The parties met remotely, pursuant to notice, at 10:31 a.m.

PARTICIPANTS:

Government Representatives:

KEVIN AMER, U.S. Copyright Office
JOHN RILEY, U.S. Copyright Office
JORDANA RUBEL, U.S. Copyright Office
LUIS ZAMBRANO RAMOS, National Telecommunications and Information Administration

Panelists:

KENDRA ALBERT, Harvard Law School Cyberlaw Clinic
JONATHAN BAND, Library Copyright Alliance
STEVE ENGLUND, Jenner and Block, on behalf of the Entertainment Software Association
WILLIAM J. EVJEN, Swank Motion Pictures
HENRY LOWOOD, Stanford University
DEAN MARKS, AACS LA
SARAH McCLESKEY, Hofstra University, Resource and Collection Services in the University Library
Panelists: (Cont'd)

BARBARA NELSON, Swank Motion Pictures
BO RUBERG, University of California, Irvine
JAMES STEFFEN, Emory University
GISELE TANASSE, University of California, Berkeley
DAVID J. TAYLOR, DVD CCA
MAYZE TEITLER, Harvard Law School Cyberlaw Clinic
J. MATTHEW WILLIAMS, Joint Creators and Copyright Owners
MADELINE WOODALL, Harvard Law School Cyberlaw Clinic
MR. AMER: Good morning, everyone. My name's Kevin Amer. I'm the Deputy General Counsel at the Copyright Office, and we'd like to welcome you to the second week of hearings in the Section 1201 rulemaking.

Before we begin Class 5, I'd just like to go over a few logistical items. These should be familiar to many of you. So, those of us on the government side will pose questions, and we will call on participants to respond. We found it works pretty well for people to use the "raise hand" feature on Zoom to indicate that they'd like to speak, but if that's not working for you for whatever reason, feel free to just raise your hand, and we can call on you after that, as well.

We have a lot of topics to cover, as you may expect. So we would ask that you please try to focus your responses to the particular question asked, and we ask that you keep your comments relatively brief. We'll provide a sort of, short roadmap at the beginning of this session to just give you an idea of what topics we're planning to cover.

In addition, today's event is being
live-streamed, and it's being recorded and transcribed by a court reporter. The video and transcript will be posted on the Copyright Office website. And so, we would ask that everyone please try to speak clearly and to mute your audio when you're not speaking, to assist with the recording and the transcription.

Finally, on Wednesday afternoon, we're going to be holding an audience participation session. For those watching on the public link, you can sign-up to participate in Wednesday's session using the SurveyMonkey link we're going to provide in the chatbox. And then, on Wednesday afternoon, those who have signed up can join the audience participation session using the same link they would use to view the sessions for that day.

Okay. So, today's first hearing is on Class 5, preservation of audio-visual works. Before we begin, I would like to invite, first, my Copyright Office colleagues to introduce themselves. So, Ms. Rubel and Mr. Riley?

MS. RUBEL:  Good morning, everybody. Jordan Rubel, Assistant General Counsel.

MR. RILEY:  Good morning, everyone. John Riley, Assistant General Counsel.

MR. AMER:  And Mr. Zambrano Ramos?
MR. ZAMBRANO-RAMOS: Thank you, Mr. Amer.

Good morning, everyone. This is Luis Zambrano Ramos.

I'm a Policy Analyst at NTIA.

MR. AMER: And now I would like to invite

the participants to introduce themselves. Let's

please start with the proponents of the proposed

exemption. So, Mr. Band?

MR. BAND: Hi, I'm Jonathan Band. I

represent the Library Copyright Alliance.

MR. AMER: Ms. McCleskey?

MS. MCCLESKEY: Sarah McCleskey, Hofstra

University, Head of Resource and Collection Services

in the University Library.

MR. AMER: Dr. Steffen?

MR. STEFFEN: Yes, my name is James Steffen.

I'm from Emory University in Atlanta, and I am the

Film and Media Studies Librarian and the Head of the

Humanities Team.

MR. AMER: And Ms. Tanasse?

MS. TANASSE: I'm Gisele Tanasse. I'm the

Film and Media Services Librarian at the University of

California at Berkeley.

MR. AMER: And let's turn, please, to those

opposing the proposed exemption. So, we have Mr.

Evjen? I'm not sure if I'm saying that right. If
not, I apologize.

MR. EVJEN: Oh, perfectly.

MR. AMER: And Ms. Nelson from Swank.

MR. EVJEN: Bill Evjen, Vice President, CIO at Swank Motion Pictures, and Swank Motion Pictures represents the major studies -- 100 plus studios -- in the non-theatrical space, which libraries are part of.


MS. NELSON: There we go. Good morning. Barbara Nelson, Swank Motion Pictures. I am Senior Vice President overseeing the studio relations of the 100 studios and distributors that Mr. Evjen mentioned previously.

MR. AMER: And Mr. Marks and Mr. Taylor?

MR. MARKS: Morning. Dean Marks. I'm Outside Counsel to Advanced Access Content System, LLC -- AACS, LLC -- and the DVD Copy Control Association. Thanks.

MR. TAYLOR: Good morning. This is David Taylor. I'm Outside Counsel to DVD Copy Control Association and to the Advanced Access Content System Licensing Administrator.

MR. AMER: And Mr. Williams?

MR. WILLIAMS: Good morning. Matt Williams

Heritage Reporting Corporation (202) 628-4888
for Mitchell Silberberg & Knupp. I'm representing the Joint Creators and Copyright Owners.

MR. AMER: Great, thank you. And so, to start off with the questions for Class 5, I'd like to turn it over to my colleague, Jordana Rubel.

MS. RUBEL: Good morning again, everybody. I want to walk us quickly through a number of topics that we plan to cover this morning. I'm anticipating an interesting and lively discussion. So please do your parts to make it so. I'll give you a quick outline of the topics, so you know what to expect. And we'll ask you to please reserve your comments on a particular topic for the questions that specifically address that topic.

The first topic that we're going to discuss, we're going to talk about the problems librarians are seeing with damaged and deteriorating DVDs and Blu-Ray discs. We'll talk about when CSS is used on DVDs and whether it is really necessary to shift content that is currently stored on DVDs and Blu-ray discs to non-disc format, for the purpose of preservation.

Second, I want to talk about Section 108 and whether that is sufficient to address preservation concerns, and also, how the issue of what we've called "preemptive" preservation plays into that analysis.
Third, I want to talk about the market check requirement and whether motion pictures that are available through streaming services should be considered viable alternatives.

Fourth, I'd like to talk about the off-premises use and any other limitations on use. And finally, I want to discuss the licensing market for motion pictures and how the proposed exemption would affect that market.

And, in connection with that last topic I described, we have two short presentations that panelists are going to make. So, let's go ahead and get started.

Please rest assured that we have read and have carefully considered, and will continue to carefully consider, the written comments that were provided. But I do want to start off by giving the librarians who are panelists on this morning's call, a chance to describe, in their own words, what some of the issues they're seeing with deterioration and degradation of Blu-Ray discs or DVDs.

So, anyone who's interested in speaking to that point, go ahead and use your "raise hand" function, or you can even just raise your hand up, like that, so I'll know to call on you. Dr. Steffen,
you want to start us off?

MR. STEFFEN: Yes. Is it okay if I present some slides in addition to my verbal comments? If not, I can just speak.

MS. RUBEL: Yeah, it would be better if you just spoke. We asked for participants to submit things in advance, so we'd have a chance to take a look at them.

MR. STEFFEN: Okay.

MS. RUBEL: So, if you could just give us your oral comments, that would be great.

MR. STEFFEN: Yeah, that's fine. Okay. So, over the past few years, I've become aware of increasing problems with disc rot affecting a number of commercially-pressed DVDs. This includes from a wide range of producers such as the Criterion Collection, producers overseas.

One of the ones which I found the most discussion about was Warner DVDs produced between 2006 and 2009 at the Cinram plant in Pennsylvania, which included, like, BBC, some independent producers, and, of course, Warner Brothers. So, I started my own investigation of our collection, and we have, like, some 750 or so discs that were produced during this period.
I've started investigating them, and of those, about 198 were out-of-print. And in my inspection of those, about 50 percent of those -- 52, so far -- display signs of disc rot -- like discoloration. And of the ones that I physically inspected also, 14 were no longer playable.

And to give you one example, we have a DVD of Heartbreak House which is part of the Shaw collection that was released by the BBC, and that one is no longer playable, and there are no real viable replacement options. So, the disc is out of print.

There were never any subsequent pressings made. The title is also not available for streaming for academic purposes, but it's also not available for streaming for individual purposes. I think there's a high likelihood, because it was part of this bad pressing, that all or almost all of the copies available in libraries will be completely deteriorated in a matter of time.

And there may be no way, in the future, for the public to access and study this particular film. And it's also the only adaptation of this particular play, Heartbreak House by Shaw, that was commercially released on DVD. So, it really leaves people with no options for access and study.
MS. RUBEL: Ms. Tanasse?

MS. TANASSE: Thank you. I wanted to speak briefly to some of the deterioration that we see in our collection because of use. And our collection is used exclusively by our students and instructors -- so, UC Berkeley users, as well as some researchers who come to use content within our building.

We do not allow any researchers or authors to take content out of our space. We are very controlled with our physical lending. So, what we have typically seen over the past years is a wearing-away at the spindle of the core of the disc. The plastic will start to chip with normal wear-and-tear to the point where it can become -- you can try to sand a few times, but it does, eventually, become unplayable.

We also see separation of the polycarbonate protective layer from the data layer. This happens also with normal wear-and-tear, removing the disc from a case, for example. Or, if there is some kind of oxidation or moisture, whether that happened when the disc was being produced, or in our case, we had a devastating flood in 2018, and we are anticipating, you know -- this isn't something we've seen yet -- but there could be some separation that results from that.
So some of the degradation is both from the normal wear-and-tear on the disc but also what James spoke to very eloquently, earlier.

MS. RUBEL: And Ms. McCleskey?

MS. McCLESKEY: Good morning. I'd just like to speak briefly to the wear-and-tear issue in terms of players. So, our discs also only circulate to Hofstra faculty for use in the classroom, and students and outsiders can use them in the library only.

And we find that the discs, now that people are mainly playing them on an external DVD drive or on a laptop-type drive, is much more destructive -- much more likely to damage the discs, and when we had DVD players in all the classrooms with the specific tray for loading the disc to play.

Also, just the packaging that discs come in makes them prone to damage. I think we've probably all broken one just trying to get it out of the package -- the little pop-out. So, it's a fragile medium, and I think that's our, sort of, our main concern with that.

MS. RUBEL: Just sticking with the librarians for another minute, were any of these issues that cause degradation or damage surprising to you, or were those concerns that you might've had at
the time when you decided to purchase the content in
that format? Ms. Tanasse?

MS. TANASSE: I've been very surprised with
discs that have worked well for us in the past that we
have demonstrated circulated statistics on,
specifically with the separation of the polycarbonate
protective later from the data layer. So, that's not
something that seems to be associated with the
removal, necessarily. It's not like somebody tugged
it too hard but would seem to be something that
happened over time that I did not expect and did not
receive as part of my audio-visual training.

And I was not, kind of, forewarned that this
is something that we expect to see happen. I would
say that's also the case with some of the spindles.
Some are made better than others. And so, the center
core of the discs, some are -- I don't know, really,
the technical term because I was not trained on this.
It is a surprise.

Some have, like, a gap in the middle of the
clear plastic, and some are solid plastic through and
through. And what I have noticed, just, kind of, in
handling many, many discs -- we have a 25,000-disc
collection -- is that those that have, you know --
those that are hollow in the center are more prone to
this kind of cracking.

MS. RUBEL: Mr. Marks? I'm assuming you'd like to respond to a point that somebody's already made.

MR. MARKS: Thank you so much. It was just one point on the Warner Brothers disc rot. I think the primary problem from the problems with the manufacturing were with HD-DVDs, which was an initial format that was competitive with Blu-ray discs. I would say the format may even be considered obsolete today, just like Beta versus VHS.

That was and looking in the Wikipedia -- an entry -- and checking with some Warner Brothers DVD entry, libraries (Technical Interference) a problem (Technical Interference) DVDs (Technical Interference) format. I'm not saying that there's never been any problems with individual DVDs, but I just wanted to make that (Technical Interference) that that problem with lots of titles seem to have been more on the (Technical Interference) DVD format in 2006 and eight, so.

MS. RUBEL: Mr. Marks, I was able to understand most of what you said, but your audio is coming in just a little bit choppy. It might --

MR. MARKS: Oh, I'm so sorry. Is this any
better?

    MS. RUBEL: I think so, actually. But I do believe the Court Reporter was able to pick up what you said. But for future comments, that sounds much better.

    MR. MARKS: Thank you so much. And I will just summarize one sentence that I think that primary problem from 2006 to 2008 of Warner Brother discs was the HD-DVD format. I'm not aware of any titles that were put out in the HD-DVD format that weren't also put out in the standard DVD format.

    MS. RUBEL: Dr. Steffen?

    MR. STEFFEN: Yes, thank you. I just wanted to clarify. I am talking about DVDs, which, of course, I physically inspected myself. The reason why I became aware of the issues is when I started researching the Criterion Collection Blu-rays which were suffering from bronzing.

    It was a limited number of titles. I came across comments in the home theatre forum -- it's a public fan forum, basically, where many people were reporting on this issue. They were inspecting their own collection. And so, these are DVDs in private collections, and my findings match what the private collectors are reporting, in terms of the high
percentage of discs failing.

But, I guess, the point I just wanted to emphasize is that it's not just the Warner Brothers. There's other discs that are suffering from accelerated disc rot. We don't know the full extent of it, which is what's concerning, I think.

MS. RUBEL: Mr. Taylor?

MR. TAYLOR: Yes, thank you. I did want to address the Criterion example. I mean, the Criterion Blu-ray did have a problem, and Criterion put in a replacement program for those titles that needed to be replaced back in 2014. So, I mean, the fact of the matter is is that disc rot can occur because of either manufacturing problems or storage problems.

And just like anything else that has a manufacturing problem, it will happen. So, I mean, it shouldn't be of surprise that things are sometimes imperfect, but they are, indeed, replaceable. And as far as Heartbreak Hotel, I think it's a far stretch to suggest that anything that's in digital format will be forever lost in this time and era that, if you look hard enough, you can find almost anything in the internet age.

So, I don't think that's quite exactly a statement. And as far as things going out of print,
things may go out of print, but they do, in fact, come back, whether it be an anniversary set, a new format -- anything that people enjoy, people figure out -- particularly the copyright owners -- how to make more money off it by redistributing it.

MS. RUBEL: We're just going to take a couple more comments on this point because we've got a lot of other things to cover, as well. Ms. Tanasse, you've been waiting for a little while. Oh, you're still on mute.

MS. TANASSE: I think I may have jumped-line ahead of Sarah because I've already made some comments. No? Okay. I did want to speak to some of the production issues when we're looking at a set of DVDs. So, we've had several television series where some of the discs may be fine, and one of the discs in particular does not work.

And you can buy a couple different copies of that set and find one that does. So, there's this, kind of, unpredictability of these forums and these lists where we might be able to go back and check and see there's been issues reported with this certain disc. There is just variation with that, that I've seen, kind of, on the micro level with particular titles.
MS. RUBEL: Ms. McCleskey?

MS. McCLESKEY: I'd just like to address your question of whether we expected deterioration, and I would say that, as Librarians, we are very familiar with format upgrade, format replacement. We have gone from film to U-matic, to VHS, to DVD, to Blu-ray, to streaming, and we have purchased content multiple times -- the same thing -- and we have no problem with that. That is to be expected. Our problem is when we cannot replace, so.

MS. RUBEL: And Mr. Williams, I'm going to give you the last word on this one. But, trust me, Mr. Band, we will have plenty of time to come to you.

MR. WILLIAMS: Yeah, thank you very much. Just quickly, we had some comments in footnotes 32 and 33 of our filing about the availability of some of these titles. And with respect to the Warner Brothers catalog, some of those titles in the footnotes we reference are available for manufacturer on-demand.

So, if there is an issue with disc rot on those titles, they can, essentially, be purchased through Amazon and printed in an individualized basis. Not saying that would cover every single title we've heard about today, but with respect to Warner Brothers, there is a lot of availability out there.
So, that's the only point I wanted to make on that.

MS. RUBEL: Mr. Zambrano Ramos?

MR. ZAMBRANO-RAMOS: Thank you, Ms. Rubel. This question is for the proponents. Once you acquire a DVD or a Blu-ray, can you talk about the conditions that these DVDs or Blu-rays are kept inside the libraries? Thank you.

MS. RUBEL: Ms. Tanasse?

MS. TANASSE: In our facility, temperature is relatively controlled, and we track humidity. I mentioned before, we had a devastating flood, and floods are not a rare occurrence in libraries. I would also say that most libraries don't necessarily have the capacity to temperature control or to check for humidity. We're an R1, so we're a large institution. We have a Preservation Department that advises us on climatic issues.

The other issue is that when we circulate to our instructors, they may be held in unideal conditions. They might be in a kitchen while someone's boiling pasta. So, while we have some control in our facility, we have a great amount of control in that we don't circulate for students to take home.

So, there's less use outside of our
controlled environment, but going out to the classroom, you know, things can be left in cars, for example. But that's not so much the case for us.

MS. RUBEL: All right. We're going to change gears a little bit. This is a more overarching question. The opponents have argued here that the proposed exemption seeks to take an existing exemption for out-of-date software and apply it in the context of motion pictures that may no longer be sold on discs but that those two are completely different animals.

What are the differences between out-of-date software and motion pictures that are relevant to the Office's analysis? And I'm not sure, Mr. Williams, if your raised hand is a hold-over, or if you had something to respond to that question.

MR. WILLIAMS: It was a hold-over, but I can respond quickly to that, as well. I think with software, take your word processing software, for example, the average consumer isn't looking to use a ten-year-old version of their word processing software if they can get the most up-to-date version. And that's just not true of motion pictures. I mean, a movie was made when it's made, and people still want to watch it and enjoy it and love it today. Not that people can't enjoy older versions of software.
programs, but it's just not an equivalency when it comes to demand.

And so, especially with respect to off-premises uses, motion pictures are quite, quite different, I would say, from normal computer software programs. So, that was the main point we wanted to make there.

MS. RUBEL: And Mr. Taylor?

MR. TAYLOR: Yeah, I mean, I would just point out what we had written in our comments that the distribution of movies is a far more dynamic creature. It's windowed. It has multiple layers. I've already said that when a movie is released one time, it may be remastered and reissued again. You just don't see that kind of robustness, dynamic marketplace, with computer software.

And you don't see computer software, necessarily, the creators going back three or four times trying to put it into a new marketplace.

MS. RUBEL: Mr. Band?

MR. BAND: I would certainly agree that, for many titles, and many movie titles, sort of, don't go out-of-date, that there is a continuing market. It might be a dwindling market, but that the market does continue in a more robust way than it does for
software.

But there's a lot of titles out there. There's a lot of video of one sort or another, and for a substantial chunk, the market does disappear. And those aren't coming back. They're not going to be re-released, and for -- but those titles, even though they have virtually no enduring entertainment value, they do have enduring cultural and research value.

And it's that subset that we're interested in. We're not -- obviously the Disney films are going to be re-released over, and over, and over again, and we're not concerned about the windowing and how Disney tries to maximize its revenue by creating artificial scarcity. We're not talking about that.

We're talking about niche films, foreign films, you know, T.V. programs that that are dated, that no one is really going to ever release again but that do have research value. And that's the focus of this petition.

MS. RUBEL: Related to that point, there was a factual issue raised in the written comments about when CSS is actually used on a DVD. And as I understood it, the assertion was that CSS isn't typically used unless they expected to sell at least 5,000 copies of the disc.
So, I'm curious to hear more about that assertion and also whether there's some similar limitation on the use of AACS? Mr. Taylor?

MR. TAYLOR: I'm so sorry. Yes, the issue of when CSS is applied and not applied, it is multifaceted. So, the one issue which we identified was that when it was going to be what, at the time, would be a minimum print of 5,000 copies, then we saw that creators were more likely to insist on CSS being applied.

CSS is typically applied, as far as I understand it, at the replicator level. The titles that were identified in the comments, they were not ever released in massive numbers, probably not even above the 500 level.

And so, it would be difficult to imagine that a creator who probably was just trying to get something out into the marketplace would pay the additional fees for the CSS licensing.

As far as AACS, all AACS Blu-rays -- all Blu-rays contain AACS. That is no longer an option, and we've, kind of, cleaned that up so that the marketplace is more consistent.

MS. RUBEL: Can you point us to any written source that discusses the procedure for determining
whether CSS will be used in a DVD?

MR. TAYLOR: I would have to get back to you. I had to do a substantial amount of research — of searches and, kind of, like, cobble this together. And I'm happy to provide that to the Office, later.

MS. RUBEL: Thank you. Another overarching question, and then we'll move on to discussing Section 108. The proposed exemption would allow, essentially, something that you could describe as space-shifting -- converting from the disc into a digital copy.

Why is that necessary for preservation? Why couldn't you copy the content from a damaged DVD onto another DVD, which would at least provide some additional time that the content could be viewed? Mr. Band?

MR. BAND: Right. So, I was talking to Mr. Marks and Mr. Williams about this the other day and here I have one hand, and basically what you would be suggesting is this is like preservation with one hand tied behind your back.

Like, why would you want to do that? Why would you want to make a preservation copy that within 20 years, you'd have to make another preservation copy? You know, the whole point is to preserve the work for future generations, not to try to make it as
infeasible as possible.

So, we want to encourage preservation, not
discourage preservation. And so, to say, well, you
need to make it -- copy it onto another disc where you
know there's going to be more disc rot as opposed to
making a server copy where you're going to have --
there will certainly be maintenance, but in the long
run, less maintenance, and more security. It just, in
terms of what the whole point of the exercise is, it
makes no sense.

MS. RUBEL: Ms. McCleskey?

MS. McCLESKEY: I agree with what Mr. Band
said, but I would say that a copy onto a different DVD
is, obviously, a possibility and something that we
would be very happy to do. And I think that -- I'd
just like to say that, yes, windowing, we recognize
all those things.

And I have yet to meet a librarian who would
say I would rather use my crummy preservation copy
than buy a new, remastered, wonderful edition of this
thing. Like, that just doesn't -- that doesn't
happen. So, we are not trying to avoid purchase of
the new, latest edition.

We are trying to preserve content that we
cannot -- it doesn't have a latest edition. And if
doing that onto a second DVD is what we do, then
that's okay. It's not ideal, but it's okay.

MS. RUBEL: Ms. Tanasse?

MS. TANASSE: I would agree with Sarah that
it is okay to transfer to a DVD. That would be a
stop-gap that would be appealing to us. We have had
issues, having extensive experience with preservation
copies of VHS tape to DVD, where the blank DVDs that
are available to us, they also degrade over time.

We've had issues with the opaque layer not
being opaque enough to have reliable playback, even on
our internal DVD players, which tend to be of good
quality. So, the blank discs have all of the same
issues, if not more, that we've discussed about
commercially-produced DVDs.

MS. RUBEL: Dr. Steffen?

MR. STEFFEN: Yes. And the other -- so, we
would be interested in having physical preservation
copies to circulate for on-premises use, but even so,
I don't think it's ultimately adequate because discs
are also easily damaged during use, especially now
that so much playback has shifted towards computer
drives.

It's surprisingly easy for the hub to become
cracked. In fact, even though I'm very careful, that
happened to me recently with a Blu-ray, and it happens
to other users all the time. So, if we have a copy
that somebody needs to use, there's always some risk
that that copy is going to get damaged during use.

And if our one surviving preservation copy
is damaged, then that, again, leaves us without any
options. So, that's why having a backup copy of the
disc image would be really helpful, at least for
long-term preservation.

MS. RUBEL: Mr. Williams?

MR. WILLIAMS: Yes, thank you. Just a
couple of points. As Jonathan said, we have been
having conversations and trying to narrow
disagreements and collaborate, and I appreciate his
time on that and everyone's comments today. That's
always preferable to the alternative.

And I like what he said, of course, about
we're not looking to include Disney titles that are
likely to be reissued in this class, and things of
that nature. And that's very helpful.

I think if you go back to the 108 study
group consensus recommendations from a decade or so
ago, there were some ways to address this issue of
when something's available in the marketplace that go
just beyond whether it's available on discs.
They talk about whether it's available through a license model or a download model, for example, and also whether it's just a reusable copy that's available as opposed to a brand-new copy -- an unused copy.

And so, those are things that I think, if anything's considered in this space, which we're not endorsing, it would be helpful to look at that. There's also the security issues involved here and the specificity that might be required related to how these copies would be secured.

And the 108-study group had some much more specific proposals involved there, as well. So I think while this proposal is focused just on discs -- what's available on discs -- and I think that's a pretty robust market, our point of view is we should look beyond just discs because everything is available at the major studio level, for the most part, in some form or another, so researchers are not being prevented access.

And so, we would suggest it goes beyond just discs. But if we are going to focus on discs, I think the 108 study proposals also said that the replacement copies should be on a physical disc, not on a server. And so, I would say, if we're going anywhere with this
one, that does make a lot of sense.

MS. RUBEL: Mr. Marks?

MR. MARKS: Thank you. Just, also, to follow-up with what Mr. Williams said, understanding everything and appreciating what the librarians said about the advantage of a server copy versus disc copy. I think one of the advantages of the disc copy in the Section 108 is that then that replacement disc copy can clearly be used only on-premises use. I think that's a little less clear, with respect to a server copy, given that it would involve reproduction and potential performance.

And then, those security issues about if you have lots and lots of in-the-clear copies on a server and the server's hacked -- the market harm that it could cause. So it's just a matter of balancing these various issues, and I wanted to bring those up. Thank you so much.

MS. RUBEL: Mr. Taylor?

MR. TAYLOR: Yes, thank you. Real quick, just to go back to this point that every 20 years you need to have another DVD copy, I don't think that's exactly accurate. I think that DVDs have been around now for 20 years or so, and most people -- 99.9 percent of users -- are not finding that they need to
replace their DVDs.

And if you're going to copy the work onto another DVD, you're obviously going to take the time to choose a better DVD than probably it was originally issued on. There are different forms of DVDs. The Library of Congress has an extensive report and study -- ongoing study -- that for archival preservation purposes, you'd use a DVD Gold (phonetic), which, that disc itself is inherently superior to even the ones that are distributed in the commercial marketplace.

Finally, as far as how many discs you should get, I mean, this is a quintessential question of Section 108. I mean, if you get to copy three copies for a replacement copy and your replacement copy goes bad, well, there is a certain limitation on how many copies you get.

MS. RUBEL: Mr. Zambrano Ramos?

MR. ZAMBRANO-RAMOS: Thank you, Ms. Rubel. This question is for proponents and opponents if you'd like to chime-in. I was just curious if you could talk about the availability of DVD players to play copies of those DVD and how that availability will look moving forward, say, in the next 5 to 10 years and even upwards of 20 years?

MS. RUBEL: Ms. Tanasse?
MS. TANASSE: The manufacturing data that we're seeing for DVD playback equipment is very similar to what we saw at the end of VHS. So, these playback decks are really not being produced at a level that suggests they will be readily available to us for a long time to come.

I would also say that the quality of the decks that you can get today is much lower than we saw in the past, especially in the mid-00s to late-00s. They just will not play many of these burned discs reliably.

MS. RUBEL: I want to move us along a little bit just because we have a lot of other topic that I'd like to cover. So, if we have time, we can come back and discuss these issues at the end.

The Office has previously stated that Section 108's three-copy limit doesn't adequately accommodate the requirements of modern digital preservation practices. Does anybody disagree with that statement, or do we all agree that, for digital preservation, more than three copies would be necessary? Mr. Band?

MR. BAND: Yes, I would agree with the Office's statement. I think it's spot-on that digital preservation does require more than three, especially
if you're including intermediate and temporary copies. And this really goes back to the previous question about, you know, we're looking forward to the 21st century and, sort of, forcing people to use obsolete storage mediums. Really, it just makes no sense. You should use the best technology, especially since we're trying to do a preservation of cultural heritage, which benefits all of us. It's not something that benefits libraries, right? This benefits society at-large, and therefore we should be able to use the best forms of preservation, which would be digital preservation, in other words, the server copies.

MS. RUBEL: Mr. Williams?

MR. WILLIAMS: Thank you. Yes, I think we're allowing preservation and replacement copies to overlap a lot, which they do not, in Section 108. And our position is that, for now, Section 108's the law, and that's really what the Copyright Office should be looking at. Although I understand that there are recommendations out there about how to revise Section 108 and also views on what Section 107 covers.

In terms of discs being obsolete, I don't think that's accurate. And if you look at footnote 35 from our filing, we actually have a citation to LCA's
website citing a story from April of last year talking about DVD and Blu-ray player sales jumping significantly during 2020.

So, as far as I'm aware, those players are going to be available in the marketplace for the foreseeable future. When it comes to the multi-copy issue for preservation or replacement copies, I think there are scenarios where you may need to make more than three copies to get to the end result of one copy that you can either use for preservation or for replacement purposes.

But I think the 108 study documents, over time, essentially said the point of those changes would not be so that you can end up with a bunch of different copies. It would be so that you can end up with one copy for the point of either preservation or replacement, and that the other copies should go away.

And so, that's, essentially, I think where we're coming from on this is that even if you do want to go beyond current Section 108 and allow for more than the three copies, ultimately the goal, if you're going to go there, should be one copy for the given purpose at-issue instead of several different copies.

So, it's a matter of addressing them, as Jonathan said, the temporary copies and things of that
nature that require the steps along the path to get to
one copy. It's not a matter of having six copies at
the end of the day.

   MS. RUBEL: And for the proponents, are you
proposing a limit on the number of digital or server
copies that could be made? Mr. Band?

   MR. BAND: Not specifically. I mean, we
don't -- we're basing the language of this exemption
on the language of the software exemption. Certainly
it's not our contemplation that there would be
proliferation, right?

   I mean, the idea is if you have one copy in
your collection, that you would end up with one copy
in your collection and that only one copy could be
used at a time, right?

   I mean, that's -- no one's envisioning that
this should lead to a proliferation of copies. We're
-- the goal here is to maintain the status quo.

   MS. RUBEL: Mr. Taylor?

   MR. TAYLOR: Yeah, I just wanted to
illuminate this one point on players. And we work
with a lot of manufacturers. We're the people that
license them the technology. We have no sense that
players are going to disappear. And whenever a new
player, a new format, comes out, it is always
backward-compatible.

Well, at least so far, they've always been backwards-compatible. So, you have a Blu-ray player that will play a DVD.

MS. RUBEL: I want to talk next about preemptive or preventative preservation. And I understand that the main argument from proponents is that preservation is better achieved if it occurs before there's any damage or deterioration to the disc. So, how do you respond to that, opponents? Mr. Williams?

MR. WILLIAMS: Yeah, thank you. I'll get the hang of this "lower hand" and "raise hand" thing, eventually. Sorry. I have to keep remembering to go up-and-down on that. So, I understand where the proponents are coming from on this issue, and I don't want to pretend like I don't.

On the other hand, I think, if you go back to the 108 study group recommendations and to what the Copyright Office did with those in 2017, there was an issue of fragility as opposed to something becoming obsolete or damaged before copies could be made by libraries.

And that proposal, for better or for worse, has not gone anywhere, legislatively. And so, you
know, I think if there had been some cooperation, legislatively, at that level, perhaps we would have a Section 108 that already refers to fragile copies, meaning copies that are likely, or may go bad, in the near future, instead of already-deteriorating copies.

But we're not there legislatively, right now. It's not in the statute. And so, you know, our position is that, really, 108 should be the bellwether that you look at in this proceeding. And if you consider fragility as opposed to what's already in the statute, you know, I think it would need to be defined pretty well in the case of discs.

And I think that proposal in the studies and recommendations I mentioned was part of a package, right? So, it was grouped along with the need to look not only to unused copies for replacements but to usable copies. It was packaged with a proposal not only to look for physical discs but for licensed streams or downloadable copies that are described as licensed, in many instances.

So, that was part of a, kind of, package agreement or consensus, I think. And if you're going in that direct here, I think you'd want to look at that whole package.

MS. RUBEL: Yeah, and we will touch a little
bit more on streaming in just a moment. I will make
the point, real briefly, that obviously Section 108 is
not the only exception, and the Office has considered
fair use in the past in similar contexts. Mr. Band,
were you raising your hand, as well?

MR. BAND: Yeah. Well, I was just going to
make the point, as you just did, that, you know, 108
is not the be-all and end-all that's applicable. You
know, the Office has already determined that Section
107 is relevant in this context.

And also, I just wanted to reiterate the
point that, you know, these materials, you know -- the
track record has shown that they are inherently
fragile, certainly, relative to books. And, you know,
a book, you know, well-preserved, can last 100 years,
go through numerous readings, whereas, you know, it
seems that most DVDs, simply, that's not the case.

And so, you know, the ability to -- a DVD
seems to start deteriorating as soon as you get it, or
if not right away, then very soon after that. So
this, to some extent, is a bit of an academic
discussion. These are fragile materials and need to
be preserved.

MS. RUBEL: I think the counter-argument
that I saw in the comments was that, you know, we have
to consider what was the benefit of the bargain when
the disc was originally purchased. And the copyright
owners sold the content on these discs for a
relatively low price with the understanding that
people would be using them, generally, for individual
or family use, and that there wouldn't be further
reproduction or distribution.

So, I want to give the proponents a chance
to respond to that argument that I saw in the
comments, especially as it relates to the idea of
preemptive preservation. And Mr. Taylor and Mr.
Marks, I will come to you after I give them a chance
to respond. Mr. Band?

MR. BAND: Well, the benefit of the bargain,
I mean, the libraries have invested millions of
dollars buying DVDs. And again, they're not doing it
for their own edification, right? It's so that it's
for the use by students and researchers.

And so -- and again, as referred from the
librarians here from Ms. McCleskey and others,
librarians are perfectly happy to buy newer formats
when they become available, if they're available. The
point here is that a lot of this material simply does
not appear to be available in any other format. And
so, again, it's to all of our benefit to make sure
that the investment that the libraries made in buying these DVDs is preserved.

I mean, you know, it's not like we're asking for the studios to subsidize the making of the preservation copies. I mean, the libraries are going to spend their own money to make the preservation copies. But that, you know, it's because they're just not available anywhere else.

And if they were available, believe me, the libraries would prefer to buy that rather than make, you know, these preservation copies. But when they're not available anywhere else, they want the ability to make these preservation copies.

And again, it just doesn't -- there is no harm to any market because they're not on the market.

MS. RUBEL: Ms. Tanasse?

MS. TANASSE: I just want to emphasize that at the University of California, Berkeley, we spend more than a quarter of a million dollars annually on licensing media content for our users -- for our students, faculty, and staff. So, $237,000 is spent licensing media. We're not seeking to not pay to use content.

Much of this home video content, however, at this lower price point, it's not so much the full film
that's being used, but rather, clips or portions that
are being written about in scholarship. They may be
published in academic articles. They may be looked at
critically by students in their papers.

It's not so much the use of the full film
but what we might typically consider a fair use of a
feature film. So, our highest users of our home video
collections -- of Disney content and other content --
are actually ethnic studies classes where students and
scholars are looking at the representation of people
in film.

MS. RUBEL: Dr. Steffen?

MR. STEFFEN: Yes, with regard to the
question of preemptive preservation, to get back to
the concrete example that I gave of the Warner
Brothers DVDs -- so, I mentioned that 198 of the 767
titles are out-of-print. In many cases, or most
cases, they were only issued in that original edition
from 2006 to 2009.

They were never reissued. And I'm
including, you know, the Warner archive
manufacture-on-demand as a reissue. So, those things
I would consider in-print because you can purchase a
new copy. So, the thing is with these discs is that
we can't predict when they will go bad, and there
isn't a clear correlation between whether a disc will be playable and whether there's clear signs of deterioration.

I had discs with really patchy, visible deterioration on them that still played okay and then other discs that looked basically normal that would not play all the way through, at all.

So, like, I think, in that case where we had clear evidence that there were faulty pressings and the discs were no longer available, and then you can identify the plant that they were manufactured on by the code on the hub of the disc.

Then, I think it would make sense for us to make preemptive preservation copies of those out-of-print discs to ensure that the content would continue to be available for access.

MS. RUBEL: Mr. Taylor?

MR. TAYLOR: Yeah, I would just like to go to that point right there that Dr. Steffan had used is that, when you have disc rot, he said correctly that you sometimes can, indeed, play something that looks like it has visible disc rot. And disc rot, it can be from the holes -- it looks like little termite holes, or it can be the colorization on the bands, or it can even be the disc peel.
Just because you see that doesn't mean you can't play it, but it is a clear sign that, maybe, you should take some action. Now, as far as the printing, if it's a manufacturer-caused disc rot, generally speaking, then that, you know relatively soon as soon as you play it that there is a print error and that was manufactured incorrectly.

So, you still have time in the marketplace to go out and find a replacement copy, or send it back, or participate in any of the other programs when there's a manufacturing problem.

MR. AMER: Can I just follow-up on that? And Mr. Marks, you can address this, too, if you'd like. So, I mean, to the opponents, I take it that your view is that it would be -- I'm trying to understand what the parameters are of your objection.

So, would you agree that it's a non-infringing use to the extent that this activity is consistent with 108c? So, under 108c, it says you have to -- the preservation right only applies if the copy is damaged, deteriorating, lost, or stolen.

So, what does that mean in practice? I mean, you know, how do you respond to Dr. Steffan's point that, you know, it may not always be quickly, you know -- it may not always be clear whether a copy
is deteriorating?

I guess, I'm trying to understand what you're suggesting that any exemptions should say and what should be required of libraries. Should they have to make a case-by-case analysis to determine whether each disc is, in fact, deteriorating, under your view?

MR. TAYLOR: Under -- yes. I think, absolutely, it should be on a case-by-case basis. And, as I said earlier, there are two causes for disc rot, manufacturer error and storage error. So, if we're talking about disc rot from storage error, meaning that you can see, visibly, that something's going on here, then that's an opportunity for you to say, okay, can we still play this, and can we still preserve it?

Now, if it's the other kind of disc rot that is a misprint where the adhesives aren't sticking together or is not playing all the way through, you know that usually when you start playing it.

And finally, I would just like to say that, you know, DVD has been the most successful product -- home video product -- there has ever been, and we don't see this marketplace crying out that they have all these DVDs that aren't working. 99.9 percent of
DVDs, when they're kept right, stored correctly, not left in a car, not left in an attic, not left in humidity, they're going to work perfectly fine. And we've seen this now for 20 years. So, there's no reason not to expect them to continue to work.

MR. AMER: Mr. Marks?

MR. MARKS: Thank you so much. I just wanted to -- I think there's been a little bit of back-and-forth about the preservation under Section 108 and its existing preservation which we're not opposing. Obviously, that's the law, but that goes to the disc copy. When we talk about, well, there's more than 108 at-issue, there's also Section 107 in fair use, I think our issue there is that, you know, in the existing case law, space shifting of entire copies is not found to be fair use.

That is our problem with the server copy, and it's not just a matter of standing on that legal principle, it's the notion that if you're proactively preserving thousands of titles onto a server, you know, that does cause a certain amount of threat if the server is hacked.

MR. AMER: And so, could I just follow-up on that? So, 108 doesn't say anything about the format
needing to stay the same. So, if we were, just in land, libraries would already, I think -- tell me if you disagree -- be entitled to make server copies as long as it's only three copies.

Do you agree with that? I mean, is your objection to the idea that there could be more than three copies involved?

MR. MARKS: Well, I think -- and maybe Mr. Williams can help me out here, or Mr. Taylor -- I had, frankly, read that the referencing physical copies rather than server copies. But you folks are much more the experts than I am, in the Copyright Office. So, I could've been misreading that.

MR. AMER: Mr. Williams?

MR. WILLIAMS: Thank you. So, as it exists now has the preservation provision and a replacement provision, and the preservation provision is about unpublished materials, which is not what we're discussing here today. And the replacement provision only applies to copies that are already damaged or deteriorating, which is also more limited than what we're talking about here today.

I would agree with Dean Marks that, I think, as 108 was written, it intended for a replacement copy to actually be a replacement in a similar medium. I
think there is room for debate on that question. If you go to the 108 study group's recommendations, for example, they do focus on keeping it in the same medium, keeping a physical copy a physical copy.

And I think that was a consensus position amongst not just copyright owners but, you know, the whole 108 study group. So, that's where I would come out on it. I would also just like to say that, in terms of this question of, you know, what does 108 allow now, we do think that should be the focus that you guys have.

But this proceeding requires more than just establishing a lawful use, right? So, there's multiple steps in the process. You get a lawful use, you have to look at available alternatives, and you have to look at the 1201 factors.

And so, I would say even if you can establish a lawful use under 108, which, as I mentioned, does not go as far as they would like to, as, I think, they can see. You'd have to look at those other alternatives, which we think would include downloads, streams, et cetera.

And then, just finally, because I think what Mr. Steffan said was impactful, I wanted to try to address it. I don't remember the exact numbers that
he gave, but he said, basically, a very large percentage of his collection of Warner Brothers titles he could not get in any format through manufacturer-on-demand or otherwise, and I -- unless I'm missing something, I don't think the entirety of that collection is set forth in the comments.

But of the ones that we were given in their comments that we looked at, we could find a lot of them on new discs. And 32 -- footnote 32 -- of our comments points to the ways you can get Joan Crawford Collection, Volume 2, on new discs, as well as other titles.

And so, I'm not questioning his good faith search, but if we had the complete list of titles, we might find more of them are actually available. So, that's all I wanted to say.

MS. RUBEL: I want to move us along, just for the sake of time, to talking about the marketplace check that's included in the proposed exemption. And I'll just cut to the chase. I want to give both sides a chance to talk about why streaming services either should or should not be considered as viable replacement copies.

And, a related point, in the Library Copyright Alliance's reply, it made a textural
argument about Section 108 Cl that the term "unused replacement" refers to a material object. I would like some further explanation of that, just to make sure I understand the argument. Why don't we start with Mr. Band?

MR. BAND: Sure. So, at the highest level, many of the streaming services simply aren't available to libraries. So, Netflix, Amazon, and so forth, they, you know -- they do not -- their streaming services are not available to libraries. They're only for, you know -- for personal use, and, you know, library can't do that. So, libraries can't access that.

So, a huge tranche of the videos that might be out there, simply are not accessible to libraries. Swank, of course, does make some available, but the titles it has are more limited. And, you know -- and the other problem with any kind of service is that the titles change over time. It just depends on what titles are available at that service at that time.

And, you know, licensing arrangements are changing all the time, and the market demand changes. And, you know, we all have this frustration, right, that there's a film we wanted to watch on Netflix, and we put it on our list, and then, lo and behold, when
we finally got around to it, it was gone, right?

I mean, we all experience that, and so, this
is -- you know, there's nothing surprising about that.
And so, for that reason, you know, these streaming
services just can't be considered reliable for the
purpose of making sure that material is available in
five years, ten years, fifty years, for serious
academic research.

With respect to 108, it says, you know -- it
does talk about copies, and copies seems, to me, to
mean physical copy. I mean, that's the definition of
copies. And so, a stream is not a copy. You know,
it's a performance.

And so, it seems that that's certainly
what's contemplated. But even if it wasn't what's
contemplated, certainly in terms of what is practical
here, you know, again, given what the goal is of
preservation.

And then, let me just add the final point
is, again, as we've been saying, if it is available in
the market in a usable format, the library's going to
do that. That's what they're going to -- they're
going to always prefer that. And so, there's really
not going to be any meaningful harm to any market
because we're only talking about things that are
pretty much out of commerce.

MS. RUBEL: Ms. McCleskey?

MS. McCLESKEY: Streaming is in no way an adequate replacement for a physical ownership of a DVD or a copy. One of the problems is that if we license something from Swank, for example, a student cannot make a clip of that content and download it and include it in a presentation with fair use for some sort of comment or criticism.

And the same with the other educational streaming services, which are wonderful services. And, you know, I would say that my library, we are a mid-sized, private, tuition-driven institution. We spend, in a normal year, over $60,000 on acquiring licensed video content.

The vast majority of that is through streaming platforms, and in the pandemic year, we spent an additional $20,000, a large chunk of which went to Swank, a large chunk to Kanopy, a large chunk to Criterion Pictures.

So, this is not us trying to avoid spending money. We are attempting to preserve content. And the other point I wanted to make was that we are very used to doing this on a case-by-case, title-by-title basis. We are very comfortable looking at the disc,
and not just the disc and its condition, but the
content of the disc and what it's offering to the
users.

And whether that's the extra content,
whether it's the commentary in the booklet that came
with it, it's the whole package. And so, streaming is
wonderful for many, many things. And we certainly
don't frown upon it, and it, in fact, at Hofstra it's
the preferred format for us even for acquisition.

I will buy a "life of file" license for
five, or six, or seven-hundred dollars for a title
rather than licensing it temporarily or buying a DVD.
But when it comes to actually physical ownership,
being able to use the thing as a physical object,
streaming is not a replacement. Thanks.

MS. RUBEL: Dr. Steffen?

MR. STEFFEN: Yes, I just wanted to
underscore the unpredictability of the marketplace
with titles. So, yes, if you're talking about
something, you know, that's, like, part of the major
catalog of a studio, it's likely it's going to be
available through Swank for a long time. So, you can
license it, you know, on a semester basis or year-long
basis, if you wish.

But titles do become no longer available.
In fact, I just had an example this spring where someone wanted to use the film "The Graduate" by Mike Nichols, in a course. And that film is complicated because the rights, as far as I understand, are jointly owned by MGM and Studio Canal, and it was released on DVD and Blu-ray by the Criterion collection.

And there is individual streaming on, say, Amazon Prime that's through Lionsgate, but when I approached Swank, assuming that, since it's Lionsgate and Swank works with them, I'd be able to get it, they came back to me, and they said, no, they lost the rights to that sometime back.

So, we couldn't even license it for the semester to make available for a class, much less, you know, a long-term streaming access for the collection. And that's all just because the film has been acquired by different studios over the years, and the current configuration doesn't make it amenable for academic or library streaming.

MS. RUBEL: One last point I wanted to make about the market check, it did seem to me like there was some tension between the idea of preemptive preservation, on the one hand, or the need for preemptive preservation on the one hand, and also the
idea that you're doing a market check to see if there
are any replacement copies available.

I'm not sure this is really a question, but
if anyone wants to speak to that, it seems like
there's some tension between those two ideas. Ms.
Tanasse?

MS. TANASSE: I would say that our priority,
in searching, is always the goal of licensing and
acquiring a new copy. That is how I approach all my
curatorial work, is to make content accessible. And
the first choice is always to license and purchase.

And we have documented approaches to -- we
have the Mellon funded project that showed where do
you look to try to find where things are sourced. We
have communities of practice that support librarians
in finding out how to acquire films. So, our goal is
always to acquire a new, legal copy to license, when
possible.

It's only when you can't find something,
that you begin to think of preservation copy.

MS. RUBEL: Mr. Band?

MR. BAND: Yeah, if I just might add, I
understand your point about the tension, but the point
is is that a library isn't going to just say, okay,
we're now going to be preserving all of our
collection. I mean, that's just not realistic.
That's not how it's going to go about things.

It's going to go, say, well, you know, here are some films. Maybe it's, you know, this film isn't in great condition. Is it, you know, if we're using the terminology of 108, I mean, is it damaged, deteriorating, lost, or stolen? Well, it's not lost or stolen, hopefully.

You know, how damaged is damaged? How deteriorated is deteriorated, right? So, it might be a little deteriorating, a little damaged, but that might be enough to say, you know what, this is something we want to make sure we have in the future. Let's do a market check.

And then they do a market check and say, no, we can't. There's nothing in the market. And then they might say, okay, let's preserve it, meaning it is going to be on a case-by-case basis. And, you know, because these terms are not completely black-and-white, you know, is it damaged enough to meet 108 -- you know, the 108 standard, but maybe it isn't damaged enough to meet the 108 standard.

But that's why we would want the flexibility to say, well, it should be preventative, meaning if it's a little damaged but not unreadable, right? You
know, again, because it's -- so much of 108 is based on books, right? And with a book, even if a book is in pretty bad condition, or you can still read it, right? Or you can, sort of, assemble different chapters from different books and put it together.

You can't do that with a DVD, right? If parts of it are deteriorated, it's gone. It's useless. And so, a little bit of deterioration is very problematic with a DVD in a way that it isn't with a book. And so, to some extent, the issue with preventative preservation really does to that, that we're not -- you know, they're not completely analogous.

MS. RUBEL: I want to thank Mr. Evjen and Ms. Nelson for their patience. We are finally getting to you. We're going to talk a little more about the current marketplace for licensing. So, why don't we start with Swank? And Mr. Evjen, I'm going to allow you to share your screen so that you can talk through some slides that you prepared.

MR. EVJEN: Yeah, and Barb, why don't you kick us off? I'll share this screen, Barb.

MS. NELSON: Sure. Thank you. I think it's important to note that Swank has been providing this service that Mr. Evjen is about to show, for just over
nine years. And although we are probably most known for the Hollywood content, we also have agreements with distributors that are very niche, several American independent, foreign distributors, and our collection actually is just under 40,000.

So -- and when we are working with our clients, currently we're in over 1,000 colleges and universities throughout the U.S., it is very rare that we are asked for a picture that we do not represent. I know it was mentioned earlier about The Graduate -- yes, of course, from time to time, there are some very tricky ones, The Graduate being one of those.

But that is very rare, and it generally is about 1 percent of the time where we are unable to provide a piece of content that has been requested by a client. So, with that, Bill, would you like to, kind of, get into the details of how the service works?

MR. EVJEN: Thank you, Barb, I will. The main thing here is this is in regards -- the product is called Swank Digital Campus, and this is something we use and work with from a librarian standpoint. So, we engage the institution, the university, the school, for content that is going to be used for academic purposes.
You know, in the past -- it was mentioned beforehand -- things were used like movie reels, then VHS, then DVDs and Blu-rays. A lot of problems with these physical forms is you have to consume an entire class to view that content with the students there.

The world, and generally what we do now, is a digital world where the content is licensed for academic purposes, and the studios make available their catalogs for us to use, whether it's on DVD or not. We can have access to their full catalogs of content, and we work with the librarians on a set list of content that they have worked with their instructors to bring onto the site.

And then, we make this available. And when it's in a digital form like this from us working with the studios, we're able to maintain the studio content protections, the encryptions, or the DRM that is required, and it allows a lot of other niceties in that we're able to provide a number of languages, ADA-compliant content as well, with closed captioning.

So, this is a view that the instructors or the librarians would see of the content that was chosen by that institution for that semester or that year, and the instructors are then able to view the titles that are available to them for their classes,
and they are also able to see some details about that. And then, they are also able to view this themselves. Viewing includes, again, different languages, closed captioning, abilities to you know, cast to a television, like a Chromecast, further details about the title, and they can stop, start, play this as many times as they want.

A professor or an instructor is then able to share this with their students, either by a direct link, or a link that goes into their learning management system which a lot of them use, whether it's K-12 or whether it's, you know, more academic institutions.

They make that content available. The student then, in turn, is able to view this title as many times as they want during the semester, during the school year, and more importantly, different than, let's say, a DVD or a Blu-ray in the class and the student needing to be there, a student can view this and consume this content on their personal device outside of the classroom and still have those, you know -- none of those restrictions on number of plays, and they can jump to any point in the film as they wish.

From there, let's say a professor or an...
instructor has a title the librarian has not procured. In that case, we expose out our entire catalog of content -- those titles, you know, 40,000 plus titles that are mentioned -- and they can find a title, see the details about it, and you'll see that blue request button there on the bottom, make a request for that title.

That request then gets sent as an email to the librarian of the institution. You know, it's their job to procure these digital assets, and they can approve or not approve that, and then that title will then be fulfilled by Swank and made available. It is also possible for the librarians or the admins of this at this institution to completely customize this.

They can put it in their own categories of content. They can also get full reports on the usage, how those titles are used, how often, and when. And then, they can customize this and brand it completely as their own look and feel, their own logo, so it appears like any other application within their institution.

So, this is a very high-level, three-minute view of the solution. It's actually very deep and something that is constantly in continuous
development, also along with the studios in making
sure that the security, the protections, the
encryptions, the digital rights management, is to the
latest and always protecting the content. That's the
most important. Thank you. I'll stop sharing.

MS. RUBEL: Thank you very much. And I know
Mr. Taylor also had a short presentation about Hoopla
and Kanopy.

MR. TAYLOR: All right. Before I share my
screen, I may lose my sound, and hopefully you guys
will continue with sound. So, somebody raise their
hand and let me know that sound's not working if
that's the case.

(Prerecorded presentation begins.)

Hi, everyone. This is Donna, Technology and
Media Librarian for Arlington Public Library. In this
video, I'll show you how you can connect your Hoopla
and Kanopy accounts to your streaming media device so
that you can stream free movies and television shows
from your TV rather than using your phone or your
tablet.

Hoopla and Kanopy are two of the free
services that are available to you with your Upper
Arlington Public Library card. Hoopla has movies and
television episodes that you can stream, while Kanopy
has thousands of independent films and documentaries also available for you to stream.

Hoopla, overall, will offer you access to both music and audiobooks as well as movies and TV, but only movies and television will be available to stream from your TV. So, in this case, I'm going to go to the search, and I'm going to search for one of my favorite romantic comedies, which is also my favorite genre of movie, and that is "Amelie".

Now, once you find a movie that you like, you search for it, you see it in your results, you're just going to click on it to select it. You're going to see the title details for that movie, and then when you're ready to check it out -- and this includes movies or television episodes -- you'll click "borrow" and then "play", and it'll start streaming.

You can borrow up to ten items total on your UAPL Hoopla account every month. So, that would include movies, television episodes, and it would also include any audiobooks or eBooks, or comics, or music albums that you decide to check out as well. And your borrows will reboot every calendar month.

Adding Kanopy to your Roku or to your other streaming device will be the same process. You'll return to your Roku home screen and open the Kanopy
So, then when you return to the Kanopy app on your Roku, you can start browsing to see what movies are available. Now, unlike Hoopla, Kanopy is exclusively movies, and that includes more than 20,000 feature films and documentaries.

It also includes unlimited access to the Great Courses education series, and a selection just for kids, on Kanopy. Like Hoopla, you can borrow ten movies per month on your account, using your Upper Arlington Public Library card, and you can browse through the selection. You can browse for different subject matters.

You can browse for different categories. You can see some of the carousels that they have preselected for you, and of course, you can click on the magnifying glass to search for a movie by name directly.

Once you find a movie that you'd like to borrow, click on it, and then you'll see that there's a description of it. You can add it to your watch list. You can also click to see a much more expanded description, but all you'd need to do to officially borrow it is press the play button, and then it'll begin streaming on your device.

And, of course, you can go back and see what
else is available on your watch list. That's sort of, like, don't forget about these movies, or a "save for later" list. And you can also go back and see what you're currently watching.

So, that's it. That's how you can enjoy Hoopla and Kanopy on a streaming media device for your television.

(End of prerecorded presentation.)

MR. TAYLOR: All right. I would just like to point out the distinction of those services versus Netflix. These services are a pay-per-use service, and Netflix and Prime Amazon, they're subscription services. So, you don't necessarily see the same phenomena with these services that you do with Netflix and Prime because they have an all access, and those movies are only available for a certain time period, and that's why they disappear.

When you're using another business model such as pay-per-use, it's less likely that those movies and titles are going to disappear.

MS. RUBEL: So, I see we have a couple folks who wanted to comment. Let me just pose a specific question to you. I'm interested in hearing what kind of uses by the university community are not provided for through these services that we just saw.
presentations about? And why don't we start with Ms. McCleskey?

MS. McCLESKEY: Sure, thanks. And I will start by saying that Hofstra is a pretty robust customer of both Swank Digital Campus and Kanopy. Hoopla, of course, is mainly private libraries. Kanopy's in both. Also, I'm on the Digital Campus Streaming Service Advisory Committee as well as the Kanopy Content Advisory Board.

So, I have some relative degree of familiarity with these services, and they're great. But they don't have everything, and I think for Swank to assert that they can fulfill 99 percent of requests is really disingenuous because Swank doesn't own 99 percent of the content, or license 99 percent of the content.

Kanopy has the Criterion Collection. Criterion Pictures, USA has 20th Century Fox. And all of these things, to some extent, titles move around from service to service as rights are sold. But there's no platform that has everything. That's why we have Kanopy, and we have Swank, and we have Alexander Street Press, and we have Films on Demand and other platforms.

So, the point is, no one has everything, and
a lot of content, no one has it, period. So, there
are things I just can't get on the streaming services
that are taught. And that's where we, sort of, fall
down in trying to say, well, streaming is an adequate
substitution for our entire DVD collection because
that's just not the case.

MS. RUBEL: Ms. Tanasse?

MS. TANASSE: I agree that these are
fabulous platforms that we rely on to provide
day-to-day access to our students, researchers, and
instructors. I have a mug here that I'm not showing
on screen because it is from one of these providers.

I am also on the Kanopy Content Advisory
Board. For me, a robust, healthy, video marketplace
-- an educational video marketplace -- is incredibly
important because that is the content that we are able
to provide to our users, and we put a lot of money
into it.

But even with the video of the Kanopy
platform that is focused on public libraries, there is
content that is available to public libraries through
Kanopy that is not available to academic institutions.
So, I saw titles on there that are not available to me
for licensing on UC-Berkeley's Kanopy platform.

And the reality is that these platforms tend
to not own the copyright on their films. So, they are using licensing agreements to make them available. Titles that I had licensed from Kanopy last year are no longer available to me to license this year. So, the content does out-of-print, and my preference is always for that highest-quality video stream to make available to our highest number of users.

I see this on-site preservation access simply as a stop-gap, one that is not ideal.

MS. RUBEL: Dr. Steffen?

MR. STEFFEN: Yeah, to speak to this issue of streaming video availability, one of the areas where I've been seeing a lot of challenges is actually PBS educational documentaries because they're produced by -- they're sometimes independently produced. There's limited licensing agreements which enable for PBS broadcast and home video releases.

So, we do buy the physical item on DVD, and as you may know, they often have special licenses that allow for public performance rights on campus as well. But when we try to license the videos for streaming, we're often finding that when we reach out to the individual studio, they can't license it to us because of some underlying rights issues.

And the availability of the content has also
shifted a lot over the last several years. Like, there was a large collection on Kanopy. That went away. There was a good number of titles on Alexander Street Press. I believe there's some titles on Films Media Group as well, but the available is spotty, and the track record for licensing individual titles for streaming is not great.

So, we don't have a high success rate for things that are not already available on one of those platforms.

MS. RUBEL: Mr. Band?

MR. BAND: Yes, I just wanted to add -- this is a point that some of the librarians made before, but -- whereas these platforms are great for in classroom use to allow students in classes to see videos, it's not great for research purposes, especially if you want to make clips for inclusion in scholarship because my understanding is those rights aren't included.

And so, you know -- so, if you're a scholar, and you want to make a clip, you really can't use these services.

MS. RUBEL: Mr. Taylor?

MR. TAYLOR: Yes, I find that point very interesting because we have an entire 1201 proceeding
that says they can, indeed, make clips from those
services. So, you know, I'm baffled by that. But I
would also point to the fact that these services, they
are young. I mean, DVDs have been around for twenty
years. These services are five, six-years-old. I
think you have to keep that in mind.

You asked earlier, is it fair to do a market
check and say if the videos are available on streaming
services, should that count? And the history of this
proceeding has always been yes. If it's available in
another format to the user, we spent the first two or
three proceedings considering whether or not titles on
DVDs were still available on VHS. So, I see it
completely analogous and consistent to say that if it
is available on the streaming service, then that
should count.

MS. RUBEL: Mr. Williams?

MR. WILLIAMS: Yes, thank you. Just quickly
on a few topics. We were discussing "The Graduate"
and whether it was available on Swank or not. As best
I can tell from a quick search, it's available new on
discs. So, at least for purposes of this exemption
proposal, we wouldn't even need to get to whether it's
available on a streaming services because you can
still buy the Blu-ray and DVD copies of "The Graduate"
brand new on Amazon.

So the market check would result in people being able to acquire that. I agree with Mr. Taylor that, when it comes to clips, we do have separate exemptions that deal with that issue that cover both discs and online transmissions. So I think clips are already addressed through those other exemptions.

With respect to the issue that, you know, not any given streaming service or download service has access to every title, that's true, and I can see why it's frustrating and can be somewhat time consuming. But to me, that is evidence of a market that is working properly. The fact that not every title from every copyright owner is available on only one service means there's competition.

There are multiple services developing. They are trying to win the market competition and prove that they're the best service. And so, there's a healthy market there that we need to continue to allow to develop.

And then, just a couple of final points on, kind of, the scope of what's been proposed in the exemption. You know, we've expressed opposition to it generally today, but I do think a couple of things came through in the testimony and the comments that if
you were inclined to consider it, would be important for you to think about.

One is we've heard a number of times that really what the focus of this proposal is, is research uses by academics in university settings. And so, any exemption that's considered, I think you'd want to consider limiting it in some fashion to those types of uses and defining research in some way that is meaningful so that you're not dealing with just entertainment uses of motion pictures, et cetera.

And then, we have good representatives from university libraries here today, and they've given compelling testimony, but we don't have, really examples of the need for this throughout all libraries, archives, and museums. And so, I think those are two limitations worth considering.

Finally, the fact that Netflix is offered to consumers is true. It's a personal use subscription model, but as I've mentioned in other panels, circumventing things is not allowed by the terms of use either. So when we hear, you know, terms of service as a limitation, it doesn't necessarily compel me because, one way or another, somebody's hacking something they're not supposed to hack here, or using something in a way they're not supposed to use it.
So, that would be my last thought on that.

MS. RUBEL: Right, we're going to give Ms. Tanasse and then Mr. Band the last word.

MS. TANASSE: I wanted to speak to that question of the ability to make clips on platforms. That is an option to authenticated users at institutions that have those platforms, but if we're talking about scholars publishing articles and the questions of screenshots, while copyright is at play, university libraries enter into licensing terms with each of these platforms that prevent clipping that is outside of the platform.

So, the viewing must be done by authenticated users within the platform, and the question of taking screenshots, from my awareness of all of our licenses and purchase agreements, is not an option on any of these platforms. So, that streaming surrogate is not a good option for these regular elements of the scholarly conversation and scholarly publishing.

MS. RUBEL: Mr. Band?

MR. BAND: Yes, if I could just respond to another aspect of the existing exemption for clips.

Yes, you can circumvent CSS for the purpose of getting a clip, but this is -- here, the problem is that the
content might have disappeared, might no longer be available by the time you need to make that clip, right?

Because it needs to be preserved before you can make a use of it. So the existing clip compilation -- existing exemption for purposes of making clips doesn't address the problem here because the content might not be around in order to make that clip in the first place.

MS. RUBEL: Before I pass it over to Mr. Amer, I just want to thank everybody very much for their participation. You definitely kept it lively and interesting, at least from my perspective. So, thank you very much, and I'll pass it to Mr. Amer.

MR. AMER: Yes, thank you all very much for participating. I agree. It was a very helpful discussion, from our perspective. We are going to adjourn for now, and we will be back at 1 o'clock to talk about Class 14. Thanks very much.

(Whereupon, at 12:19 p.m., a lunch break was taken, to reconvene at 1:00 p.m. later that same day.)
AFTERNOON SESSION

(1:00 p.m.)

MR. AMER: We're about ready to get started, so if the participants could please start their videos?

(Pause.)

Great. I think we have everyone. Thank you all for joining us. So this hearing is on Class 14, which involves preservation of computer programs, including video games. My name's Kevin Amer. I'm Deputy General Counsel of the Copyright Office, and I just wanted to, again, go over some logistical items.

We, on the Government side, will pose questions and call on participants to answer. We would ask that you please, if possible, use the "raise hand" feature on Zoom, and we'll call on you. If, for whatever reason, that isn't working, feel free to just raise your hand, and we'll call on you that way.

We have a number of topics to cover, and so, we would ask, as always, that you please limit your responses to the topic of the question asked and to keep your comments relatively brief.

Secondly, today's event is being livestreamed, and it's being recorded and transcribed by a Court Reporter. The video and transcript will be
posted on the Copyright Office website (Technical Interference).

THE COURT REPORTER: Hello, this is the Court Reporter. Mr. Amer, we seem to be losing you.

MR. AMER: Oh.

THE COURT REPORTER: You're okay now, but we lost the past, maybe, 10, 15 seconds.

MR. AMER: Okay. Does this sound okay?

THE COURT REPORTER: Yeah. I think you're good now. It was, maybe, just a momentary slowdown.

MR. AMER: Okay. Finally, as we've indicated, on Wednesday afternoon, we're going to be having what we're calling an audience participation session. For those who would like to join that session, you can sign up using the link that is now provided in the chat, and on Wednesday afternoon you can join that session using the same day's link that will be available for the hearings on Wednesday.

So as I said, this hearing is on Class 14. I would like to first invite those of us on the Government side to introduce themselves. So, could we start with Ms. Rubel and Mr. Riley?

MS. RUBEL: Good afternoon. Jordana Rubel, Assistant General Counsel.

MR. RILEY: John Riley, Assistant General Counsel.
Counsel.

MR. AMER: And Mr. Zambrano?

MR. ZAMBRANO-RAMOS: Thank you, Mr. Amer.

This is Luis Zambrano-Ramos. I'm a Policy Analyst in NTIA's Office of Policy Analysis and Development.

MR. AMER: Great. And now, I would like to invite the participants to introduce themselves. So, let's start with the proponents. So, Mx. Albert, Mx. Teitler -- I hope I'm saying that correctly -- and Ms. Woodall?

MX. ALBERT: Sure. Kendra Albert. I'm an attorney with the Cyber Law Clinic representing the Software Preservation Network.

MX. TEITLER: Maisie Teitler. I'm a Teaching Fellow in the Cyberlaw Clinic representing the Software Preservation Network.

MS. WOODALL: Madeline Woodall. I'm a Student Attorney at the Cyberlaw Clinic representing the Software Preservation Network. Thank you.

MR. AMER: And Mr. Band?

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

MR. AMER: Dr. Ruberg?

DR. RUBERG: I'm Dr. Bo Ruberg. I teach digital media at the University of California-Irvine.
MR. AMER: And Dr. Lowood?

DR. LOWOOD: Hello. I'm the Harold C. Hohbach curator at Stanford University. I'm responsible for the film and media collections and the history of science and technology collections.

MR. AMER: Great. And now I would invite the opponents to introduce themselves. Let's start with Mr. Englund.

MR. ENGLUND: Hi, this is Steve Englund of Jenner and Block. I'm here for the Entertainment Software Association.

MR. AMER: And Mr. Williams?

MR. WILLIAMS: Yes, Matt Williams of Mitchell Silberberg and Knupp for the Joint Creators and Copyright Owners.

MR. AMER: Great. Thank you all for participating. So, to start off, I would like to talk about some of the scope of offsite access that's being requested here because there seems to have been some dispute in the comments about what actually is being contemplated. So, I'd like to start, if I could, with the proponents.

I'm hoping that you could provide just a general overview of what sorts of offsite access is being contemplated by your request. In particular,
are you talking about providing individual copies of programs, streaming, and any sort of limitations that you're envisioning with this petition? Mx. Teitler?

MX. TEITLER: Yes, I'm happy to answer this question. So, we believe that there are a number of non-infringing uses that could be contemplated under this exemption. For instance, controlled emulation for researchers and scholars to interact with, and research, obsolete games. Also controlled screensharing of materials for remote learning classes -- a number of uses that would be lawful under both 107 and the Teach Act that could be carried out under this exemption.

MR. AMER: Yes, Mx. ALBERT?

Mx. ALBERT: Just to second what Mx. Teitler said, we didn't lay out a clear, sort of, list of what our potential authorized offsite methods of access because we believe that libraries and archival institutions need the flexibility to determine what is the best, sort of, non-infringing use for the particular work and for the particular circumstances. You know, that might include, in certain cases, making an emulated version available. It might, in certain cases, including loaning out a work. You know, they ultimately, you know, video games and
software more generally, is a sort of, very -- it's a broad category. There's a lot of different potential, sort of, uses and types of works.

And so, we don't believe that writing in particular restrictions into the exemption would be an effective way of resolving the, sort of, individual needs of archival institutions.

MR. AMER: Now, as you know, one of the concerns, obviously, that we've heard -- and I'm, obviously, going to give the opponents a chance to address this -- but one of the concerns that we've heard is that, you know, as drafted, your proposal does not include any of the limitations in terms of number of copies that can be distributed.

It seems to me that one analog to your proposal is 108(e) which provides some opportunity to provide individual copies. But it's limited to single copies, and there's language in the statute about preventing systematic reproduction and distribution.

So, I'm wondering what your response is to that concern. Yes, Mx. Teitler?

MX. TEITLER: So, I think 108(e) is a helpful analog here. 108(e) does have a user-end number limitation, but it doesn't actually impose the same numerical limit on the library end. And so, if
we were to have analogous restrictions here, which, again, might be appropriate in some instances but, in other instances, fair use and the Teach Act might cover additional copies, that restriction would be applied on the user end rather than the library end.

MR. AMER: Yes, so, Dr. Ruberg?

DR. RUBERG: I just wanted to speak briefly from the academic perspective. So, in terms of number of copies, to give some context, I often teach video games in quite large classes. So, when we're talking about undergraduate students, I teach a class on digital media and society at UC-Irvine that is 350-students large.

So, it's just to give you a sense that often, for really core educational classes that teach literacy in digital media, we actually need quite large numbers of, again authenticated and official students accessing the material.

MR. AMER: Okay. So, I wanted to follow up on one point that was made, which is this idea that this single copy limitation applies to the end-users but not, in your view, necessarily, to, I guess, the preservation copies. Is that what you're saying? So just so I understand, so when you talk about making copies available offsite, are you talking
about end users who -- students, researchers, et cetera -- or are you talking about people who would be doing some of the preservation work, or both? Yes, Ms. Teitler?

MX. TEITLER: I think we're primarily talking about users. So, with 108(d) and 108(e), those copies are meant to preserve the traditional scholarly right to conduct research at home with one's scholarly materials that has been enjoyed by libraries and their patrons for centuries, with traditional materials.

While there might be some cases where archivists could conduct work offsite remotely that would be fair, I don't think that 108(d) and 108(e) specifically would encompass those uses. Does that answer your question?

MR. AMER: Partly. So, in terms of what your proposal is trying to get at, you're trying to implement something analogous to 108(d) and (e) that would provide for, you know, the equivalent of what's provided for in those exemptions?

MX. TEITLER: Our view is that there are a number of uses that are legally permissible that are not currently allowed because of the on-site limitation that was put in the previous rulemaking.

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That includes uses such as analogs to 108(d) and 108(e) but might also include some additional uses that would be fair under a case-by-case fair use analysis, which, again, is very fact-specific and very individual and is the reason that we believe that this broader language that would allow libraries, which are very risk-averse institutions that are accustomed to making these kinds of decisions about their traditional materials, to analyze and decide on an individual, case-by-case basis, what would be appropriate.

MR. AMER: Mx. Albert?

MX. ALBERT: Just to second what Mx. Teitler said. So, I think that, yes, we -- like, I could imagine certain circumstances where 108(d) or 108(e) style, that, sort of, loaning out, sending a copy would be appropriate, but for lots of video game uses, that's just not going to be a useful idea.

Like, let's say, "oh, great, like, you get this floppy of this 1980s game." I will send it to you, right, this individual copy. Well, if I'm a scholar or researcher, like, great. I now have this copy I can't use. So, there may be circumstances in which something like, sort of, emulation as a service or other types of access are just going to be more
appropriate to the particular work.

So, we didn't want to limit it to the kinds of restrictions that are in 108(d) and (e) because we don't think that's necessarily consistent with the different ways in which folks need to use these works, including what Dr. Ruberg talked about, about, sort of, access for teaching.

MR. AMER: Okay. So, to follow up on that, I think one of the -- and I want to bring in the opponents, too -- but one of the concerns or, maybe, points of confusion seems to be that the current language talks about preservation, right? You know, and so, the current language, in some respects, tracks Section 108(c), although not entirely.

So, I think there is some question about if you're asking an exemption that covers these additional activities -- teaching and scholarship and so forth -- whether that would need to be spelled out more clearly in the language of the exemption because those things aren't necessarily limited to preservation. I wonder if you could -- yes, Dr. Lowood?

DR. LOWOOD: Yeah, maybe it would help if I said a few words about why libraries engage in preservation in the first place. Surely, there's many
benefits to that, many cultural heritage reasons for
doing it and so on and so forth, but in terms of our
core mission as university-based libraries and
archives, we support instruction, and we support
research.

So, the preservation activity should not
really be thought of as separate from provision of
access. It's really the reason that we expend
resources in these expensive projects to preserve
software, various kinds. We do it in order that
classes like Professor Ruberg's can be conducted and
that researchers who come to us for access to
historical materials can be served.

MR. AMER: I wonder if either Mr. Englund or
Mr. Williams, you wanted to speak to the concern you
raised in your comments about this apparent lack of
restrictions on the parameters of the offsite access?

MR. ENGLUND: Sure, I'll take a stab at it,
and Mr. Williams may want too as well. But, first, I
want to be clear that video game companies support
legitimate preservation by responsible preservation
organizations. But, like you, Mr. Amer, I've, kind
of, struggled to figure out exactly what it is that's
being proposed here. The original proposal regulation
didn't have hardly any limitations at all on the use
beyond they'd have to be a library and archive's preservation.

And the reply comments suggest some limitations that possibly the proponents would be willing to accept, but they aren't very limiting at all. This may not be the time to get into that, but I'm happy to do so.

But then, today, at the panel, we've been talking about distribution of copies, and I didn't understand, from the comments that were filed in writing, that distribution of copies was even in the cards here and it was not obvious to me that that really works because video games and video game consoles tend to have interoperable technological protection measures. So, simply passing out copies of games doesn't necessarily mean that they will be playable on consoles unless this is also about allowing all of the students in a class to hack consoles.

If this is focused on emulation and it's focused on scholarly purposes, I think the regulation doesn't do it. And it's also, kind of, confusing what the proposed regulation says because the initial comments from the proponents marked up clause 12(2) of the regulations while the reply comments marked up
12(1)(b) of the regulations. It was two different paragraphs of proposed regs. But, either way, there aren't a lot of limitations here. And so, I think the Office's task is to analyze the full possible scope of what is permitted under any particular regulations under consideration. And I think, based on what we're hearing so far, it's one that would allow any public library in America to engage in circumvention of TPMs without a limitation to university libraries or research purposes, or much of anything else.

And if you then apply your fair use analysis to that, I think you conclude that there are lots of uses that aren't the kinds of uses that the proponents are talking about.

MR. RILEY: I'd like to jump in, and maybe it would be a good point here to talk a little bit more about the concept of controlled emulation and what is actually happening there. I think that the record can, kind of, use a little more discussion on that point because it doesn't look like the exception is looking for emulation or a controlled screensharing language in the exemption itself.

So, if someone would talk about where copies are made and what other 106 rights are implicated by
that, that would be helpful. Mx. Albert, I see your hand is still up. Would you like to address that?

MX. ALBERT: Sure. I think I can understand that there might be some lack of clarity on what we're proposing. That's merely because we're trying to accommodate the wishes of the Entertainment Software Association and the Joint Creators. In terms of adding additional restrictions to the exemption that we think will do their best to minimize the harm onto preservation institutions while preserving the interests of video game makers and to harmonize the eligibility restrictions across the two software preservation exemptions -- or, two of the three software preservations exemptions, which we know is a subject of much confusion.

In terms of the controlled emulation or the 108 copies, like, the purpose is to allow archival institutions in the way that meet the eligibility criteria proposed by the Copyright Office in 2017 as part of the discussion document, to do what they do with all of their collections, which is make a determination about what an appropriate use is, given the rights of the copyright holder, and then engage in those uses.

So, some circumstances, those might be...
controlled emulation uses. And I think Dr. Lowood can
talk a little bit more about how exactly that works.
But the point is that the specific restrictions
around, like, you -- it's only good for this thing, is
totally inconsistent with how archivists and
preservationists actually preserve video game works.

And the core problem here is not that the
works aren't being preserved because there's actually
no ability, and there's no ability for scholars to
access. So, I think that, you know, if the Copyright
Office thinks it's appropriate to include those sort
of -- I think it's 108(d) -- style language around
notice of access to the work -- or, notice that access
to the work is for no purpose other than private
study, scholarship, or research, in order to offset
some of the concerns about, sort of, general online
access to arcades, I think that we, as proponents
would be okay with that.

And we, obviously, are suggesting importing
the eligibility requirements that were part of Class
14a, the video game Class, to 14b. But I'll let Dr.
Lowood talk a little bit about the controlled digital
emulation space because I think he's better equipped
to talk about the realities of that.

DR. LOWOOD: Yeah, I'll go ahead and do that
now, if that's okay. First, I should say, controlled emulation is something that's being tested now. There aren't a lot of actual services that have been stood up. In the academic library and archives world, the idea behind controlled emulation is that collections available at one institution could be made available to authenticated researchers or to students at a home institution, or possibly at other institutions as well.

Again, these would be authenticated users. It's an online system that allows for that. The situation with rights for access is a bit of a stumbling block right now. We, under the current regulations, we feel like it's going to be very difficult to do that. But, you know, Stanford, any major library that is involved in creating a service like this is going to be very attentive to the rightsholders and their interests.

We're not going to be putting anything up on the open web. This will be a closed system with authenticated users, and pretty much restricted to the researchers and students or other groups that we've mentioned earlier.

MR. RILEY: Can you explain a little bit more about, you know, where the copies are in
emulation? Because I'm not entirely sure I follow, you know, is the operating system being emulated? How does that work with the game, for example? I just think you need to walk us through it a little more slowly.

DR. LOWOOD: Yeah, so, you know, we have a software collection at Stanford. Say, we pick a title from our collection to make available through emulation. At Stanford, you know, at the holding institution, someone will put together a kind of, a package which involves the environment that's needed to run that software.

So, if it's software that uses an earlier version of DOS, for example, that will have to be accessible to that system, and that will run at Stanford. A user at UC-Irvine, where Professor Ruberg is, would make a request to us. It would be authenticated and would, essentially, have that available through the browser in, kind of, a streaming fashion, to them.

MR. AMER: Let's go to Mr. Zambrano, who I think has a question, and then I'd like to move onto talk about Section 108 in a little more detail.

MR. ZAMBRANO-ROMOS: Sure, thank you, Mr. Amer, and this is for proponents, and maybe this is
for you, Dr. Lowood. Could you elaborate a little bit more on the security parameters that are used when you're sharing some of this information off-premises? You mentioned a closed system, authenticated access, but I was wondering if you could talk a little bit more about that.

Are there any kind of -- anything that guides you to develop that security, maybe from the software development world? Is there anything out there that could explain how this security process works? Thank you.

DR. LOWOOD: Should I just answer that? I will do that. So, first of all, let me clarify. I'm not part of our IT team in the library. I'm not the person who's going to be designing this system, but the way it's going so far with our testing and with our projects to develop this, is this probably would be a single sign-on like you would have at any university, where you would use your university credentials to sign into the system to gain access to the node at your university. And that would be the way it would be delivered.

So, I expect that we would require authentication -- something like that. I can't say that, you know, now that it's going to be the usual,
sort of, single sign-on. So, single sign-on would be, basically, your university username and password would get you into that system.

MR. AMER: Mr. Englund, did you want to respond quickly? And then, I did want to move onto the next topic.

MR. ENGLUND: Just a couple brief points before we move onto the next topic. I mean, first, the discussion of controlled emulation is interesting, and to a certain extent, perhaps even comforting. But none of it's in the regulations. So, there's no limitation to universities or researchers or students or authenticated users, or anything like that.

That is a very different proposal from the proposal that is on the record. Second, simply should observe that college students are important consumers of video games. And so, merely saying that somebody is a student at a university who has been identified as being enrolled at the university ought to be able to access emulation is not a comforting message.

I think if the proposal is that these are authenticated students that are doing a project on a particular game, that's a different proposition. You can, if you wrote a regulation to that effect, you could analyze it. But again, merely saying that
somebody is a university student ought to be able to
play games through an emulator is not something that
sounds like it would be a fair use.

MR. AMER: Okay. So, I see some hands up, but I do want to
ask another question. I think it might be helpful for us to sort of
understand what your views are in terms of what Section 108
currently allows and does not allow, and to what extent fair use
or something else may need to come into play to fill
in any gaps.

So, I mean, I'm looking at Section 108, and as we've talked about,
there is Section 108(e), which does provide an exception for libraries
to provide individual copies that become the property of the requester
if a market check is performed, and a copy is not otherwise available.

Now, 108(i) excludes audiovisual works. So, it seems to me that, if
we're just looking at 108 and we're talking about making individual copies for users following
a market check, you would need to look to some other -- you would need to look to fair use or
something else to cover video games. But I'd like, actually, both sides to address that and see if they
agree. Mx. Teitler?

MX. TEITLER: Yes, I'm happy to speak on
this. So, to your point, 108(i) does exempt audio-visual works from a number of the 108 provisions including 108(d) and (e). As I mentioned earlier, the spirit of 108(d) and (e) absolutely encompasses the uses we're talking about here, that traditional right to scholarly research done at home.

Moreover, in the 108 Report that the Copyright Office put out a few years ago, the Office clearly indicated that the requirement of operating from a physical premises for 108(b) and 108(c) is no longer functional for audiovisual materials, and we believe that that is absolutely applicable here.

I'll also add that a number of the synchronous and asynchronous online courses that we might talk about that would happen under this exemption would be encompassed by the Teach Act if people were engaging with portions of material, and I will, maybe, suggest that my colleague, Ms. Woodall, can speak further to the applicability of fair use here.

MR. AMER: Yes, Ms. Woodall?

MS. WOODALL: Absolutely. So, while 107 -- so, 107 can fill the gaps left by 108 here for uses including research and teaching, which would not be included under 108 currently. Our argument laid out
in both our long comment and our reply that these are
transformative fair uses, still holds and has actually
been strengthened since the Google decision made
earlier this month that recognized teaching and
research as transformative paradigm purposes that
fulfill fair use.

MR. AMER: I understand that. I'm sorry to
interrupt, but we're going to certainly get into fair
use. But I just want to, kind of, start from -- I
want to put fair use to the side for just one second
and see if we can, sort of, reach agreement on what
may or may not be permitted under Section 108. So,
Mr. Williams, could I bring you into this discussion?

Do you agree that if a library has a
collection that includes software other than computer
games, they have some right under Section 108(e),
provided a market check is completed, to make and
distribute individual copies of those works to users?

MR. WILLIAMS: Thank you. So just to make
sure I understand your question, you're asking about
software other than video games that would not
simultaneously be an audiovisual work?

MR. AMER: Right.

MR. WILLIAMS: Right. So, on 108(d) and
(e), my understanding of 108(d) is that it only
applies to portions of specific types of works and that probably is not the space in which we're living, for this discussion.

With 108(e), I think it applies to instances where there's an actual request by a researcher, not a proactive policy that's put in place to try to create replacement copies or preservation copies of the computer programs.

So, as I've understood the proposal, and my understanding was consistent with Mr. Englund's that they weren't really looking to distribute copies of programs, so much, you'd be living within the 108(b) for unpublished materials and 108(c) for published materials, and that's limited to on-premises access.

So, I guess that's a long way of saying I think the answer to your question, under 108(e) for a computer program that is not also an audiovisual work, would be that, in some instances, they could distribute a copy on a request from a researcher.

MR. AMER: Okay, thank you. Dr. Ruberg?

DR. RUBERG: So, I just wanted to bring up what looks, to me, like an equity issue, which is about differences across different areas of media, different things that we might study. So, I'm a scholar, originally, in literature. My PhD is in
Comparative Literature, and I have colleagues who still teach in literature who have access to these materials that they need for their scholarship, for their teaching.

You can reach out to a library, to an archive, ask for something obscure, get a copy of it, whereas for us teaching video games, it's really just completely night and day. So, we don't have access to things to study. We don't have access to things to teach, and video games, really, are just as crucial as forms of culture, as forms of art, as something like literature.

And I also want to clarify, just to very quickly to respond to Mr. Englund's question about students going on, playing video games for fun. The types of games that we are talking about, the types of games that I'm talking about, are not, primarily, contemporary, big games that our undergraduates are playing for recreation.

These are artistic games, historical games, small, experimental games. These are the things that our students and our scholars need access to.

MR. AMER: Thank you. Mx. Albert?

MX. ALBERT: Well, I just wanted to take a second to point out that the 108 -- I believe 108(b)
and (c) -- although it says "premises", it doesn't specify physical premises in the way that the exemption -- the current rounds of the exemption do. And, you know, I think there are certainly institutions that understand that as premises being the sort of, broader authenticated space in which users can work in.

So, I think even if you were putting the non-video game software under 108(b) and (c), I don't think that that necessarily support a restriction around physical premises.

MR. AMER: Okay. I wanted to ask one other question about 108. So, in our 2018 recommendation in recommending the exemption for preservation of computer programs other than video games, we did focus on 108(c) and, kind of highlighted the fact that it expressly prohibits the distribution of digital copies outside the premises of the institution. And, as you note, Mx. Albert, the exemption refers to physical premises. The statute just talks about premises.

What should we do with that? I mean, you know, I take the point that the current exemption doesn't exactly track 108. It allows -- it's not limited to three copies. It includes museums and so forth, but what do we -- if we have a sort of,
expressed prohibition in 108(c), I wonder what your
view is as to how we should address that. Yes, Mx.
Albert?

MX. ALBERT: So, I think that it goes back
to the reasons why the Copyright Office didn't accept
some of the other limitations that are present in
108(c), right? Not restricting the exemption to --
what is it -- damaged, deteriorated, lost, stolen, or
format obsolescence. And our, you know, in 2018, we
discussed extensively why format obsolescence is not
the right framework here.

And I think this speaks to the need to, sort
of, that the Copyright Office has written about in its
Discussion Document to, sort of, update -- to move
beyond the sort of, textural context of 108(c) to,
sort of accommodate the realities of the needs of
scholars and institutions.

And, you know, I don't mean to belabor it,
but clearly, the COVID pandemic has accentuated the
need to have no longer be required to have off -- to
no longer be restricted to particular physical on-site
premises access.

So, I think that, you know, whatever the
reasons why we chose not focus on Section 108 in this
current round of rulemaking is we think that, you
know, fair use provides a much more robust, broad way
to accommodate the types of uses that archival
institutions have to make of these words in order to
actually serve their users in the way that is
equitable in the ways that Dr. Ruberg was talking
about.

MR. AMER: So, I mean, I'm trying to address
the concerns about unlimited copies and so forth. So,
from your perspective, is it appropriate for us to
consider a framework similar to -- if we're talking
about any offsite access, is it appropriate for us to
look to 108(e), which is a much more, sort of,
confined exception?

It does allow for offsite copies upon the
request of users after a market check has been
performed. Is that something that, kind of, moves the
ball towards facilitating the types of uses that
you're interested in?

MX. ALBERT: I'm assuming that's for me.
Yes. I mean, that's why we, you know, in our, sort
of, the language we incorporated in order to address
the ESA's and the Joint Creators' concerns,
incorporated some of the 108(e) language, right? You
know, the notice that access to the work would be used
for any purpose other than private study, scholarship,
or research.

    You know, what I would want to caution the
Copyright Office against is limiting the sort of, uses
to those present in 108(e). We think that the
108(e)-style restrictions are totally reasonable, and
that's indeed why we said we'd be willing to submit to
them if the Copyright Office thinks it's appropriate.

    MR. AMER: Okay. Yes, Mr. Williams?

    MR. WILLIAMS: Just to say quickly that, you
know, as you mentioned, 108(e) does not apply to video
games, does not apply to audiovisual works. And so,
you'd be going outside of 108. And the other thing
that I have an issue with, with using the language
that the petitioners proposed, although I do
appreciate them putting it in, and I understand that
it comes from the statute, is the security language
about just not having notice that someone,
especially, is going to misuse these copies.

    It doesn't go far enough, for my liking.
    It, basically, unless you proactively go out and try
to ask someone to admit that they're going to do
something other than research, the language doesn't
have much teeth. So it's hard to imagine a situation
where someone who's a beneficiary of the exemption
wouldn't be able to qualify under that language.
Someone would need to, you know, show up wearing a t-shirt that says, "I want to do something more than research," or something like that, potentially. So, I think much stronger language would be needed there.

MR. AMER: Okay. I'm going to give the folks with their hands up a chance to respond, and then we're going to, I think, move to the next topic. So, let's go, first, to Mx. Teitler.

MX. TEITLER: Yes, so, I'd just like to raise the point here that these types of limitations have worked perfectly well in other rightsholder contexts. I mean, books, all traditional publishing materials have been able to be subject to these types of limitations without bringing about the downfall of an industry.

I also think it's appropriate to add that libraries make these kinds of decisions constantly. They are attuned to what scholars are coming in to study. They are aware of the types of decisions they have to make to comply with copyright law. We're not talking about people who are particularly not risk-conscious.

Libraries are very conservative institutions that care about compliance, and I really think it's
unrealistic to suggest that a library would go out
here and make copies available where there might be
bad actors who would take advantage of them. It
really flies in the face of what they do already,
every day, to make traditional works available in this
way.

MR. AMER: Mr. Englund?

MR. ENGLUND: I agree with everything Mr.
Williams said a few minutes ago, and I would just like
to put a little bit more gloss on it, that the
proponents here have chosen one of the weakest parts
of Section 108(e) as their offered compromise here
that there's no notice. But the concept of notice
isn't very meaningful if a public library chooses to
put emulated games up online for a public audience, as
the proposed regulations would seem to permit.

At that point, nobody's going to provide
notice when they go online to the library's website to
play the game, and they have omitted from their
proposal the limitation that someone mentioned a few
moments ago -- the requesting language. That was
language crafted back in the '60s for a very
traditional, interlibrary loan model where a
researcher would manifest himself to a librarian, and
I'd like to get this book -- a copy of this book --
for an inter-library loan.

And, you know, in that case, perhaps the absence of notice coupled with that human interaction of the request is, perhaps, a reasonable limitation in the statutory language. But here, we don't have that limitation. So, the proposal would permit a library to make a game available for the public. And, with that, the notice limitation is not meaningful.

MR. AMER: Mx. Albert?

MX. ALBERT: So, I want to note that I think that -- I'm not sure, and maybe this is my mistake -- but Mr. Englund and Mr. Williams have overlooked the fact that there are requirements built into the eligibility criteria of using reasonable digital security measures.

You know, that's the thing we think that it makes sense to take from 14(a) to 14(e). So, you know, it's written into the definition of an eligible institution that that eligible institution has to include appropriate digital security measures for the particular works at issue.

And this is building on, again, the Copyright Office's Discussion Document on Section 108 where the Copyright Office specifically says, hey, it doesn't make sense to require particular, specific
It, in fact, is -- we want -- that would be an overly burdensome requirement, but what we want is for libraries, archives, museums, to be able to make the appropriate decision about the types of security restrictions.

So, I think that, you know, if an eligible institution has to use reasonable digital security measures, right? So, that already says that Mr. Englund and Mr. Williams' parade of parables where the public library is, sort of, making these games available for free, well, unless we think that that is a reasonable digital security measure, and I think it's clear that Mr. Englund and Mr. Williams don't, right, then that's not an eligible institution under the exemption.

So, I hear -- I want to be really sensitive to the concerns that the Joint Creators and the ESA have. I understand that this is a space where there are a lot of competing, difficult decisions to be made.

But I think it's, kind of, like, you know -- as my colleague Mx. Teitler said, libraries make these decisions all the time, right? And part of what we're doing is just trying to preserve the same flexibility that the Copyright Office mentioned in the Section 108
context, in order to allow them to do so. But Dr. Lowood is much better positioned to speak to that than I am.

MR. AMER: Thank you. Yes, Dr. Lowood, and then I'd like to ask another question.

DR. LOWOOD: Yeah, just a little bit of context, maybe information to support what Mx. Albert just said. You know, my experience is that academic libraries are pretty conservative in this regard, quite risk-averse. If you look at our catalog, there's very little from our collection that is available in the open web to anyone, in other words, without restriction, without authentication.

And in every case, those items are available because we have explicit permission from the rightsholders. We're involved in a project right now regarding thousands of digital objects that we created as preservation measures to contact rightsholders and see if we can secure their permission to make things available in the open web, and if not, only research access will be provided in those cases.

So, I just, sort of, want to temper the idea that, you know, our goal in this is to provide, you know, unrestricted access to everyone. That's not the case at all.
MR. AMER: Thank you. So, my question before was just limited to 108. So, I would like to now, sort of, turn to fair use. So, it seems to me that if you're going to include video games, some degree of offsite access to video games, you would need something other than 108 as a basis for doing so, given 108(i), which excludes audiovisual works from the exception under 108(e).

So, for proponents, you know, and Ms. Woodall, I apologize. I cut you off before. I don't know if you wanted to jump back in here, but I'd like to hear your, sort of, best case for the proposition that fair use, under current law, might extend to some level of offsite access for video games. Yes, Ms. Woodall?

MS. WOODALL: Yes, of course. So, fair use, under current law, which is currently developing, and we've actually seen the most recent Supreme Court decision on transformative uses of software earlier this month, I think the same logic can be transposed over to video games where, although we are using -- or, although a researcher, preservationist, or educator might be using the video game or software for its exact same use as designed, as long as it's being used for an overarching, transformative purpose, it
can be -- the purpose sways in-favor of fair use, as it did in the Google v. Oracle decision.

Breyer specially noted that teaching and research are paradigm transformative uses, even if the software is being used for a similar use or a similar context, so long as that overall use is transformative. Teaching, research, and scholarship, add comment and critique, which are fundamentally transformative.

Our brief goes into much greater detail about other aspects of history and research that are transformative, but effectively, these uses we're seeking to allow are all transformative and have very minimal to no market harm, as these are out of commerce works we're talking about.

MR. AMER: Thank you. Mr. Band?

MR. BAND: So, it seems to me that the only issue here, really, is, I guess, the fourth factor, right? I mean because we already have an exemption that allows on-premises access. And so, what we're trying to do is get off-premises access. And so, the only difference, really, between on-premises and off-premises, conceivably, is some potential harm to the market.

But, otherwise, it's all the same. And so,
that's really the issue. The only issue to really focus on is, is there somehow a much greater threat to the market of the rightsholders by virtue of off-premises access? And the answer here is, plainly, no.

I mean, part of it is because the nature of the works we're talking about, we're already talking about out of commerce works. So, that already diminishes, significantly, the risk. But also, you know, let's be real. You know, if I can go into the library with my laptop and have access to the video game on my laptop in the library, how much less of a risk is that than if I could do the same thing from my apartment or my dorm room?

I mean, either way, there's going to be -- either there's going to be adequate authentication and security, or there isn't. And we've already heard that that's a requirement that there is now. There's been absolutely no showing that somehow this has been abused, that this has let open some floodgates.

And so, given that, there really is no difference. And so, we're, you know, this is, to some extent, a little bit of, you know, how many angels can dance on the head of a pin. You know, there's really not going to be any appreciable difference to the
market. Either our security measures work, or they
don't.

And if they do, then it doesn't matter
whether it's in the library or outside the library.
Either way, it's the same.

MR. AMER: So, the current exemption says
video games -- applies to video games solely for the
purpose of preservation of the game in a playable
format by an eligible institution, and one of the
conditions is that the video game is not distributed
or made available outside of the premises of the
eligible library.

So, I think a question is, and I take your
point about, you know, already -- the exemption
already providing for some degree of on-premises
access, I think a question is, how is this proposed
exemption related to preservation, which is,
obviously, the focus of the current exemption?

MR. BAND: Well, I mean, preservation is the
reason we wanted circumventing, right? I mean, you
need to -- you're circumventing in order to preserve
the work. And then, the question is, okay, now having
preserved the work, what kind of access is
permissible?

And is it only on the premises? Is it only
researchers on the premises, or can a researcher from, you know, from an apartment down the road, can that researcher also have the same access? But the underlying purpose of the initial circumvention is the same. I mean, it's for purposes of preserving the work.

MR. AMER: Dr. Ruberg, I think, maybe, you had your hand up first. If not, I apologize.

DR. RUBERG: Thanks. So, I just wanted to provide an example that speaks to Ms. Woodall's point about transformative use -- fair use, transformative works, and also this question of preservation and access.

So, to give you a sense, so, a lot of the work I do is on diversity and LGBT issues in video games. And what I do, as a scholar, is I'm actually looking back at games across history to find the things about them that are related to LGBT issues and to inclusion that may not be immediately obvious.

So, I'm not necessarily just looking at games that have, you know, LGBT people in them. I'm trying to unearth, you know, who has worked on these? What messages are in them? So, there's a deeply transformative purpose to this kind of cultural work on games that actually shifts what we think we know.
about them -- shifts the conversations around them.

And, for example, I was working on a project where I really needed access to materials that were at -- there's a Museum of Play in Rochester, New York, which, I'm in Southern California. That is not an easy trip to make.

And if I had been able to have remote access to those materials during my process, I could have done that transformative work because they would have been preserved. So I just want to second this idea that the preservation and the access, for me as a scholar, are inherently linked.

MR. AMER: Mx. Albert?

MX. ALBERT: Sure. I had two quick points I wanted to make, one is just to build on Ms. Woodall's point about Oracle v. Google, and I think that the other piece of language that came out in that decision was after our filings that I really want to emphasize is Justice Breyer's discussion of the public benefit and the fourth factor, which, I think, goes to Mr. Band's point about, sort of, like, what is the debate about here.

And even if there is some sort of market harm, right, which I don't -- there is no evidence in the record that, you know, the preservation by the
types of eligible institutions we're talking about here is causing any kind of market harm.

But I will say is that, you know, he -- Justice Breyer very explicitly talks about weighing the importance of public benefit and the importance as part of thinking about the fourth factor. And I think that's worth emphasizing here, as Dr. Ruberg talked about that important public benefit.

The other thing I wanted to flag was I think that, you know, Dr. Ruberg and Dr. Lowood can talk extensively about the relationship between preservation and access, but I wanted to point the Copyright Office back towards part of our original briefing where we actually talked about how, in order to sometimes get funding for the kinds of preservation -- the expensive kinds of preservation -- that we're talking about there, institutions have to make these kinds of works accessible to outside researchers, right, or to, sort of, populations who are affected by them.

And we actually heard stories since we submitted our original testimony that, you know, there are certain grant committees that will look at a grant that doesn't allow for, sort of, access to the relevant researchers, not by going to the site, but
sort of, more generally, and won't give you money.

So, if software preservation is inherently tied to these, sort of, on-site premises restrictions, this work isn't going to be preserved. The way this has to do with preservation is because the limiting of the access to these -- limiting access to these works limits the types of works and the works that are getting preserved.

MR. AMER: Mr. Williams?

MR. WILLIAMS: Thank you. On Oracle v. Google, we had some discussion of this last week, and at least my reading of it is it's much narrower than the space we're discussing during this particular hearing. It was dealing with, you know, uses of functional API software, nothing close to the video game and audiovisual work.

And I think Mr. Band agreed with that last week, although maybe I'm overstating what he said. But I don't think it's fair to say that that decision stands for the proposition that all educational or all research uses are fair or lawful, and I think it's also about a very narrow type of software and a very specific set of circumstances.

On the issue of no evidence of harm, you know, I would say the current exemption is limited to
on-premises use. So, for us to have the evidence of harm caused by off-premises use, we would necessarily have to be pointing to people who are not covered by the existing exemption.

It's also quite difficult to build a record of who believes they're using an exemption and who's engaged in infringement. So, collecting that kind of evidence, for us, is always difficult. On the question about fair use versus Section 108, I would just say that our view is that, at least until the Section 108 Discussion Document gets traction and is passed by Congress, that the Copyright Office should be very hesitant to go beyond the current parameters of the statutory Section 108.

And some of what's being discussed today is covered by the recommendations in the Discussion Document. Some of it, I think, goes beyond what's covered by the Discussion Document. But that document's been out there for several years. It's not yet been adopted by Congress.

So, I think it's not necessarily safe to assume that everything covered in that document is covered by Section 107, and that would include covering public performances, which what primarily seems to be at issue here, rather than distributions.
at the request of individual researchers who make requests.

As Mr. Englund reiterated earlier, the current 108(e) is about user requests, not about proactive projects by universities. So, thank you.

MR. AMER: Thank you. Dr. Lowood?

DR. LOWOOD: Yeah, I just wanted to add a little bit to the comments regarding access in relationship to preservation. Yeah, they're inextricably connected. Indeed, when we apply for grant funding, there is usually a question or two about the provisions of access that we'll provide.

And I'd like to add to that that, with internal funding, it's the same thing. Within the library, if an internal project is to be considered, we'll have to say something about access. If access is, you know, not available to materials that we preserve, it's going to have a chilling effect on those preservation activities.

MR. AMER: Thank you. Mr. Englund, and then I'm going to have one very quick follow-up, and then I'm going to turn it over to my colleague, Mr. Riley, for the next topic.

MR. ENGLUND: I'd like to just expand a little bit on Mr. Williams' comments, with which I
agree. As the Office goes through its use analysis
here, it needs to focus on the broadest possible scope
of activity permitted on whatever regulation it's
thinking of adopting.

And right here, this proceeding, in this
class now, that is not one that is very limited, as we
explored earlier in the panel. And we shouldn't focus
on the things that are already permitted by the
current exemptions. Focusing on the broadest reaches
of the new activity that's authorized, what we're
talking about is public performance without much in
the way of meaningful restrictions.

Charitably, for the convenience of
researchers, when the audience is researchers, but,
potentially, in the case of public libraries,
providing access to their patrons because that's
permitted, for recreational gameplay. And, you know,
the Office has said, in 2015 and 2018, that public
recreational gameplay is not a transformative use --
not a fair use.

And, I think, there's a tendency by the
proponents here to talk about downstream uses like
scholarship that could be created if there were more
convenient access to preserved materials. But that's
really indirect. I think the focus here needs to be
on the public performance for convenience.

    That's not transformative, and to the extent that we're talking about recreational play by patrons of public libraries, the potential for market harm is very obvious. And, you know, with respect to Google Books, I think the Supreme Court's decision could not have been clearer that it was animated by the nature of API declaring code, which at least some Justices appeared to think wasn't protected by copyright at all, and it was within that very specific and narrow framework that reached the fair use decision they did.

    I think you could not extrapolate that to all access-enhancing uses of public performances of copyrighted works, creative works. That's just an over-reading of Google against Oracle.

    MR. AMER: Okay. I want to be mindful of time, here. Mr. Zambrano, did you have a question?

    MR. ZAMBRANO-RAMOS: Yes, thank you so much Mr. Amer, and this question is for proponents. I'm just curious, in the purposes for off-premises access, we're talking a lot about research and scholarship. Does that include research and scholarship on the preservation methods themselves, or just on the material that is preserved? Thank you.

    MR. AMER: Dr. Lowood?
DR. LOWOOD: I'll try to answer that. Let me know if I'm not answering the question that you're asking. Yeah, well, we do publish on our preservation methods. In fact, the work we've been talking the last few days about, the work that we're doing with regard to emulation as a service and some of the things that we've learned, including some of the things that we've learned about our contacts with rightsholders and our efforts to gain permission for world access and things like that.

So, yes, we do engage in research and publish about the preservation methods themselves. Did that answer what you were after? Okay.

MR. ZAMBRANO-RAMOS: Yes, thank you.

MR. AMER: Ms. Woodall?

MS. WOODALL: I believe that we're also talking about research on the actual works themselves as a downstream use. I, as we've discussed, those are treated in-practice as the same thing, a lot of the time, that preservation access for research and teaching.

And I'd also like to just add an additional note on the Google decision. I'm not making the point that all teaching and research uses of software or video games are permissible. However, Breyer does
list teaching and research as paradigm, transformative uses of software.

That same principle, that software can only be used -- the code can only execute so many functions -- does apply to video games. This research and teaching is not changing the actual code structure of the video games. We're talking about transforming them for access, critique, comment, that kind of thing.

MR. AMER: Thank you. So, in the interest of time, I'd like to now turn it over to my colleague, Mr. Riley, who has some questions.

MR. RILEY: Thank you. I think we've touched on these a little bit, but I want to hammer-down on a couple of topics here. For the proponents, I wanted to offer the ability to explain a little bit more and ask whether the adverse effects are clearly attributable to the implementation of a TPM, or are the adverse effects due to changes in the roles of libraries, archives, and museums.

And specifically, I know we've made reference to the ability to raise funds and, for example, the difficulties going to different locations to complete research. Long and short, is this the kind of harm that's related to the TPM? Mr. Teitler?
MX. TEITLER: Yeah, so, I want to be crystal clear that the adverse effects here arise directly from the outcome of the 2018 rulemaking. So, the net effect of the exemption in 2018 was to allow permissible uses, but only to allow them on site. That barrier is really significant in preventing a lot of other lawful uses for scholarship and teaching that could be carried out but for that language in the existing exemption.

If exemption language doesn't count as an adverse effect of the TPM that should be addressed in this rulemaking, then it's not clear to me where you could ever address adverse effect of the language itself because those harms that are preventing these lawful uses came about directly because of that language that was put in three years ago.

MR. RILEY: Mr. Band?

MR. BAND: I think the example that Dr. Ruberg gave is a perfect example of exactly how it is the TPM that's the problem. You know, it's the TPM that is preventing, or the narrowness of the exemption that has been granted to circumvent the TPM, that is preventing the Museum of Play from making access to that game available off-premises.

And so, you know, that is a perfect example,
a clear example, of how the TPM is having an adverse
effect on research activity.

MR. RILEY: So, let me ask this in a
different way. Are there any games that cannot be
preserved under the current exemption?

MR. BAND: I think, again, they can be
preserved, but the utility of the preservation is not
as robust as it could be, and that, ultimately, has
negative societal effects.

MR. RILEY: Mx. Albert?

MX. ALBERT: Yeah, to second what Mr. Band
and Mx. Teitler said, right, like, the reason we're
talking about funding for this kind of work and that
being tied to access is to illustrate exactly that
connection, right, between the limited, sort of,
outcomes of any circumvention, and thus, the
preservation to on-site use and the inability to be
able to, kind of, view this work more generally.

And I will also say, you know, that it's --
the goal of the 1201 exemption process, as outlined by
the statutory factors, has to do with the idea of
making them available for teaching, scholarship, et
cetera, right?

Like, you know, it's not just like, oh, you
know, preservation, although that's what we're focused
on here. So, my point -- I think the point I just want to make is the reason we're talking about, sort of, access to grant funding, et cetera, is to say that the limits to on-site use as limiting the works to only be available for on-site use, results in them not getting preserved.

And that's the sort of, problem that we're, sort of, aiming squarely at with this round.

MR. RILEY: Dr. Ruberg?

DR. RUBERG: Hi. So, I just wanted to speak a little bit to scale. So, I think this relates to your question, Mr. Riley, and also to go back to something that Mr. Englund said. So, Mr. Englund said that when we talk about scholarship, that that's actually focusing, in some ways, on the wrong thing because it is a down-the-line concern.

And I just wanted to clarify that that's actually really not true. So, I'm here today representing a very large field. There are hundreds of people like me who hold PhDs who study video games professionally. There are thousands upon thousands of students learning about this right now.

This is, arguably, the growing area for the study of art and media today. There are whole new college programs that are starting up. There are --
you know, I can't even count the number of books and articles coming out every month.

So, just to clarify, this is not a vision that I'm talking about for down-the-line. This is the reality that we live in. This is already vibrant, and there is a serious restriction on that public benefit when we cannot access the materials that we need.

So, just, I think, Mr. Riley, just to put that in context, right, of the scale of the kind of thing that we're talking about.

MR. RILEY: Dr. Lowood?

DR. LOWOOD: Yeah, your question, Mr. Riley, about whether there are restrictions on getting preservation done made me think a little bit there. And it's kind of interesting, actually, there are some potential issues.

And I can speak to some projects that are underway right now involving these very complex objects that digital games and other kinds of interactive media represent, especially when you're talking about titles from the 1980s or the 1990s where, you know, people don't exactly remember how everything was put together, and it becomes very complicated.

I'm thinking of one project where we've had
to draw in people who were involved in the original project, located in other places, to, you know, where we really would benefit from having them take a look at what we're doing, help us figure out how to put together the environment in an emulation situation, you know, those kinds of things, to get the preservation done.

So, I think that, actually, there could be situations where preservation would be impacted by not being able to have remote access to the materials.

MR. RILEY: So, in 2018, the Office did not propose extending an affiliate archivist exemption. But I think it was our understanding, and maybe can you confirm or if you want to add a little more, that that was not a part of this exemption request.

DR. LOWOOD: Yeah, I was only answering the question from a practical point of view. Don't ask me to say anything about the legal situation because you're not going to get a correct answer. But, I mean, I'm just saying, as a practical matter, there are situations where, you know, we're starting to encounter them now as we dig into some of our collections, where we need collaboration from people who were historically involved in the creation and development of this software to help us, to guide us,
in putting together the pieces that will make it possible to run the software again.

It's not something that I came prepared to talk about. It was entirely prompted by your question.

MR. RILEY: I completely understand. I know we're, kind of, running short on time, so I want to go relatively quickly. Mx. Teitler, and then Mx. Albert.

MX. TEITLER: Sure. I'll keep it short. I wanted to highlight two other factual -- well, really, first highlight a factual consideration, second, touch on the affiliate archivist point. So, first, under the existing regime, the methods of preservation that are acceptable tend to narrow to the benefit of very, very popular works.

So, the works that are harder to preserve that are created by studios that would not have the funds to preserve them themselves, games that typically relate to marginalized identity, for instance, I know we mention in our filings, but the first video game to feature a black character, Heavyweight Champion, which there are no existing copies of, is the type of work we're talking about there.

And those works cannot, and will not, be
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preserved unless libraries and public interest organizations step in to save them because they are fundamentally unpopular, and the industry has no interest in preserving them because they weren't very good from a play perspective. But they are very interesting from a historical perspective.

MR. RILEY: I actually have a question about that particular game because you had mentioned that in your filing, and I was a little confused because I was under the impression that that game is lost to time, now, and also that it needs specific, specialized interfaces to have the game work.

So, maybe -- is that -- that is not a typical game that you're -- that might be a type of game, but that game, specifically, you're not looking to preserve, or --

MX. TEITLER: That game, specifically, unfortunately, to your point, is impossible to preserve now because all of the copies of it appear to have been destroyed. But there are many, many analogous games that have to do with marginalized identity such as Caper and the Castro, and I'm sure Dr. Ruberg could speak more on this, that are really, really important when we think about how marginalized people are portrayed in media and what that media says
about existing culture -- scholarly, rich games that were not popular at the time of their creation, haven't been preserved, and there are only a few copies left.

Those are the types of works that are really valuable to scholars, that we've heard across the scholars we've talked to, that are interested in reaching on, that they can't right now because there might be one copy in one library somewhere, and they can't get the funding to go and see it, or the library doesn't have the funding to preserve it because they can't make it available. So, that's a huge problem.

Secondly, to touch on your question of affiliate archivists, this exemption does not encompass affiliate archivists. That was meant to change who would do the circumvention and where. The circumvention here would be occurring on site with the same people who are eligible to circumvent under the existing exemption.

MR. AMER: Dr. Ruberg, did you have something to add?

DR. RUBERG: Yes, just a quick follow-up to Mx. Teitler's point. So, it is absolutely the case that there are games that are of great cultural importance that may seem to be lost but, in fact,
often, there are individual copies in peoples' private collection.

So, video games, because, you know, people are fans of them, they will often, in their garage, have collections of them. We have an example of this, a kind of personal, informal archive at UC-Irvine where I work, where someone came to us and said, hey, I've been storing this in my garage in Las Vegas for the last 20 years -- this amazing array of things that are important for marginalized folks that are not represented in other collections.

But we have very little we can do with them. They're now in a storage closet, this amazing resource, because they take specific tech to run, and because we don't have the support to be able to share them more widely. So, even things that seems obscure, even things that seem lost, there is still the possibility for them to be re-found and to be shared and studied through this kind of work.

MR. RILEY: Mr. Williams, were you going to respond?

MR. WILLIAMS: Yeah, thank you. So, there are titles that are not commercially available that may never become commercially available again, and, to some degree, those titles are already covered by the
existing exemption if you're dealing with preservation-related issues.

There are many more titles that I think would also be covered by the proposal here, that could very well become available again, even if they are not available today. And we tried, in our comments, and ESA set forth a number of examples in their individual comments, to show how common that is becoming.

And so, to revisit the fourth factor analysis under fair use that people focused on earlier, there is certainly a potential market for games that are currently not commercially available. And in many cases, there's an existing market for those games, even if it's not being filled at the moment.

A copyright owner may decide to fill it any day. So, trying to draw that line, I think, is quite difficult, between the games that, perhaps, are not going to be available and that researchers want to get access to or want to preserve, and games that are still in the marketplace, viable properties, that are still under copyright.

And so, when you include the remote access on top of the existing exemptions, that marketplace damage, or potential damage, becomes a lot clearer
than if you retain them in their current form.

MR. RILEY: So, if I can follow up on that, as we were discussing earlier today, there were two examples of what a user might do with a preserved work, in terms of how it would be performed or transmitted. And one was emulation, but the other one was controlled screensharing.

I'm wondering if the opponents have less of a concern related to controlled screensharing and, maybe, with respect to the market or other factors? I'm going to hit Mr. Englund first, and then Mr. Williams, if you still want to respond to that, leave your hand up.

MR. ENGLUND: So, I think we haven't actually heard a lot of exactly what the proponents have in mind by controlled screensharing. I guess, to the extent that it implies that a preservation organization knows personally who its audience is, and so, is rendering a public performance, but to a known, well-defined constituency that it's clear to the preservation organization that they are actually bona fide scholars as opposed to people interested in playing games for recreational purpose, I think that is a different fair use analysis than the one I think the Office would need to engage in given the current
regulatory language.

So, I think, if you were to write a rule that talked about controlled screensharing under the circumstance I just described, I think the fair use analysis would look different.

But you know, I think, from my perspective, the most important point here, and I want to make sure it doesn't get lost. Earlier, Mr. Riley, his questioning of Mr. Band, I think I heard Mr. Band say that there's no preservation that can't happen today under the current exemption, or something to that effect.

It really reinforces the point that we aren't talking about a preservation exemption, as the Office has always understood that. This is about convenience of access. And I think that's just a very different thing for the Office to analyze from a fair use perspective than traditional preservation.

MR. RILEY: Let's see. Ms. Woodall, and then Mx. Albert.

MS. WOODALL: So, to that point, I believe the example of controlled screensharing was provided in the context of education. So, that doesn't really solve the problem for research or other scholarship access issues. And it is different than traditional
preservation.

And, additionally, to the market point that Mr. Williams made a moment ago, while rights-holders do have an ability to reissue their work back into the market -- into the commercial market -- the case law cited in the ESA's argument, or briefing -- I'm looking at footnote 54 -- every single one of these cases is dealing with a non-transformative work. So, it doesn't necessarily apply.

Transformative works, clearly, as we've discussed in our briefings, don't have the same type of market effect that non-transformative uses do. We're talking about research uses, teaching uses that will not supplant the market.

Additionally, their cited point about having the exclusive right to determine when to re-release into new markets has since been overruled, as of this month. So, while rightsholders so have some control of when they can re-release into the market, that market share is not absolute.

And as the Google court discussed in its opinion earlier this month, these rights are limited. Congress, when contemplating inserting software and audiovisual works into the Copyright Act, understood that they would be limited by fair use and other
restrictions within the Copyright Act. Thanks.

MR. RILEY: Well, I want to turn it over to Mx. Albert. I want to add, you know, if Mx. Albert or anyone else wants to address this, you know, we made some mentions of the Teach Act, and the Teach Act has some other restrictions in its language, including language that requires mediated instructional activity, an "accredited" quote-unquote non-profit institutions.

Are there any restrictions in the Teach Act that might be appropriate for this exemption? And we'll go to Mx. Albert first.

MX. ALBERT: I think I'll let Mx. Teitler take the Teach Act question. I wanted to talk a little bit about the reissue market discussion. So, I think, as we address in our briefing, just to reiterate, you know, reissues of video games, re-releases, may be all very well and good for certain players, but they really actually don't solve the problem for research use.

I think the most evocative example we found was the Baldur's Gate Enhanced Edition which actually changed two of the characters' sexualities between the original release and the re-release. So, I, colloquially, have been calling this the Han shot
first problem, but that, maybe, reveals my media consumption habits.

So, I think that, to the point about, sort of, stuff getting re-released on the market, how to draw that line, I think that, you know, the line that the Copyright Office has taken in previous versions of this rulemaking works perfectly well here, in terms of, if it's not available on the first party market, then it's out of commerce.

And I think that the reality is, and Dr. Lowood and Dr. Ruberg can talk more about this if they need to, but, you know, most -- library-style access or archival institution access to video games is always going to pale in comparison for a re-release for folks who are interested in play.

You know, I don't, like, there has not been -- I don't think there's evidence on the record, and I haven't seen any evidence suggesting that users will line up outside their local archive rather than downloading something to their Switch.

And I think that that just isn't something that's well -- even in the context of having access offsite, you know, the reality is that, you know, I might be able to access certain other kinds of copyrighted materials -- novels -- through my research.
institution, but I still buy the physical ones because I actually want to read the physical copy, and/or that, you know, it's just not in the same market.

So, I think that I don't -- I want to make sure that we don't create a line around the reissues that doesn't actually serve the needs of the scholars we're working with, or sort of, creates some weird, sort of, after-the-fact change to what is fundamentally preservation and a fair use. And I'll let Mx. Teitler take the Teach Act stuff.

MR. AMER: Mx. Teitler?

MX. TEITLER: Yes, so, I think what I'd like to highlight here is that it's pretty clear that the highly specific standards in the Teach Act limit usability in a degree that's just far too great and ends up chilling a lot of otherwise fair and permissible uses.

The Teach Act, unfortunately, is widely regarded as a legislative failure. Professor William Fisher in his Copyright X course describes it that way, and I'm sure Dr. Lowood could elaborate further that because of the very, very specific limitations in place in the law there, people don't rely on it, and don't use it, even where there might be permissible sharing of materials.
So, because, as I said earlier, libraries are such risk-averse institutions that are accustomed to copyright compliance regardless, they are well-positioned to determine which uses might be permissible here without importing those traditional, specific limitations of the Teach Act.

And, in fact, if we did import them, because libraries are so risk averse, they probably, as school have, in the Teach Act, would shy away from using the exemption at all, and end up, you know, choosing not to engage in activities that might be fair. So, I think we have to be really sensitive to the organizations we're talking about here and what their behavior's like in the real world.

MR. RILEY: Dr. Lowood?

DR. LOWOOD: Okay, just a couple of things. First, just about commercial reuse, I just wanted to say that the very popular titles that are more likely to be commercially viable, you know, they represent, in terms of the percentage of titles, actually a relatively small percentage of the collection.

Many, many more titles are more like what Professor Ruberg described. You know, things from 30 years ago that have virtually disappeared. And the point to keep in mind, then, is it's very unlikely
that a title like that is going to be held by more one
or two libraries, maybe, which means that remote
access for scholars who are not fortunate enough to be
at one of those institutions, is very, very important.
And again, it's very unlikely that those
titles are going to be the kinds of things that, you
know, a big publisher's going to pick up for a major
re-release. And in those cases, they'll be accessible
some other way for students and researchers.

About the Teach Act, well, of course, under
COVID, we spent a lot of time thinking about the Teach
Act and what it allowed us to do, and it is the case
it wasn't particularly helpful in coming up with clear
guidelines about the kinds of questions we were
getting as instructors were frantically moving from
all face-to-face teaching to all-online teaching and
trying to figure out how they could do the equivalent
of a screening in a course, you know, showing a film
or showing a game to a group of students in real time.
And we had to make up a lot of stuff as we
went along, to be honest. So, I don't know that the
Teach Act would be particularly helpful in this
regard, either.

MR. RILEY: Mr. Englund, I'm going to call
on you next, but as you reply, I'm going to ask
another question. There was this assertion by proponents that there's no evidence of "arcades" claiming archival library status under the existing exemption.

And I'm wondering if you have any evidence of that sort of circumstance, in addition to whatever you would like to offer on the current topic.

MR. ENGLUND: So, several quick points, and then I will respond to that question last. First, I think it should give the Office pause that the proponents, throughout this hearing, have run away from the expressed specific purpose statutory exemptions.

They, at the beginning of this panel, were talking about Section 108. They've just now done it about Teach Act. Congress has gone through a process and spoken on the propriety of those uses. And, you know, the desire on the part of the proponents here seems to be everything's fair use; we don't have to worry about those.

But, in trying to apply its fair use analysis, I think the Office has to be hesitant to go too far beyond the bounds of what Congress has said -- just say, "hey, everything's transformative." So, I think it's destructive and problematic that, you know,
the proponents really can't point to anything other than fair use that they think might authorize the kinds of uses they're talking about.

Second, I think Mr. Lowood just mentioned -- or Dr. Lowood just mentioned -- that the kinds of titles being preserved are likely to be more obscure titles, not the most prominent or popular games. And I've heard similar themes throughout the panel.

Unfortunately, the regulation doesn't say that, and at the risk of repeating myself, the Office's analysis needs to look at the broadest aspects of the activities permitted here. So, you've got to assume that the games that we're talking about providing access to are the most popular titles of three years ago that may be part of a franchise that has a current edition out in the market now and, through that lens, apply fair use analysis.

And next point, I think I heard Mx. Teitler say a few minutes ago that the exclusive right of the copyright owner to control reissues was recently repealed. That came as news to me. I think that was a reference to the Google against Oracle decision. And again, the court, in that decision, obviously, struggled with the perennial question of how to recognize actual versus potential markets and
ultimately credited a jury verdict about the
possibility of Oracle's being able to successfully
enter the smartphone market.

I don't think that tells you very much at
all, if anything, about the ability of video game
publishers to re-release titles. It's very clear that
they can. They do. It's very popular.

Next, Dr. Lowood mentioned COVID, and
several panelists during the course today have done
COVID. And I'm not the one to predict what the path
of the global pandemic will be, but, you know, we all
read the newspaper, hear about escalating vaccination
rates and so forth.

I think it is at least safe to assume that
when these regulations go into effect at the end of
October and that three years from then when those
regulations finally run their course that the COVID
situation's going to look a lot different.

And as colleges and universities talk about
reopening their campuses in the fall and in
anticipation of October 28th, the Office should be
hesitant to attach much weight to COVID.

Finally, the question you just asked about
-- unfortunately, I can't decipher my note. What was
the question you just asked?
MR. RILEY: It was about evidence of any --

MR. ENGLUND: Oh, arcades, yes. So, I think the best example I would provide is an organization called The Internet Archive. And we could, perhaps, debate whether it meets the definition of libraries or archives that the proponents have originally suggested they might be willing to incorporate here.

But it has long provided something called the internet arcade. You can Google internet arcade; you'll find it. It has a collection of older arcade games that are being run on an emulator and available to a public audience.

And so, it is mostly not console games -- I mean, not all console games, but I think it's a good illustration of the kind of thing that someone who calls themselves an "archive" could provide to a public audience if you wrote a regulation that says it's okay to provide emulated games to a public audience.

MR. RILEY: I know we're running low on time. Mr. Amer, did we want to follow up our --

MR. AMER: Yeah, let me just -- we're over time. So, I think I had just one, sort of, follow-up question, and it's primarily for the proponents, and you may want to respond to -- I think it's related to
some points Mr. Englund made. So, you can incorporate those.

I mean, so, it's true that any, sort of, statement by the Office about what fair use may or may not cover involves some element of prediction because every case is different, and fair use is very fact specific.

But I'm wondering if you can give us a case or cases that you think are the most factually similar that do the most to bolster your contention that the type of offsite uses you're requesting is covered by fair use.

I mean, I understand, and I know you've cited cases in your papers, and I know you've mentioned Google versus Oracle today, but to the extent there is a case that is factually similar to what you're describing here, I think that would be helpful for us. Mx. Albert?

MX. ALBERT: Sure. So, I think I actually may defer to Ms. Woodall on the fair use point, but there were a couple of points Mr. Englund raised that I wanted to flag. First, I think that it's unkind to say that we grudgingly accepted these restrictions because the eligibility restrictions actually come from our 2018 software exemption, and I'm not sure the
ESA actually even pointed out that there weren't present in the video game exemption. So, we were just trying to make sure that the exemptions were harmonized and that appropriate institutions were taking things on. With regards to the Internet Archive, I see no evidence -- the ESA has produced none, nor, I think, is there any evidence -- that the existence of the Internet Archives games online has anything to do with the 1201 exemption process.

I actually don't even know if any of those games involve DRM in the first place, right? So, claiming that that is an example of the type of thing that might be allowed by a sort of, broader offsite access strikes me as entirely a red herring because a) it already exists; they didn't need this exemption, b) we don't even know if they're covered by this exemption, and c) I think the point to make is that the actual types of institutions that are looking to these exemptions for guidance often are very cautious, as we stressed over, and over again.

Finally, I just wanted to respond to the COVID point. I think, as Dr. Lowood, sort of, has pointed out generally, and I think pointed out to us specifically, the reality is that the creation of
offline access mechanisms during COVID is not going away.

Although COVID may go away, the expectation is that these offline access mechanisms are going to continue to exist. Scholars have become accustomed to the understanding that like, hey, you could reach out to a librarian and maybe get access to a type of software.

And I think this just goes back to Dr. Ruberg's point earlier, which is, like, there's an equity issue here where we're, sort of -- scholars who study video games are actually not able to access works in the same ways that scholars who study other literature.

And then, I think that, you know, I'll let Ms. Woodall take the fair use question.

MR. AMER: Ms. Woodall?

MS. WOODALL: So, two points. One, first I'd like to respond to Mr. Englund's earlier point. It was actually me that was discussing the withdrawal and re-release in the market. I was referring to, yes, Oracle and all of the other case law is non-transformative and doesn't necessarily apply to this case.

I'm not suggesting that transformative as it
applies to all uses of software. However, in cases where research or teaching reached that level of comment or critique, they can weigh in favor of that.

   In response to -- oh, and then, one last point on that. Congress has also said, in addition to providing rightsholders with expansive rights, and Judges have concurred with this, that the purpose of fair use is to be flexible and to adapt to new and unanticipated uses.

   And the provisions here that are at issue are 30-years plus old. So, fair use is flexible and exactly designed for this kind of analysis. As far as a case that's closely analogous, three come to mind. Corellium, and pardon if you can hear the sirens going by my window, but in Corellium, Corellium developed a product using the iOS -- Apple's iOS technology -- to create online environments for facilitating technology security research.

   This allows them to access the iOS in order to fulfil these research ends. Additionally, White (phonetic) is very analogous, that online access to lawyers' legal briefings and additional pleadings, that provides access, but it does so with a transformative end by adding value for viewing, selecting, converting, identifying materials to make
them available.

Research and teaching do very similar things with the available works. They review, select, comment, critique, do very analogous things to that. The last example I can provide, just off the top, Sindermann v. CJ Society.

Here, we had a critical review of an unpublished novel. That was a fair use because it was using the book for scholarship purposes and as a means of preserving. I believe that fully answered your question, but I am happy to answer a follow-up.

MR. AMER: Great, thank you very much. Mx. Albert, I think you'll be the last word.

MX. ALBERT: I will try to be brief. I know we're over time. So, I think that the one thing that I wanted to say to complement Ms. Woodall's points with regards to the fair use is that, like, yes, there's not a case that says directly something about remote access because the sort of, distinction between on-site and offsite access is a process of this procedure.

And so, the uses in question are fair, and the question goes to the -- as Mr. Band said earlier -- the question about market harm. We believe that the reasonable security measures that libraries or
archival institutions are required to implement in order to be eligible for this exemption would more than cover the types of concerns raised by the opponents.

And so, I think that, you know, the question, then, is like, we've shown the harm of not allowing offsite access to these works. It both harms the preservation and also harms the development of scholarship in this field, you know.

And I think it's up to the Copyright Office to make sure that, you know, that the rules that are supposed to exist for the purpose of actually allowing, you know, people to use copyrighted works in ways that are consistent with the public benefit and consistent with fair use, do that. So, I'll end there. Thank you.

MR. AMER: Thank you very much and thank you all very much. I think this was a really helpful discussion. And so, we will adjourn for today, and we will, maybe, see some of you tomorrow at 10:30.

Thanks very much.

(Whereupon, at 2:44 p.m., the meeting was adjourned, to reconvene at 10:30 a.m. on April 20, 2021, the following day.)

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CERTIFICATE

CASE TITLE: Unclaimed Royalties Study Roundtable
DATE: March 26, 2021
LOCATION: Washington, D.C.

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

Date: March 26, 2021

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Section 1201 Rulemaking Hearing
April 19, 2021

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Section 1201 Rulemaking Hearing                               April 19, 2021

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