS. CHAUVET: Thank you. I do want to ask a
follow-up since you talked about the statutory
language. So, in the previous rulemaking in 2018, the
Register declined a similar proposed exemption by BYU
that would permit circumvention for nonprofit
educational purposes in accordance with 110(1) and
110(2). Specifically, the Office determined that the
proposed exemption implicated the rights of
reproduction and distribution, which are not covered
by 110(1) or 110(2). So if you could please identify
any changes in the law or facts since 2018 that would
allow the register to or should make the register
reconsider that position. Mr. Wise or Mr. Midgely?

MR. WISE: I would just say that, you know,
for me and then Peter can follow up with anything
there, that the idea is to be able to continue those
uses for those, and, yes, it would add to some of that
copies, but 112(f) does allow for copies to be made
for those uses. And --

MS. CHAUVET: It does, but it does not allow
for 110 -- it doesn't apply to 110(1); 112(f) only
applies for copies made under 110(2). So, when we're
talking about full-length motion pictures, my question
is, if you can't rely on 110(1) and 110(2) to show
full-length motion pictures through, like, distance
learning, like, what changes in the facts or law have
occurred since 2018 that would allow the Register to
expand the exemption as you propose?

MR. WISE: It's not so much in the law, I
guess, as it is in the environment that we're in and
the availability of content and being able to use some
of the legacy content that we have available in our
collections and relying on some of the other statutory
language to provide access to library collections.

MS. CHAUVET: Thank you. We haven't heard
from Swank, which I think it would be very interesting
to hear your perspective, so Mr. Evjen or Ms. Nelson,
would you like to respond about licensing in the
educational context? Ms. Nelson?

MS. NELSON: Sure, sure. What we do at
Swank, and just as a little bit of -- and Bill has a
demonstration too, if we would be able to show that.
But, at Swank -- and we started this about eight or
nine years ago as a result of professors coming to us
asking for a platform that was convenient to students
because they could not obtain videos or DVDs within
the library. So we really did this to help out our
university customers.

So, from then, we have just built an infrastructure that is extremely popular with our clients, and we work currently with over 1,000 colleges throughout the U.S. and we continue to really invest in the technology to make this product more and more helpful and useful for teachers across America.

We represent over 100 studios and distributors, and we do our very best to obtain every single picture that is requested. And of the pictures that are requested, we have about a 1 percent decline or about 1 percent of those pictures are not available to our college and university customers. And, you know, we do things such as genre profiles and we do everything we possibly can to fit the needs of the professors and the librarians that are requesting content. And our price point is extremely affordable, where it actually breaks down to roughly pennies per student across the U.S.

So, you know, with that, it might make sense to have Bill Evjen give a demonstration if that makes sense.

MS. CHAUVET: Unfortunately, we had to -- the Office had to receive any materials that were going to be shown in advance of the hearing. So,
unfortunately, we can't do that demonstration right now, but thank you very much, Ms. Nelson.

MS. NELSON: Okay.

MS. CHAUVET: Mr. Cheney, I see you've had your hand raised, I'd like to give you an opportunity to ask any questions that you may have. Mr. Cheney, you're muted. Mr. Cheney, you're muted.

MR. CHENEY: Thank you. It was my turn, I guess, to do that this time. There are a number of questions that I have, and this has been a robust conversation, and I appreciate that. I think it's been very helpful from my perspective. I think one of the things that I want to really focus in on are the limitations of the licenses perhaps, and some have talked about terms of service and whether there are some limitations there for universities and their uses for educational purposes in some of those things.

And perhaps even Swank can speak to that as to what terms of service would be there and focusing on sort of the 110(2) discussion that we've been having where it's been required to do face-to-face to use some of these materials and if that is carried over in the terms of service. And especially in light of this pandemic and who knows what might be next or how far this may go, if that's a continuing limitation

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that is a concern to the universities, then I'd like to hear more about that if we could. Thanks.

MS. CHAUVET: Ms. Pantalony, did you want to respond to that? You've had your hand raised.

MS. PANTALONY: Yes, thank you. No, I'm not muted. Thank you. I will respond, and I'll respond on behalf of the Association of American Universities and Columbia in this respect. This environment has caused universities to lurch forward three steps and then take two steps back, trying to determine how best to move forward to understand, first of all, aspirationally where we'd like to be in September and where public health standards, the science, and the data may take us in the next few years.

There is an aspiration at Columbia, and it was voiced by the president in a public statement, that it is our goal to try to return to as much a normal environment as possible in September, but at the same time, for the summer months, for example, our dorms are only going to be 20 percent occupied, and at the same time, we are banking on a good portion, if not most, of our students being vaccinated before the start of the fall semester.

And we have students that are not only situated in the United States, but we have students
that are from all over the world and a good portion of those students who are also our graduate students, and it really remains to be seen how much of the Columbia community and, in fact, the communities of many universities and colleges can actually reenter the United States and attend university in person.

So, you know, the model that was presented to us that we have used robustly for years within the confines of 110 presumed that in-person learning would be the standard, and in a perfect world, boy, would we like to return to that space. But, at the same time, we understand that between, you know, reentry regulations in a pandemic and visa requirements and the whole machinery of our government to return us to normal is going to take some time.

And so we have to figure out a way to get ourselves to a point where we can teach and provide core mission, meet core mission within this transitionary period, and this is not something that we can predict with any great certainty.

So that is, in fact, how I respond to Mr. Cheney's question. The real issue is, how do you work in a classroom, a hybrid classroom environment with film? It's not something that's really been explored in any great detail here. You know, you can't just
share your screen and show a film technically. I mean, forget about the terms and conditions of the licenses or the contracts that may preclude you from doing that. From a technical perspective, the quality, the bandwidth, it just does not work.

So, you know, faculty have had to sort of reinvent the wheel, so to speak, in developing curriculum because you have to be able to have your students screen. They may have to go out of a Zoom room to screen, come back into a Zoom room to discuss. It's a very different sort of rhythm in the teaching environment. So that means two things. Forty-eight-hour, 24-hour access is not going to work because they need to be able to go back to that film perhaps throughout the entire term as they study. The other issue here, of course, is that with students literally all over the world, what is provided as a repertoire by, you know, streaming services is not the same in every jurisdiction.

And I had an instance where faculty came to me and said, I'm trying to teach Latin American studies, I use this film every year, we can't get a license for it, but I think it may be on Netflix. And I said, well, tell your students, you know, it's the cost of education these days that they should
subscribe to Netflix. And then we figured out that, of course, the film was available in the United States, but it was not available to certain international students.

And the end result is that we're trying to cobble together our ability to deliver on education in a world that has just fundamentally changed, and we need the tool sets necessary to deliver. Now a § 1201 exception is not going to be the panacea that delivers everything, but at least it gets us to a point where we can start to assess what may be possible because, right now, the films that are in our collection for which we do not have a streaming license are just a bunch of plastic and that's it.

MS. CHAUVET: Thank you, Ms. Pantalony.

Mr. Williams, you've had your hand raised. Would you like to respond?

MR. WILLIAMS: Thank you. And I think the representatives from Swank could speak to this some too, but I wanted to make sure I clarified, given Mr. Cheney's question, that the terms of service I was talking about earlier were with respect to kind of personal acquisition of transmission or downloads or subscriptions through your typical provider that you and I would use. These services that I laid out
earlier that focus on educational licensing, the terms of service do allow for streaming to the entire student body or to a smaller number of students, depending on the preferences of the institutions and how they want to pay for the license.

So I didn't want to imply that the educational licensing market, that it's hindered by terms of service that don't allow for the needs to be met. But, with respect to your average personal download that you might get from Amazon or from Google Play or from Apple, those terms of service usually are limited to personal uses. So I was just trying to address the question that educators have raised from time to time that can we really use those copies or those streams in an educational setting for multiple users.

So I was just trying to explain that the terms would potentially be violated by those uses but that circumvention would certainly violate the terms as well.

MS. CHAUVET: Thank you.

Mr. Evjen, you had your hand raised. And then Mr. Taylor after you.

MR. EVJEN: Yeah. And this is in regards to full-length motion pictures and titles. The platform
we have provided with the 100-plus studios that we represent and their catalogs that go with those respective studios is designed specifically for this type of environment we're in with the typical teacher-student relationship in many cases is remote or hybrid. And what we're finding also is, in the days of the past, they maybe put a DVD or a VHS tape and consumed one or two entire classes to do that, there's less need and desire to do those kinds of viewings. And a lot of times, the students are assigned these titles to view outside the classroom and then come back in to discuss those in more detail.

The titles that we do make available via the platform are licensed on a semester basis or a year basis for the institution and allow for unlimited viewings, starting and stopping at any point throughout the process for all those students within that institution. It includes -- importantly, it maintains the studio protections for the content and the digital rights management and also includes the multiple audio tracks and our ADA-compliant titles with closed captioning as well. And they are accessible outside of the institution, even in the students' homes.

MS. CHAUVET: Thank you, Mr. Evjen.
Mr. Taylor?

MR. TAYLOR: Yeah. I think that we need to get back to what we're talking about circumventing. If we're talking about circumventing DVDs and Blu-ray discs that universities have, the titles that they've actually proffered here, they don't seem to have much of. If you look at BYU's library collection, you looked for "Hunt for the Wild People," they don't have that listed as available on DVD, but they do have it listed on Canopy, and it takes you directly to Canopy@byu. "Bread & Tulips," "Pane e tulipani," as they had mentioned before, they don't have that DVD available at BYU. In fact, that DVD is only available in two U.S. libraries.

So I really see this not as an issue of market failure because more streaming is coming online and you see that where these obscure titles are most available, you don't really find them on DVDs and Blu-ray discs because those serve the popular markets, but it's the streaming market where you will find "Bread & Tulips" available on Canopy and the "Bicycle Thief." They do, in fact, have three "Bicycle Thieves." So I would just point out that to the extent that there's a shortcoming, it's only because the streaming market hasn't yet grown, and we should
not take any measures that would keep it from growing by allowing a short-cut by circumventing DVDs.

MS. CHAUVET: Thank you.

Mr. Miller?

MR. MILLER: I'm raising my hand on behalf of Peter Midgley, whose hand-raising function isn't --

MS. CHAUVET: Oh, I'm sorry, Mr. Midgley?

MR. MIDGLEY: Thank you. Yeah. So I hope what's coming through and what you're hearing from multiple universities, including ours, is that we have no issue taking advantage of the licensing options that are available to us. There is nothing about our proposal that is intended to undermine or undercut. We wish Swank, who is here, and all the other streaming providers nothing but the best as they seek to increase their catalogs and we take advantage of those options.

But what's before the Office is what can be done with the -- what circumvention activity is allowed for the discs that we have collected, which are significant. Those collections are large, and they've been made largely for the purpose of being used in an educational setting. And so the factors that are outlined in evaluating whether circumvention is permitted should focus on whether or not the
underlying use is non-infringing.

So you referenced earlier § 110(1) and 110(2), which deal mostly with the performance side, but 107, which also expressly calls out teaching and scholarship, you also asked if there were any changes. I'm afraid I don't have anything today, but there was a change yesterday when the Supreme Court handed down Oracle versus Google, which specifically said, and I'm quoting here, "The text of § 107 includes various noncommercial uses, such as teaching and scholarship, as paradigmatic examples of privileged copying."

So the Supreme Court yesterday reemphasized the importance of teaching and scholarship as examples, paradigmatic examples from the United States Supreme Court of privileged copying. So, when we're going through the analysis of whether or not the uses we're describing are non-infringing or not, we can't leave out § 107, which the Register also acknowledged earlier was a critical part of distance education.

So the gaps that we're talking about that have existed in licensing, screening licenses, have been around for a long time. They've been recognized for many years, but we've been able to, through 110(1), when we had the ability to meet in person, we were able to fill in some of those gaps with discs in
our collection. And now what the pandemic has highlighted is that either we need to take a broader definition of what a classroom is, which is one possible way to solve this problem, or, if we're going to continue to view a classroom as the physical space that seemed to be referenced back in the '70s when the Act was passed, we need to think about, well, what are the other ways, the non-infringing ways that we're allowed to use the discs in our collection.

And so whatever language -- you know, as was mentioned earlier, there are some drafting issues that could be resolved here, but I hope we all share the goal that we should be able -- educators should be able to continue to use films in the way that they have for decades, and if we need to work some through drafting language to get us to that goal, that's great. We're happy to do that. But, anyway, I just think that needs to be said.

MS. SMITH: Mr. Midgley, can I ask, is it your position that full work uses in general is a paradigmatic fair use that need never be licensed in educational settings? Or is it more that the pandemic situation in particular has made it more likely to be fair use and, thus, this exemption is needed?

MR. MIDGLEY: So thank you for that
question. What we have outlined is we should be
allowed to do the non-infringing uses that are defined
by the statute, so if copying a full work is allowed
by the statute under 112(f) -- and I know, Ms.
Chauvet, you mentioned that 112(f) applies to the
performance of reasonable limited portions under
110(2), but it doesn't reference the copy, the length
of the copy that you can make to facilitate that
110(2) performance.

So, again, that issue's never been
litigated. We could debate, but whatever copies are
allowed under 112(f) need to be permitted under 1201
and 107. So, if you look to our --

MS. SMITH: So hold on.

MR. MIDGLEY: Go ahead.

MS. SMITH: Can I ask you just a follow-up?

How does your institution conceive of what level of
copying is permitted under 110 or 107? Do you engage
in copying of full works?

MR. MIDGLEY: So we, to the best of our
ability here -- you know, universities are large
places. We have thousands of employees, and we can't
be aware of every single instance of circumvention
that's happening everywhere on our campus. But, to
the extent that we are aware, we have done our best to
understand the current exemptions, the ones that relate -- the current exemption for educational use and the one for accessibility and so on. And, you know, again, we've invited the Office to clarify because, in our review of the 2018 recommendation, it certainly appeared that the Office believed that copies under 112(f) could be full copies. That was our understanding of the recommendation.

The language of the exemption itself was a little bit more ambiguous on that point, and we think some clarification there would be welcome. So anyway, what I'm ultimately getting at is the case I think that might be helpful for the Office to consider would be the Georgia State case, which involved literary works used in a course reserve context which are not subject to TPMs, and if you read through that case, it has a lengthy history where the court has to go work by work and decide whether this particular copying and distribution was covered under 107 or not.

And in the vast majority of the cases, the answer was yes, it was covered. There were a handful of cases in which the court found the copying and the distribution exceeded the bounds of 107. What we have in this instance -- so my point is that universities are accustomed to doing this kind of analysis and
deciding what use they can make of the works in their
collection when they're not protected by TPMs, but,
here, because these works, unlike the literary works
in the Georgia State case, are protected by TPMs, we
have 1201 to contend with before we can even turn to
the 107 analysis.

MS. SMITH: Right, right. No, I do
understand that and I want to focus on the 107 or 110
analysis because you have said that the case law has
been untested in the audiovisual context for full
works, so I appreciate you bringing up the Georgia
State case. So it sounds like, is this right, it is
your position that in many cases, full work copying of
audiovisual works you believe to be fair or you are
engaging in, and it is just the 1201 issue that you
think is precluding a broader adoption? Am I
understanding the position right?

MR. MIDGLEY: What we're saying is that we
would have to do the analysis on a work-by-work basis
and just as the Supreme Court has instructed, so we
would have to look at it case by case. So, as an
example, if there's a work that was specifically
designed for the education market, that's going to be
less likely to be a fair use than a different kind of
work where -- maybe an orphan work where there is no
copyright-holder anywhere that can possibly be tracked
down. And so, when we're looking at the fourth
factor, it's much more likely that we're going to find
no market harm in those situations. And so we can't
paint with a broad brush and say all copying is either
going to be covered by fair use or it's not, you're
going to have to do it on a case-by-case basis. But
1201, right now, precludes that.

MS. SMITH: Okay. So I understand and I
want to open the conversation up because I think that
is part of what the Office is struggling with, is that
if we are asked to recommend a broad-based exemption
for something that does, through Georgia State and
other case law, ask you to look at a contextual I
think was the word in the opinion yesterday as to
whether something is fair use, whether we should
structure an exemption that says look at whether it is
educational or is an orphan work as opposed to across
the board concluding it is likely to be fair if we're
not seeing educational institutions taking that view
and we cannot touch it in court. I just want to make
sure the Office is keeping pace with where the law is
at. So perhaps Mr. Williams, then Ms. Pantalony.

MR. WILLIAMS: Yes. Thank you. I haven't
had enough time to fully digest the Google opinion
from yesterday, but I certainly don't think it goes so far as to say all educational uses are, by default, fair use and that's been the conclusion of the Office over time, that they're not, by definition, always fair. And so the Georgia State case, although it has a very, very long procedural history, and so I may overlook something, my understanding is that it did involve portions of works, not full-length novels, for example. And so what we're dealing with here would be distinguishable both in subject matter and in the use at issue when we're talking about full-length motion pictures and remote streaming.

And so I do think it's still appropriate to start with § 110(2) because that is where Congress, anticipating that there would be remote learning, decided how to draw the contours of what that should look like, and as the Office said three years ago, the contours stopped short of allowing for full-length motion pictures to be streamed remotely.

So then, when you go to § 107, which I would argue is questionably appropriate given the clarity of 110(2) on this topic, you do have to look at the potential market that we've been discussing and the existing market, and there's clearly such a market here. And the fact that a work is not currently
available doesn't mean that there's no streaming educational market for that work. There certainly is a potential market.

As Swank testified, they're looking to fill that market gap where it exists as much as they possibly can and others are as well. And just because the use is educational doesn't mean it's, by definition, transformative. We are talking essentially about space-shifting of full copies and then remote delivery of full copies. There's nothing in the proposal that really defines exactly what could be done or what the purpose of these full-length streams would be.

And so I thought the analysis done three years ago was done correctly. I think what we've heard essentially is, in terms of change, we have the pandemic, which is a terrible thing we're all living through, and we do acknowledge its impact on education, but with a long-term fair use analysis looking forward, past this October, when you will issue the regulations, you know, the fact that the pandemic is not incorporated into the proposal and the fact that this has longer-term consequences, I think, weigh against granting the exemption.

MS. CHAUVET: Thank you, Mr. Williams. Ms.
MS. SMITH: Do you think it might be appropriate -- just a second, Ms. Chauvet -- for the Office to incorporate the pandemic conditions into the proposal for full-work licensing? I mean, hopefully, it will abate, you know, much sooner than the three years for the benefit of everybody, but that is something we should look at doing?

MR. WILLIAMS: I would not, sitting here today, endorse doing that, but I am happy if we get a question after the hearing to tell you what we think about that. Like I said, we do acknowledge the impact of the pandemic, but there would be a number of factors that would have to be considered, including the availability of works on services and the other contours of the exemption.

MS. CHAUVET: Thank you. Ms. Pantalony?

MS. PANTALONY: Thank you. I just want to respond a bit to what was just said about sort of the market harm and the purpose of our conversation today, which is really to take a look at the market implications for providing an exception under 1201. We could sit here and argue about whether or not certain hypothetical circumstances generally meet fair use four-factor assessments or not. The bottom line
is the case law tells us very clearly that this is a
case-by-case analysis, and it would be very difficult
in the abstract to say that streaming film, once we
get rid of the 1201 impediment, is all going to be
fair use because we're educational institutions.

That is absolutely not where we've ever been
in our analysis. And, you know, the bottom line here
is we want access. Access is going to come to us in
any form, whether licensed or, in the event of a
license not being available, potentially in some other
form. And we are, as we have, you know, demonstrated
for some time now, been absolutely willing to sign
licensing agreements for streamed film. This is not
going to stop. And, in fact, I think my institution
would be upset if, all of a sudden, streaming services
disappeared.

So the real challenge before us is to craft
an exception that serves in filling gaps while at the
same time ensuring that markets are not adversely
affected. And the whole issue about a film not being
available in the marketplace now still having the
potential of being harmed by an exception is really
almost like a chicken-and-egg story because, when the
film becomes available in the marketplace, presumably
as a response to oh, my goodness, the film is going to
be circumvented and streamed at a university because it is not currently available, you know, we may actually have, like, the opposite effect taking place, that as the market develops and as impetus is created to get film into the streamed service, into a repertoire or into a catalog, more and more film will come onboard simply because this potential exception exists.

So my attitude is let's try and grow the market but, at the same time, not kill educational opportunities working with our collections.

MS. CHAUVET: Thank you.

Mr. Taylor and then Professor Decherney, but I ask if we could please try to be concise as we are about 30 minutes left, though we might run a little bit over if we need to. But we still have some areas to cover. Mr. Taylor?

MR. TAYLOR: A very quick response to the last statement, my response was that the titles that have been identified in this proceeding aren't available on DVD or the collections aren't there. But I want to go back to the issue of 112(f). 112(f) is there for the performances and the ephemeral copies that go along with the transmission of the work. By the fact that you have 112(f) suggests that when we
had the reproduction right and we're transferring it from the disc to the server, there needs to be some exception or you need to find that that's fair use. And, quite frankly, there is no court cases that says creating that server copy implicating the reproduction right is indeed fair use. So, I mean, I think that to justify that server copy under 112(f) is a very far stretch and misinterpretation of the law.

MS. CHAUVE: Thank you.

Professor Decherney?

MR. DECHERNEY: So I just wanted to comment on the discussion of the pandemic. And the pandemic has certainly accelerated the use of online learning by all educational institutions, but it certainly isn't the only use of online learning. Things won't disappear even two, three years down the road. Just looking at my own institution where I'm the faculty director for the university-wide online learning initiative, we have over 200 MOOCs, Open Online Courses, which have had more than 10 million enrollments. We have six fully online degrees, including the first ivy league BA degree.

And so online learning has already been an important part of what happens across all universities and educational institutions, and I think we're going
to see much, much more of that. You know, I've seen efforts at Duke, for example, to say keep the innovation going, thinking about how all the lessons learned from the pandemic will be taken into education going forward. And so this isn't just a pandemic -- none of these issues are just limited to the pandemic.

Just thinking -- going back to the question about 110(2) and our request to extend the exemption to unaccredited and for-profit educational online learning platforms, I just wanted to remind you of a quote from the legislative history that we included in one of our comments, but I think it really shows that trying to extend this beyond BYU or Columbia or Penn, you know, really is within the mission and initial vision of the TEACH Act.

This is from Senator Hatch, who said, "For our nation to maintain its competitive edge, it will need to extend education beyond children and young adults to life-long learning for working adults and to reach all students of all income levels in cities and rural settings, in schools and on campuses, in the workplace, at home, and at times selected by students to meet their needs."

Kind of amazing that that was written however many years ago, but, you know, it's never been
more relevant that people are just learning throughout
their lives, reskilling for new jobs, and that these
kinds of opportunities that exist for learning outside
of traditional institutions are being taken advantage
of by educators and students now really more than ever
as they put together lesson plans and try to learn as
schools' ability to teach online is limited.

MS. CHAUVET: Thank you.

MR. DECHERNEY: Yeah. So saying that the
pandemic is important, but it's just accelerated
changes that were already in place.

MS. CHAUVET: Thank you. I see Professor
Benson raised her hand, and then we would like to turn
to some specific questions about BYU's proposal.

Professor Benson?

MS. BENSON: Thank you. I just wanted to
point out further that, as noted, we do want to
license films. And in talking to our media
specialists, as I noted, there are films we just can't
license, so there is a gap. On top of that, it is my
understanding after speaking with these media
specialists that it is actually not cheaper for us to
rip a copy of a film rather than license it because we
also have to get closed captioning, we also have legal
obligations under the ADA.
So it's actually, I think, currently cheaper for us. So why would we want to do that? We don't want to, but there is a gap, and we are trying to maintain our educational experiences for our students. And so, therefore, I do think what Rina was pointing out, what Professor Pantalony was pointing out is that we're trying to increase the market by almost saying, hey, let's make these films available. And they may never be available because there may be some obscure films that someone in, you know -- I don't want to name names because who knows what department they're in, right, wants to show their students, and we have a DVD copy and it's just not widely accessible and no one else wants to show it. But that shouldn't preclude those students from getting that educational opportunity.

The other thing I would like to point out is I do think learning is transformative. In fact, often, when I show a film in class or online, I stop the film, talk about what just happened, have a discussion, and then go back to the film. And so we're not just streaming entire films all the way through. And often, I think Swank would agree, their service allows us to do that, and we do that often as teachers and educators. So we don't want our students
to go to Netflix on Sunday night and watch a film. That's not actually the educational experience we're trying to provide. Thanks.

MS. CHAUVET: Thank you, Professor Benson.

I believe my colleague, Mr. Welkowitz, has a question for BYU about the expansion to employees.

MR. WELKOWITZ: Thank you, Ms. Chauvet.

For BYU, you suggest expanding the existing exemption to cover college and university employees, not just college and university faculty. Could you explain why that is necessary? And could you address whether there would be adverse effects on non-infringing uses if the change were not incorporated?

MS. CHAUVET: Mr. Midgley?

MR. MIDGLEY: Yeah, thank you. Yeah, sure. So I would just note I didn't sense -- I mean, we've reviewed the opponents' comments pretty carefully and we didn't sense any direct opposition to that proposal, so maybe they can clarify if they are opposed to that proposal, but the primary purpose there was just to clarify. I mean, as a practical matter, what happens frequently is faculty will direct other staff members, maybe librarians, other people to do the actual circumvention work, and, right now, it may be somewhat ambiguous whether that work that's
being done on behalf of a faculty member is covered by
the exemption.

So, at a minimum, we would appreciate some
clarification of a potential ambiguity. If the intent
was to cover work that was being carried out on behalf
of faculty members, we think the exemption should be
clear on that point or if, for whatever reason, it
meant to exclude that kind of work, then we would
appreciate understanding that, because I can just tell
you faculty members -- how do I say this politically
to my university colleagues? Faculty members are not
necessarily the most technologically sophisticated
users. And, anyway, we would appreciate a rule that
made it possible for other support staff to carry out
the circumventing activity.

MS. CHAUVET: Thank you, Mr. Midgley. We
didn't ask the question because there seemed to be
opposition but more for clarification about your
position and for purposes of the record.

Mr. Taylor, I see you have your hand raised.

MR. TAYLOR: Yeah. I think it's long been
our position that members of the community and be they
staff or faculty could engage in acts of
circumvention, and there was never an expectation that
the professors themselves had to do it.
MS. CHAUVET: Thank you, Mr. Taylor.

Mr. Stanley?

MR. STANLEY: Hi. Thank you for having me.

And, Mr. Taylor, thank you for that comment. I just off of Peter Midgley's comment wanted to say that I am a filmmaker, but I also spend a lot of time educating, guest speaking, and working with the universities, and I wanted to just support the position that BYU took there in saying that a lot of times when we come in, we're not technically an employee of a university, but we need the access to these films to be able to share, educate, and inspire, you know, the next generation of filmmakers. So I wanted to just offer some support to Mr. Midgley on that. Thank you.

MS. CHAUVET: Thank you.

Another question we had for BYU is that the proposed regulatory language from your comments eliminates the comment and criticism limitation. Why is that necessary? And is there any adverse effects on non-infringing use to retain that limitation?

Mr. Midgley?

MR. MIDGLEY: Yeah, thank you. Again, the comment and criticism limitation, which is currently in the exemption, we feel places an additional hurdle for educational users to potentially have to overcome.
and it's unnecessary, especially given the express preference and priority that should be afforded to educational uses in 1201 and really throughout the copyright statute altogether. In the 2018 recommendation, the Register or the Acting Register made it clear that there were educational uses which were not necessarily comment and criticism that should be included in the exemption. And we just want that to be reflected in the language of the exemption itself rather than being limited to the language of the recommendation.

MS. CHAUVET: Thank you. I've got a follow-up question because you also proposed eliminating the teaching or scholarship limitation, which obviously is broader and is not limited to just comment and criticism and it was added because of the educational purposes that were included in the record in 2018, so why is it necessary to eliminate teaching and scholarship from the existing exemption? Mr. Midgley?

MR. MIDGLEY: I don't know that it's -- again, it seems like we're -- if there is an issue with a particular language that's being proposed, we're certainly open to drafting recommendations or proposals where we could clarify the intent. So the overall goal was just to incorporate by reference the
statutory definitions and leave it up to those statutory definitions to clarify what is and is not permitted under the exemption, without trying to add extraneous or additional limitations in the language of the exemption itself.

MS. CHAUVET: And do you have any specific examples where people have been confused by the limitation for teaching and scholarship, which is taken from the statute? Mr. Midgley?

MR. MIDGLEY: Yeah. Well, I mean, again, I would just point to the public statement that I referenced earlier where there is, I would say, just general confusion. I think the very fact that in this hearing, we heard a clarification, and I appreciate the fact that it was clarified in this hearing who were the intended beneficiaries of the exemption from our friends on the other side, but, you know, many, many people who rely on the exemption are not present here today and don't have the advantage of hearing our colleagues make that acknowledgment. So our goal really is to just put as much -- to remove as much possibility for ambiguity from the language of the exemption and just rely on the statutory definitions.

MS. CHAUVET: Okay. Well, the statute does include the phrase "teaching or scholarship," so how
is that ambiguous to include in the exemption?

MR. MIDGLEY: Well, again, what we're saying is that the -- we have no objection. If the Office is inclined to include "teaching and scholarship," I think that's certainly a -- you know, if that would resolve any kind of concerns, I don't think, in principle, at least I for one, have any objection to that. But what I would encourage the Office to consider is whether or not inserting that additional language helps or adds another possibility for confusion and ambiguity.

MS. CHAUVET: Thank you.

Another question for BYU. Your proposed exemption language eliminates the short portions requirement. During the 2010 rulemaking cycle, BYU submitted a comment arguing in favor of an educational exemption, including the short portion limitation. So what has changed now such that BYU seeks to eliminate that limitation? Mr. Midgley?

MR. MIDGLEY: Yeah. That just gets back to what we were talking about previously. To the extent we believe that the gaps in current licensing markets have been able to be filled in under the classroom exemption, the face-to-face classroom exemption under 110(1), the pandemic has almost eliminated that as a
possibility at many universities, including ours. And so we think that the exemption should no longer be limited by short portions to make it clear that there are uses of more than short portions which are certainly non-infringing. I don't think the Office has ever made an express finding that only use of short portions are non-infringing.

And we have pointed in the record to several examples where the Office, in its digital distance education report, for example, issued about 20 years ago, made it clear that there are, for example, fair uses under 107 which are more than short portions, more than reasonable limited portions, which could be covered and non-infringing, and so it's those kinds of uses that are not clearly unambiguously covered by the current exemption that we think should be included.

MS. CHAUVET: Thank you, Mr. Midgley.

We now have some questions that are specific to the joint educators' proposal. So, Professor Decherney, I'd just like to confirm a few things first, actually, about your proposed exemption. So the proposed language includes the phrase "to allow educators and preparers of online learning materials to use short portions of motion pictures." What do you mean by "educators"? Like, what does that term
mean in this context? Because, if it's K through 12 or college, doesn't the existing exemption already extend to those beneficiaries?

MR. DECHERNEY: So it could be K through 12 or higher education educators or sometimes working professionals who are teaching on online learning platforms that exist outside of the current exemption, so for-profit or non-accredited organizations.

MS. CHAUVET: So then just to clarify, when you say "educator," you're talking about educators at for-profit or unaccredited academic institutions? Is that what I'm understanding?

MR. DECHERNEY: Just to go back to one of the examples, so Osmosis, one of the members of the coalition, has a medical education platform. Some of the educators on it are universities and medical schools. Others are professional healthcare providers who work directly with Osmosis. They create videos which can be used by accredited organizations, but, also, they're mostly used by medical students and healthcare professionals.

MS. CHAUVET: So the proposed exemption language also includes the phrase "in offerings for registered learners of online learning platforms." So what does "online learning platform" mean and how is
that different from a MOOC?

MR. DECHERNEY: So the MOOCs are being offered by universities or other accredited and nonprofit institutions. So a museum could offer a MOOC if it had been accredited as an educational organization and it was nonprofit. But there are many other platforms out there that are for-profit or unaccredited, something like Khan Academy or LinkedIn Learning, which we mentioned.

MS. CHAUVET: So where's the line then between an online learning platform and an arguably instructional video that anyone puts up on YouTube? Like, where are the boundaries on this definition?

MR. DECHERNEY: So these are created by educators. They're on registered platforms. They would be for educational purposes. And then they would have all of the various limitations, again, of 110(2), so, you know, registration, copyright policies and education, and limitations on redistribution.

MS. CHAUVET: Ms. Smith, did you have any questions?

MS. SMITH: Yeah. I just wanted to follow up, the same question as you, Ms. Chauvet. I mean, Mr. Decherney, if we concluded that we were still a little nervous about this is educational, it is
teaching me how to play Minecraft, mommy, not that, you know, any of us have experienced that, is there anything else you can, you know, kind of help us think through how we might craft the exemption that brings in some of the organizations you're talking about that also draws a bit of a line?

MR. DECHERNEY: Yeah. So, I mean, I think that all that -- if you wanted to look at YouTube, it doesn't have any of these kinds of protections and limitations that, you know, are already in there. It's truly an educational purpose. It's an educator and preparers of educational material, again, being used for educational purposes, short portions, comment and criticism, and then all of the various limitations that 110(2) already puts on other kinds of organizations. The only difference is that, you know, it's going to extend beyond the already granted exemption for accredited and nonprofits.

MS. CHAUVET: Thank you, Professor Decherney. Mr. Taylor, did you want to respond to that?

MR. TAYLOR: Yes, very quickly. I'm not sure what they provided to us is non-infringing in all the circumstances. But even if they are non-infringing, there is screen capture. We've
already heard from other people who have vehemently
over the years objected to screen capturing recognize
that, yes, screen capturing does work. And so I think
the Office can take some comfort in the fact that if
it's not a clear-cut -- any use that they want to make
could still be made with screen capture.

    MS. CHAUVET: Thank you.

    MR. DECHERNEY: May I respond to that?

    MS. CHAUVET: Yes. Yes, Professor Decherney, go ahead.

    MR. DECHERNEY: So, actually, we can't find
any example that we've heard in which screen capture
would be effective. Screen capture creates an
imperfect copy, as we've already heard. It can
distort the lesson being taught. It has dropped
frames. Audio and video could be out of sync. DRM
can block it. Really, there's an equity argument. It
doesn't even work -- it works even worse if you're an
under-resourced institution with a bad computer.

    So examples like "The King's Speech" where
it could be used by educators to talk about someone
with a speech defect, if the audio and video are out
of sync, you wouldn't know if it was a technical issue
or if it was part of the medical condition. You know,
we looked at the example of dwarfism being used in
"Game of Thrones." You know, if the audio and video are out of sync, it could actually become comical and completely change kind of the lesson being taught.

So none of the examples that we've shown do we think screen capture would actually teach the same thing that a perfect copy would teach.

MS. CHAUVET: Thank you. Just a couple other clarifications. When you say "preparers of online learning materials," what does "preparers" mean? Are they staff of the online learning platform? Like, how do you define who's preparing these materials?

MR. DECHERNEY: So, yeah, this is exactly -- if we think along the lines of language that's been included before -- in fact, we think this entire exemption is very similar to other kinds of exemptions that have been proposed, the scope is very similar to 1A and then the limitations are similar to 1B. As Mr. Taylor was saying earlier, there hasn't been opposition to having assistants helping the educators make the clip, so IT staff or assist TAs or assistants. So that's the same kind of distinction we were trying to make exactly, kind of part of the class that's been filed in the past.

MS. CHAUVET: Sure, though, in the past, in
2018, the Office rejected the proposed exemption. So I think we're just trying to get some clarification.

MR. DECHERNEY: Yes. So, if you --

MS. CHAUVET: Hold on. Hold on. Because you also used the phrase "online learning materials," so, like, what does that mean?

MR. DECHERNEY: So I believe the class was rejected in 2018 mostly because of standing rather than a specific critique of the language of the exemption. And so we really made an effort this time to bring in many more online learning platforms and educators into the coalition but also have spoken to a much broader range. Sorry, what was the question about the language?

MS. CHAUVET: Well, what does "online learning materials" mean? Like, that's a very broad phrase.

MR. DECHERNEY: So we're thinking of video material that includes short portions for comment and criticism that's being used by educators, prepared by educators and support staff. Again, very similar to the kind of exemption that's been around for 15 years.

MS. CHAUVET: So can I ask -- so are MOOCs offered by for-profit or unaccredited academic institutions? And I ask because the proposed language
is very different than the existing exemption, so is
what you're really seeking just an extension of the
existing exemption in its current form but applying it
to for-profit institutions and for unaccredited
institutions offering MOOCs?

MR. DECHERNEY: So that could be one use,
and it could be a corporate -- a business, a
for-profit business that creates MOOCs, and those
exist on the same platform that offer MOOCs by
accredited nonprofits. But it could also be shorter
-- something shorter than a course. So going back to
Osmosis, they have these videos -- they have videos
that might be on a specific disease or surgical
technique, and those are often used by medical
students and by healthcare professionals and by
patients. Actually, a very common use is patients
trying to learn about their own conditions as
subscribers of Osmosis. But those wouldn't be full
courses, and a MOOC is -- the C is course.

MS. CHAUVET: Right. So I guess my other
questions because you talk about businesses preparing
online materials, so would it be reasonable to limit
an exemption to any academic institution? I mean,
you're first talking about, you know, the education
and academic institutions and then, on the other hand,
you're also talking about businesses, so I'm trying to understand the scope of your proposed exemption. Is it really academic institutions that we should be focusing on, or are we also focusing on any business that wants to offer an online educational course, arguably educational course?

MR. DECHERNEY: Yeah, I mean, I wish there was a strong line that we could draw between the two, but it can be blurry. Many, many universities -- many businesses, rather, have internal educational platforms and operations which sometimes are for educating their own employees, and that could be really important, but, you know, they also sometimes will make their education more broad.

So, you know, Google teaches MOOCs, actually, on Coursera, a platform that we use as well. Our courses would be exempt; theirs wouldn't. You know, our courses sometimes teach similar things. We have a degree, actually, on Coursera to train people to be programmers, coders. Google actually offers something similar, but it's at a much lower price and a much smaller byte size and helps many, many people enter the workforce as coders. Our courses would be exempt; theirs would not.

MS. CHAUVET: Thank you. So the proposed
exemption also includes the phrase "for purpose of criticism, comment, illustration and explanation."
What does "illustration and explanation" mean and how is that different than criticism and comment?

MR. DECHERNEY: So especially in a teaching context, we think this is something that's a kind of core fair use and that's done all the time in class, which is to include something as an example of an argument that's being made and also something to start discussion, for example.

MS. CHAUVET: So would it be fair to say that you're talking about teaching and scholarship? Is that a reasonable interpretation of what you mean?

MR. DECHERNEY: Yeah. No, I think teaching and scholarship would cover the examples used in an educational context.

MS. CHAUVET: Okay. Because teaching and scholarship is part of the existing exemption for the K through 12 and university, so I'm just trying to understand why that exemption does not cover what you want to do.

MR. DECHERNEY: Yeah. I mean, I think the idea is the general category and we're trying to give examples within it.

MS. CHAUVET: Okay. Thank you for your
patience, Professor Decherney. I just have a few other clarifications to make, please. So your proposed exemption includes the phrase "when use of the film and media excerpts will continue" — sorry, "will contribute significantly to learning." What does "contribute significantly to learning" mean and how is this not a subjective measurement?

MR. DECHERNEY: I mean, again, if it's teaching and scholarship, it's likely to also be something that contributes to learning, but it's trying to show the whole — I guess the whole process, right? When we're talking about teaching and criticism and comment, scholarship, this is, you know, the reception of it.

MS. CHAUVET: Thank you.

Mr. Welkowitz, we're definitely running low on time, but did you want to ask a few questions about "The King's Speech" and "Hidden Figures" examples?

MR. WELKOWITZ: Okay. Thank you, Ms. Chauvet.

Your written comments relating to the motion picture, "King's Speech," says that it shows students who struggle with stammers — it shows them demonstrations and techniques displayed in the film that can be used to overcome their own stammers and
other public speaking difficulties. Are you suggesting that showing clips of "The King's Speech" for such purposes constitutes fair use?

MR. DECHERNEY: Yes, if I can have both the "Hidden Figures" example and the "King's Speech" example, they are actually showing someone trying to overcome a disability in one case and the importance of African-American scientists in the other. And what might happen in a classroom is to take them out of this kind of character development narrative and then put them in a larger context of disabilities, right, to give that kind of context or talk about race in American society or gender in the workplace, and by adding this kind of additional context, then, all of a sudden, we can look at the examples very differently.

They're no longer part of a narrative, developing character in kind of the emotional way of teaching something about similar issues, but can show you the kind of systemic social, cultural impact that it might have.

MR. WELKOWITZ: And you do think it is fair use? I'm just making sure. I just want to clarify for the record. So your position is that using those clips is a fair use if I understand you correctly?

MR. DECHERNEY: No, sir, that's not -- I
don't believe that's how fair use would work, that
every time you use those clips it would be fair use,
but using them in this kind of context that would
also, you know, be a broader lesson, then it could be
fair use.

MR. WELKOWITZ: Okay. Do any of the
opponents, oppositions want to respond to that? No.

MS. CHAUVET: And, Professor Decherney,
could you also please explain why circumvention would
be necessary to show the clips of "The King's Speech"
and the "Hidden Figures"?

MR. DECHERNEY: Yeah. So I actually already
used the "King's Speech" example talking about screen
capture that because it's showing someone's disability
and it's really about the way that image and sound
work together and if the image and sound did not or,
you know, were not synchronized in the way they are in
the film, obviously, it would give a very different
kind of lesson. It wouldn't work.

MS. CHAUVET: All right. Thank you.

Mr. Taylor?

MR. TAYLOR: Yeah, I just wanted to respond
to the earlier question. I think what Mr. Decherney
just described is closer to fair use, but what was in
the initial comments where they suggested that "Hidden
Figures" would be inspirational to African-American young girls, that in itself, that inspiration isn't enough to constitute fair use.

MS. CHAUVET: Thank you, Mr. Taylor.

We're a little bit low on time, but we do have some specific questions for the OTW proposal. So, for OTW proponents, your comments state that the proposed exemption is based on the 2010 recommendation. Because there have been multiple changes since 2010, I just have a few clarifications, please. So the proposed exemption language removes the reference to the specific medium on which the motion pictures would be affixed. Namely, it removes the phrase "on a DVD protected by the Content Scramble System, on a Blu-ray disc protected by the Advanced Access Content System, or via a digital transmission protected by a technical measure." Why should that limitation be removed? Why is that necessary?

MS. ROSENBLATT: Well, it's based on --

MS. CHAUVET: Hold on. I'm sorry. Let me just call on you for purposes of the court reporter. Professor Rosenblatt, please go ahead.

MS. ROSENBLATT: Thank you, yes. It's based on that 2010 language which had that limitation. Following 2010, in 2015, those limitations were
removed, which is why we sort of updated the 2010
limitation to conform or updated the 2010 language to
conform to what the Register found in later
proceedings to be an appropriate scope. And that --

MS. CHAUVET: Can I ask about that? Because
2010, it specifically covered DVDs, and then, over the
years, other things were added, like the Blu-ray and
then the digital, so why should we remove any
reference to the medium on which these motion pictures
are affixed? Why is that necessary now?

MS. ROSENBLATT: So I think that we're not
wedded to removing any reference to medium. Our
concern is we want to make sure that DVD, Blu-ray, and
streams are included. We also know that as technology
changes, we want to make sure that the range of
materials that vidders use is available to them.

One of the things we're seeing now is that,
for example, there's a decrease in the availability of
things to own and an increase in the availability of
things to borrow. And so we want to make sure, for
example, that this exemption applies to lawfully
obtained materials, not necessarily lawfully owned
materials for that reason. And so I think that's the
sort of concern that we're expressing there.

Essentially, our goal is to make this as
comprehensible as possible for people whose intuitions are they want to do the moral thing, whatever the moral thing is. This is our sort of overarching thing that we're hearing from I think most of the proponents today, is that people want to do the moral thing. They want to pay. What they want to do then is not get caught out in something that's hypertechnical after they've paid.

MS. CHAUVET: Okay. Thank you. Then that actually leads to my next question because your proposed language excludes the limitation of lawfully made and acquired. That limitation was in 2010, 2012, and the 2015 and '18 exemptions. So why is it necessary to remove that limitation now?

MS. ROSENBLATT: Here, too, lawfully made, we know that there's a lot of debate over lawfully made in the Kirtsaeng context, right? We think that that might be an overcomplication. Lawfully acquired is, again, a reasonable limitation as long as it encompasses all different sorts of acquisition, including borrowing and ownership.

MS. CHAUVET: Mr. Ayers, did you want to respond to that and then Mr. Taylor?

MR. AYERS: Yes, thank you. Actually, specifically on that point, I think we'd be concerned
about the expansion of the concept of "legally acquired" to include what could essentially enable a rent, rip, and return scenario, where content is borrowed or rented, is then copied, the copy is retained, the borrowed or rented copy is returned or no longer accessible, and now there are two copies when only one was paid for.

So we just want to make sure that we're not enabling through this process a rent, rip, and return model. And also noting that this entire process is about trying to create rules. And, certainly, we all want to do the moral thing, we all want to do the thing that is helpful for educational purposes, but we also want to make sure that the rules are clear so that those who are engaging in these activities, including noncommercial videos, have some guidelines to follow that are clear, and regardless of whether they prefer to not be aware of the law or find the law inconvenient or distasteful or unpleasant, it's still appropriate to have these rules to make sure everybody has a clear understanding of what's expected.

MS. CHAUVET: Thank you. Mr. Taylor and then I see Mr. Cheney, or at least you had your hand raised before. So Mr. Taylor?

MR. TAYLOR: Yes. I agree with Mr. Ayers on
much of what he said. I think the biggest problem is
that this is a rulemaking where the proponents have to
provide evidence. And leaving it so wide open, you
really are abandoning the requirement that proponents
come forward with evidence of harm for their
particular use. And, most specifically, I think, you
know, the way they have phrased it, you could easily
just as well include UHD Blu-ray, which they have not
provided the evidence for.

MS. CHAUVE: Thank you.

Mr. Cheney, did you want to go ahead and ask
your question?

MS. ROSENBLATT: I also have a response.

MS. CHAUVE: I'm sorry. Mr. Cheney was
going to ask a question very quickly, Professor
Rosenblatt. We'll get to you.

MR. CHENEY: Yeah. No, thank you. And I
was going to turn back to something that we had talked
to a few minutes ago if that's okay, and we had talked
about it earlier as well in some of this context and
that's back on this screen capture idea, I wanted to
go back and ask more questions about something that
was talked about here and really highlight something.

There was two things talked about that
indicated that some devices or other things block
certain screen capture technology, and I want to get
more on the record on that. The other thing that was
interesting to me that was talked about is in several
of these contexts but especially in what we're talking
about right now, screen capture didn't allow and when
you pulled that screen capture, it didn't allow you to
separate the audio track from the others when you're
making some of these vids, right?

So I want to get more information on that
concept and idea because I don't think we've talked
about that near enough and put enough on the record
here on that idea. Thank you.

MS. CHAUVET: Professor Rosenblatt, would
you like to respond to that?

MS. ROSENBLATT: Yes, and I will also --
I'll also point to my colleagues, but, first, in
response to the points made about -- in response to
the prior question, there's two points here or three
points.

One is that we should emphasize that in this
proceeding and in previous proceedings, opponents to
these exemptions have never identified and have, in
fact, acknowledged that there is no known connection
between the sort of ripping and the events of ripping
that vidders, noncommercial remix makers use, no
connection at all between that and piracy or leaking.
So the idea that this is creating copies that are
floating out there in the sort of rip-and-return
context is just an illusory concern.

We should also point out that when vidders
and noncommercial remix makers rip things, they
typically rip chapters, not entire films, and so
that's again quite distinct from the rip-and-return
model.

And, finally, I would point out that a great
many sources that vidders and other noncommercial
remix makers use simply aren't available to own
anymore. They're available on streaming services.
And you just can't buy them. You can't own them
because of cases like Autodesk that have encouraged
copyright owners to make things available on a license
basis rather than an ownership basis.

So, given that shift, that's something that
as technology shifts, we would want this exemption to
shift along with it to the extent that any shift is
necessary. The current language speaks about lawfully
obtained and makes no reference to ownership, so we
actually don't think that any change is necessary
there.

To respond to Mr. Cheney's question, thank
you very much. In our submission here, we have a footnote, Footnote 5, that talks about the way screenshots are blocked on Android and iOS when DRM-protected video is playing, Netflix being the best example. There's just a big block on screenshots. So there are a number of examples there in our submission that we would point you to of that, and we're happy to generate more if that would be helpful.

For your last question, if you could repeat it, I think it's probably best answered by my colleague, Dr. Turk, but I want to make sure that we remember it.

MR. CHENEY: Sure. Just a reminder if that's okay. The reminder is that it was mentioned earlier that when you screen capture something, it doesn't allow you to separate the audio and the video portions of the video, where ripping the chapters, as you mentioned, gives you that option to separate the tracks. This screen capture does not. So I want to get more information on how that works.

MS. ROSENBLATT: Yeah. Actually, both Dr. Turk and Dr. Coppa can respond to that, I think, probably helpfully. And I will mute myself.

MS. CHAUVET: Okay. Professor Turk, would you like to respond first and then Dr. Coppa?
DR. TURK: Sure. So I admit that I don't use screen capture very much, and so I can't speak to whether there are particular difficulties separating the audio and the video when getting a copy via screen capture. Typically, when ripping, it is possible to rip without the audio, which makes the entire process both simpler for the person who's doing the copy in order to, you know, create something that's a fair use of the copied content but also means that the copy is not, in fact, a perfect copy, right? I mean, nobody is going to watch "Lovecraft Country" or "The Good Place" or whatever without the dialogue and the soundtrack. So that's a way in which ripping both produces a better visual and also a less complete copy in terms of, you know, piratable copy.

Professor Coppa may be able to speak more to the screen capture audio issue.

MS. CHAUVET: Dr. Coppa?

DR. COPPA: Yeah. I just wanted to add that, in fact, vidders watch all the time without the audio. And this idea -- there is no -- it's a non-case that a vidder would rent a thing once and copy it and return it because the level of obsessive rewatching and, in fact, often without sound that you need to do to actually make a vid, you're looking for
kind of visual patterns and footage that normal people wouldn't do. So, in fact, what you want is a very, very, high-quality visual file. And, in fact, you also want to get rid of the audio because you don't want to use that space on audio, and, in fact, what you want is the visuals to be very, very big because you're going to start, you know, looking for shapes in them. And you want to get rid of that extra ballast of the audio as quickly as possible. And all of that is sort of -- it's just a practice that is very, very different from piracy and, in fact, results in footage that is not really watchable in the way that normal people watch TV or movies.

MS. CHAUVET: Thank you, Dr. Coppa. I'm going to call on a few people, but I first wanted to note that the existing temporary exemption permits, you know, circumvention for the creation of noncommercial videos. It was not meaningfully opposed. So I want to think about, you know, why the existing exemption is not fulfilling your needs as a vidder community, so that's something to think about. But, first, I'd like to call on Mr. Williams and then Mr. Miller, who might be raising his hand for Mr. Midgley. Mr. Williams?

MR. WILLIAMS: Thank you. Yeah, just very
briefly. The point about there being no evidence of piracy, it's just not possible for us to collect that kind of evidence. People wouldn't go online and say here's my name and I used this exemption and copied this and now I'm going to put it on a peer-to-peer network. So the idea that we could collect that kind of evidence in any meaningful way has always perplexed me. And I say this spiel every three years, but I'll say it again, that would be very hard for us to find that kind of evidence.

With respect to screen capture technology, and Mr. Taylor may be able to correct me if I'm wrong, but my understanding of how it works is it literally captures the input that you're viewing on your screen. So there's no reason that it would have to capture any audio to my understanding, so there wouldn't be a need to separate the audio from the video the way there would be with a ripped copy.

MS. CHAUVET: Thank you.

Mr. Midgley and then Mr. Taylor.

MR. MIDGLEY: Thank you. Yeah. With respect to Mr. Cheney's question about screen capture, we just wanted to clarify that the earlier conversation about screen capture -- the emphasis in the current exemption on the quality overlooks other
reasons why educational users in particular may want to use -- why screen capture is not an adequate alternative to circumvention. So three years ago, we provided, for example, the foreign language instruction example where it has less to do with the quality and much more to do with the fact that with circumvention an educational user can capture multiple languages simultaneously and accessibility information and a lot of other information which is on a DVD or Blu-ray disc which, because of what Mr. Williams was just describing, when all you're doing is recording what's happening on the screen, if you want to capture a movie in both French and English, let's say you have to watch it twice, record it twice, and, of course, the quality is much lower. If you're going to be making use of more than short portions, which is what we've been advocating in the educational context, screen capture is just not a viable alternative to circumvention, and it doesn't necessarily -- the focus on quality is not helpful to understanding why it may or may not be sufficient.

MS. CHAUVET: Thank you. Mr. Taylor?

MR. TAYLOR: Yeah, I just want to follow up with that, is that I don't think we are here talking about whether or not most of these groups can make use
of Blu-ray disc or DVD disc or high-definition streams. I think we've already resolved that issue and they are able to do that. I think the only group where this is an issue for is with the joint educators online learning platform.

But putting that aside, to answer Mr. Cheney's question, we've dealt with this issue. In 2015, we dealt extensively with whether or not vidders could make use of screen capture on the Mac Apple system because of the square or gray square. In 2018, when we came back to this issue, Mac and Apple did not have those things, so we didn't really address it extensively.

But, if you go back to it today, you will see, in fact, there are measures put in place, and Google has just recently announced some measures to block screen capturing. That doesn't mean that you can't do it. The circumvention that's required that Ms. Rosenblatt had suggested earlier isn't the circumvention of the Blu-ray disc or DVD. What I think she was referring to, that kind of circumvention is the workaround that you have to do to get around the Apple box. And as we established in 2015, if you wanted parallels and used a PC system or if you used Boot Camp, you could get around the temporary block.
Netflix, I just tried it in October to
record DVDs -- to record Netflix with a player, and it
recorded perfectly for me, so I don't --

MS. CHAUVET: Thank you, Mr. Taylor. Sorry,
we're already over time and I feel like we've talked a
lot about screen capture, so I just want to move on to
some more OTW-specific questions. So I just want to
reiterate that the existing temporary exemption
permits circumvention for the creation of
non-commercial videos. So my question is, are there
examples where vidders who want to circumvent for
purposes of comment and criticism for use in
noncommercial videos but are not able to do so because
of the existing exemption? Like, why does the
existing exemption -- why is it not enough and why
does it need to change?

Proponents? Professor Rosenblatt?

MS. ROSENBLATT: So the existing exemption
is enough in the sense that it provides an exemption
for what vidders do. The way it's not enough is that
it requires vidders to make an evaluation of the
fitness of one potential circumvention technique
before engaging in the circumvention technique that
makes more sense.

MS. CHAUVET: So may I please ask a follow-
up about that specifically then, please, Professor Rosenblatt? Because we talked a little bit about this before because your proposed language also includes an evaluation where the person engaging in circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use. So, again, why is that evaluation that you proposed reasonable, but the evaluation that's in the existing exemption, why is that unreasonable?

MS. ROSENBLATT: So the evaluation that they're doing for the one that we've proposed is an evaluation based principally on quality and availability, which is relatively easily done and is intuitively done by vidders.

MS. CHAUVET: But isn't the existing exemption asking for the same type of evaluation, whether or not the high-quality content is necessary, and if it is, then they can circumvent? Like, it's the same evaluation, so I'm trying to understand why the change is necessary.

MS. ROSENBLATT: This is something that my colleagues actually may be able to speak even more about, but it is, as we see it, a different evaluation because it's an evaluation that requires using different technologies, and that's an extra step that
stands in the way of making an expression, rather than an evaluation that simply requires knowing how high quality you need. But I would turn it to my colleagues because I think they can probably speak to this better than I can.

MS. CHAUVET: Okay. I'll call on Dr. Coppa in a minute, but you testified before that when you say something is necessary to fulfill the purpose of the use, you are talking about the necessary is the high-quality content. So, to me, the evaluations appear to be the same. Professor -- or, sorry, Dr. Coppa, if you could please speak to that.

DR. COPPA: Right. Just the necessary -- so, for me, again, not as a lawyer, it seems the fair use piece of it, I mean, people sort of understanding that they're making a noncommercial thing for comment, people understand that. And the evaluation in terms of how high a quality you need really has to do with your own artistic plans for what transformations you're going to make, which is the kind of thing that Dr. Turk could speak to.

If you know that you're actually going to be focusing on a character who only takes up a portion of the frame and then, consequently, you're going to need to crop the whole thing, you're already evaluating
that you need very high-quality footage and you're thinking about what you need to do to make the thing you want to make to focus on the thing you want to focus on, which is a kind of artistic choice.

You probably -- the question of how you're circumventing when vidders know they need to get source, they, you know -- and just to say, vidders are mostly, you know, pink-collar workers. They're working on home equipment. They're not working on, you know, stations at school. Many of them are teenagers. So, in fact, you know, they probably have a process and they're trying to say a thing.

And so the evaluation they're making, the closer it is to fair use and the closer it is for people to be able to make a kind of moral choice of, like, I paid my subscription and it really is going to be for the year, I mean, nobody's going to work on a $2.99 overnight because you have to watch it 10,000 times, but, you know, I bought Netflix or I bought my DVDs and now I need to figure out how to make this footage big enough that I can stick it into my editing software. And that's where I would defer to Dr. Turk.

MS. CHAUVET: Very quickly, though, but a follow-up is because the existing exemption states that the person can circumvent if he or she believes
that non-circumventing alternatives are unable to produce the required level of high-quality content, so that seems to be the exact same thing that you're asking for, so why is it necessary to change the existing language?

Professor Turk, did you want to respond to that, or Dr. Coppa or Professor Rosenblatt?

DR. TURK: I can.

MS. CHAUVET: Thank you, Dr. Turk, go ahead.

DR. TURK: The existing language can be read to suggest that people have to screen capture before they can rip, and that seems silly and unnecessarily ambiguous. I'll stop there, and I can say more if you want me to.

MS. CHAUVET: Thank you.

Dr. Coppa or Professor Rosenblatt, would you like to add to that?

DR. COPPA: I mean, you know, again, vidders have a practice and they're going to get source in the way, A, that's available. In some cases, there may not be choice. You know, if there is an opportunity to buy DVDs, people will normally take that. But to actually suggest that we tell everyone to get screen capture software, which they may not have already installed, and that they learn how to use that and
that they need to try that before they follow what has been, you know, at least since 2005, a pretty standard practice of, you know, buying DVDs and working with digital files, educationally, as somebody who's been involved in trying to kind of disseminate ideas through the OTW about best practices, that seems kind of counterintuitive, especially that, you know, certainly would -- and, again, screen capture may be, in fact, the best thing for something that doesn't exist in a fixed form in a DVD or Blu-ray.

But, if it does, the idea that we would tell them to use screen capture first is very counterintuitive and isn't the same sort of fair use argument as, you know, it should be noncommercial, you should have bought your footage, like sort of the kind of norms that really normal people and normal people I should just say worldwide. I mean, vidding is continuing to go, is international, and it is well past the place where, you know, you can get any kind of coherent message out to people who do this all around the world. So the closer it tracks to fair use, the better.

MS. CHAUVET: Okay. Because the Office has, in the past, Register recommendations stated that it is not necessary to attempt screen capture before
circumventing, so are you asking now for the Office
just to reiterate that so that when you're trying to
educate your members you have something newer to point
to? Again, like, I'm just trying to understand why
it's necessary to change the language if the Office
has already given you what it seems that you need and
what you want to do. Professor Turk -- yes, Professor
Rosenblatt, go ahead.

MS. ROSENBLATT: That is exactly the sort of
clarification that we're looking for. It would be
preferable for obvious reasons to have it in the
statute. Having it in associated recommendations
would be better than not having it in associated
recommendations.

I also want to just add to that that to the
extent we're thinking about what screen capture is
good for and what ripping is good for, one of the
great ironies of this is because of the high quality
that's typically needed, and we talk about this sort
of evaluation that people do for their art, right?
They know they're going to need a big file to make a
vid. One of the great ironies of this debate is
always that screen capture is probably sufficient for
the sorts of consumptive uses that piracy would
involve but not typically going to be sufficient for
the sorts of big file uses that non-commercial
remixers make. So that's something that I think we've
probably said before, but it's worth pointing out.

    MS. SMITH: Okay. Thank you, Professor
Rosenblatt. I think it's helpful to understand why
you're requesting this clarification because I think
we will look at -- it does seem like some of it may
already be permitted, and we'll try to make sure that
it is understood.

    We are certainly over time. Does anyone
have -- last call for anything else they would like to
contribute to the discussion. If you could just wave
virtually or in real life. Going once, going twice.

        (No response.)

    MS. SMITH: Okay. Well, thank you very
much. I think that concludes today's hearings. We
are going to convene again tomorrow at 10:30 Eastern,
which is going to be Class 16, Open Source Software
License Investigation. And, again, thank you for your
time, and we will be in touch if the Office seeks any
further information in connection with this proposed
exemption. Thank you.

        (Whereupon, at 1:00 p.m., the hearing in the
above-entitled matter adjourned, to reconvene at 10:30
a.m. the following day, Wednesday, April 7, 2021.)
REPORTER'S CERTIFICATE

CASE TITLE: Copyright Office Section 1201 Hearing
HEARING DATE: April 6, 2021
LOCATION: Washington, D.C.

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

Date: April 6, 2021

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