BEFORE THE UNITED STATES COPYRIGHT OFFICE

In the Matter of:             )
)             
SECTION 1201 PUBLIC HEARING: )
PROPOSED CLASS 2: AUDIOVISUAL )
WORKS - ONLINE LEARNING     )
)                  

Suite 206
Heritage Reporting Corporation
1220 L Street, NW
Washington, D.C.

Tuesday,
April 16, 2024

The parties convened remotely, pursuant to notice, 
at 12:01 p.m.

PARTICIPANTS:

SUZANNE WILSON
JALYCE MANGUM
JUSTICE SHANNON
PETER DECHERNEY
MICHAEL AYERS
STEVEN ENGLUND
DAVID JONATHAN TAYLOR
MS. WILSON: Good morning or afternoon depending on your time zone. I want to welcome everybody to our first day of our hearings in the 9th Triennial Section 1201 Rulemakings. My name is Suzy Wilson. I'm the General Counsel at the Copyright Office, and I'm going to take us through the introductions and a little bit of the logistics for today.

So these first hearings will be on Class 2, and for how we're going to run this, this will be very similar to how we did it three years ago. My government colleagues will be posing questions, specific questions, for the participants and they will call on the participants to respond.

For the participants, please use the Raise Hand feature in Zoom to indicate that you would like to respond to a question. But, if it's not working for you, feel free to just raise your physical hand and we can find you and call on you.

We have a lot of topics to cover today, as you might expect, and only 90 minutes to do so for this class. We ask that you please try to keep your responses focused to the particular question asked and
keep your comments relatively brief so we can get
trough everything and allow all of our questions to
be asked.

Today's event is being live-streamed, as
well as recorded and transcribed by a court reporter.
The video and transcript will be posted on the
Copyright Office website, and we ask everyone who is
speaking to please speak clearly and to mute your
audience when you're not speaking to assist with both
our recording and the transcription that's being done
by the court reporter.

And finally, I want to let everyone who is
listening in to know that Thursday afternoon we will
be holding an audience participation session. You can
sign up to participate in that session by using the
link that will be put in the chat. We will ask that
remarks be limited to about three minutes for public
participation, but they can be on any of the classes
that are being covered this week.

Also just a note on the chat for today, it
is not set up for public interaction during the
hearing today but is a way for us to be able to put
any notices out to all of you who are listening.

So today's hearing is on Class 2,
Audiovisual Works and Online Learning. Before we
begin, I would like to invite first my Copyright Office colleagues to introduce themselves.

MS. MANGUM: Hello. My name is Jalyce Mangum. I'm an attorney advisor in the Office of the General Counsel here at the Copyright Office.

MR. GRAY: And hi, everyone. My name is Mark Gray. I'm an Assistant General Counsel here in the Office of General Counsel.

MS. WILSON: We also have a colleague here from NTIA. Please go ahead and introduce yourself.

MR. SHANNON: Good afternoon all. My name is Justice Shannon. I am a policy analyst with NTIA.

MS. WILSON: I would now like to invite the participants to introduce themselves. We will start with the proponents of the proposed exemption. Please introduce yourself.

MR. DECHERNEY: Hi. My name is Peter Decherney. I'm a professor at the University of Pennsylvania, and I'm here representing the Joint Educators.

MS. WILSON: Now let's turn to those who are opposing the exemption, the proposed exemption, and we'll start with AACS LA.

MR. AYERS: Hi, good morning, everybody. My name is Michael Ayers, and I'm counsel for Advanced
Access Content System Licensing Administrator, LLC, also known as AACS LA, and we provide content protection technology for the Blu-ray disc format.

MS. WILSON: Thank you. Now for the Joint Creators and Copyright Owners.

MR. ENGLUND: Hi. I'm Steve Englund of Jenner & Block and representing in this panel the Entertainment Software Association, the Motion Picture Association, the News Media Alliance, and the Recording Industry Association of America.

MS. WILSON: And then finally, on behalf of the DVD CCA.

MR. TAYLOR: Hi. I'm David Taylor. I'm counsel to DVD CCA, and we provide CSS, which is a copy protection technology for DVDs.

MS. WILSON: Great, thank you. And so, to start off with the questions for Class 1, I would like to turn it over to my colleague, Jalyce Mangum.

MS. MANGUM: Thank you so much, Suzy. Again, thank you all for being here today. Again, my name is Jalyce Mangum, and I will be co-moderating the hearing today. To open us up, I'd like to start with Mr. Decherney. You are the proponent for the proposed class we're discussing today, representing the Joint
The Joint Educators proposed a similar class during our last cycle, expanding the existing exemption for Massive Open Online Courses, or MOOCs, as we'll refer to them today, related to online learning and audiovisual works. Last cycle, the Register found that the record lacked support to expand the exemption to for-profit and/or unaccredited educational companies and organizations.

Briefly, can you state to what extent your current proposed exemption is different from the proposal you submitted in 2021?

MR. DECHERNEY: Yes. Thank you for the question. So, as you know, since 2006, the Copyright Office has continued to expand exemptions for educational use, really transforming the way that media can be used in teaching in a broad range of ways. That was eventually expanded to MOOCs, online education for accredited non-profit institutions.

What happened, I think unintentionally, is that there became a kind of divide between traditional learners, who tend to be learning through institutions that are non-profit accredited institutions, and non-traditional learners learning through a whole range of innovative platforms that are sometimes for-profit,
sometimes unaccredited.

A number of things have changed. I mean, one is that the market for that kind of education continues to grow. The service that these providers offer to non-traditional learners has continued to grow. They've been really important in closing the educational divide.

I think one big change in our proposed exemption is actually building on what the NTIA wrote in response to the last Triennial Rulemaking response, to try to find a way to really narrow the class in a very solid way. So just to reiterate what's in the comment, it's a limited, a very limited exemption, and it aims to create a non-discriminatory class limited by engagement with state and federal bodies.

So, again, we use the NTIA's definition from the last rulemaking. The exemption would be limited to qualified online educational entities. That's those entities registered with state and federal government bodies that have an educational mission.

We've given a number of examples, you know, others. These appear in different kinds of forms, but for the company 2U, for example, they list their educational mission in their Form 10-K as part of their 501(c)(3) registration, and it says, "Our
mission is to expand access to high-quality education and unlock human potential." There's the educational mission in a way that is confirmed and verified by a state or a federal government body.

MS. MANGUM: Thank you for that response.

Mr. Ayers, Mr. Englund, and Mr. Taylor, thank you for being here representing the opponents. As I'm sure you know, the Joint Educators revised their proposed exemption in their reply comments, and I'd like to give you an opportunity to briefly summarize your thoughts on the revised language, starting with Mr. Ayers.

MR. AYERS: Hi. Thank you. Good morning.

I think our position as we've stated in our filings is that the evidence shown doesn't -- the evidence provided by the proponents doesn't really advance the ball over what was considered in the last proceeding and that the examples given in the filings this time are actually not very supportive. They're a little on the thin side and not very supportive. We have examples of technology platforms rather than actual creators and a number of, in fact, entities that arguably don't even need the exemption because they're already working cooperatively with content creators.

So I think we would look at the language and
say that the changes since last time are not supported
by -- they weren't supported by the evidence then, and
they continue to not be supported by the evidence now.
And so we would recommend that those changes not be
made to the existing exemption.

MS. MANGUM: Thank you Mr. Ayers.

Mr. Taylor, your thoughts?

MR. TAYLOR: Yes, thanks for the question.

I think, if you're specifically referencing the
changes between the initial comments and the reply,
what I had seen in the reply was that they wanted to
add the standard MOOC requirement of qualified online
in courses requiring close analysis of film and media
excerpts.

I mean, I think it does make it more similar
to what's already in the exemption for MOOCs, but at
the same time, I don't think that that in itself is
enough to improve the exemption or the proposed class
because, basically, they haven't provided any evidence
of why they need for these particular possibilities
close analysis of film and media excerpts. So I don't
think it really moves the ball any further.

MS. MANGUM: Thank you.

Mr. Englund, your thoughts on the revised
language?
MR. ENGLUND: So, like Mr. Ayers and Mr. Taylor, I think that the language that was included in the reply comments really doesn't move the needle. This is an exemption that the Office has considered and denied in essentially the same form three previous times. And the Office had it exactly right, I think, the first of those times in 2015 when it explained that an exemption where anybody can declare they're teaching a MOOC and anybody can be a student is anathema to the exemption process. And I don't think minor changes in the wording of the regulation really change that.

And, you know, one of the principal examples here that is relied upon in Professor Decherney's comments is a service called Udemy. And I think, when I first started thinking about this class, I viewed it as providing a school-like experience. After spending some time on Udemy, I think that experience is very incomplete and Udemy is basically a platform that I now think of as akin to YouTube or TikTok, where content creators provide classes and people can go and access on demand streams of informational content. Udemy isn't like a school. The content creators aren't like university professors, and the kinds of courses here are not ones that are being
offered at America's colleges and universities I don't think. So this is an important class to really appreciate the breadth of the exemption that's being offered in terms of the full range of content being offered on Udemy courses like "How to get women obsessed with you even if you're homeless," or "How to communicate with your animal telepathically."

And that kind of coursework requires a very different kind of analysis of the courses offered by accredited colleges and universities and is just not something the Office has condoned before or ought to no matter how the regulatory language gets tweaked.

MS. MANGUM: Thank you. I'll go to Mr. Taylor, and then I'll go back to Mr. Decherney to get some clarifying information about the class.

Mr. Taylor.

MR. TAYLOR: Yes. I just wanted to correct Mr. Decherney. Professor Decherney suggested that it was unintentional. Back in 2015, we spent a significant amount of time examining who could exactly offer a MOOC, and almost the entire discussion was distinctions drawn very carefully around non-profit educational entities versus for-profit entities. So it was not unintentional, something that has resulted from the changes in the marketplace, but by carefully
looking at a fair use analysis and what was already in place for educational entities and exemptions.

MS. MANGUM: Thank you.

Professor Decherney, I'm sorry. I was calling you Mr. Decherney. I'd like to confirm some things about your revised proposed exemption. The proposed exemption now applies to educators of qualified online educational entities and preparers of online learning materials acting at the direction of educators of those entities.

Speaking of Udemy, how is Udemy, which appears to be an online platform for independent educators, an example of a party for whom the exemption would apply? Wouldn't the exemption only apply to the instructors themselves, who, according to Udemy, retain all of the rights in their content?

MR. DECHERNEY: Yes. So exactly. So Udemy was founded by a Stanford professor in 2011, I believe a professor who really had a lot of facility and kind of was considered a really exceptional math professor and wanted to take what he did at Stanford and make it more widely available, to scale it and so started creating online courses and then took the platform and opened it up to other educators.

And so the question was about who would the
exemption apply to. Would it be educators or would it be to the platforms themselves? Similar to the existing exemptions, it would be for the educators, but there's also language in the existing exemptions that allows for staff to support educators in creating the material.

MS. MANGUM: Thank you. Your exemption also applies to preparers. Can you provide an example of that and state why that class of persons is important or distinct from educators?

MR. DECHERNEY: Yes. So let me just use the example of my own course that I've used since we started talking about MOOCs. I teach a course on the history of Hollywood. It's on a platform called edX. It's had over 80,000 learners in it. I just recently offered a smaller version of it to alumni at the University of Pennsylvania.

And in creating the course, I had support from my teaching assistants, who helped create content that's used in the course. So even though I am teaching the course in the same way I would teach a course on campus, there are a lot of people who support that course. It could be IT staff. It could be research assistants or teaching assistants. And those are the sorts of preparers who help create the

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material that goes into a course. Especially in an online course, it's usually even more of a team effort, where videos are created and other kinds of materials, sometimes that will require a kind of technological expertise to create the online material.

MS. MANGUM: Thank you. That's really helpful. Going back to Udemy, though, in terms of who the exemption is applying to, you're stating it's the educators on Udemy. Do you have data or the number of educators who are represented on Udemy, any of that information that you could provide for the record?

MR. DECHERNEY: I had that this morning and I don't know where it is.

MS. MANGUM: I believe we will also -- we can also accept post-hearing -- you can submit a post-hearing letter, and you can provide that in response.

MR. DECHERNEY: Yeah, I'm sorry. I can provide that, the Udemy number specifically, later.

MS. MANGUM: Thank you. The only other example I believe that you provide is Khan Academy. Can you provide examples of other educators or preparers for whom the exemption would apply and those who really want to use film and media excerpts but cannot?

MR. DECHERNEY: Yes. So, actually, Khan
Academy has several film courses. They employ two art historians who create and oversee, curate a lot of their humanities offerings but specifically their art and media offerings. Those courses, you know, really don't use clips at all. They describe the material and sometimes will use still images. And so it's the often full-time educators who are on Khan Academy.

Khan Academy is really a kind of amazing resource that's democratized lots of types of education. They do have courses that look very similar to the kinds of courses you would find in K through 12 education or universities, but they also have other kinds of supporting forms of educational content, the kind that Mr. Ayers was dismissing as not relevant to this rulemaking but I think are also really important and very important to supplementing education.

I'll give a personal example here. My daughter is currently a college student. When she decided to apply to college, we thought we would pay for a tutor to help her study for her SATs, as, you know, as people do who can afford that. She then decided to first use the free tutoring for the SAT through Khan Academy, and, actually, it was so successful and powerful that we ended up not having to
hire a personal tutor for her.

It really democratized access to educational resources and opened up the doors to higher education and does that for millions of students in a way, you know, that was really off limits to those who couldn't afford it before. And so those are the kinds of supporting educational opportunities that are created for non-traditional students by these sometimes for-profit, sometimes unaccredited organizations.

MS. MANGUM: Thank you. Turning now to your definition for qualified educational entities, the language of the revised proposed exemption defines these entities as online entities registered with their state or local jurisdiction or the federal government as an entity, for-profit or non-profit, with an educational purpose or a mission.

How would you define an educational purpose or a mission? How would an entity demonstrate that mission? Would it be through some sort of organizational document, securities filings, corporate charter, et cetera?

MR. DECHERNEY: Yeah. So there are a number of ways in which these show up. Sometimes through tax documents, sometimes through the establishment of the organization either as a for-profit company or a
public benefit company, or in the case of 2U that we used earlier, or sorry, or in the case of other places like Khan Academy through Form 990, which is used to set up a 501(c)(3). Sometimes it's through an SEC filing like a 10-K my legal team tells me is the name of the document. So there are quite a few ways that these organizations are registered, both federally through their establishment, through annual tax filings, or at the state level.

MR. GRAY: If I can follow up quickly on that. So I guess, you know, as we're thinking about the scope of this exemption and how we would structure it if we decided to recommend it, you know, those are a lot of different kinds of documents and places you could discern educational mission from.

Like, is there some sort of standard, you know, document or test that we could put that, you know, might help, you know, for example, for the opponents to have just a little bit more clarity about how this hypothetical class would operate just as a matter of regulatory language?

MR. DECHERNEY: Yeah. I mean, so there are different kinds of institutions. Some are unaccredited non-profits; some might be unaccredited for-profits, and so there are a number of different
ways that they are established and would interact with
different governing bodies. Most of them seem to have
a stated purpose that you can find on their home page.
So, you know, Coursera is kind of bringing
education to all. 2U, as I mentioned, you know, their
mission is to expand access to high-quality education
and unlock human potential. LinkedIn Learning says
that LinkedIn is helping professionals use the
platform to connect, learn, grow, and get hired. And
so, you know, generally, the mission is somewhere on
their website, as well as in these kinds of filings.

MS. MANGUM: Thank you.

I want to give the opponents an opportunity
to respond because I know, Mr. Taylor, specifically in
your comments, you noted that Udemy didn't have an
educational purpose or mission even though language
that they use is to improve lives through learning.

Starting with Mr. Taylor, can you describe
why language like that wouldn't demonstrate an
educational purpose and respond generally to Professor
Decherney's comment?

MR. TAYLOR: Yeah. I think that the problem
with it is that we don't understand what "registered
purpose" means. I mean, typically, in corporate terms
of what an entity's doing, it's corporate documents.
And to the extent that you can find in an SEC filing a representation, that representation can be made, but it doesn't necessarily, in my mind as a corporate attorney, speak to the fact of whether or not its purpose as a registered purpose is indeed an educational mission as, you know, we properly understand that.

But I think the more important aspect of this is this rulemaking concerns who can circumvent, and the question really isn't whether or not the platform itself has an educational mission. Udemy is not looking to circumvent, is not providing courses.

So, I mean, whether or not we sort out Udemy correctly or any of the other platforms correctly, I don't think it really answers the question that is who are we authorizing to circumvent.

MS. MANGUM: Mr. Englund?

MR. ENGLUND: Yeah. I wanted to make a point similar to Mr. Taylor's last point, which is I'm just totally confused here about what the proponents want. I thought we heard Professor Decherney say five minutes ago that this exemption would not apply to Udemy, it would apply to the content creators on Udemy, of which I believe there are 75,000 or so.

And so, in the case of an example that used
in his comments of Learn English with Movie Clips, it was uploaded by a user named Zahed Bashradi. Presumably, that is somebody who Professor Decherney would like to have be a beneficiary of this definition but no reason to think that he's got any registrations with any states. So I'm really having a hard time reconciling his description of the definition and the words of the definition with what he said about Udemy.

MS. MANGUM: Mr. Ayers, your thoughts?

MR. AYERS: Thank you. Just adding on a bit to reinforce the idea that when these documents are filled out, and referring back to a comment that Professor Decherney had made a little while ago, that these comments were -- or these purposes had been stated and verified in government documents.

And I would just caution the Copyright Office to be aware that many of these statements are not verified. There is nobody who is checking. You know, it may come up later. Certainly, there could be penalties for having falsely represented an organization in the appropriate context.

But, for the most part, these are representations that are made with little or no checking and certainly little or no verification. I would also be cautious about relying on advertising

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statements on websites as to identifying specifically
the purpose of an organization intending to drive
profit.

And also noting that going back to the
public documents, the public filings, that we've
identified a number of instances where the filings, I
think, you know, charitably stated, are sometimes
inconsistent as to what the purpose of the
organization is. Sometimes it's stated very broadly,
sometimes it might be stated narrowly. Sometimes a
mission may be represented in a state filing that is
not reflected the same way in their advertising
materials and so forth.

So I think it's a bit of a swampy ground
when it comes to looking at what's been filed in one
document or another, and I really would suggest that
if the Copyright Office were to go down this road,
that we be very clear about what sort of filing would
be appropriate.

MS. MANGUM: Thank you.

I'll give Professor Decherney an opportunity
to respond, but can you specifically also speak to the
point, Mr. Englund's point about clarifying the class
for who would be circumventing?

MR. DECHERNEY: Yeah. No, exactly. That's
what I was hoping to speak to. The other issues are all about fraud, and that can obviously appear anywhere but I think might be outside the scope of this.

So, in a way, this seems to me to function exactly the way the existing exemption works. So, right now, there's an exemption for educators who are affiliated with, teaching through an accredited non-profit institution. So I teach at the University of Pennsylvania. That's how we've defined the class.

The exemption applies to me because I'm teaching for that organization, but the way that we've defined the class is around the kind of organization for which I teach. So this would be the same. So, you know, Udemy has faculty, has educators who teach for it. They allow educators to be on their platform. We define the kind of educators through their engagement with that platform, which, again, is very similar to the way we have thought about a traditional educator like me and the way that I am engaged with the university that I teach for.

MS. MANGUM: Mr. Taylor, I'll give you an opportunity to respond, and then I'm going to turn to another topic.

MR. TAYLOR: Yeah. There's a radical
difference between Professor Decherney's association as a faculty member of a non-profit accredited institution and what we see at Udemy, where anybody can offer anything and there's no vetting process.

And as we put in our opposition comments, Udemy completely disavows any responsibility for that content. So I think that it's very tenuous to suggest that it's just like Professor Decherney serving as a faculty member at a non-profit accredited educational university.

MS. MANGUM: Thank you for those thoughts.

Kind of pointing to that non-profit aspect, turning to some of the fair use factors, the proposed exemption applies to educators and preparers at qualified educational entities, which include for-profit entities.

In light of Warhol, can you address how the commercial purpose of the use impacts the first factor? And that's to Professor Decherney.

MR. DECHERNEY: Yeah. So, again, going back, we don't have as many examples because we found that educators who are teaching outside of accredited non-profits are definitely worried about creating material and trying to educate students in ways that are outside the law but would certainly be more
impactful and effective.

And so I teach courses on the history of Hollywood. That is my MOOC. I use hundreds of examples of Hollywood clips. I've never received any notice actually or complaint about them, legal or non-legal. And these are certainly transformative uses, where I am using clips to analyze and to understand how they're used in terms of storytelling or entertainment, to use them to kind of understand the transformation of history.

They are used, appropriate amounts are used. I never use more than is appropriate. I engage students to and invite students to comment on them, and, certainly, even if they happen to be entertaining at the same time, the primary purpose is certainly transformative and educational.

MS. MANGUM: Thank you. You're saying the primary purpose outweighs the commercial purpose. Is that what you're getting at?

MR. DECHERNEY: Yeah, absolutely. Yeah, if there's a commercial market out there for short clips, and we actually haven't really seen that.

MS. MANGUM: Thank you.

Mr. Taylor, your response?

MR. TAYLOR: I think that basically what
Warhol helps us to understand is that under the first factor, when the alleged infringing work is at issue, we're really looking at the same commercial purpose. And to the extent that we have examples here, which we have very few if not but only one, the example that we're provided here is that this person is using the intrinsic value of entertaining works for the purposes of his work, and so he really is not engaging in something that is truly transformative but really -- how can I say this -- is really relying on the intrinsic value of entertaining works to build a business. And to that extent, I just don't think fair use allows even an educator, educating creator, to rip off other creators for that purpose.

MS. MANGUM: Mr. Englund, I know your comment specifically referenced the Warhol decision in applying the first fair use factor. Can you speak to or respond to Professor Decherney's comment?

MR. ENGLUND: Yeah. So I think there are two main lessons to take from Warhol, one, that you need a transformative purpose or a justification, and second, that commercial purpose matters and is to be balanced against the perceived transformativeness of a use, and I think neither of those considerations supports the breadth of the exemption that's being
sought here.

First, with respect to purpose, the proposed regulatory language is broader than the current MOOC exemption in the sense that it covers not only criticism and comment but also illustration and explanation. And I think some of the examples in Professor Decherney's comments talk about use of movies for their informational content, to show things that are shown in the movie. That is not a transformative purpose for using a movie.

And when you look at the full range of courses on a platform like Udemy, you have things like "Learn to use the mystery of fairy witchcraft Shamanism today," another course I observed, it really stretches the bounds of education. So you can't think about this through the same lens as you would a typical accredited college or university education.

With respect to commerciality, obviously, the commercial platforms have a commercial purpose. On a platform like Udemy, the individual content creators have a commercial purpose, and a lot of the users have a commercial purpose. According to Udemy's last annual report, 58 percent of its 2023 revenues came from business subscribers to the platform.

So you take into account a purpose that's a
lot less transformational than typical accredited university teaching and the course that Professor Decherney provides and described a moment ago. Consider also the commercial nature of the activity all around, which Warhol has reminded us matters. And it just doesn't fare well under the first fair use factor.

MS. MANGUM: Professor Decherney, your response, and can you also when you respond speak to the expansion to illustration and explanation?

MR. DECHERNEY: Yes. So, first, I just want to talk about who the non-traditional learners might be. So sometimes it's students who don't have access to traditional accredited non-profits. Sometimes it's students who are struggling in their accredited non-profits and are looking for outside forms of tutoring or kind of, you know, shorter form support. Sometimes it's really a kind of growing, a massively growing market for education, one that we serve as well at accredited non-profits, which are, you know, working professionals who are hoping to advance their careers as the job market changes, as jobs become obsolete and need to be continually learning throughout their careers and throughout their lives.

The argument we've been making is one of
equity, that there is an exemption for learners who have access to accredited non-profits. And for all the reasons that that exemption exists and creates a high-quality educational environment for the people who are privileged to have access to it, we'd like that extended. We're hoping that can be extended to non-traditional learners who don't have access.

So one example that we gave in our comment from Udemy, "Learning English with Movie Clips" doesn't use movie clips. We've actually talked about language learning in previous rulemakings and all the details about speech and facial expression, micro-expression that you get from high-quality clips that you can't get certainly from a still image and even from a poor image. And so that would be one example where illustration is relevant, but that's also a form of close reading even as it forms as illustration. I mean, they often will go together, maybe always go together.

MS. MANGUM: Thank you for that. And sort of on that, what evidence do you have that for-profit entities are more accessible than non-profit entities to these non-traditional learners?

MR. DECHERNEY: So Coursera offers open online courses, sometimes taught by educational
entities, sometimes not. Some are offered by Google and other companies. Many of those courses are free and open to anyone. Some parts of the course are free and open to anyone.

There are, of course, elements of accredited non-profits that are free and open. We have lectures at our university that are always free and open to the public, but the traditional courses and degrees are very, very expensive. And so we know for a fact anything that's free and open to the public, you know, can reach a much broader audience.

Our own courses that are open and free have had more than 15 million enrollments and also are, you know, free and open. So anyone with a computer and an email address can take a course at edX or Coursera, which certainly makes them -- you know, which certainly increases access.

MS. MANGUM: Thank you. So, as we think about sort of the bounds of this proposed exemption, there is a thought that maybe there could be room for non-profit unaccredited institutions. Is the fair use analysis or would it be different for non-profit unaccredited educational entities, and in your responses, can you speak to the third and second factor as well, specifically opponents. Is there any
room for non-profit unaccredited educational entities
in -- that would be --

MR. DECHERNEY: You mean is there room for
for-profit unaccredited?

MS. MANGUM: No. I'm specifically talking
about, like, say the exemption only applied to non-profit unaccredited entities. Is there room for that, or would the fair use analysis be different? Maybe we could start with Mr. Taylor.

MR. TAYLOR: Yeah, thank you. I think that, you know, again, we're talking about hypotheticals here, and fair use really depends on a fact determination based on the specifics. So, I mean, is it possible that a non-profit educational institution that's not accredited or maybe is or is not -- I'm not sure. I don't want to fight your hypothetical.

Could it be fair use? Yes, but more importantly, if that's the case or if you were thinking about that, there are not any examples in this rulemaking of that situation, and we certainly don't get to test whether or not fair use actually exists in those examples.

So back to the question of Professor Decherney's equity argument, this rulemaking, we can't just say because other educational institutions have
these exemptions, we therefore deserve it too. I mean, similarities to other educational exemption is just not enough. There has to be a record on which to make the determination that the underlying activity is indeed non-infringing, and you don't have it for what they propose, and you don't have it for your hypothetical either.

MS. MANGUM: Mr. Englund?

MR. ENGLUND: So I agree with what Mr. Taylor just said, and to elaborate a little bit, if you focused on the unaccredited non-profit, under the first factor, accreditation provides some assurance of a truly educational process. And I think merely being non-profit doesn't assure you that there's really an educational motivation here as opposed to some other motivation that just doesn't include making money.

But specifically about the other factors, there, I think, you know, the second and third are impossible to judge in the abstract, but, you know, the fourth factor, if somebody is not accredited and maybe is offering the content for a minimally educational purpose, the fact-specific fair use analysis does not necessarily lean toward fair use.

MS. MANGUM: Thank you, Mr. Englund.

Professor Decherney, can you provide any
examples of non-profit unaccredited entities that may be able to use this proposed exemption?

MR. DECHERNEY: Yes. It's actually interesting again to go back to the Coursera example. So Coursera is a platform that allows for open education. There are courses on there by accredited non-profits, Penn, Stanford, hundreds of other universities.

There are also courses on there by unaccredited non-profits. A great course by the Museum of Modern Art on photography, the history of Photography, on photography today. A huge community has developed around it. They use still photographs. There's a tremendous amount of analysis of still photographs.

There are also, though, for-profit unaccredited organizations which also offer courses through Coursera. One of them is Google, and Google offers accreditation, its own form of certificates through that and now says that those courses are as valuable when hiring for Google as degrees that you get from accredited non-profits.

So all of these cases exist in the same platform in the same way and can educate students. Obviously, an exemption that is expanded to
unaccredited non-profits is better than one that doesn't, but there are also really valuable cases of for-profit unaccredited organizations offering very, very important education through these platforms.

MS. MANGUM: Thank you. Kind of one more clarifying question about the language of your exemption. The accessibility of the information is sort of keyed to the registration or the learner's registration and not to the term of the course. Can you describe why there's that difference? The current exemption for MOOCs has it keyed to the length of the actual course. The registration seems to be a lot longer than some --

MR. DECHERNEY: So we are open to exactly the same limitations that exist in the TEACH Act that are extended to the MOOC exemption, so registration, technical protection measures, and also limited to the length of the course.

MS. MANGUM: Thank you. We talked a little bit about adverse effects, but I want to give Professor Decherney another opportunity. Opponents state that there's no evidence for the assertion that students are being left behind or that any educational harms are being caused by the limitations in the current exemption. Do you have any measurable
evidence that online learning has been or will continue to be hampered by the current prohibition?

MR. DECHERNEY: So the way that it's hampered is that both the quality and the range of educational offerings at accredited non-profits continues to improve and expand, while the educational offerings at unaccredited platforms continues to shrink by not being able to take advantage of both the tools and range of topics that can be covered as a result of the MOOC exemption.

I was really surprised this time to find how many of the organizations we approached didn't want to join as a petitioner because they were afraid of exposing themselves to some kind of legal risk and how many have actively reduced the ways that they are teaching, the methods they use to teach, because of the kind of environment that's been created by the DMCA and the exemption process.

MS. MANGUM: Can you provide a number even if they don't want to disclose their actual names? Like, how many organizations are you talking about?

MR. DECHERNEY: Yeah. I mean, dozens that we've approached.

MS. MANGUM: Thank you. So I want to turn to alternatives regarding whether eligible users may
access the software through alternate channels that
don't require circumvention. I'm wondering if the
proponents can speak to any alternatives that could be
useful to the proposed class?

MR. TAYLOR: I'm sorry, can you repeat that
question?

MS. MANGUM: I wanted to talk about
alternatives. In a number of the comments, the
opponents mentioned that there were alternatives, that
circumvention is not necessary for this proposed
class. I'm wondering if the proponents can speak to
that. Mr. Taylor, Mr. Ayers, Mr. Englund.

MR. TAYLOR: I think the confusion is you're
saying proponents and you meant opponents.

MS. MANGUM: Opponents.

MR. TAYLOR: Sorry, I do that all the time.

MS. MANGUM: I'm sorry.

MR. TAYLOR: Since I opened my mouth, I will
go ahead and finish the thought. We've always
contended that screen capture is a very reliable
method of and an alternative to circumvention. We
have submitted in this proceeding an example of screen
capture from one of the courses or that would relate
to the course Learn English Through Films.

Professor Decherney, of course, has his
instructive background on the quality of screen
capture, but we have at least established in this
proceeding that in most instances where high-quality
images is not necessary, then the screen capture would
be sufficient, and we think that even in the example
here, screen capture was more than sufficient.

MS. MANGUM: Mr. Ayers, you indicated that
you had a demonstration or technology that you'd like
to demonstrate. Does that relate to screen capture?

MR. AYERS: Yeah. Yes, for the AACS LA and
DVD CCA filing, that was relating to screen capture.
So I don't think we're prepared to offer that today,
not assuming it would be needed. But I would note, to
reinforce what David has mentioned, that screen
capture has been shown to be entirely adequate. The
quality is actually very good, especially, you know,
for learners who are reviewing the lesson on a small
screen device, such as a tablet, a laptop, a phone,
and not in an expensive home theater arrangement.

I would also notice that the examples
provided by the proponents have also noted that there
are examples of cooperative efforts between these
platforms and educators and the content owners
themselves in, for instance, a partnership between
Khan Academy and Pixar. That shows that not only was
circumvention not necessary, not even screen capture was necessary because there was the availability of working directly with the content owner in a very amicable relationship.

MS. MANGUM: Mr. Englund?

MR. ENGLUND: I agree with what Mr. Taylor and Mr. Ayers just had to say and will also add that copyright owners typically have clip licensing programs, and commercial entities who want to obtain the right to use movie clips take advantage of those routinely.

MS. MANGUM: Professor Decherney, can you speak to any of that? And also can you respond to maybe do you have any data regarding the types of devices used to access online courses, and whether is clip quality not affected by the type of device that's used to access these courses if they're non-traditional?

MR. DECHERNEY: Yeah. So, first, I will say Pixar is a kind of example that also proves that the -- you know, the exception that proves the rule. One of the few courses we've been able to find is one in which there's a direct licensing relationship because fair use isn't available to non-traditional platforms.
Again, it's an equity argument, and so we have talked many, many times about screen capture and the available streaming libraries and why they're insufficient, the quality of screen capture, drop frames, pixelation, others, and the clip libraries are very, very narrow and really diminish the range of teaching opportunities. That's been true for accredited non-profits, and it's equally true for unaccredited organizations.

Interestingly, the expansion of broadband by the FCC, the NTIA, is often tied to discussions about equity and education, and we know that students who don't have access to fast connections and downloadable content really have trouble accessing education and their educational experience can be reduced. So one of the best practices when creating courses is to allow for downloadable content so that the quality of clips, you know, can be high.

MS. MANGUM: And any data on the types of devices used?

MR. DECHERNEY: Yeah. So the vast majority of learners accessing online education are using mobile devices. We can provide that number later. I don't have the exact information.

MS. MANGUM: Thank you. And are you aware
of any educators or preparers of online learning materials that are currently using screen capture technology for course materials?

MR. DECHERNEY: No.

MS. MANGUM: Thank you.

In your reply comments, you talk about the fact that there is no meaningful market for licensing short clips, noting that services like Swank or Kanopy are not accessible to every educational institution.

Can you speak to the Joint Creators' assertion that there are clips available through Fandango Movie Clips website and Movie Clips YouTube channel? Do you have any evidence that these options aren't sufficient for educators or preparers at qualified educational entities?

MR. DECHERNEY: Yes. So I know from my own experience that these are very, very limited libraries. I know from my department experience we have students who prepare clips because, even though Kanopy has a great system for making clips, the available libraries are very narrow.

Just last month, I had to give several lectures on Cuban cinema. I could only find two films from the Cuban revolutionary period that are available streaming in any way at all. The vast majority, you
know, are just not available, and so I had to search
for other means of accessing.

MS. MANGUM: Thank you.

To any of the opponents, would you like to
speak to the availability in the marketplace for
clips?

MR. ENGLUND: I'll just say that I can't
speak to which motion pictures are available through
which platforms, but there are extensive libraries
available through the services identified in our
comments. I understand that the Copyright Clearance
Center has a motion picture licensing program, and,
you know, if you go to the websites of the studios,
there are avenues for applying for licenses for clips.
So there are definitely ways to access a lot of
repertoire, though I can't cite specific titles.

MR. DECHERNEY: We have looked at this in
the past, and the studio libraries make up a very,
very small percentage of the films that are taught
within my university, less than 10 percent.

MS. MANGUM: Thank you.

Mr. Taylor?

MR. TAYLOR: Yeah. I would just simply say
that we have looked at this in the past, and when we
looked at the availability of clip licensing, we were
looking at the availability of clip licensing for non-profit entities, and we did not consider for-profit entities. And I think, by and large, we were looking at people who are looking to make an offering in the marketplace for profit. They indeed should be able to or at least be required to first check to see if there is availability of a clip license, and there shouldn't be a blanket excuse for not looking for that license.

MS. MANGUM: Thank you so much.

Mr. Shannon, do you have any questions that you'd like to ask the proponents or the proponent and opponents?

MR. SHANNON: Sorry about that. Embarrassing. Yes, I do. I would like to start with given the near-constant use of the Internet in post-COVID America, how would broadening this exemption affect digital equity concerns? I believe both sides have spoken to this already. If you could get more contextual on that, that would be great. That's a question for both sides ideally.

MR. DECHERNEY: Yeah. There's obviously a huge growth in the use of online tools, platforms, content, starting immediately as lockdowns began. Those numbers have decreased a little bit, but, actually, for the last 14 years, online education year
over year has grown, has grown significantly, even as numbers of students in traditional learning environments has actually decreased.

So, yeah, those numbers have continued to expand. Just looking at our own, you know, at Penn's online offerings, seven years ago, we had one online degree. We now have 18 fully online degrees and more in the pipeline. We have 3,000 fully online students who are learning at our university. So, you know, even the market for traditional accredited non-profits has grown dramatically in the last decade.

MR. SHANNON: Opponents, please hop in. I will wrap back around in a moment if that's all right.

MR. TAYLOR: Steve, you want to go first?

MR. ENGLUND: Happy to, yeah. So I think this exemption doesn't really move the needle one way or the other much on digital equity. Like Professor Decherney said, there is a wealth of online education that is being offered by non-profit educational institutions, accredited institutions.

I'm not clear how much of that actually relies on motion pictures that have been accessed through circumvention of TPMs, but that option is available for providers of those courses, and the proponents here have just not made a showing that
opening up all motion pictures to circumvention by
for-profit entities is going to produce more better,
different kinds of educational offerings than are
already available or could be provided by non-profit
accredited organizations.

MR. TAYLOR: This is David Taylor. Yeah, I
think digital equity just brings us back to many past
proceedings where we have looked at very well-
intentioned purposes, including in the last one where
we had COVID and the Register spent some time
addressing the fact that this rulemaking simply cannot
say that for the purposes of any one reason that it's
going to deviate from the statutory mandate.
And if you look back at the 1201 study, we
clearly look and see that broad categorical
exemptions, even for the best purposes, are not
permitted under this rulemaking. So I don't think
that for proponents of digital equity, that they're
going to be able to find relief in the 1201
rulemaking, no matter how many of us agree with those
purposes.

MR. SHANNON: I have a follow-up for Steven
Edmond (sic), Mr. Edmond. What about tutors for
courses, right? You have a course, a film studies
course taught at a university. How do tutors, for-
profit tutors, online work to, like, help facilitate
or support students in those courses?

MR. ENGLUND: Assuming that was me you were
addressing, yeah, I don't have a lot of visibility
into that world. But, when I hear the word "tutor," I
picture individualized interactions, not pre-recorded
course material developed by circumventing the TPMs on
motion pictures. So tutoring just doesn't seem very
relevant here.

MR. SHANNON: Thank you.

Mr. Ayers?

MR. AYERS: Thank you. Yeah, just to build
on that point a little bit, I think also, in the
context of tutoring, you're looking at individuals or
teams of individuals that are making use of the course
materials already prepared and are not necessarily
generating essentially a new course that requires new
materials. So I think the case of a tutor is a step
removed from what we're looking at here.

MR. SHANNON: I'm going to go -- well, Mr.
Taylor and then Mr. Decherney. I'm sorry about that.
I'll allow you to answer all of those statements.

MR. TAYLOR: Yeah. Just to, I guess, maybe
give you what you're looking for a little bit more is
that I think traditional copyright analysis would say
that a one-on-one experience is probably de minimis if it's truly one-on-one. But what we are talking about here is massive open online courses. So I think that you have the full weight of the copyright law for these kinds of exemptions that we're looking at here.

MR. SHANNON: Thank you.

MR. DECHERNEY: You know, very interesting that you bring up tutoring because that's been one of the places of the most innovation over the last year and a half. First, Khan Academy released an online tutor, an AI online tutor, using ChatGPT by having a kind of set database that it works with. It's been really effective at massively scaling the kinds of one-on-one tutoring that are available for learners in online environments. I think it's Georgia Tech where their online TA, their virtual TA, actually won a teaching award recently. So Coursera also has one.

A platform we talked about in the last rulemaking whose former CEO was a co-petitioner is called Osmosis. Osmosis started off as part of Khan Academy to help with medical and science education. It then spun off interestingly as a for-profit site that's used by medical students to help them learn outside of classroom experiences. But it's also now incorporated into the traditional learning
environments of many medical schools.

So these are kinds of platforms and learning environments that exist across a range of uses. But the ability to provide individualized tutoring and education that's really tailored towards individuals has just skyrocketed in the last year and a half.

MR. SHANNON: Thank you. Can you explain -- no, I'll pause that. How much does the exemption move or limit -- how much would this exemption remove burden on small organizations? I know the Pixar example was given. How much access would a smaller organization have to Pixar? Say Khan Academy started up later on. Would Khan Academy be able to make that licensing agreement with Pixar? For both proponent and opponents. I would like both sides of this, please. Mr. Decherney, if you would like to start, that would be great.

MR. DECHERNEY: Yeah. From our experience talking to legal teams at small educational entities, there's a very high fear of legal risk and of fair use in particular. I don't know how much access a small entity would have to Pixar.

Khan Academy is not a small entity. You know, they're well funded by the Gates Foundation and other organizations and have dramatically moved the
needle in terms of education, you know, globally. So they're a very, very important player. But I assume it's going to be much more difficult for a small organization, and, you know, I can tell you the legal fear and exposure really drives and limits their educational offerings. That's what we've heard over and over again for the past during this rulemaking.

MR. SHANNON: Thank you.

Mr. Ayers?

MR. AYERS: Thank you. Just, yeah, I think it would be disingenuous to try to claim that, you know, every single small entity would have the same access, you know, to very large studios, and so I don't think we can make that claim here.

I would note, though, that it's exactly this sort of program that would seem to pioneer the ability of having these direct relationships, and, certainly, as the market evolves, that will improve conditions not only for larger entities but make them also available to smaller entities as well.

So I think it is an issue that the market will address as these relationships increase and are refined, and so you will see a benefit that will be enjoyed by smaller entities as well, even if the early days they're not as accessible.
MR. SHANNON: Mr. Englund? I hope I pronounced that properly.

MR. ENGLUND: Yes, that's good. So I'll just add that this is all speculation, right? Professor Decherney doesn't know what the nature of the discussions was between Khan Academy and Pixar. I wasn't involved in those discussions, so we're all just speculating about the nature of those discussions, and the Office shouldn't base its decisions here on speculation about private deals.

In general, I've found that copyright owners will entertain business proposals that seem interesting, and sometimes they come from large parties, sometimes they come from small parties, and they make rational business decisions. That's why the sort of thing the copyright framework was designed to create by giving copyright owners market opportunities to exploit their works in ways that are mutually beneficial.

MR. SHANNON: Thank you.

In discussing the licensing opportunities, there was a distinction made between licensing opportunities for for-profit and licensing opportunities for accredited not-for-profit during the last hearing. It was mentioned that there was a less
than 10 percent availability on licensing platforms
during the last hearing and earlier today. Do you
know the amount, like roughly the amount of
availability today? And this is for Professor
Decherney and opponents. How much access do you have,
Professor Decherney or peers?

MR. DECHERNEY: So I'm very, very fortunate
to teach at a well-endowed university, where we have
amazing access through our library to a very wide
range of information and material and resources. It's
actually still a significant burden for us to be able
to afford the licenses even for the films that we want
to teach in classes. It's something we struggle with
and have a limited budget that impacts our curriculum
and our courses, and I know for a fact that, you know,
less fortunate faculty have a much, much more serious
problem. And so we're just asking for equity that
that kind of burden that we already have doesn't
become an even larger burden on educators of non-
traditional students teaching through unaccredited
platforms.

MR. SHANNON: Mr. Englund?

MR. ENGLUND: I think it's important to
point out that the response that Professor Decherney
just gave was an economic response, and Copyright
typically does not consider the price to be a reason
to grant exemptions or to recognize a particular use
as fair use. To the contrary, courts have said things
like it's commercial to try to acquire a work without
paying the customary price. And so, to the extent
this is an issue about economics and not wanting to
pay the customary price, that is not a reason to grant
this exemption.

MR. SHANNON: Right. So I think I asked the
question wrong. The question is about availability.
So, if the customary price, if there's not a license
for the film, what is the solution for for-profit
institutions in this situation that not-for-profit
accredited institutions don't necessarily have to
concern themselves with as much?

MR. ENGLUND: So what do for-profit entities
do if they can't get a license is what you're asking?

MR. SHANNON: Yes, and I was trying to --
well, yes, both parts would be great to hear from you.

MR. ENGLUND: I guess the easy answer to
that question is they do the same thing that for-
profit entities do all the time when they want to use
copyrighted works. They either negotiate a deal or
they design their products in ways that don't require
a use that contains copyright rights.
But, in our comments, we identified a number of sources of clips that all have broad catalogues and, as I understand it, would be available to a for-profit educational entity. So I think there's no reason for you to assume that for-profit educational entities could not get a license here in commercial markets.

MR. SHANNON: Thank you.

Mr. Taylor?

MR. TAYLOR: Yeah. I think, again, that they have the benefit of alternatives to circumvention, which is, I mean, if they really want to make use of a clip that's not licensable, they can use screen capture and the screen capture is readily available to them.

And I don't see an outcry from entities that we are hypothetically discussing showing up at the Copyright Office saying that they need an exemption. And as far as the availability for Mr. Decherney and classroom purposes and other educational purposes, this rulemaking has already been extremely responsive to making exemptions available for specific purposes where they have demonstrated the underlying activity was not infringing, and that's the question that remains here that the proponents simply have not been
able to demonstrate.

MR. SHANNON: Thank you.

Mr. Ayers?

MR. AYERS: Just reinforcing David's comments with a tiny addition, screen capture is absolutely available to those entities, profit, non-profit, accredited, unaccredited, and whether they are experiencing budget constraints or not, if it's a fair use, they have those tools available to utilize.

And I would note that in this proceeding we've had a distinct lack of explanation as to why that's not sufficient. We don't have any examples really of why -- we have somewhat vague complaints of stuttering and a frame dropping on occasion. We also have some comments about that somehow the digital divide is applicable here as well, that somehow being able to download a ripped copy is better than being able to download a screen-captured copy, and so I don't think that actually applies either.

So screen capture is a valid and viable option that is available to all comers, and we haven't seen a reason presented why that is insufficient.

MR. SHANNON: Could I ask you to explain why the screen capture, why that's not a valid argument?

You say that screen ripping or that ripping, not --
the lack of a loss of quality when ripping versus
potential loss of quality when screen capturing is not
a valid argument. Can you explain why?

MR. AYERS: So just to make sure I'm on the
same track here, so what I'm saying is that -- or the
question you had originally asked was what
alternatives are available to those who are not able
to obtain a license, and it's been mentioned that
screen capture is an alternative that, assuming the
use is fair to begin with, the license is not
necessary.

And putting aside completely whether the
actual use in question is a fair use, screen capture
has been, you know, as we provided in our filings and
has been explored in multiple sessions, multiple
rounds of this proceeding in the past, screen capture
is very viable. It provides a completely useful end
product for the educator to use and doesn't require
circumvention. It uses tools that are readily
available and provides a product that is at least as
useful as the original version ripped from the
physical media. And so we've not seen any time spent
in this proceeding exploring why that's insufficient,
you know, for the cases that we've talked about here.

In fact, the biggest reason, the biggest
example that we've seen is that of presenting clips that correspond to language lessons, and to the extent you're showing a use of a particular phrase in a familiar setting, in a familiar context, that is just as easily done and just as effectively done using screen capture as it is compared to using it from a ripped copy of a physical disc, whether it's a DVD or a Blu-ray disc. I hope I've addressed your --

MR. SHANNON: Yeah. To reiterate that, it sounds like what you're saying, you used the example of language learning. In the case of language learning, loss of quality or pausing that can potentially occur through screen capturing is not a concern because there's still the equal quality of education gained?

MR. AYERS: I would say that it's at least sufficient quality to do the job. One might question, I think reasonably, whether the use of the clip is actually a fair use in that particular circumstance or is it used as essentially a gimmick to make the language lesson more attractive to a consumer. Come take my language lessons; you can watch movie clips. You know, so there's that question, you know, putting aside that question. But just as far as the basic utilitarianism, the basic utility, I'm sorry, of the
screen capture clip, it provides just as much utility in most contexts as the ripped copy from a commercial physical medium.

MR. SHANNON: Thank you. That's what I was asking. Sorry if I wasn't clear enough. Thank you.

MR. AYERS: Thank you.

MR. SHANNON: Mr. Taylor?

MS. MANGUM: Actually, we're going to wrap up, and, Mr. Taylor, you can include those in your final statements. We're going to let everyone have final statements, and we're going to start with the opponents. So, Mr. Taylor, you can start, and we'll let Professor Decherney have the last word.

MR. TAYLOR: All right. Thank you. I think that just to respond on the last note is is that screen capture in this proceeding and in past proceedings shall I say has been found to not be sufficient sometimes when needs for high-quality images or even sound were warranted based on the use.

But, in each one of those determinations, we have a solid record where we had proponents and multiple examples of evidence of the non-infringing activity and explanation with those examples of how screen capture fell short and what was specifically the need that was sought by the act of circumvention.
Here, we have no record. The only record of use that we have is the one of “learn English through films,” and the underlying activity cannot be said to be clearly non-infringing. The for-profit motive, the way it was marketed, every aspect of this example says that this is a non-infringing use, and in the absence of more examples or any successful example, there's no basis for the Copyright Office to recommend a class or exemption in this case.

MS. MANGUM: Mr. Englund?

MR. ENGLUND: So, when the Office created the current MOOC exemption in 2015, that went through a very exhaustive process and a record much more robust than this one that carefully tailored an exemption that remains more or less what's in effect.

This is the third time it has heard proposals from Professor Decherney to expand the exemption to for-profit unaccredited opportunities. The record just doesn't look any different, except maybe it's a little smaller and thinner. Nothing has changed in the last nine years except that there are more for-profit courses that are available.

But the copyright analysis is the same. The fair use analysis, most importantly, is still the same. You've still got commercial entities that are
engaged in the activity, and it's important to remember, as I said at the outset, that it is a mistake or at least an incomplete vision of what we're talking about here to assume that all of these courses are like Professor Decherney's MOOC.

We're talking about a lot of on demand content that might be informational, kind of entertaining on a lot of topics that aren't being taught in accredited schools, offered up on platforms that for all practical purposes are a lot like YouTube and TikTok. And you start analyzing that kind of content through the usual fair use lens, and it just doesn't seem like a fair use for all the reasons that the Office has held three times previously.

And as we've been exploring the last few minutes of this panel, there are other alternatives, screen capture, explored at length in prior proceedings, not a major feature of this proceeding, mostly an indication how thin the record is in this proceeding, as well as licensing programs. Therefore, the Office should deny the exemption for the same reason it has three times before.

MS. MANGUM: Thank you.

Mr. Ayers, your final thoughts?

MR. AYERS: Sure. First of all, thank you.
for having us all today. Just to essentially
reiterate points you've heard, these topics have been
discussed and negotiated multiple times in the past.
What we're doing now is focusing a little bit more on
where the discussion is since the exemption's already
been created.

As has been stated, we've not seen an
increase in the evidentiary submissions to support the
points that are being asked here in the expansion, the
proposed expansion, of the exemption, and, in fact, it
has been noted that the evidentiary showing is a
little thinner than it has been in the past.

So we're focusing down a little bit more,
not really hearing anything new, and, you know, not to
knock anybody who is engaged in very worthwhile
endeavors, I think the Copyright Office is at the
limit of what it can do in this circumstance given the
rather slim evidentiary record.

MS. MANGUM: Thank you.

Professor Decherney?

MR. DECHERNEY: Yeah, thank you. No, thank
you so much for all the time thinking through this
with us. I mean, it's a really exciting time to be an
educator. There are new tools out there. We're able
to scale the kinds of education we provide, you know,
beyond things we'd ever imagined when I started teaching. It's shocking for me still to say that I've had 80,000 learners who are able to access my course that in the past I could only teach to a hundred students a year.

What we keep hearing from the opponents is that non-traditional students just shouldn't have access to the same kinds, the same quality of education that traditional students get at accredited non-profit institutions.

We've gone through the fair use analysis. We've gone through questions of access, of screen capture, and for all the reasons that we've had that you've granted an exemption for accredited non-profits, I mean, I think that those same kinds of high-quality education, educational opportunities, should be available to as broad a public as possible.

They shouldn't be available to everyone, and so I think we've done a really great job this time, and I want to thank the student attorneys I've worked with at American University. One of the great things about the exemption process is all the law students I've worked with over the last 18 years on this.

And I think together we've done a really great job of finding a way to narrow the class so that
it only applies to true educational institutions that
are trying to offer a really high-quality product to
as broad a public as possible and really democratizing
American education, really one of the great things, I
think, that our country has to offer. There's no
other educational system like ours. Actually, just,
yeah, I'll end there.

  MS. MANGUM: Thank you for everyone's
thoughts. I will hand it back to Suzy Wilson.

  MS. WILSON: Thank you, everyone. This was
a very helpful discussion, and we really appreciate
everyone's participation and input today. We will now
adjourn for approximately an hour, until 2:30 p.m.
Eastern Time today, when we will have a hearing for
the next class, which is Class 5 on Computer Programs
and Repair. Thank you so much.

  (Whereupon, at 1:29 p.m., the hearing in the
above-entitled matter was adjourned.)

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REPORTER'S CERTIFICATE

CASE TITLE:  Section 1201 Public Hearing:  Proposed Class 2: Audiovisual Works - Online Learning

HEARING DATE:  April 16, 2024

LOCATION:  Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the United States Copyright Office

Date:  April 16, 2024

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