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Section 1201 06-04-2012

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U.S. COPYRIGHT OFFICE

HEARING ON EXEMPTION TO PROHIBITION ON
CIRCUMVENTION OF COPYRIGHT PROTECTION SYSTEMS FOR
ACCESS CONTROL TECHNOLOGIES
SECTION 1201 (DIGITAL MILLENNIUM COPYRIGHT ACT)

Library of Congress
James Madison Memorial Building
Room LM-408
Washington, D.C.

June 4, 2012
9:05 a.m. - 5:47 p.m.

Reported by: Denise Brunet, RPR

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1 A P P E A R A N C E S :

2

3 PANEL MEMBERS :

4 DAVID CARSON

5 ROBERT KASUNIC

6 STEPHEN RUWE

7

8 PROPONENTS :

9 PETER DECHERNEY, Associate Professor of
10 Cinema Studies, University of Pennsylvania

11 MARTINE RIFE, Professor of English, Lansing
12 Community College

13 JONATHAN BAND, Counsel to the Library
14 Copyright Alliance

15 RENEE HOBBS, Professor and founding
16 director, Harrington School of
17 Communication and Media, University
18 of Rhode Island

19 SPIRO BOLOS, New Trier High School

20 GORDON QUINN, Artistic director, Kartemquin
21 Educational Films

22 (Appearances continued on the next page.)

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1 APPEARANCES (continued):

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3 PROPONENTS (continued):

4 PETER BRANTLEY, Director, Bookserver

5 Project-Internet Archive

6 JIM MORRISSETTE, Technical director,

7 Kartemquin Educational Films

8 BOBETTE BUSTER, Film professor, screenwriter

9 and producer

10 JACK LERNER, Clinical associate professor,

11 USC Gould School of Law; director, USC

12 Intellectual Property and Technology Law

13 Clinic

14 ALEX COHEN, Clinical intern, USC

15 Intellectual Property and Technology Law

16 Clinic

17 BRENDAN CHARNEY, Clinical intern, USC

18 Intellectual Property and Technology Law

19 Clinic

20 MICHAEL DONALDSON, General counsel, Film

21 Independent

22 (Appearances continued on the next page.)

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1 APPEARANCES (continued):

2

3 PROPONENTS (continued):

4 REBECCA TUSHNET, Professor, Georgetown

5 University Law Center

6 FRANCESCA COPPA, Associate professor of

7 English and film studies, Muhlenberg

8 College

9 TISHA TURK, Associate professor of English,

10 University of Minnesota-Morris

11 CORYNNE MCSHERRY, Intellectual property

12 director, Electronic Frontier Foundation

13

14 OPPONENTS:

15 DEAN MARKS, On behalf of AACCS LA

16 BRUCE TURNBULL, On behalf of DVD CCA

17 STEVE METALITZ, On behalf of Joint Creators

18 and Copyright Owners

19

20

21

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

2 MR. CARSON: Everyone, take your seats.

3 We're going to get started.

4 One of our witnesses isn't here, but we'll
5 just have to hope he gets here on time, because we
6 have a very busy schedule today. We don't have any
7 room at all to waste, which is one reason why we're
8 going to keep everyone to a ten-minute limit on their
9 testimony. And we had a rather lackadaisical approach
10 to that last hearing. This hearing we're going to
11 enforce it strictly because we just have too much to
12 do in one day. So that's ten minutes of testimony.

13 If you are showing any audio-visual material,
14 there's a limit of up to five minutes, and that is
15 within your ten minutes. But that's the details.

16 The one-sentence overview, this is the third
17 out of four hearings in this year's rulemaking on
18 exceptions from the prohibition on circumvention of
19 technological measures that access to copyrighted
20 works.

21 And today we have a very full day, all of
22 which has to do with various variations on class 7

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1 relating to motion pictures on various media.

2 Our first panel will be talking about
3 exemption 7F, 7G and 8. I'm not going to read them.
4 I am assuming that the details will come out in the
5 testimony. This is perhaps the last time we'll be
6 hearing from any of you on this. I say perhaps
7 because it is conceivable, but by no means certain,
8 that following this hearing we may have some follow-up
9 questions. If we do, we'll send them to all of you in
10 writing. They may be for some clarification of facts.
11 They may be because of legal issues that we're still
12 not entirely clear on. But to be clear, at the end of
13 the hearing today, subject to any such questions we
14 might ask, the record is closed.

15 We are in a fairly advanced stage at this
16 point. We should have essentially all of the factual
17 assertions and argument in writing already. The
18 purpose of today is to give witnesses an opportunity
19 to summarize their positions and to clarify anything
20 they think needs clarifying or that we think needs
21 clarifying, as will come out in our questions and
22 answers.

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1 So with that -- the first witness would have
2 been Jonathan Band, who is not here yet. We will be
3 holding up -- at the five-minute point, we'll be
4 holding up a 5 and at the one-minute point we'll be
5 holding up a 1.

6 So since Jonathan Band is not here
7 yet -- we'll have to hope he gets here
8 within the next hour -- and we'll start
9 with Peter Decherney.

10 By the way, none of you should be obligated
11 to keep your coats on. It's pretty hot up here, and I
12 assume it's pretty hot out there.

13 MR. DECHERNEY: Members of the Copyright
14 Office, thank you for the opportunity -- should I push
15 this down?

16 MR. CARSON: Unfortunately, I'm afraid the
17 button needs to be pushed throughout.

18 MR. DECHERNEY: Thank you for the opportunity
19 to discuss the crucial role of high-quality media in
20 higher education. Before I begin, I just want the
21 thank you on behalf of the tens of thousands of
22 members of the organizations that have joined me here

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1 as co-petitioners. As our written comments outline in
2 detail, the 2010 exemption for professors and media
3 studies students has had a direct and palpable
4 positive impact on education across disciplines.

5 Media studies students, biology professors
6 and their colleagues in other departments are now able
7 to bring media clips into the classroom in fluid and
8 effective ways.

9 Just a few years later, however, some of the
10 limitations on the 2010 exemption pose real harm to
11 educators and students wishing to meet the demands of
12 today's technological and pedagogical standards. As a
13 result, we're seeking to bring the exemption up to
14 date by including all students, as it now includes all
15 faculty, and incorporating high-definition images
16 which have become both the commercial and the
17 educational standard.

18 To support this exemption and its modest
19 expansions really is to support high-quality
20 education. All faculty and students absolutely need
21 to use the highest quality images to deliver and
22 receive the highest quality education. Moreover, the

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1 educational exemption has not led to abuses in the
2 past. On the contrary, and we've shown through many
3 examples, that it's improved the quality of teaching
4 and learning.

5 These expansions don't represent major
6 changes. They'll simply allow the existing exemption
7 to match the pace of education, media and technology.
8 So if you haven't taught or studied in a university
9 recently, you may not be familiar with the total
10 integration of media into the curriculum. As pencil
11 and paper have been for centuries and word processors
12 have been for decades, the tools of digital image
13 manipulation are routine elements of academic
14 communications.

15 In today's so-called flipped classroom,
16 faculty reduce in-class lecture time and allow
17 students to participate more actively in the
18 pedagogical process. Students do in-class
19 presentations for their peers and they work on
20 collaborative projects that were once relegated to
21 homework.

22 Faculty have long needed to use media clips

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1 to illustrate lectures. Today, students in all
2 disciplines need the same ability to use high-quality
3 images for their own in-class presentations.

4 The University of Pennsylvania's Weigle
5 Information Commons, or WIC, is typical of the
6 multimedia facilities that can now be found on many
7 campuses. At WIC, students from every discipline
8 learn how to edit video, sound and manipulate still
9 images. They learn the tools they need to compete
10 with multimedia -- to complete multimedia assignments
11 that are common in every field of study, and very
12 simply, without the expanded exemption, students in
13 many fields will not be able to complete their
14 assignments.

15 In our reply comment we mentioned Penn
16 professor of urban studies Andrew Lamas who is an avid
17 WIC user. Professor Lamas explained that, in the
18 past, he taught his students to communicate in many
19 genres, from academic essays to op-ed columns.
20 Working in these different genres trained students to
21 bring their policy advocacy to different communities
22 of readers.

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1 For the past seven or eight years Professor
2 Lamas has also asked his students to create video
3 essays which are by no means a new medium of
4 communication. The video op-ed itself is an
5 established form now.

6 So what quality of images should Professor
7 Lamas' students use? I think this is a bit like
8 asking, you know, what's the vocabulary they should be
9 allowed to use in their op-eds? Is it enough when
10 they use weak verbs the in passive voice? Of course
11 not. They need to use the most effective vocabulary
12 available. And that effective vocabulary changes over
13 time.

14 So is DVD quality good enough for this kind
15 of work? It really isn't, and I'll give you three
16 important reasons why. First, faculty and students,
17 from our historians to scientists, analyze protected
18 media as part of their of everyday activities. In the
19 past we have shown that it's necessary to make clips
20 in order to save classroom time, to show multiple
21 clips on slides and manipulating excerpted media.
22 It's also necessary to have the highest quality images

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1 because the depth of analysis rises with the quality
2 of the image used.

3 The New York Times declared in its tests that
4 the -- the difference in picture quality between
5 Blu-Ray and standard definition DVD was very obvious.
6 Blu-Ray simply blew away standard definition players.
7 The difference was dramatic. The Blu-Ray images were
8 smooth, sharp and rich. Every scene popped with
9 clarity and presence never seen with the standard DVD,
10 making the scenes, whether dynamic exteriors or
11 heavily shadowed interior club scenes come alive.

12 So in these stills from the Blu-Ray and DVD
13 versions of Citizen Kane, I think you can see the
14 richer tonal range, the increased depth of field, the
15 enhanced modeling of black and white, or chiaroscuro
16 effects in the Blu-Ray. The Blu-Ray is much closer to
17 the original image -- rather, to the image as the
18 director, Orson Wells, and the cinematographer, Gregg
19 Toland, intended. It's also closer to the original
20 spectator's 35-millimeter experience.

21 So these aesthetic differences obviously are
22 important to media studies professors and students.

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1 But they're also important, just for example, to
2 American studies professors Michael Denning from Yale
3 University and Amy Kaplan from the University of
4 Pennsylvania who have both written about the political
5 discourse in the background of Citizen Kane and how it
6 comments on the main story.

7 So in this particular scene, the child,
8 Charles Foster Kane, yells, "Unions forever" in the
9 background while his mother endows his trust fund.
10 The Blu-Ray shot models dark and light to emphasize
11 the distance between the two planes of action, while
12 the DVD's washed-out image flattens the space and the
13 political commentary.

14 A second reason that DVDs are insufficient is
15 that high-quality definition images deliver an
16 affective response that can't be matched by legacy or
17 waning formats. Viewers, especially students, have
18 become accustomed to the immersive experience of
19 high-definition images. Violence is more powerful,
20 suffering invokes more pathos, comedy is funnier.

21 By contrast, even the DVD images that looked
22 impressive three years ago now look muddy and

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1 pixelated. You can't go backwards. There's a kind
2 of -- Moore's Law at work here, an equivalent of
3 Moore's Law. Just as the computer processor from
4 three years ago appears sluggish, the crisp images
5 from three years ago have kind of lost their
6 definition.

7 Compare these two images from Avatar. Here's
8 the DVD. As one student remarked to me, watching the
9 DVD is like looking at the film through dirty glass.
10 And here's the Blu-Ray.

11 Affect is integral to the teaching in many
12 fields. When classes analyze media, for example, they
13 ought to consider spectators' responses. A marketing
14 class needs to know how consumers will feel when they
15 observe food being prepared or they encounter product
16 placements in television ads. Johns Hopkins history
17 of science professor Robert Kargon often uses video
18 clips in his course on the history of artificial
19 humans, cyborgs, golems and automatons. He compares
20 accounts of synthetic humans from the late medieval
21 period through the present. He's interested in the
22 language that's used to express utopian hopes and the

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1 dystopian anxieties during different periods.

2 This is work that requires very close textual
3 analysis. And when he teaches this course in the
4 fall, it really would be a disservice to students if
5 he couldn't -- if the course had to end around 2006
6 because he couldn't use Blu-Ray DVDs -- Blu-Ray video
7 and he couldn't use the images and the language that
8 they were meant to be expressed in for their
9 particular time.

10 So this brings me to a final and related
11 reason that high-definition images are necessary for
12 21st century teaching. They have become the consumer
13 standard. In many cases, teaching with a DVD when
14 consumers view high-definition images outside of the
15 classroom is like teaching with microfilm when the
16 original manuscript is available.

17 At my university, we do all that we can to
18 give students access to original medieval manuscripts
19 so they can see the detail and experience the impact
20 of the original with its unaltered colors and its
21 marginal notes. It's in that same spirit that I'm
22 here to ask you to be able to use high-definition

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1 consumer quality images in classrooms. Students need
2 access to contemporary media in order to analyze and
3 make sense of their world.

4 So the joint commenters -- joint creators
5 have offered a number of alternatives to bypass the
6 encryption, but unfortunately none of these
7 alternatives have the capability of meeting our needs
8 as educators and students, and we really have looked
9 at them closely.

10 There are several online clip libraries,
11 including the recently introduced Movieclips, but none
12 of these offers even a fraction of the titles
13 currently used in classrooms. There is cell phone
14 capture, which is again is not acceptable for a lot of
15 reasons. It introduces a lot of distortion.

16 Screen capture we have found -- most screen capture
17 programs have kind of absolute limits on the pixels
18 that can be used. Some of them don't work with
19 PowerPoint which makes them useless for academic use.
20 The frame rate is usually very low, usually 15 frames
21 per second. The best we found is 30 frames per
22 second, which is less than half of Blu-Ray.

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1 So just in conclusion, I'd like to say that I
2 understand the desire of businesses to want to protect
3 their investments, but these educational uses don't
4 pose harm to the copyright holders. Moreover, they
5 represent long-established core fair uses. Since
6 2006, my colleagues and I have the DMCA exemption
7 rulemaking process very seriously. We've gathered
8 evidence and demonstrated section 1201's potential to
9 cause real harm to higher education. And in previous
10 rulemakings your office has always seen the evidence
11 clearly and responded by crafting exemptions that
12 media to be used in appropriate ways by university
13 faculty and students.

14 I hope that, once again, you'll see that the
15 need not only continues, but it's evolved, and the
16 exemption should be updated to meet the current state
17 of education. Thanks.

18 MR. CARSON: Thank you, Professor Decherney.
19 Jonathan, are you ready?

20 MR. BAND: Thank you very much and thank you
21 for accommodating my wedding -- my nephew's wedding
22 schedule.

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1 So I'll be very brief. As you've seen from
2 our written comments, we're basically asking for the
3 existing exemption to be renewed, so I'll just make
4 a couple of -- underscore a couple of points. First,
5 as Professor Decherney indicated, film clips are
6 widely used throughout higher education by both
7 professors and students, and I think the content
8 providers should be flattered that their media has
9 become so pervasive in the way students and faculty
10 view the world, that they can't -- one really cannot
11 teach classes about almost any subject now without
12 including their content. And so they should be
13 flattered and they should welcome this development.

14 The commenters didn't really seem to object
15 to the renewal of the exemption that we proposed, but
16 rather they claim that we're misusing the exemption,
17 that somehow we're using it when lower quality
18 alternatives have been available, and Professor
19 Decherney talked a little bit about that, and let me
20 just underscore a couple of points.

21 First of all, their comments talked a lot
22 about the screen capture technologies, but as

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1 apparently -- you know, again, in their testimony they
2 wouldn't identify exactly what screen capture
3 technologies that they consider to be
4 non-circumvention and, therefore, not implicating of
5 section 1201. And my understanding is in the hearing
6 in Los Angeles this specific issue came up and, once
7 again, the rights holders would not specifically
8 identify what kind of technologies they would consider
9 to be kosher. But even if there were technologies
10 that they would consider not to be circumventing,
11 there could be some other rights holder out there who
12 claims that it is circumventing, so simply saying that
13 there's a technology out there that might help us
14 doesn't really translate into an effective provision
15 on the ground where we need to have certainty when
16 we're working with a large number of faculty members
17 and students.

18 Second of all, the issue of quality is
19 that -- I think quality is always needed. High
20 quality is always needed. To the extent that -- if
21 the rights holders think that the quality is important
22 in the product, that they made it high quality for a

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1 reason, then it just doesn't -- it baffles the
2 imagination as to why that quality somehow is less
3 important in classroom. If it's important to have
4 good quality in your basement when you're watching it
5 at home, then there simply is no reason to say it
6 doesn't -- that quality is not necessary in the
7 classroom, and especially when you're watching it on a
8 much bigger screen sometimes in the classroom and so
9 the distortion is greater.

10 Professor Decherney mentioned the issue of
11 authenticity, also the notion that standards evolve
12 and what people expect -- expectation of consumers
13 evolve, and what was seen as remarkable three years
14 ago or five years ago now could seem sort of -- again,
15 almost distracting now. And in is the last image that
16 Professor Decherney put up from the Martin Scorsese
17 movie, you know, which was talking about all of these
18 wonderful optical illusions and wonderful special
19 effects that now look absurd, but at the time, to a
20 child seemed to be very, very compelling.

21 Standards evolve, and what we see -- what we
22 expect evolves, and the -- not having the same quality

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1 really can dilute the impact, the emotional impact,
2 the force of the message. And, again, not having the
3 same quality of the product as it's made available to
4 the consumer or made available in theatrical releases
5 really weakens the impact and the educational use of
6 the work.

7 And finally, you know, if the quality of
8 these other technologies, such as screen capture, if
9 it's so good, then why do we bother -- why do they
10 bother using CSS at all? I mean, there's sort of,
11 like, a logical circularity here. If it is good,
12 using these alternative technologies, then there's no
13 point in having encryption. But if the encryption
14 really does achieve something, if there really is --
15 what you get without the encryption isn't as good,
16 then that makes our case, that is -- that there is a
17 need to get the high-quality material and there really
18 is a qualitative difference between what you can see
19 with screen capture as opposed to what you can see
20 through circumvention. Thank you very much.

21 MR. CARSON: Thank you. Martine Rife.

22 MS. RIFE: I don't need to push this. You

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1 can hear me; is that true?

2 MR. CARSON: Yes.

3 MS. RIFE: Thank you very much for having me
4 today again. I participated three years ago. My name
5 is Martine Courant Rife, and I'm from Lansing
6 Community College, and part of my response was to
7 support the group that Peter Decherney -- their
8 document that they submitted which I thought really --
9 everything that they discussed in there regarding how
10 the exemptions are being implemented, it just rings
11 very true. So I wanted to just come in person and
12 just talk about how it's playing out at the community
13 college where I work.

14 As I said in my document that I filed,
15 it's -- almost half of all undergraduate students
16 attend at community colleges, and in this room we do
17 have a lot of representation from universities, so it
18 was very helpful when you expanded the 2010 exemption
19 to go beyond just what's in a college's library
20 because, as I pointed out during the last round of
21 hearings, community colleges -- we're just operating
22 with much less resources than your typical research

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1 university. So just being able to use anything
2 legally obtained is very helpful and also to include
3 all college professors, you know, rather than just
4 ones specializing in film studies.

5 So what has happened over the last couple of
6 years since the new exemption was put forward is that,
7 at my college, a colleague and I have -- we put
8 together a workshop, and the point that I'm trying to
9 make here is how the exemption that you crafted in
10 2010 is being implemented in a way that's ethical and
11 responsible and thoughtful and reflective.

12 So these workshops that we've had, we've had
13 a couple of them at my college, and there's been a lot
14 of interest. They've been well attended. We've had
15 between 30 and 40 faculty administrators attend these
16 workshops. And in it I talk about, like, the legal
17 parameters, and then my colleague, he shows some of
18 the examples of how he uses it in a day-to-day basis.

19 So just examples at my college that kind of
20 repeat what Decherney's group said of how faculty are
21 using the exemption, A creative writing instructor
22 would use -- he uses clips of the Judy Garland Wizard

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1 of Oz movie to show how to construct narrative tension
2 and to discuss strategies that writers use in order to
3 build their stories. So this is very helpful to
4 students to see these examples.

5 Another example is an economics professor at
6 the community college level using clips from famous
7 and popular movies to show different economic
8 theories. The one that I remember him discussing was
9 the zero sum game. And then we also -- another
10 example that I recall is an astronomy professor using
11 clips to bring forward principles of astronomy that
12 students can discuss in the classroom.

13 So it's being implemented in a thoughtful way
14 that is across the disciplines at the community
15 college level where almost half of all students
16 attend.

17 My specialty of teaching is first year
18 writing, and first year writing actually has -- it's
19 not really acknowledged as much as it should be for
20 the importance that it serves because almost every
21 college student will take a first year writing class.
22 And so we look -- we have organization that we look to

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1 to tell us what we should teach as best practices or
2 what students need to know currently.

3 And the groups that I'm involved in and that
4 put forward standards are the writing program
5 administrators, which we call the WPA, and the
6 National Council of Teachers of English, which we call
7 the NCTE. But one of the things we do is they create,
8 like, protocols or documents that we look to to see
9 how we should revise our curriculum.

10 And just to give you an example, since all of
11 the organizations that are specializing in the
12 teaching of first year writing tell us that we should
13 be teaching digital literacy and informational
14 literacy, and this goes right to the heart of what
15 this exemption addresses.

16 So from the writing program administrators'
17 first-year learning outcomes -- this is specifically
18 for what students would take during their first
19 semester of college writing -- by the end of the first
20 year of composition, students should be able to use
21 electronic environments for drafting, revising,
22 editing and sharing text -- and that's a quote from

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1 the learning outcomes.

2 So, you know, when something is legal, like
3 the way that the exemption had been crafted for
4 faculty to use, then we can teach about and I can have
5 workshops -- we can create workshops to teach about
6 how to do things legally.

7 On the other hand, when it isn't legal, then
8 it's -- then it's hard to address it in the classroom.
9 So if you recall, the evidence presented by the EFF 11
10 years ago showed than what's happening, like, on
11 YouTube with the vidder community that these kind of
12 documents and texts are being created, but until
13 students are included in the mix of what -- in a broad
14 range of what you are allowing to fall under the
15 exemption, it's very difficult to figure out how to
16 teach about how to do something that we know they're
17 already doing, but that we can't really talk about
18 because we're not supposed to be doing it.

19 So it's just -- I would agree with everything
20 Decherney said -- Professor Decherney said about --
21 that the use of digital text and media in the
22 classroom, and specifically in the first year writing

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1 classroom, it's just a given and it reflects what we
2 are charged with teaching in this day and age.

3 And so I really would ask you to expand it to
4 include students, not just the film studies students,
5 but all college students. That's my -- that's the end
6 of my testimony. Thank you.

7 MR. CARSON: Okay. We've got a few minutes
8 left, and I just wanted to ask one question --

9 MS. RIFE: Okay.

10 MR. CARSON: -- because you talked about your
11 first year writing class and --

12 MS. RIFE: Yes.

13 MR. CARSON: -- you said students should be
14 able to use electronic environments for drafting,
15 editing and presenting text.

16 MS. RIFE: Yes.

17 MR. CARSON: What I didn't hear was how that
18 translates to the use of motion pictures. So can you
19 give us how that's actually been applied in your case?

20 MS. RIFE: Okay. So -- that's a question --
21 that's kind of an issue that came up three years ago.
22 When I say text, I'm not -- we don't -- no longer just

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1 refer to alphabetic -- we call them alphabetic text,
2 like typed things. When we say a text, it can be a
3 montage.

4 So at the hearing three years ago, I remember
5 I had an example of a student that had created, like,
6 a parody or a comedy about some popular movies that
7 create racial stereotypes. So in the first year
8 writing classroom, many teachers are having students
9 create texts that are -- that can be video texts. So
10 that's -- the other two groups also that I forgot to
11 mention, the American Library Association and the New
12 London Group have some literature that talks about the
13 importance of teaching information on digital
14 literacy.

15 So to create a text is to create numerous
16 kinds of texts that -- we think students should know
17 how to create numerous kinds of texts because they're
18 asked to do that in their jobs now. When they get
19 hired, they can be hired as a communications
20 specialist, and they might need to create movies and
21 videos and things like this for the organization that
22 they work for.

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1 So -- it's every teacher across the United
2 States that's teaching first year writing isn't having
3 students -- I don't have empirical evidence on the
4 number, the percent, but it's an increasing number,
5 and it's something that we know we are supposed to
6 teach and we are trying to develop professional
7 development materials so that we teach students what
8 they need to know and we try to broaden what we
9 conceive of as a text.

10 MR. CARSON: And have you personally taken
11 advantage of the existing exemption in your work?

12 MS. RIFE: Yes.

13 MR. CARSON: Give me an example.

14 MS. RIFE: To show examples of speeches?
15 Because my Ph.D. is in rhetoric and writing, so I'm
16 interested in the art of persuasion. So I've used it
17 to show different kinds of speeches.

18 MR. CARSON: Okay. Thanks.

19 MS. RIFE: Thank you.

20 MR. CARSON: All right. The next person on
21 the list is Renee Hobbs from the University of Rhode
22 Island. I think the mikes back there work, but let's

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1 check and make sure.

2 MS. HOBBS: Okay. Thanks very much. Is that
3 working?

4 MR. CARSON: Yeah. Great.

5 MS. HOBBS: Great. My colleague, Spiro
6 Bolos, is going to call up some technology when I need
7 to use the technology.

8 Thanks for the opportunity to come and talk
9 to you a little bit about the need for K-12 educators
10 to be able to use media in flexible and dynamic ways.
11 Of course, media is a crucial component of K-12
12 education, and right now the current law limits the
13 ability of educators to make fair use of audio-visual
14 works for educational purposes.

15 High-quality image media is ubiquitous to
16 young people today who grow up with 52-inch HD screens
17 in their living room. And poor quality clips, as
18 other commentators have noted, lose their impact when
19 learners are distracted by the bad image and sound
20 quality. As other commenters had noted, the
21 perceptions of quality change over time, change over
22 generations. Young people growing up in American

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1 schools today find poor-quality clips to be
2 distracting and difficult, painful even, to watch.

3 Now, high-quality clips are important for
4 courses in film studies and science and the fine and
5 performing arts, as the Copyright Office recognized in
6 the 2010 decision, not just for detailed analysis of
7 image and sound, but for their larger communicative
8 value as conveyors of ideas and information.

9 Increasingly, DVDs are the only format available for
10 many forms of movies and digitization of clips is
11 required for effective classroom use.

12 Critics of our exemption say that we have
13 alternatives, like the use of media compilation
14 websites. But the use of media compilation websites
15 is not a viable solution because Internet access in
16 many school communities is unreliable and restricted
17 and filtered.

18 Every year I do about 15 to 20 events in
19 American public school districts all across the
20 country. In about 50 percent of the communities that
21 I work in YouTube is not -- it's not available. It's
22 blocked by the technology administrator. So on --

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1 even on media compilation websites, even if a school
2 district permits educators to access them, there's a
3 limited number of resources that are available. And
4 what is there has been edited in ways that may or may
5 not be suitable for an educator's specific need.

6 More problematically, ads before and during
7 clips are especially problematic because they change.
8 Even if the teacher has previewed the clip before
9 viewing, it's not possible to predict what ad will be
10 viewed during the classroom playing because one time
11 it might be a Kleenex ad, and the next day -- only a
12 few days later, it might be an ad for a violent movie.

13 Smartphone screen capture, from the teachers
14 I've talked to, is not a viable option. And right now
15 I want to show you a video that I captured when I was
16 doing a workshop in Lawrenceville, New Jersey. This
17 is a high school teacher at a parochial high school in
18 Lawrenceville, New Jersey, and he's talking a little
19 bit about the challenges he faced when trying to use
20 screen capture to take an excerpt of a piece of
21 audio-visual media. Let's see if we can watch that
22 clip now.

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1 MR. CARSON: You put it very well. Let's see
2 if we can.

3 I don't want to disrupt the flow of your
4 presentation --

5 MS. HOBBS: All right. We'll show it when
6 we --

7 MR. CARSON: -- but can we come back to it
8 when it works?

9 MS. HOBBS: -- can. We'll show it when we
10 can.

11 One of the reasons why we're asking for an
12 exemption for audio-visual works and not just DVD is
13 reflected in an observation I made this fall of a high
14 school English teacher named Carolyn Fortuna at
15 Franklin High School in Franklin, Massachusetts where,
16 in her English class, the theme is sport and society.
17 She's looking at the way in which representation of
18 sport both reflects and shapes our understanding of
19 social values.

20 And she wants to do a critical analysis of
21 the Madden Games, but of course finds it very
22 difficult to bring in examples of the -- the way the

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1 games are depicted and how they've changed over time.
2 She seeks to support her students making connections
3 between the classroom and the culture.

4 Okay. Well, now we'll here from the teacher
5 at Lawrenceville -- in Lawrenceville, New Jersey.

6 (Video played.)

7 MS. HOBBS: This teacher had many other
8 stories to tell me of the challenges he's experienced
9 in trying to support the needs of the teachers in his
10 community, but that gives you a brief idea.

11 Let me talk about my fourth point which is
12 that teachers are frustrated in their efforts to
13 incorporate media in the classroom. Using multiple
14 DVDs, searching for streaming media online, watching
15 unavoidable and inappropriate ads, and having to fast
16 forward to the specific clip required all have a
17 negative impact on teaching and learning, especially
18 when teachers in the elementary and secondary grades
19 are trying to build those critical thinking skills by
20 using the time-honored classic technique of
21 comparison/contrast. It's how we help students learn
22 to analyze something. We compare and we contrast. By

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1 definition, we have to use one artifact and compare it
2 to another.

3 For example, John Landis, a technology
4 teacher at the Russell Byers Charter School in
5 Philadelphia, wanted to teach his fourth graders about
6 the history of technology by having them compare and
7 contrast two clips from Super Mario Brothers because
8 Super Mario Brothers, back in the day, looks
9 considerably different than it looks now. And if
10 you're growing up as a nine-year-old child in
11 Philadelphia now, you don't really understand how fast
12 technology has changed, and it can be a tremendous
13 opportunity for kids to really carefully pay
14 attention, to compare and contrast in this highly
15 engaging activity. Unfortunately, that activity is
16 unlawful.

17 Now, the 1201 rulemaking process was
18 implemented to ensure that the public would have the
19 continued ability to engage in non-infringing uses of
20 copyrighted work. The use of media to promote
21 critical thinking, analysis and communication skills
22 contributes to the development of an informed

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1 citizenry.

2 Right now, only 25 percent of the children
3 who are now age 16 will graduate from college. So we
4 think it's vital that these skills be learned in the
5 elementary and second grades. Right now, K-12
6 teachers have to choose among three bad choices. They
7 can violate the law and bypass CSS. They can search
8 for online clips, and they may or may not find ones
9 that meet their needs, and they may or may not have
10 inappropriate ads. Or they can choose not to use
11 media in the classroom.

12 Granting our exemption would advance the
13 quality of education in American public schools
14 because audio-visual works and clip compilations are
15 essential for teaching and learning. They support
16 learner engagement and attention. They increase the
17 perceived relevance of the curriculum. And they
18 increase recall and comprehension of the content.

19 For that reason, we think it's important to
20 meet learners' expectations for image quality by
21 permitting elementary and secondary educators to make
22 clips for teaching and learning. Thanks very much.

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1 MR. CARSON: That you very much.

2 Mr. Bolos, I assume -- are you doing a
3 separate presentation? Your name is on the list, but
4 it --

5 MR. BOLOS: Yes.

6 MR. CARSON: You are?

7 MR. BOLOS: Yes.

8 MR. CARSON: Okay. Great. Then it's your
9 turn.

10 MR. BOLOS: My name is Spiro Bolos. I'm a
11 social studies teacher from New Trier High School.
12 That's in the north shore of the Chicago suburbs.
13 This is a very affluent district, but it's a public
14 school, and I'm trying to emphasize that for a reason,
15 which you'll see in a minute.

16 So I believe one of the main objections in
17 the last ruling, the 2010 ruling, was that there
18 wasn't enough evidence from the actual classroom with
19 real students. So my testimony today is intended to
20 show the effect of limiting access to high-quality
21 media on actual students in my class.

22 In terms of what is normative practice for

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1 teachers in my building, it's real kind of interesting
2 because many teachers use VHS tapes still. They don't
3 do it for the high-quality aspect of it at all. In
4 fact, the only reason they use VHS is because we teach
5 in 40-minute blocks, and it is something that you can
6 queue up in a very precise manner, and oftentimes it's
7 not the quality they're looking for, but at least it's
8 not wasting class time.

9 And also, as a first-time mentor of a new
10 teacher, I've noticed how much new teachers struggle
11 with technology in the classroom and how they are
12 assessed if they cannot -- assessed poorly if they
13 cannot make their transitions as smooth as possible,
14 if they cannot use media in an efficient way.

15 I made a few assumptions when I did my little
16 experiment in my classroom. One of them was that
17 although I'm a Mac guy, I would only use Windows
18 because that is the norm for teachers across America.
19 Most people are using Windows machines, even though
20 Macs are easier to use video with, I would argue.

21 The other assumption I made was something
22 that was mentioned just earlier -- I used a free

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1 program called Jing to capture the media as opposed to
2 Camtasia. My district, because of its affluence, is
3 actually very willing to provide me with Camtasia,
4 which is either a \$199 or \$299 suite of programs. But
5 I know that most educators don't have access to the
6 resources that I do. So I used Jing instead. Jing is
7 a free version -- a web-based program -- web-based
8 version of Camtasia. So I didn't use that because of
9 the monetary issue.

10 To prepare for the screen capture itself,
11 what I did was first I found a quiet place. It was
12 very difficult to do this in a public school. I had
13 no idea how difficult this was. People kept on
14 breaking in. I couldn't do this at my own desk
15 because my colleagues are, you know, configured in
16 pods.

17 The second challenge was that I had to
18 capture the video in real time. This was also a
19 challenge. I'm considered to be one of the most
20 technologically savvy people in my building. I've
21 often functioned as a technology staff developer. And
22 so I know how to use this technology. But most people

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1 struggle and they give up very easily when there are
2 challenges. And so I had to do this multiple times to
3 get the clip exactly where I wanted to as I was trying
4 to capture it.

5 Then I would wait. You know, typically, the
6 clips could be anywhere from 5 to 15 minutes, and
7 every time you're using a clip, you have to wait in
8 real time.

9 Now, what's interesting about Jing, this
10 particular project -- this particular freeware, is
11 that it's a web program. And so when you are done
12 capturing, you have to upload the video clip to the
13 web in order for it to be useful in any other place in
14 the building.

15 And so I would upload it to the web. And I
16 would upload it to the web. And I would wait. And I
17 would wait many, many, many minutes, sometimes hours,
18 to get it up to the web. And this is also an issue in
19 terms of the amount I could unload to the web. Jing
20 is cap'd. Because it's a free program and because
21 they want to incentivize people to buy the more
22 expensive Camtasia suite, it is capped at five minutes

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1 total. And, therefore, I couldn't use any clips
2 beyond five minutes.

3 An example would be my modern world history
4 class, I wanted to use a clip from Elizabeth, the
5 film, the Hollywood movie. And the problem was, of
6 course, that the clip I needed was 5 minutes and 30
7 seconds, and that was the most important part, was the
8 end.

9 So we set up an experiment in my American
10 studies class. This is a team-taught class. I'm the
11 history teacher. My partner John is the English
12 teacher. And we were reading The Great Gatsby and
13 doing a comparison with, of course, Citizen Kane.
14 That seems to be the movie of the day. We called it
15 The Great Gatsby meets Kane.

16 So we set up two groups of students. The
17 first group was the screen grab version. And when we
18 set it up, it looked something like this.

19 (Video played.)

20 MR. BOLOS: I picked that particular scene
21 because there was an argument between all of the
22 characters all speaking at once. This is the debrief

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1 from that same screen capture clip.

2 (Video played.)

3 MR. BOLOS: So that was the screen capture.

4 Then there was another group of students for the
5 actual DVD quality clip of Citizen Kane. Very quick.
6 It looked like this.

7 (Video played.)

8 MR. BOLOS: That was just an example to show
9 you we're doing the same type of activity with a
10 different group of students. Finally, the DVD rip
11 debrief.

12 (Video played.)

13 MR. BOLOS: And so, in conclusion, I would
14 just say that, you know, in a political environment
15 where public education is under attack, it seems --
16 you know, I asked myself the question, why is it that
17 students at the college level -- some students at the
18 college level who are, you know, a minority in this
19 country to begin with. Get access to high-quality
20 media whereas in -- at the public education level,
21 where all students attend, they get access only to
22 poor-quality media? Thank very much.

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1 MR. CARSON: Thank you. I think that's it
2 for the proponents in this panel.

3 Dean, are you going to go first?

4 MR. MARKS: Yeah.

5 MR. CARSON: Okay. Great. Dean Marks.

6 MR. MARKS: We're also going to have a little
7 bit of some audio-visual, so David Taylor is going to
8 set that up. But while he's sitting that up, I'm just
9 going to start to save you some time.

10 Thank you so much for giving us the
11 opportunity to testify today. I'm here representing
12 AACCS LA, which is a limbed liability corporation of
13 the licensing administrator for AACCS. AACCS stands for
14 the Advanced Access Content System, and AACCS LA was
15 formed by eight founder companies. Those companies
16 are IBM, Intel, Microsoft, Panasonic, Sony, Toshiba,
17 the Walt Disney Company and Warner Brothers, which is
18 the company that I actually work for.

19 AACCS LA developed and licenses the AACCS
20 technology for the protection of high-definition
21 audio-visual content on optical disc, and particularly
22 Blu-Rays which I'll be referring to as medias.

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1 AACS LA licenses its technology on a cost recovery
2 basis.

3 So what is AACS? It's a robust
4 encryption-based technology. And, unlike some of its
5 predecessors, it actually permits AACS LA to revoke
6 keys deployed to its licensee, so this allows AACS LA
7 to, if there are non-compliant licensed products out
8 there on the marketplace, to prevent them from playing
9 back newly released content protected by AACS.

10 It's a robust content protection technology,
11 and it really served as and continues to serve as the
12 foundation for content owners to release premium
13 content to consumers in the home video marketplace and
14 high definition. I just also wanted to note that AACS
15 is sufficiently robust that it has resisted easy hacks
16 and it continues to do so.

17 One feature that we talked about with AACS
18 and that will be part of the whole AACS ecosystem is
19 AACS Managed Copy. And this will allow consumers, as
20 well as educators through an online server to be able
21 to make an authorized copy of the content that is on
22 an AACS protected BD to a computer hard drive through

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1 a method that is referred to as a bound copy method.
2 It will also allow users and consumers to make a
3 recordable copy onto recordable media, such as DVDs as
4 and SD cards. And this Managed Copy system is
5 expected to launch by the end of this year.

6 AACS LA respectfully submits that the
7 proposed exemptions for classes 7F, 7G and 8 should be
8 denied. The proponents have not identified specific
9 works protected by AACS that are unavailable for
10 non-infringing uses. And Blu-Ray discs and AACS have
11 not previously been subject to an exemption. And
12 there really has been no persuasive demonstration of
13 adverse effects on fair use and -- to justify why
14 there should be an exemption for AACS and
15 high-definition content now.

16 I'd just like to note, from the last
17 presentation, that the student who was viewing a clip
18 from the DVD said himself, I don't see how that clip
19 could possibly be in higher quality. So to sort of
20 say, for educational purposes, that DVD quality is
21 somehow insufficient really is belied by the evidence
22 just given in the last panel.

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1 And we'd also just like to remind, of course,
2 the Copyright Office that the whole exemption is a
3 question of balance: Adverse effects on clear,
4 non-infringing uses versus the need to protect the
5 integrity of technical protection measures like AACS
6 to actually encourage content owners to release
7 high-quality content out in the marketplace.

8 We wanted to make one comment on the 2010
9 exemption. There's been some notion that the 2010
10 exemption somehow took away benefits that were --
11 proponents claimed they had under the 2006 exemption
12 because the 2010 exemption was limited to DVDs. The
13 2006 exemption referred to audio-visual works included
14 in the educational library of a college or
15 university's film or media studies department.

16 We wanted to note that Blu-Ray was not
17 commercially released in the U.S. until June 2006,
18 well after that round of rulemaking was initiated.
19 Accordingly, neither Blu-Ray nor AACS was the subject
20 of any of the 2006 proposed exemptions. And,
21 therefore, the 2006 exemption did not, in fact, create
22 an exemption for film professors to circumvent AACS on

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1 BDs as they could not have possibly demonstrated in
2 that proceeding that the prohibition against
3 circumvention resulted in a substantial adverse effect
4 on their non-infringing uses.

5 So -- we also believe that no exemption
6 should be created for other college and university
7 professors or K through 12 educators with respect to
8 AACCS and Blu-Rays. Really the need for high
9 definition is unpersuasive, as I just mentioned, in
10 the last clip. And there's really been -- there was a
11 demonstration as to how some of these alternatives to
12 circumvention appear not to be satisfactory, but that
13 really just hasn't been the case in what we've seen as
14 we have worked with some of these alternatives to
15 circumvention. So we just wanted to put some of those
16 up for just a moment.

17 Here are the variety of alternatives to
18 circumvention that are available -- video capture
19 software, video streaming services -- for particularly
20 film studies departments and media studies departments
21 at colleges and universities, the ability to use
22 professional camera equipment to record displays.

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1 Smartphones and tablets, clip websites and, of course,
2 the Managed Copy.

3 So for university professors and film/media
4 studies and students, they still have access to work
5 on DVDs pursuant to the prior exemption, and that, we
6 believe, provides more than adequate quality.

7 In terms of video capture software, we just
8 wanted to show a quote from a teacher about the
9 Applian Replay Video Capture software that is made by
10 Applian -- and I'm not going to repeat the quote. The
11 quote is up there. But they say that it's easy to
12 use, it's -- it will help make -- my media and film
13 lessons will actually feature some media and film, and
14 that the quality was very good. The quality of the
15 playback was absolutely superb, and there are no
16 problems with audio syncing.

17 So here's an important point with respect to
18 the video capture software. It was asked at the
19 May 17th hearing in Los Angeles whether the video
20 capture software, such as the product that was
21 demonstrated at the May 11th tech demonstrate violates
22 the DMCA. And we examined that product, and we have

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1 concluded that it does not violate the DMCA.

2 Some commentators have also pointed out that
3 that particular product that was demonstrated on
4 May 11th is not Mac-compatible. We have identified
5 Mac-compatible video capture software, and we have
6 examined it, and it functions in the same manner with
7 the same quality as the video capture software that
8 was demonstrated at the May 11th hearing. And we have
9 also concluded that that Mac-compatible software does
10 not violate the DMCA.

11 So we just wanted to show a little bit --
12 there's been some discussion of smartphone recording.
13 We just wanted to show a very, very brief clip of that
14 that we made using an Android RAZR Maxx. So here's
15 the original recording on the left of the smartphone
16 at 720P, and that's from the movie War Horse.

17 At the right is the clip enhanced with
18 stabilizing feed reveal editing tools. Those tools
19 are software tools. It retails for less than \$50, and
20 it's basically one or two punches of an online button
21 to do the clean-up with it.

22 There are also clip websites that were

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1 discussed extensively at the May 17th hearing --
2 Anyclip, Movieclips -- where there are a lot of clips
3 that can be assembled for presentations.

4 And, finally, we talked about AACCS Managed
5 Copy, but I also wanted to mention digital copy. The
6 testimony from the May 17th hearing showed that there
7 were 350 titles between just Warner Brothers and Fox
8 alone that have been released for the digital copy
9 where a full copy of the movie product can be made
10 from a BD disc onto a hard drive using Windows media
11 or Apple.

12 Finally, there's been some discussion about,
13 you know, we need to keep pace with the quality of
14 media that is out in the marketplace. DVD is really
15 still king. There are more than twice as many DVD
16 households as there are Blu-Ray households. Still
17 75 percent of the physical product that is out on the
18 marketplace is on DVD as opposed to BD. And DVD is
19 not going away, and it is still the basic touchstone
20 high-quality format that is out even in the consumer
21 marketplace. BD is growing and BD is -- is on a
22 trajectory up in the marketplace, but it is not the

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1 majority format.

2 Finally, the -- the content which is released
3 only on BD is exceptional. The proponents have talked
4 about a couple of director cuts, some bonus material
5 that's available only on BD versions, but they didn't
6 argue that they wanted to make use of these cuts and
7 were prevented from doing so by AACCS, but were merely
8 saying that somehow the DVD format was disappearing.

9 Of course, if you're going to be showing a
10 full-length picture, as was sort of alluded to in the
11 last testimony, it can always be displayed in the
12 classroom simply using playback from the Blu-Ray disc
13 itself without the need to circumvent.

14 In any event, these cases do not justify an
15 exemption, particularly since the original versions of
16 these films are readily available on alternative
17 formats, including DVD, for film and media studies
18 professors, and the full director's cut and bonus
19 materials are available for classroom use in a number
20 of ways that do not circumvent.

21 So as I mentioned, BD is on the increase now
22 into the marketplace. By 2014, Futuresource predicts

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1 there will actually be 83 million Blu-Ray players in
2 the marketplace. And so Future -- so that's a
3 doubling, frankly, of where we are today. So we're
4 concerned and wanting to see that -- that Blu-Ray
5 marketplace continue to develop and grow.

6 And Futuresource has also said that there are
7 going to be 95.2 million tablets and 287 million
8 smartphones in the marketplace by 2014. We quote that
9 figure for two reasons. One, Blu-Ray is just not
10 going to become the dominant format the way DVD did
11 because of all of the competing ways now that digital
12 content is delivered to the marketplace via
13 smartphones, tablets, digital distribution and other
14 channels.

15 But there's a second point here, and that is
16 that, frankly, smartphones and tablets are going to be
17 a lot more ubiquitous than BD players, and all of
18 those tablets and smartphones have video capture,
19 video recording capability, and the ease and quality
20 of the clips that they can record make it more likely
21 that clip recordings can easily be made and assembled
22 and will be more readily available for educational

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1 purposes than ever before, and that's without the need
2 of engaging in any acts of circumvention.

3 So, in conclusion, we believe that denying
4 the requested exemptions with respect to AACS and
5 Blu-Ray will cause no harm to the proponents, and we
6 believe that granting exemptions is too risky because
7 it would deny BDs and AACS the full benefit of the
8 DMCA protections and would prematurely harm the format
9 before it achieves maturity. Thank you.

10 MR. CARSON: Thank you. Bruce, you're next.

11 MR. TURNBULL: Thank you and good morning. I
12 also appreciate the opportunity to be here. As has
13 been indicated, I'm here representing the DVD Copy
14 Control Association, which is a not-for-profit
15 corporation located in Morgan Hill, California.
16 DVD CCA licenses CSS to protect the unauthorized
17 access to or use of prerecorded video content
18 contained on DVD discs, licenses the owners of such
19 content and the relating offering of disc replicating
20 companies, producers of encryption engines, hardware
21 and software decrypter and manufacturers of DVD
22 players and DVD ROM drives.

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1 The availability of CSS was essential of
2 incentivize content owners to risk releasing their
3 valuable content in digital form on DVD, thereby
4 allowing consumers to enjoy movies and other video
5 content in higher resolution than had previously been
6 available. This, in turn, laid the groundwork for
7 fast-growing consumer electronic products -- the fastest
8 growing consumer electronics product in history.
9 So -- we're familiar to the office from the previous
10 hearings, but I just wanted to give that brief
11 introduction.

12 Now, today, I wanted to focus on a couple of
13 points. First, I wanted to spend a few minutes just
14 reminding all of us about the standards for this
15 proceeding. And this was very well laid out in the
16 initiation notice from the Federal Register, but I
17 think, in some of the comments in the back and forth,
18 has gotten a little bit lost, and I wanted to
19 underscore a few points there.

20 The Copyright Office, in the notice,
21 indicated that in order to prevail, the proponents
22 have the burden of proof of an exemption, and they

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1 must demonstrate distinct, verifiable and measurable
2 impacts on their purported fair uses. There must be
3 actual instances of verifiable problems.

4 In order to satisfy the likely prong, which
5 is a possibility, as quoted in the Register notice
6 from the managers report, an exemption based on the
7 likely future adverse impacts during the applicable
8 period should be made only in extraordinary
9 circumstances in which evidence of likelihood is
10 highly specific, strong and persuasive.

11 And as Dean indicated, that the proponent
12 must show that problems justify an exemption in light
13 of all of the relevant facts, including the
14 availability of works using the protected format.
15 Identification of isolated or anecdotal problems would
16 generally be insufficient to warrant an exemption.
17 The mere fact that the digital format may be more
18 convenient to use for a non-infringing purpose is
19 generally insufficient. And there must be sufficient
20 harm to warrant an exemption from the default rule --
21 and, again, the default was to uphold the
22 circumvention prohibition.

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1 And the -- sort of the full range of
2 availability of a work for use is necessary to assess
3 in order for the evaluation of an exemption on the
4 prohibition on circumvention. And whether the measure
5 supports a distribution model that benefits the public
6 generally is important factor. All of those things we
7 think are important as the Copyright Office examines
8 the set of requests that are before it.

9 Now, with regard to DVD CCA, and DVD
10 specifically, very briefly, DVD CCA does not object to
11 renewal of the exemption for college and university
12 professors, with all of this obviously with regard to
13 CSS and DVDs -- renewal of the exemption for students
14 in film studies classes, nor a clarification that was
15 requested by librarians and others who may be
16 assisting users who are otherwise exempted for their
17 use. We did suggest some, perhaps, clarification on
18 some of the exemptions, and we would direct the office
19 to our written comments on that.

20 In the context of this panel, we do object to
21 the extension of the exemption to all college and
22 university students and the extension of the exemption

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1 to K through 12 teachers. Fundamentally, we believe
2 that the alternatives that are available for those
3 users and uses are fully sufficient to meet the needs
4 that have been identified.

5 The screen capture software -- I would point
6 to specifically the demonstration that was here on
7 May 11th by a teacher from the Poolesville High School
8 in Montgomery County, also a public school, I would
9 note, who demonstrated the use of the Replay Video
10 Capture software where it was evident that it works
11 easily. He integrated the presentations that he
12 made -- the clips that he made into the teaching
13 software that he's provided for his classroom. It
14 allowed -- the screen capture software integrated very
15 well with that. He was able to record exactly the
16 segments that he wanted.

17 The quality, as he pointed out, even some of
18 the fine features of the All the President's Men video
19 where there was a scene where there was a focus in the
20 foreground and a focus in the background and, in
21 between, deliberately a more fuzzy picture -- the
22 screen capture software was able to pick up that

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1 distinction. And as we've seen on -- from Dean's
2 presentation, there are testimonials from other
3 teachers and professors.

4 The recording of the screen by the
5 smartphone, as we've demonstrated, has -- particularly
6 when you add some of the easily available video
7 editing software -- is easy to use, and the quality is
8 certainly acceptable. The visual details are clear.
9 The subtitles were clear. The audio was in sync with
10 the video. And I think the smartphones that are
11 available are certainly well within the reach of many
12 ordinary consumers. As Dean has indicated, there are
13 going to be hundreds of millions of them in consumer
14 hands shortly. Mitch Singer's demonstration at the
15 May 11th demo also showed how bookmarking can be done
16 with online streaming services, and -- so that's
17 available as well.

18 And as to cost, the video capture software
19 that we demonstrated costs less than \$40. Smartphones
20 are -- as I said, are things that are available to
21 many millions of Americans. And easy-to-use
22 high-quality video editing software is less than \$50.

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1 The -- as to the legality issue, I would
2 state that DVD CCA concurs in the statements that Dean
3 made with regard to AACCS LA in its conclusions with
4 regard to screen capture and the DMCA.

5 And I think that concludes the -- my opening
6 presentation. Thank you.

7 MR. CARSON: Thank you very much.

8 Steve Metalitz.

9 MR. METALITZ: Thank you. Good morning. I'm
10 Steve Metalitz. I'm pleased to be here on behalf of
11 seven national organizations dubbed the Joint Creators
12 and Copyright Owners. I think -- I'm glad that you're
13 having this hearing and that you've broken up the
14 hearing the way that you did. We feel that the three
15 streams that are encompassed right now in the existing
16 exemption really ought to be unpacked. They present
17 very different issues. And, in this case, the main
18 issue here is less whether the use that's being made
19 or sought to be made by circumvention is not
20 infringing and more a question of whether there are
21 alternatives that don't require infringement that
22 enable that use to be made.

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1 Bruce has already summarized the points about
2 the burden of persuasion in this proceeding, the fact
3 that it's de novo, and the position of the Joint
4 Creators and Copyright Owners is similar to what Bruce
5 just mentioned.

6 If you believe that the proponents have met
7 their burden in this de novo proceeding, we would not
8 have an objection to a simple renewal of the existing
9 exemption as it applies to the post-secondary
10 education.

11 We do have very strong concerns about
12 expansion of it to cover not just DVD, but all access
13 control formats for motion pictures, which is the sum
14 of what's proposed here. We are concerned about
15 extending it to all students. We're concerned about
16 extending it to all educational levels. We're
17 concerned particularly with number 8, the proposal to
18 cover all educational uses. That is quite different
19 than the -- much more expansive than what is covered
20 by the existing exemption which deals with clips for
21 classroom use.

22 And I just want to mention it because two of

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1 the proposals before you refer to audio-visual works
2 rather than just motion picture. We heard, I think
3 for the very first time today, two examples from
4 Ms. Hobbs of a request involving video games which, of
5 course, are also audio-visual works. I think we need
6 to know a lot more about -- I don't understand what
7 circumvention was needed in order to make the uses
8 that she was describing, so maybe that could be
9 explained later.

10 So if we look back at what has changed over
11 the last three years since we were all here together
12 in this room discussing similar proposals -- let's
13 look at what has changed both in terms of the
14 proponents' claimed need to circumvent and in terms of
15 our position that there are alternatives available.

16 I think, if you look through the materials
17 and the written submissions and the testimony, you're
18 going to see a lot of examples where, yes, perhaps it
19 could be done better in high definition and move
20 beyond the DVD format, but you see almost no evidence
21 that's really necessary to do that. And, of course,
22 this -- the office has long maintained, in accordance

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1 with the applicable law, that this proceeding is not
2 about enabling access to -- not to works in the
3 favored format or the particular format, necessarily
4 the preferred format, but whether there's really any
5 substantial burden on the non-infringing use.

6 So when you take an example, such as from
7 professor -- from the AAUP submission of using the
8 Zoolander film to compare that with Chaucer, that was
9 fine in 2009 to do it on DVD. Somehow it has now
10 become intolerable to limit this to DVD. High
11 definition would be needed. I'm not sure that they've
12 made that case.

13 I think the Library Copyright Alliance was
14 very candid in its reply comments when they said that
15 with the -- we're dealing with here -- there's always
16 going to be a subjective feeling by the would-be
17 circumventor that circumvention is needed, and their
18 point was, from their point of view, objectively it is
19 always needed in every single educational setting.

20 So that's really kind of a meaningless
21 limitation on the existing exemption. And I think --
22 again, I understand why educators want to have the

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1 option to do this and to circumvent the high
2 definition, but I don't think that they've presented
3 compelling arguments that would meet their burden on
4 why is that is necessary.

5 You know, we made -- Jonathan's argument is
6 that since we made it high quality for a reason,
7 everyone should be entitled to circumvent in order to
8 obtain that high quality. We also -- the industry has
9 also used access control for a reason, and that reason
10 was well spelled out in the hearings in Los Angeles.
11 This is an important element in making more material
12 more available in more ways to more people in more
13 formats and at more price points than ever before, and
14 that access controls -- robust access controls are a
15 key element of that, so we're quite concerned about
16 proposals to allow potentially millions of people to
17 circumvent those access controls.

18 I think Dean has already discussed that the
19 death of DVD is -- that those reports are somewhat
20 exaggerated, as Mark Twain might have said. I'll just
21 briefly mention the issue of expansion to allow all
22 students, including K through 12 students, if you

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1 amass these proposals together, to perform
2 circumvention. I don't think, again, that a
3 compelling case has been made or a persuasive case has
4 been made that that's necessary.

5 We're told that students are really teachers.
6 That's the AAUP's submission, which I'm sure will come
7 as surprise to the members of that trade union who
8 think that teachers actually have some privileges that
9 perhaps students don't have. But I don't think a
10 persuasive case has been made.

11 As far as the -- the K through 12 uses, I
12 think -- we had some -- some new testimony on that
13 today, but I think Mr. Bolos' testimony that teachers
14 use VHS because the timeliness of the use is more
15 important than the quality of the use in their
16 setting, the quality of the reproduction in that
17 setting, I think is indicative of whether -- you know,
18 I think that's important to consider in whether
19 they've met their burden of showing that they need to
20 be able to circumvent digital materials.

21 And as far as what comes out in the
22 classroom, well, we now have the battle of the high

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1 school social studies teachers, and you saw the
2 presentation from Poolesville High School and -- New
3 Trier is a much bigger high school than Poolesville.
4 And I think it was useful to get the students'
5 reactions, but I think you have to decide whether that
6 really meets the burden of showing this.

7 I'll just say briefly on the other side, a
8 lot has changed from -- in terms of the available
9 alternatives. You've already heard about the
10 improvements in camcording, the accessibility of that,
11 improvements of video editing and in screen capture.
12 There is a lot different than what it was three years
13 ago.

14 I think the big change is what is available
15 commercially now in terms of the clip sites.
16 Movieclips has lots of available clips, and teachers
17 are able to create PowerPoint presentations with
18 embedded links to clips. They can start at a
19 particular point and move seamlessly between
20 presentation slides without any class interruptions.
21 Obviously, that doesn't cover all titles, but this is
22 a service that was not available at all three years

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1 ago. It's growing.

2 And, finally, the UltraViolet presentation
3 that you had here on May 11th and that was discussed
4 as well in L.A. on May 17th I think is a real game
5 changer in this environment. It really enables a lot
6 of real time access, or downloaded access in many
7 cases, to this material in high-definition format,
8 1080-pixel format. Thousands of titles are available
9 today through VUDU.

10 And if you look at how this is developing,
11 the whole disc-to-digital process, which started at
12 the nation's and world's largest retailer now, and is
13 soon going to be available in the home, this will --
14 over time, this -- and probably not very much time,
15 this is going to narrow the gap between the number of
16 titles that are available on DVD and the number of
17 titles that are available through this type of
18 UltraViolet service for the kinds of classroom uses
19 that are being proposed here. Because virtually every
20 DVD title over a relatively short period of time will
21 be available in this digital copy format that enables
22 the kinds of uses that Mitch Singer demonstrated here

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1 on May 11th.

2 I think that's the real change in terms of
3 alternatives that show that the exemption is probably
4 less than needed now than it was three years ago, and
5 certainly shows why the expansion of the exemption
6 that the proponents are calling for should not be
7 accepted. Thank you.

8 MR. CARSON: Thank you. I just want to ask
9 one question about the last thing you said. And maybe
10 I need to go back and look at what happened on
11 May 11th again. But with UltraViolet, does that
12 include the ability to take clips from the copy that
13 you've made and use them in the ways that some of the
14 folks on this side of the room want to do?

15 MR. METALITZ: It includes the ability to
16 queue up what you --

17 MR. CARSON: Yeah.

18 MR. METALITZ: -- the titles and start them
19 here and --

20 MR. CARSON: Got you.

21 MR. METALITZ: -- go to another title and
22 start it there. So, functionally, I think the answer

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1 is yes, but, in fact, I don't think specific -- I
2 don't think, you know, actual clips are made.

3 MR. CARSON: Okay. Before we get to general
4 questions and answers, I'd like to ask the folks on
5 this side of the room, if you have one or two minutes'
6 worth of response -- and by "response," I mean actual
7 response to what was just said by any of the
8 opponents.

9 Renee?

10 MS. HOBBS: Yeah. One thing I'd like to talk
11 about is why clip websites are not good enough. And
12 this -- as much as we appreciate the vague of clip
13 websites, it turns out that careful selection and
14 curation of audio-visual works is part of the
15 responsibility of the teacher in using audio-visual
16 materials in the classroom.

17 If you and I were to watch a movie and decide
18 which excerpt we'd want to make, we'd probably pick
19 different in-points and different out-points because
20 the choice of in-point and out-point -- the choice of
21 what clip to use is, in fact, a pedagogical decision.
22 You're going to make that choice based on the

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1 students, based on your learning objectives, based on
2 the context.

3 So clip websites are inherently inadequate to
4 the important choices that an educator makes about
5 using audio-visual materials in the classroom.

6 MR. CARSON: Are you saying they're
7 inadequate because you can't necessarily get the clip
8 you want, that they don't cover everything? Is that
9 the point?

10 MS. HOBBS: Because the choice of where to
11 begin the clip and where to end the clip is a
12 pedagogical choice that's based on the needs of the
13 learner. And by definition, the clip compilation
14 website has a choice made by someone else.

15 And while sometimes that choice might be
16 okay, right, or even good, many other times that clip
17 choice will be not appropriate. Right? It will be
18 too long, it will be too short, it will start in the
19 wrong place, it will end in the wrong place.

20 MR. CARSON: Let me ask the folks on this
21 side of the table, who know more about these clip
22 sites, if you can respond to that. I have no idea how

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1 they work.

2 MR. MARKS: I'll take a shot at that. I
3 mean, I think what Renee has said, as far as my
4 knowledge of the sites, is accurate in terms of that
5 the sites do not provide a teacher or a user to select
6 whatever clip that they would like to from a
7 particular motion picture and select their particular
8 start and stopping points, that the clip services
9 have, if you will, pre-formatted clips that are loaded
10 onto those services.

11 But the clip services are offered as just one
12 means of satisfying the needs for peda -- educational
13 uses. Sorry.

14 And -- and I think when it comes to the need
15 to select very particular pieces of a motion picture,
16 there are always these other alternatives of using
17 video capture software or simply queuing up the DVD or
18 Blu-Ray to the point that you want it and either
19 showing it in the classroom or, if you're making clip
20 compilations, simply recording it off computer screen
21 or television screen using a tablet, smartphone, video
22 camera, et cetera.

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1 So we have not regarded the clip licensing
2 services as the be all and end all for answering all
3 educational needs.

4 MR. CARSON: Anything else that any of you
5 want to -- yes, Peter.

6 MR. DECHERNEY: So I think the bigger issue
7 with the clip licensing services isn't that --
8 choosing the starting and end date (sic), which I
9 think is an issue; it's that, right now, it's a tiny,
10 tiny percentage of the material that's available.
11 Maybe in the future, it will be a real alternative.
12 Right now, it definitely isn't.

13 We actually did a study, which we didn't
14 include -- we looked at a hundred courses that used
15 these video clips, and actually a tiny percentage of
16 them were represented -- of the clips, fewer than a
17 third were clips that were owned by a major studio,
18 the kind of people that participate in the clip
19 licensing services. At least 75 percent of them were
20 licensed by independent -- or owned by independent
21 copyright owners.

22 The smartphone demonstration, if I can

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1 address that really quickly. I mean, it was obviously
2 pretty bad, I thought. But, more technically, it's
3 very choppy and jumpy. The framing was off. Even
4 some of the -- you could -- it was hard to read some
5 of the subtitles. It was very flat, the image was
6 muted, there was a lot of color bleed from one to
7 another. Mr. Turnbull said that the sound was in sync
8 but, in fact, it was silent, and so it's not clear
9 that the sound was distorted or not. It looks a
10 little more pixelated. Those are just a few of the
11 issues you can see -- and you can look at it again, if
12 you want to.

13 Managed copying we've been hearing about for
14 a long time, and it does sound interesting, but
15 there's no evidence that there's even an agreed-on
16 format for managed copying, let alone technology that
17 will allow for managed copying. I think it's
18 vaporware for now, but it may not be in the future.

19 And then we've talked a little bit about
20 screen capture and we talked a little about the --
21 we've all talked about some of the technical problems
22 with screen capture. But it was really interesting to

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1 hear Mr. Marks say for the first time that screen
2 capture was not a form of decryption because for the
3 first time actually today I'm realizing that screen
4 capture may, in fact, require decryption, because it
5 can be blocked by some sort of copy protection.

6 We saw in Renee Hobbs' discussion of Netflix
7 that Netflix, through certain browsers perhaps, can
8 definitely block some screen capture programs. So
9 maybe the screen capture can be blocked by technical
10 protection measures in the same way that other kinds
11 of decryption programs are, which would require,
12 obviously, some kind of copy -- you know,
13 circumvention in order to get around.

14 MR. CARSON: Any other responses?

15 MS. RIFE: I just want to make a comment
16 about the smartphones. That was an interesting
17 argument, but if we imagine that the exemption was
18 formally expanded to include all students, depending
19 on the teacher, the presence of phones in the
20 classroom can cause some problems. So -- and some
21 schools even don't allow students to have phones in
22 the classroom and to do text messaging. I have

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1 colleagues that prohibit that in the classroom.

2 And so, in thinking about expanding it and,
3 like, teaching in the classroom using smartphones
4 could cause some problems. And all students also
5 don't have them, although many of them do.

6 The other thing about the smartphones is that
7 that would make it more likely that these clips that
8 could be created with that would be disseminated over
9 the web. So it seems like not a very realistic
10 example because, if you're doing something in a kind
11 of a confined digital space on your computer, it seems
12 like you have a lot more control over how it's
13 disseminated in that it's not as -- when something is
14 on someone's phone, I mean, we hear all kinds of
15 stories about inappropriate content that's
16 disseminated via smartphones and so forth. So I think
17 that could actually cause a lot of problems if we
18 were -- if that was to be a legitimate solution.

19 The other thing is that I -- when I listened
20 to the individuals testifying on the other side of the
21 aisle, I thought that -- it seemed like they said
22 pretty much that they didn't have objection to

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1 renewing the exemption we already have as long as we
2 met our burden. So...

3 MR. CARSON: Okay. Renee.

4 MS. HOBBS: I just want a small comment on
5 Steve's point about how surprised he was that the
6 students are now teachers and that somehow the new
7 instructional techniques that -- where students
8 essentially create media as part of the learning
9 experience are somehow inferior or inadequate.

10 In fact, it was John Dewey almost a hundred
11 years ago that said if you really want to learn
12 something, the best way to learn it is by constructing
13 something, so that when students actually put together
14 their own piece of video, when they make their own
15 critical commentary, that's when they learn best. I
16 think it's really important to understand that that's
17 not a new instructional strategy. It's, in fact,
18 quite an established part of teaching and learning in
19 the 20th century and it in no way represents an
20 abrogation of a professor or teacher's responsibility.

21 MR. CARSON: Spiro.

22 MR. BOLOS: If I could answer that. Along

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1 with what Renee is talking about creation, Bloom's
2 Taxonomy is something that is valued in the classroom
3 when you talk about progressive teaching, evaluation,
4 synthesis, analysis. And Bloom's Taxonomy has
5 actually been revised by many to include creation
6 because, as students are able to create, then they
7 able to better decode media around them. These are
8 critical learning skills we want our students to have.

9 Again -- I'll go back to the smartphone
10 thing. I wanted to mention one more time, smartphones
11 are very expensive. They appear to be cheap. They
12 appear to be ubiquitous, but they, you know, always
13 incur these monthly charges. Not every kid does have
14 access. It is still a real time capture. It is not a
15 file you could just create or rip off of a DVD. It
16 takes time to do that, and sometimes people don't have
17 that time.

18 And for the argument of queuing up the DVD
19 before a classroom begins, I guess some people have
20 never taught a class in which you have to share rooms
21 with others where you don't have your own room and
22 time, again, is of the essence.

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1 MR. CARSON: Jonathan.

2 MR. BAND: I just wanted to respond to the
3 point about why -- the importance of having the
4 highest quality work, especially if that is the way it
5 is distributed. When you're teaching something,
6 you're teaching the thing; you're not teaching a
7 shadow of the thing. And so it is important to --
8 there is a value of having authenticity. So, you
9 know, it's -- obviously, it's always better to study
10 something in the original language if you can.

11 Now, if the students don't understand the
12 original language, you have to study it in
13 translation. But if you can study it in the original
14 language, that is better from an educational point of
15 view. And if you're able to study the real work, the
16 work as distributed, that is better than, you know,
17 studying the camcorderd version or the smartphone
18 copied version. It's just not the same work. And
19 there is an important (sic) to the authenticity and
20 the integrity of looking at the original work as
21 opposed to some derivative of it.

22 MR. CARSON: Okay. Before we -- what we're

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1 going to do, we're going to go to questions. We're
2 going to take a break before that, but before we do
3 that, if any of you have anything in response to what
4 we just heard from any of the folks on this side of
5 the table, now is the time to do that.

6 Steve.

7 MR. METALITZ: Just briefly on Jonathan's
8 last point. I mean, I think -- the office has kind of
9 been down this road before. And as -- I understand
10 from a theoretical perspective what Jonathan is
11 saying. I noticed he addressed it with the best
12 evidence rule in court, in the federal courts. But
13 the fact is, first of all, if we're talking about
14 works in high-definition format, today, those works
15 are available on DVD. Ms. Hobbs said in many cases
16 DVD is the only format that's available. But
17 certainly for almost everything that's available in
18 their higher definition formats, it's also available
19 on DVD. And that is no less the work than the
20 high-definition format is. So I think -- I don't
21 think that that takes it very far.

22 But I think that the office also, having had

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1 to go through in other contexts, has made it clear
2 that, just as the federal courts have said that fair
3 use does not mean that you're entitled to access the
4 work in any -- in your favored format or to take your
5 camcorder into the movie theater so that you can
6 actually go back and look at it while you're -- you
7 know, to write up your criticism.

8 Similarly, it's been quite consistent
9 throughout this proceeding and in past years that
10 you're not entitled to your favored format necessarily
11 if there are alternatives that enable you to make the
12 non-infringing use without, for example, circumventing
13 the high-definition format.

14 MR. MARKS: I just wanted to make two very
15 brief remarks, one about the video capture software,
16 to clarify for what Peter had said. When we examined
17 it and when we had it tested, we were finding that the
18 video capture software was capturing the images and
19 the audio after they had been decrypted, and that's
20 why we concluded that, in fact, they are not
21 circumvention devices.

22 And so I can't tell you why it didn't work

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1 for that teacher on Netflix, but when we tested it, it
2 was working both off of optical disc and off of
3 streaming services. So I just wanted to clarify
4 that -- that point. And I think that was it for now.

5 MR. CARSON: Bruce.

6 MR. TURNBULL: I'll address the smartphone.
7 Two things. One, the reference I made to the
8 audio sync was to the May 11th demonstration where the
9 audio was played and was part of the demonstration and
10 was in sync.

11 Secondly, with regard to the presence of
12 phones in the classroom, there are a couple of things.
13 One can -- that is a choice that has been made by the
14 institution, and I understand the choice, but it
15 doesn't negate the fact that the use of the smartphone
16 for video recording would be an alternative to
17 circumvention, and it also doesn't necessarily need to
18 be used in class. The context in which we had
19 envisioned it, frankly, was not in class. It was as
20 part of homework or whatever. But even if it's an
21 in-class assignment for that particular day for that
22 particular use, one can imagine an exception being

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1 made.

2 And I guess I don't understand the more
3 likely to disseminate. I think the -- I don't see how
4 a smartphone video is any more likely to be
5 disseminated than a file on a computer. I don't
6 understand that distinction.

7 MR. CARSON: We've got two responses over
8 here.

9 MS. RIFE: I just want to say that with the
10 issue about recording with a smartphone, I mean, I'm
11 really frightened if you were to see that as a
12 legitimate solution because I think I've read articles
13 about people being arrested in movie theaters for
14 videotaping -- you know, using their smartphones to
15 record parts of movies. I just don't think that's
16 something I want to encourage my students to do
17 because, when they do it in one forum, then they're
18 going to do it in any forum.

19 So I just think it's dangerous. I don't
20 think it's a good idea.

21 MR. CARSON: To be clear, I don't think they
22 were suggesting you go into a movie theater to --

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1 MS. RIFE: No, but, I mean, if you teach them
2 to use your smartphone to tape movies, then -- except
3 when you're here, and don't do it there -- and then it
4 gets really confusing, so -- I don't know.

5 MR. BAND: I just want to echo Martine's
6 point. I mean, it just seemed -- one of the most
7 amazing things in last round was when the MPAA, you
8 know, showed people how to camcord off of a DVD, and
9 someone actually recorded that, and it was uploaded on
10 the Internet and it made sort of a mockery of the
11 MPAA. And this whole -- you know, the whole notion
12 here of -- it's, like, so we're encouraging people to
13 camcord in this situation and not in that situation.

14 You know, here you have a bunch of educators
15 who want to do the right thing, who want to get
16 high-quality material to their students, and
17 especially in the K-12 situation. And, in response to
18 people -- you know, dedicated teachers who really are
19 spending a lot of time and really trying to do -- put
20 together high-quality stuff, you're saying, no, no,
21 no, use your smartphone, hold it up -- I mean, I just
22 don't get it. Why do you want to make things

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1 difficult? Make it easy. Encourage them. Help the
2 students.

3 MR. MARKS: I'd just like to respond in two
4 respects to that. First of all, using -- taking
5 advantage of an exemption to circumvent is only
6 limited to fair uses. And so if the student decide to
7 circumvent the entire movie and put it up on the
8 Internet, the student has also engaged in illegal
9 activity.

10 So we should not confuse this issue by saying
11 that exemptions somehow give everybody a blank check.
12 And, in fact, that is precisely the concern of, I
13 would say, AACS LA, DVD CCA and the joint commentators
14 is that as exemptions are perceived as blank checks
15 for anybody to circumvent content for any purpose and
16 the entire piece of content to upload to the Internet,
17 it actually makes a mockery of technical protection
18 measures. So there's a very careful balance that
19 needs to be achieved here.

20 The second point, which I had forgotten from
21 the first time around, is that I think assembling
22 clips for use in an educational setting requires time

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1 whether you're going to record off a screen in
2 real time or, frankly, access the unencrypted file and
3 have to go through it and select clips. There is time
4 required to do that. I don't, frankly, know how much
5 more time it is to record off screen in real time
6 versus accessing an unencrypted file, but I don't
7 think it's accurate to think that one takes five
8 minutes and the other takes four hours.

9 MR. CARSON: Okay. Let's take a break now,
10 and we will be back at 11:00 sharp.

11 (Whereupon, a short recess was taken.)

12 MR. CARSON: If you could take your seats,
13 we'll get started.

14 All right. We're going to start with our
15 questions now, and I'm going to turn it over to Steve
16 Ruwe.

17 MR. RUWE: I wanted to ask both Steve, Bruce
18 and Dean about the ability to queue up multiple
19 selected portions on the various services like Managed
20 Copy, UltraViolet. I know that the educators are
21 talking about needing to queue up multiple selections,
22 multiple scenes. Can you do that through that -- and

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1 will you be able to do that through the various access
2 services? Meaning can you queue up more than one? If
3 I want to show minute 2 and minute 15 and minute 30,
4 would that be possible?

5 MR. METALITZ: Well, you could certainly
6 queue up multiple titles on Flixster.

7 MR. RUWE: I understand that.

8 MR. METALITZ: You're talking about multiple
9 points within --

10 MR. RUWE: Yes.

11 MR. METALITZ: -- the same title. I don't
12 know. I'm not sure on a service like the UltraViolet
13 service. You know -- Digital Copy, as you know, is
14 different from Managed Copy, and it's here now and
15 it's going to be more and more prevalent, and it
16 certainly would be possible for you have to a digital
17 copy -- you may well have a digital copy on a laptop
18 and a digital copy that's accessible through a service
19 like this. So that would be one way to do it.

20 MR. MARKS: I just don't know, frankly. But
21 I will try and find that out for both UltraViolet and
22 for Digital Copy.

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1 MR. TURNBULL: Managed Copy, when it comes,
2 you could devise a program, I think, that would work
3 for queueing that up. But it's not here yet. And it
4 would have to be devised.

5 MR. MARKS: I just want to be sure I
6 understand the question when I go back to look into
7 this. This would be for queuing up multiple clips
8 from a single title; is that correct?

9 MR. RUWE: Correct.

10 MR. MARKS: Okay. Okay.

11 MR. RUWE: Mr. Decherney, you mentioned the
12 ability to manipulate as a -- necessary for teaching.
13 How does the ability to manipulate video depend on
14 quality? Why is the ability to teach how to
15 manipulate it depend on the ultimate quality? Isn't
16 it putting pieces together? How does that matter how
17 high quality the pieces are?

18 MR. DECHERNEY: So I think this is, yeah,
19 really important. So one of the major ways that video
20 is used in classrooms now is by students who then will
21 edit clips together, add voice-over commentary
22 sometimes. And when they look at the images, they're

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1 studying them not in the way we are here. This is a
2 very artificial context. They're actually analyzing
3 them often very closely, comparing images side by
4 side. And so if you're going to talk about an image,
5 like the students -- the high school students talking
6 about Citizen Kane, they realized that they couldn't
7 focus on the image when it was distorted, but also
8 they couldn't look at the details and talk about the
9 details. They were forced to talk about it at a
10 certain level that was -- only that was available to
11 them. So the visual weren't always available. The
12 audio details weren't always available to them.

13 So one example of an assignment I've seen
14 many times is students doing a voice-over over a
15 series of clips in a sociology class that we've talked
16 about where students look at commodities and the way
17 that commodities circulate globally, but also the way
18 that commodities are presented in popular media. And,
19 there, they're talking about diamonds and the move
20 from blood diamond to diamond commercials, and they
21 want to look at the way that blood diamonds are shown
22 in the movie Blood Diamonds.

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1 And so they're really looking at the quality
2 of the image and, you know, the presentation of the
3 image. So, in that case, the analysis of the close --
4 the careful details, you know, is really important.

5 MR. RUWE: You just mentioned a couple of
6 things that I'm familiar with, diamond commercials --

7 MR. DECHERNEY: Okay.

8 MR. RUWE: -- blood diamonds. How is the
9 quality of that -- of those clips relevant? I get
10 that quality is relevant, but again, how is the
11 difference -- what's the added difference between,
12 say, something like screen capture and smartphone
13 capture -- as a larger theme, how is the granular
14 quality different?

15 MR. DECHERNEY: Okay. Let's go back to the
16 Citizen Kane example which we've seen a few times
17 today. So this t -his was one scene, very famous
18 scene in which there's a lot of depth of field. And
19 that's one of the things the movie is famous for. The
20 image of Kane is in the background, in the distance.
21 It's very bright. The image of his mother, who is in
22 the foreground, is very dark.

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1 In the Blu-Ray version we saw, you actually
2 get a sense of distance that you don't get in the same
3 way with the DVD. There are a few things that
4 contribute to that. The big one is the -- the deeper
5 blacks that you see in the Blu-Ray. It actually
6 changes the distance. And so that would be useful if
7 you were studying the cinematography, Gregg Toland's
8 sort of amazing cinematography in that.

9 But also if you were studying it from a
10 sociological perspective, like the American studies
11 professors I mentioned, and they're talking about the
12 way in which what's going on in the background
13 comments on what's going on in the foreground.

14 In the Blu-Ray disc, there actually was a
15 real background and a real foreground. In the DVD
16 image, which is a lot -- it's a lot -- you don't see
17 the same deep blacks, you don't see the same
18 definition. All of a sudden, you don't have the same
19 foreground and background.

20 MR. RUWE: And I'm trying to get a sense of
21 many examples of this, and we keep coming back to one,
22 it seems. I understand Citizen Kane is a significant

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1 film, but I was asking about some of these other
2 examples that you mentioned, the diamond example.
3 Specifically, what's -- how does the difference in
4 quality matter for that example?

5 MR. DECHERNEY: So we -- so in that
6 example -- so, you know, would talk about the -- if
7 you were looking at a diamond commercial, there are a
8 few ways that it could -- that it could matter. So
9 one is this affective response. When you look at a
10 diamond and you look at audiences watching a diamond
11 commercial, if the diamond is very clear and crisp and
12 sparkly, they might respond in one way. If the
13 diamond is kind of muddy and blurred, they're not
14 going to -- it's not going to sparkle in the same way
15 as the original diamond would, in the original.

16 But also, you know, they might be looking at
17 it more aesthetically and thinking about, you know,
18 the way the diamond is positioned, is the diamond on
19 the finger? Do we -- you know, could we definitely
20 define the diamond clearly from the finger?

21 MR. RUWE: Do you have any reaction to the
22 notion that some students couldn't imagine anything

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1 better than DVD?

2 MR. DECHERNEY: Actually, the more I think
3 about it, the more I realize this is more kind of cost
4 of living raise rather than a dramatic expansion of
5 the existing exemption. Three years later, the same
6 images we looked at in this room just don't look as
7 good. I find that Avatar image shocking, the
8 difference between the DVD and the Blu-Ray. Avatar is
9 a film that was sent out in over a hundred different
10 versions to different movie theaters so that it looked
11 just right in every different screening context.
12 There were many, many different versions released on
13 Blu-Ray, on DVD and other formats so they looked
14 perfect in those formats.

15 In fact, the Blu-Ray of Avatar didn't have
16 any DVD extras because they wanted to use every single
17 possible bit of space on the disc to improve the
18 quality of the film. That's the way it's meant to be
19 shown. It's the way it's meant to be studied.

20 MR. KASUNIC: Just on the point that you had
21 raised about the difference between the Blu-Ray and
22 DVD and Citizen Kane and the depth of field, I was

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1 able to see a little more in terms of the depth of
2 field, but I also saw -- you mentioned the blacker
3 blacks which tended, at least in my viewing of that,
4 to distort some parts that -- actually, the DVD was
5 clearer when it came to those dark areas, and the
6 Blu-Ray distorted it. So don't we get into a
7 situation where there are a lot of different
8 variabilities at stake and -- can you comment on that?

9 MR. DECHERNEY: Yeah, so I think that's
10 exactly right. And the question is, which one is
11 distorted? Right? They look different.

12 MR. KASUNIC: But they were both distorted
13 for certain purposes.

14 MR. DECHERNEY: Exactly. They're both
15 distorted for certain purposes. And in lots of
16 different classrooms, people study media for lots of
17 different kinds of reasons, and I actually think all
18 those different types of media should be available.

19 So it's very possible for a media studies
20 classroom to show a DVD and a Blu-Ray to talk about
21 the different qualities of the different images, in
22 which case, you would want them both available.

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1 It might be possible in the same sociology
2 class which is looking at the circulation of -- I know
3 I shouldn't come back to this again -- the circulation
4 of diamonds, right, and to show that when, you're
5 looking at this image in a third world country which
6 has, you know, dial-up Internet and you're watching it
7 on YouTube, it's going to look very different than the
8 same image which is shown on a high-definition TV in
9 the U.S.

10 MR. KASUNIC: And what about Jonathan's point
11 that the original is so important? I mean, which one
12 of these would have been closer to the original that
13 people would have seen in the theater at the time
14 Citizen Kane was shown?

15 MR. DECHERNEY: So this is the contradiction
16 we've been talking about for the last six years. And,
17 in fact, we want to claim that both things are
18 important. So, first, we want something that's as
19 close to the original as possible. In this case,
20 Blu-Ray is much closer to the theoretical number of
21 pixels that would be on a 35-millimeter film, or a
22 70-millimeter film. They don't have pixels; it's

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1 chemical, but it's definitely a much, much deeper,
2 richer image than a DVD. And Blu-Ray is certainly
3 closer to that experience.

4 But also times change. We're never going to
5 have that exact experience on video that you would
6 have on film. And so sometimes it's worth -- it's
7 important that you have access to different kinds of
8 media to talk about those kinds of media.

9 And, actually, a third way to look at it is
10 to think about its affective response. When people
11 saw Citizen Kane originally, there was a powerful
12 sharp image. When they look at a DVD today, it looks,
13 as that student described it, as looking at -- he was
14 talking about Avatar, but it looks like you're looking
15 at it through muddy glasses.

16 And so the experience of watching Blu-Ray is
17 a little bit closer to the experience of watching the
18 original 1940s 35-millimeter film. So there are three
19 ways that -- it's important, but I think we need
20 access to all of them.

21 MR. RUWE: To Ms. Rife, you mentioned several
22 trade groups, groups that were advocating the benefit

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1 of using video in the classroom, correct?

2 MS. RIFE: What they're advocating for is for
3 digital and informational literacy as part of the
4 curriculum for first year writing college students.

5 MR. RUWE: Is there any -- do they have any
6 guidelines that refer to the quality of the material
7 that's being used?

8 MS. RIFE: Well, the quality relates to the
9 rhetorical impact of any text. So I mean, if I was
10 going to do an analogy, I'd kind of differentiate
11 between a person has a one-page alphabetic text with
12 two paragraphs in it versus a person who has that same
13 exact text, and instead of having two paragraphs, the
14 text is broken down into five paragraphs.

15 I mean, a one-sentence paragraph can bring
16 emphasis to the point. I'm talking about a text
17 that's all letters. So it's the same content, but how
18 you present it is meant for a different rhetorical
19 purpose.

20 So, no, there isn't anything specifically
21 mentioning the quality of videos, but the quality of a
22 video has to be geared to the purpose and goal of your

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1 writing as customized to a particular audience.

2 So if the clarity of diamonds is important to
3 audience A but not important to audience B, depending
4 on what you're emphasizing, I mean, you need to -- a
5 person that's creating a text needs to have the
6 ability to manipulate that text to the highest degree
7 possible to achieve the impact that they want on that
8 particular audience.

9 MR. RUWE: And I think that's when necessary,
10 and that's what we're trying to get to, is when is the
11 high quality absolutely necessary? And -- I mean, I
12 think that's what we're trying to figure out. And I
13 hear a lot of -- there are some specific examples and
14 some hypothetical ones. So I'm just trying to --

15 MS. RIFE: Well, I mean, when an individual
16 is creating a text, like I've seen rubrics where
17 teachers evaluate the text that the student created,
18 and it may be a video text. If it's pixelated, the
19 student -- I know of situations where the student is
20 marked down. Because I've been in a graduate class, a
21 digital rhetoric class, where we were marked down if
22 our images were pixelated. So we are graded on --

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1 it's the quality of the entire text. The clarity of
2 your images is part of what you're presenting as a
3 component of quality.

4 So it would be like having sentences that
5 didn't have clear meaning. That's the analogy that I
6 can offer.

7 MR. RUWE: Ms. Hobbs, I think it was Bruce
8 who raised this question about, what was the act of
9 circumvention that was needed to access video games,
10 is an example that you pointed to.

11 MS. HOBBS: I don't -- I'm not aware that
12 video games require a circumvention yet, but I do
13 think it's important -- and one of the reasons why I
14 used those specific examples in my testimony today was
15 to point to the fact that teachers are using a broad
16 array of cultural products that are now normative in
17 youth culture.

18 So our job as educators is to make a
19 connection between the content and the skills that
20 we're trying to teach and the world that students grow
21 up into. And so we try to help build that connection
22 by using a wide array of cultural products. It may be

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1 in the future that video games will make use of
2 CSS-like encryption tools, but that wasn't my point.
3 My point was simply to say that educators need to be
4 able to access a broad array of cultural products in
5 order to make the connection between the classroom and
6 the culture.

7 MR. RUWE: I did notice in your -- in the
8 written proposal, you made note of one example that I
9 can identify where high quality specifically mattered.
10 I believe that was Libby Drake teaching a high school
11 course on film techniques.

12 First of all, that's one example where the
13 high quality was made note of, or it specifically
14 seemed to be relevant. And the other portion -- that
15 was high school. And we've heard a lot about high
16 school; yet you're asking for K through 12.

17 MS. HOBBS: Right. Would you like me to
18 describe a really interesting example of a lesson that
19 I did for seventh graders in a middle school? So we
20 were trying to talk a little bit about the difference
21 between film and TV. Because when you're growing up,
22 right, it's all on one box. Right? Right? They're

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1 all shows. Right? And so -- well, actually, no.
2 Television is one kind of industry and film is another
3 kind of industry. You may experience that seamlessly
4 when you're 11, but it's important to understand the
5 difference.

6 And so one way you talk about the difference
7 is to talk about the business part of how media is
8 made. But another way you can introduce it to young
9 people is to talk about the production values and the
10 production techniques.

11 So I use an excerpt from Princess Diaries and
12 the Hannah Montana movie. Right? Because, in fact,
13 you can see in the production techniques themselves
14 the distinction between film style and television
15 style.

16 In that activity, with those 11 and
17 12-year-olds, quality kind of mattered. Having access
18 to visual material that allowed us to see the
19 difference between film production and television
20 production.

21 MR. RUWE: All right. Mr. Bolos, you
22 mentioned that, while your example was pointing

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1 towards the use of Jing, you use Camtasia -- you own
2 Camtasia?

3 MR. BOLOS: I am given a copy of Camtasia if
4 I request it from my tech department.

5 MR. RUWE: Did you find any same -- similar
6 problems with quality? I know you mentioned the
7 notion of uploading and the time constraints that
8 you're under and how that was a problem. Were there
9 problems with Jing that you wouldn't have experienced
10 with Camtasia? You noted that --

11 MR. BOLOS: I used Jing instead of --

12 MR. RUWE: Right.

13 MR. BOLOS: -- Camtasia.

14 MR. RUWE: Right. But are you familiar with
15 Camtasia?

16 MR. BOLOS: Correct. Yes. I mean, I'm
17 somewhat familiar. I don't use it quite often. But I
18 don't think there's a time limit using Camtasia, and I
19 believe you can save it as a file.

20 MR. RUWE: With regard to the time, I
21 understand queuing up multiple clips is something that
22 has been pointed to multiple times. When you get to a

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1 clip that -- there has to be some threshold where you
2 want to show five-minute, ten-minute. When it's a
3 longer clip, does that diminish the concern about
4 needing to queue up? Would it be that burdensome to
5 have to queue up when you're going to show one clip
6 and then discuss it at length?

7 MR. BOLOS: You're asking is it burdensome to
8 queue up more than --

9 MR. RUWE: Take for instance -- no, no. I'm
10 talking about one clip. You were talking about the
11 Citizen Kane -- the demonstration that you had was --
12 you mentioned it was a little over a five-minute clip
13 of Citizen Kane, and it seemed like a lengthy
14 discussion that you had. It just seems that maybe
15 it's not terribly burdensome to have to queue up one
16 specific clip that then is the topic of a lengthy
17 discussion.

18 MR. BOLOS: Queuing up one clip I think is
19 less burdensome, absolutely. I would agree with that.
20 But typically you're doing more than one clip. In
21 that particular class -- that's an 80-minute
22 classroom -- we did probably about ten clips of

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1 Citizen Kane. You just didn't see it because I didn't
2 show it. But we certainly did more than -- we did
3 multiple clips.

4 And oftentimes, you know, we've done clips
5 from different versions of different films. Like --
6 you know, the two different versions, let's say, of,
7 the most popular, Romeo and Juliet, Zeffirelli versus
8 the -- who is the -- Baz Luhrmann's version of Romeo
9 and Juliet.

10 MR. RUWE: What were the points of
11 comparison? Again, I'm getting to when the quality
12 does matter, and -- it's going to be a recurring
13 theme. Every time there's an example of use of a
14 clip, okay, how exactly did the enhanced quality
15 beyond what's available through smartphone capture,
16 screen capture, how is that relevant? Why is it
17 necessary for that one? You mentioned the Romeo and
18 Juliet. Do you have an idea?

19 MR. BOLOS: See, I was answering that in
20 response to this idea of doing multiple clips.

21 MR. RUWE: I know, and now that is an example
22 where -- my follow-up is, how is the quality

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1 particularly relevant in that sort of comparison?

2 Would another method be -- another alternative of

3 showing those clips be sufficient?

4 MR. BOLOS: I don't think so. I think that,
5 again, decoding something, you want the best possible
6 quality to be viewed as opposed to kind of trying to
7 figure out things. You saw my students struggle with
8 a screen capture with not only video but also the
9 audio quality.

10 MR. KASUNIC: But we saw studios (sic)
11 struggle with a particular form of screen capture
12 taken with the Jing. To what -- since we're really --
13 the question is in terms of quality differentials,
14 what is your -- just to get back to the questions,
15 Camtasia, the high end of -- the same company makes
16 three forms of capture software. There's one --
17 Camtasia is the premium one, but then there's one in
18 between that seems more comparable, price-wise, to the
19 Applian that we had some demonstrations on, about 30
20 to \$40 range.

21 What -- have you done any experimentation in
22 the way of those medium-priced screen capture and

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1 noted any -- you know, is it better? I would assume
2 that, since Jing is free, you get what you pay for.

3 MR. BOLOS: Right.

4 MR. KASUNIC: So what is the -- do you have
5 an experience in terms of the quality differential for
6 the intermediate capture software?

7 MR. BOLOS: I have limited experience with
8 it. But, yeah, the quality definitely is better with
9 Camtasia, but it's more expensive. It's not a free
10 product.

11 MR. KASUNIC: Then what about -- my question
12 is -- so that's the premium. What about the
13 intermediate versions that -- we saw demonstrations
14 from others that -- with the Applian software that
15 had a different -- perhaps a different quality. It
16 seemed to be fairly good quality. And the
17 intermediate TechSmith version also -- I wonder if
18 that's equivalent.

19 MR. BOLOS: I don't know. I honestly don't
20 know. I don't have enough experience. I've used
21 Camtasia mostly for screen capturing and not for
22 capturing video, where I'm just capturing what I'm

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1 doing on a computer screen.

2 MR. KASUNIC: It seems that -- okay. Does
3 anyone else have experience with that intermediate
4 software, Applian -- the intermediate TechSmith
5 version? No? Okay.

6 MR. RUWE: I want to follow up with
7 Mr. Bolos. In the video that you showed on -- the
8 students were saying it's hard to understand, and one
9 of them said people talking over each other. Isn't
10 that the nature of the content that was being watched?
11 It's not -- I mean, people talking over each other in
12 that scene. I took away from that that that's why
13 they had difficulty understanding. Am I incorrect?
14 What am I missing?

15 MR. BOLOS: The difference was in how the
16 audio is captured. So when I captured it the first
17 way, using the screen capture software, I literally
18 had to go into a room and lock it so that nobody would
19 come into it because it was capturing it through the
20 microphone of the computer. That's a poor audio
21 quality that you would get from a straight rip from a
22 DVD.

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1 And so you saw the two groups of students
2 but, for time's sake, I edited it very heavily. So
3 the group I focused on specifically was the screen
4 capture version. And the audio is harder to
5 understand hearing it from the screen captured version
6 than it is from the DVD version. The kids in the
7 other class did not have the same difficulties in
8 decoding the audio.

9 MR. RUWE: When you showed the DVD version,
10 was -- I'm sorry, the highest quality version; I don't
11 know if I was a DVD.

12 MR. BOLOS: It was a DVD.

13 MR. RUWE: Was that shown queued up or was
14 that acquired otherwise?

15 MR. BOLOS: That was queued up. It was
16 completely illegal.

17 MR. CARSON: Could I just get a clarification
18 there.

19 MR. BOLOS: Sure.

20 MR. CARSON: Because your explanation of how
21 you got the audio didn't jibe with how I thought this
22 worked, but I'm certainly no expert. Are you saying

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1 that with the particular screen capture software you
2 were using, the only way you can get the audio is
3 through the computer's microphone?

4 MS. HOBBS: Yep.

5 MR. BOLOS: Correct.

6 MR. CARSON: Is that standard with screen
7 capture software? Bruce?

8 MR. TURNBULL: The Applian product that we
9 showed, the default is through the speakers, and
10 actually what Tim Short had demonstrated was
11 captured -- he captured it through the speakers.

12 There are, however, settings that you can go
13 and capture in various forms of audio for the replay
14 software. So the default is through the speakers, but
15 that's not the only way for the replay software.

16 MR. BOLOS: That's correct. I would agree
17 with that.

18 MS. HOBBS: What it means, if you sneeze
19 during the middle of the screen recording, your sneeze
20 shows up in the recording.

21 MR. TURNBULL: But only if you have set for
22 the default. If you set it, as you can, to capture

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1 the audio internally, if you will, from the audio
2 stream on the computer, you wouldn't have that
3 problem.

4 MR. CARSON: And why would the default to be
5 capture it through the speaker which would strike me
6 would be --

7 MR. TURNBULL: I don't know.

8 MR. CARSON: -- almost always lower quality?

9 MR. TURNBULL: I don't know.

10 MS. HOBBS: Because screen capture is
11 designed to do demonstrations. The normative practice
12 is, I want to teach you how to use the software, so
13 I'll talk about the software while I'm moving around.
14 From an industry point of view, it is the appropriate
15 condition to set it at.

16 MR. BOLOS: Could I add something very
17 quickly? When you capture system audio, you're also
18 capturing beeps and blips from other programs on your
19 computer. It's not just from that particular video.

20 MR. CARSON: Okay.

21 MR. RUWE: Steve, do you have anything to add
22 about the total status of screen capture software?

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1 We've heard from two others.

2 MR. METALITZ: We didn't do the analysis that
3 they did, the technical analysis that they did, but I
4 have no reason to question the technical analysis that
5 they did. As we said three years ago, that if it
6 operates to capture the images from an unencrypted and
7 otherwise unprotected signal without circumventing any
8 technological measure, then it's not a violation. And
9 as described by the technical study that Bruce and
10 Dean's folks did, that seems to describe the
11 particular program they were using.

12 If it's unencrypted and if it's not protected
13 by some other type of access control -- and I imagine
14 that, in the stream from -- at the point at which it
15 was being copied in that -- with that software, it
16 was, A, unencrypted; I think that was what your study
17 found -- and it wasn't subject to any other access
18 control. I mean, in theory, you could have an
19 unencrypted stream that is subject to password
20 protection or something like that, but this wasn't.

21 So we basically concur, based on the
22 technological findings that they had.

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1 MR. RUWE: I know it was mentioned, the
2 inability to capture Netflix video. And that was
3 using, I believe, Jing as well. Or was that Camtasia?

4 MS. HOBBS: My teacher said it was Camtasia.
5 Or -- actually, he was a little unclear. He said
6 Camtasia or something like that.

7 MR. RUWE: I've seen some indication that
8 that is -- it's a function of using Mac. I know
9 that -- that's what it was, that they were using Mac.
10 If there aren't alternatives, other operating systems,
11 what would your reaction be -- why wouldn't use of an
12 alternative operating system be the appropriate way to
13 go as opposed to an exemption?

14 MS. HOBBS: I think maybe the -- I'd like to
15 call your attention to the spirit of the video clip
16 that I shared with you. Here was a teacher, during
17 his lunch hour, in the 30 minutes that he gets in his
18 day, and he was actually chatting with me about the
19 problems he encounters.

20 So when he shared his story, I think what you
21 got a feeling from is that he made a pretty good
22 effort to try to do screen capture, and it failed. He

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1 wasn't sure exactly why it failed, and he lacked
2 perhaps the considerable expertise that someone might
3 have to be able to identify what the problem was and
4 then to try it again. I think that represents
5 significant obstacles for ordinary -- for some
6 ordinary people who are pretty busy.

7 MR. CARSON: Why doesn't that just represent
8 the fact that, on one specific occasion, one specific
9 person had difficulties which we really don't
10 understand what those difficulties were or why they
11 occurred? But isn't it dangerous to generalize from
12 that one bit of anecdotal evidence based upon a
13 30-minute conversation you had that there's a general
14 problem?

15 MS. HOBBS: David, I do 15 events in American
16 middle school and high schools every year. At every
17 event teachers come up to me and tell me the
18 challenges they have. I meant this example not to be
19 an isolated incident, but one example in the ten
20 minutes that I was provided to give you a specific
21 example.

22 MR. CARSON: Okay. But you have to

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1 understand, we have to make our decision based upon
2 what's in our record. And all that's in our record on
3 that particular topic is a lunchtime interview with
4 one teacher who had difficulty. While we may
5 sympathize with him with respect to the difficulty he
6 had on that one occasion, it's not clear to me that we
7 can craft an exemption based upon his experience.

8 And I realize that that's not all you're
9 basing it on, but to the extent that the Netflix issue
10 is an issue, I'm not sure we've got enough of a record
11 to go on. Maybe we do, maybe we don't. But I'm just
12 saying if all you've got is one conversation with
13 someone who is not entirely sure what was going on,
14 that's a pretty slim foundation upon which to build an
15 exemption.

16 MS. HOBBS: So we'll see you in three years.

17 MR. CARSON: Well, you may or you may not --

18 MR. BOLOS: Can I give a more -- prior to the
19 response to that, very quickly?

20 MR. RUWE: In a moment, yes. I'm going to go
21 to Dean.

22 MR. MARKS: I just want to put down a marker

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1 because I was trying to listen quite carefully to what
2 that high school teacher said, and he said, I needed
3 to go do the screen capture on Netflix because we
4 couldn't find our DVD of this particular film that we
5 had. And so CSS, as the access control, was
6 completely irrelevant here. I mean, it wasn't the
7 access control technical protection measure of CSS
8 that was preventing this particular teacher from
9 getting a clip.

10 And the fact that the screen capture
11 software, for whatever reason, didn't work when they
12 were trying to record the unencrypted content coming
13 from -- whether it was Netflix or any other streaming
14 service, that's a problem of recording, but that has
15 nothing to do with an access control measure.

16 MR. KASUNIC: Well, can I just follow up on
17 this discussion? Because it seems like Netflix is a
18 somewhat different issue because Netflix, to my
19 understanding, involves -- requires you to download
20 Microsoft Silverlight in order to be able to access
21 any of the streaming content, which is a secure path
22 type of software.

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1 So following up on Dean's point, is, how does
2 this relate to -- what would you circumvent, even if
3 there was an exemption, and how would you -- this
4 isn't a CSS content scrambling system issue or a CS
5 issue; this is a completely different -- which sort of
6 gets into the 7G issues. If this gets broadened to
7 the extent of including all online content, aren't we
8 talking about many, many types of technological
9 protection measures, none of which are specifically
10 identified in this rulemaking, or what the
11 consequences might be of having such a broad ability
12 to circumvent these many unnamed protection measures?

13 MR. DECHERNEY: So I actually happened to be
14 looking this up on the train down this morning, and
15 there are at least three kinds of DRM I found of
16 copyright protection -- TPMS that do advertise the
17 ability to block screen capture. One was called
18 HiHiSoft DRM, one was called Widevine and one is
19 called ArtistScope. I don't know where they're used,
20 but they do advertise that ability.

21 So now the exemption -- the 2010 exemption is
22 limited to DVDs and one kind of copy protection. We

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1 did have an exemption for three years before that
2 which applied generally to audio-visual media and
3 didn't specify a specific technology that could be
4 circumvented. I don't see why we should prioritize
5 one technology over another.

6 MR. KASUNIC: Maybe we should go back to the
7 point that was raised with respect to Blu-Ray, because
8 having been on the 2006 rulemaking, all we were
9 talking about at the time were DVDs. So I don't think
10 that, in the spirit of crafting that exemption, there
11 was any intent to -- and we had much less online
12 digital content that was available as well.

13 So at what point in time did you interpret
14 that exemption to include everything beyond a content
15 scrambling system?

16 MR. DECHERNEY: So I agree the discussion was
17 primarily about DVDs, but when I read the exemption
18 and it was for all audio-visual works, I assumed that
19 it was for all audio-visual works.

20 MR. CARSON: Maybe we're not very good
21 crafters.

22 MR. BOLOS: We were talking about different

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1 platforms and the limitations and why not use a
2 different platform. You know, coming from a school
3 district that is what we call platform agnostic,
4 meaning they do Mac and Windows, all of our feeder
5 schools are Mac only. You know, so sometimes that's
6 what happens with all the schools. They adopt one
7 platform over another. So there isn't always another
8 platform available.

9 MR. RUWE: It is a balancing act, as one of
10 the witnesses said, and if the -- I don't know how
11 burdensome it is, if it was -- firing another
12 operating system was the alternative to the need for
13 an exemption.

14 MR. BOLOS: It is burdensome at a school that
15 only supports one platform. They will not support a
16 different platform because that means that they have
17 to service that platform.

18 MR. KASUNIC: But if you're using a different
19 operating system, I mean, there do seem to be various
20 forms of screen capture software that operate, so that
21 one particular form of screen capture software may
22 have been limited to a PC operating -- Windows

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1 operating system, but there are other forms of screen
2 capture software that are available for multiple
3 operating systems.

4 MR. CARSON: In fact, while we're on the
5 subject -- I can't remember whether it was Dean or
6 Steve, but one of you mentioned in your testimony when
7 you were talking about Applian, okay, you also
8 mentioned that you've identified some other Mac -- and
9 when you say you've identified, it wasn't clear to me
10 whether you've identified it to us or you just
11 identified it internally.

12 MR. MARKS: The one that we had tested was
13 Camtasia. So I want to be precise in what I'm saying
14 about it. We, I don't believe, have tested it in
15 terms of seeing how well it functions to capture
16 content off of various optical disc media or streaming
17 media that may be encrypted. The research lab we used
18 to test it was testing to see if it functioned in the
19 same way that the replay software functioned, which is
20 to capture content after it's been decrypted.

21 And what we determined was that it captured
22 the content after decryption, which led us to conclude

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1 that it does not violate the DMCA and it is a tool
2 that is available for the Mac platform. So to Steve's
3 point, he would not be saying to all these students
4 who are on a Mac system, sorry, you're out of luck,
5 you have to now, you know, buy a PC with Windows on
6 it.

7 What we can do, I think, is get the software
8 and use it and test it for various disc capture and
9 Netflix captures to see whether it actually works as
10 advertised. Our suspicion is that it does, but --

11 MR. CARSON: But at this point you can't make
12 any representations as to the quality of what you come
13 up with, using the Camtasia and Mac.

14 MR. MARKS: That's correct. Bruce, can --

15 MR. TURNBULL: Sorry. You went to a slightly
16 different place. You're talking about quality. I
17 think Dean was talking about whether it's usable on
18 Netflix.

19 MR. CARSON: My point is -- he can speak to
20 that, but nobody on your side of the table can speak
21 to whether -- let's assume for the moment that the
22 Applian application that you demonstrated on May 11th

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1 is absolutely fine for all purposes. I think the
2 people over there might disagree, or they might not.
3 I haven't heard anything out of them so far. But
4 let's assume it's perfect, does everything you need to
5 do. You're not in a position to represent that
6 Camtasia for Mac, or any other Mac-based application,
7 is as good in terms of what it will give you, or are
8 you?

9 MR. TURNBULL: Our technical firm that did
10 the testing said that it is as good.

11 MR. CARSON: Okay. Is that in our record?

12 MR. TURNBULL: It is now.

13 MR. CARSON: Well, a hearsay statement is in
14 our record, but that's about all that is.

15 MR. TURNBULL: I mean, if you want further,
16 we're happy to -- you know, if you want to provide a
17 question, we're happy to answer it.

18 MR. CARSON: We'll mull that one over. Okay.
19 Thanks.

20 MR. RUWE: By way of comparison, I do want to
21 get reaction from this side of the room about the
22 testimony in our tech day showing a high school social

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1 studies teacher and his use of screen capture as well
2 as the review that was part of the testimony today. I
3 don't recall which brand, but an uploaded user review.

4 Any reaction to the effect that some of these
5 uses using stream capture -- and the quality seems to
6 be completely acceptable and useful? No.

7 MR. BAND: Well, I guess -- again, there's a
8 couple of ways of responding. One is that if the
9 quality is the same, then why are we here? Meaning,
10 you know, if the quality -- if what you're able to see
11 is the same using the lawful decryption of -- whether
12 it's CSS or Blu-Ray, whatever -- is the same as what
13 you're able to get using the screen capture, then why
14 are they bothering with using this technological
15 protection if it's so easy to circumvent and you're
16 able to see the same thing?

17 So obviously you aren't able to see the same
18 thing? Obviously there is a qualitative difference --
19 a significant enough qualitative difference that, you
20 know, that they're -- you know, that Dean and Bruce's
21 clients are willing to spend all this money supporting
22 this effort of -- of distributing stuff, material, in

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1 this protected form. So there's obviously got to be a
2 qualitative difference.

3 And the second thing is just -- I can tell
4 you, as a parent of kids, that they can see -- you
5 know, they're very sensitive to all of these subtle
6 qualitative differences, even not so subtle. So, for
7 example, you know, I grew up with a black and white
8 television. So even when I see a black and white
9 movie, I'm comfortable. That's part of my
10 environment. I'm able to respond to a black and white
11 film. My kids, having grown up in a world of color
12 films and color television and large screen
13 television, they have great difficulty watching a
14 black and white film.

15 MR. CARSON: So no version of Citizen Kane is
16 going to satisfy them.

17 MR. BAND: I think that that's true. I mean,
18 to some -- and I'm sure they'll say -- you know, the
19 educators can say, it's a real challenge to get a kid
20 to watch a black and white film because it is so --

21 MR. CARSON: How do you square this with my
22 experience, which is that -- I've got daughters who

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1 are -- one is in her late teens now; the other is in
2 her early twenties, but they and their friends -- half
3 of what they watch, they watch on their smartphones.
4 And you can't tell me the quality of what they're
5 watching on that little screen is all that high. And
6 they seem perfectly happy to do that. How do you
7 square that with what you're saying about high
8 quality? Renee, and then Peter.

9 MS. HOBBS: So it's really actually bizarre
10 to be in a room full of lawyers talking about quality
11 because while quality is a fixed -- can be defined as
12 a fixed dimension of a product, I think what Martine
13 was trying to say earlier is that quality is a
14 subjective experience. We've just shared with you
15 that, from our experience as educators working with
16 young people, that their expectations about image
17 quality are -- subjective as they are, as unique as
18 they are, but they're expectations that are based on
19 the context, the situation and the purpose.

20 When I'm watching a movie, while I'm walking
21 through the mall, on my smartphone, I have one
22 expectation. When I'm sitting in a high school film

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1 class or a social studies class. I have a different
2 expectation. So quality -- while you might want to
3 narrow it to think of it as a fixed dimension or
4 property of the artifact, is so much more. It's --
5 quality is based on the expectation of the user. And
6 that's dependent on context, situation and purpose.
7 That's why we're coming to you. That's why we've been
8 coming to you. That's why quality matters.

9 MR. DECHERNEY: So let me just give you two
10 examples that I've given you before, but I'll repeat
11 them. One is from my 2005 comment, so hopefully you
12 don't remember it. When I taught (sic) this Charlie
13 Chaplin clip many times, actually a beat-up
14 16-millimeter print from a 1915 film called The
15 Immigrant -- it was always a kind of academic
16 discussion about immigration, whatever else it was
17 about. When the DVD came out, I showed the DVD, the
18 same clip, and the students laughed for the first
19 time. All of a sudden, it was alive for them in a way
20 it never had been before in a beat-up old copy. I'm
21 pretty sure if I brought out the same DVD today versus
22 the Blu-Ray, it's the Blu-Ray that would make them

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1 laugh and they would respond to it, and not the DVD.

2 It's a good experiment; we should try it.

3 Another example that's in the comment from
4 this time, this rulemaking, says -- speaks to the
5 question of Camtasia and other capture software. We
6 really have tried a lot of them. They all have
7 insufficient frame rates, so that there is a jerkiness
8 to it. Individual frames can be lost. You know, the
9 quality of the image is derated in many, many other
10 waste, there's bleed-through. Sometimes the -- they
11 actually have an absolute number of pixels they can
12 capture that doesn't match Blu-Ray or other
13 high-definition formats.

14 But one example is from John MacKay who is a
15 Slavic professor at Yale University who has done a lot
16 of work on the early Soviet filmmaker Dziga Vertov.
17 And he studied his charts for making his 1929 film,
18 the Man with a Movie Camera, and it turned out that he
19 tried to pace the editing in such a way that you would
20 be able to perceive faster and faster cuts. And at
21 one point there's actually one single frame in
22 which -- there's an image that only exists for one

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1 frame. And when I saw him give this lecture, you
2 know, he showed the clip; I didn't see the frame.
3 When he showed me the clip again, after I had seen the
4 charts, I actually saw the one frame.

5 If there was a Camtasia version, you know,
6 there's a 50 percent chance that that frame would have
7 been in there; 50 percent chance that it wouldn't have
8 been and that lecture couldn't have been given -- he
9 couldn't teach that example to his students -- or
10 maybe he could, but it's hit or miss.

11 MR. CARSON: Have you looked into the Applian
12 software that was mentioned in their initial comment
13 and demonstrated on May 11th?

14 MR. DECHERNEY: I haven't used Applian, no.

15 MR. CARSON: I would like to get a response
16 from your side to the point made by Jonathan, if the
17 quality is the same, how come you're so concerned
18 about protecting it?

19 MR. METALITZ: I don't think the testimony
20 was that the quality was the same. I think the
21 testimony from the Poolesville High School teacher was
22 that the quality was acceptable and good for his

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1 classroom.

2 You know, I said jokingly we have the battle
3 of the high school social studies teachers. We do. I
4 mean, obviously, the students at New Trier in that
5 example felt -- you know, they had much more -- they
6 seemed to have more difficulty getting the point that
7 was trying to be taught in the screen capture setting.

8 You saw the screen capture material that was
9 demonstrated on May 11th. And the statement there, as
10 I recall it, was that it was well received in the
11 class and he felt comfortable as a teacher that he
12 could achieve his pedagogical goals with this screen
13 captured material.

14 I'm sure there's not going to be any one
15 definitive answer that satisfies everybody. The
16 burden is on the proponent to show that they're
17 substantially impeded in the ability to make a
18 non-infringing use because of this.

19 But I think the other point that comes from
20 this discussion is -- and it really was in the Library
21 Copyright Alliance testimony and it was in Renee's
22 statement just now, is the necessity criterion that

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1 you have in the existing exemption is completely
2 subjective. There will never be a case, it seems, in
3 which somebody who's entitled to use the exemption
4 will say, well, it's okay to use screen capture. It's
5 okay -- you know -- and I don't blame -- from the
6 perspective of the teacher, of course you want the
7 highest quality that you can get.

8 But as Dean said, this a balancing process.
9 The cost of permitting every -- every single form of
10 access control distribution of motion pictures to be
11 circumvented, which is what the proponents are asking
12 for, and to allow -- especially to allow that in
13 K through 12, students and teachers as well as
14 throughout the post-secondary area, is that we'll
15 really be -- you know, we will have perhaps
16 200 million people in the United States that are
17 entitled to circumvent this protection.

18 I think at that point, you know, you have to
19 ask yourself -- and well before that point, you know,
20 what is the trade-off there in terms of, as you heard
21 in the Los Angeles hearing, the importance, the
22 necessity for robust access controls to promote the

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1 type of dissemination of material that I think the
2 industry is now doing.

3 MR. MARKS: I did want to add something,
4 because even if you assumed -- and I'm assuming
5 arguendo here -- that the screen capture technology,
6 the video capture software produced the content that
7 was in the same quality as -- although I'm AACCS, I'm
8 going to speak for DVD here now, if Bruce permits me;
9 I'm also a board member of DVD CCA, so I feel like I
10 have a little bit of leeway here.

11 But assume the quality is the same. Jonathan
12 is sort of saying, why do we bother? And we bother
13 for a very real reason. If you look at what happened
14 to the music industry with the CDs being a
15 completely-in-the-clear format with no access control
16 whatsoever, and people would put them in their
17 computers and drag and drop the little imagine, and a
18 full copy would be made, and it was seamless to do,
19 took about two seconds, and could be uploaded to the
20 Internet. It led to a lot of unauthorized use and a
21 perception that this was okay to do. That is
22 precisely why we apply access controls to our works,

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1 so that it is not so easy and seamless to make digital
2 copies.

3 When you use a video capture software, you
4 are taking a very deliberative act to apply the
5 software, play the clips you need. It's not the same
6 as just doing a drag and drop with a mouse. And so --
7 we are businesses. If we thought access control
8 measures, which we spend a lot of time and resources
9 and money to develop, provided absolutely no
10 protection for our works, we wouldn't apply them. And
11 so I just don't think there's a basis for saying, oh,
12 well, access controls are useless because you can use
13 video capture software of the same quality.

14 The other point I wanted to make is I want to
15 make sure that our side of the aisle is not sort of
16 perceived as saying we do not believe cultural
17 products should be used in the classroom because
18 that's not what we're saying. What -- what I've heard
19 some folks say is you need to have the original. You
20 need to be as close to the original as possible. If
21 you've got the original manuscript, you use the
22 original manuscript even if it's medieval manuscript.

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1 Well, if there's one manuscript, it's only
2 available in one location. It's not available in all
3 sorts of locations around the country. And so you
4 show a copy of the manuscript. Same thing with art.
5 Sure it's great to see the Mona Lisa at the Louve
6 museum, but not every student gets to do that. And so
7 you use copies that are sometimes of less quality than
8 the original, but still perfectly satisfactory for
9 pedagogical purposes.

10 And so I feel this notion of if the highest
11 quality is there, we automatically need access to it;
12 otherwise we can't achieve our educational purposes --
13 I just think that argument sort of starts to fall
14 apart.

15 MR. CARSON: Just a caveat. We're close to
16 running out of time. We do have more questions. So
17 before you open your mouth, think how important it is
18 to say what you're going to say and be as succinct as
19 you can because the questions that didn't get asked
20 might be really important and you might wish we'd
21 asked them.

22 Go ahead.

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1 MR. DECHERNEY: Two really short -- brief
2 points. I understand that side is not opposed to
3 education. But on this side we think that if you
4 bring every student to the Mona Lisa who is studying
5 the Mona Lisa, that would be a good thing; it would be
6 better than having them study off of copies.

7 MR. CARSON: We can't help you there.

8 MR. DECHERNEY: And the second point is I
9 think a lot of this discussion of the effect of an
10 exemption that it would have on Blu-Ray and high
11 definition is obviously conjectural, but we do have
12 seven years of evidence of an exemption that covers
13 DVDs, even when they were, you know, younger in their
14 life span, and we haven't seen any massive abuse of
15 the exemption or any degradation of the DVD market as
16 a result of the exemption. Just the opposite.

17 MR. CARSON: Let's stop right there and ask
18 that side, is that last statement accurate as far as
19 you know?

20 MR. TURNBULL: On the DVD side, I think we
21 will show, in relation to one of the panels this
22 afternoon, a chart that will show how DVD sales have

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1 basically gone -- had gone up till 2004, 2005, and
2 have gone down since then. There are a whole
3 variety --

4 MR. CARSON: You don't trace that to the
5 exemption, do you?

6 MR. TURNBULL: There are a whole variety of
7 reasons why that's the case. I'm not saying it's the
8 exemption. On the other hand, I don't know that
9 either one of us can say with certainty that it did or
10 it didn't have an effect on the sales of DVD.

11 MR. METALITZ: If I could just add, I think
12 we have, as we indicated, assuming that they -- you're
13 persuaded they've met their burden, we would not
14 object to a renewal of the existing exemption. But,
15 remember, that is more -- much more limited category,
16 both of users and of products, than what's being asked
17 for here.

18 MS. HOBBS: Just one response to Steve's
19 200 million, which I don't know where that number came
20 from. There are 3 million teachers in American public
21 schools, and almost 40 percent of them have a master's
22 degree. Right? The average American teacher is 54

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1 years old. She's going to be teaching for another 15
2 years.

3 We want teachers to be able to use the newest
4 technology because technology supports innovation in
5 education.

6 I don't see any reasonable reason to make a
7 distinction between a 54-year-old middle school or
8 elementary school or high school teacher and a college
9 professor working at the community college level.

10 MR. KASUNIC: If I could just ask a question
11 that follows up with that. Martine, at one point you
12 had talked about, with the cell phone issue, there
13 could be some confusion --

14 MS. RIFE: Yeah, I'm really actually worried
15 about that the more I think about it.

16 MR. KASUNIC: I'm wondering to what extent
17 there's confusion about the existing exemption, and
18 that -- where circumvention is allowed where someone
19 believes and has reasonable grounds for believing that
20 the quality on that DVD was necessary.

21 So the question is, to what extent is there
22 an evaluation being made between various options for

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1 the particular work that's going to be shown in a
2 classroom? For instance, you mentioned at one point
3 that there were some -- sometimes you want to teach
4 about economic theories or about -- well, let's just
5 take that example. To what extent do you need
6 specific quality to talk about economic theories?

7 MS. RIFE: Okay. Well, that was an example
8 from an economics professor, but to get to answering
9 your question, what I was going to comment on about --
10 the example about Mona Lisa, going and actually seeing
11 it or -- you know, how important is quality? That
12 whole argument is premised on the idea -- and this
13 whole focus on quality is premised on the idea that
14 your whole purpose is to just reproduce what someone
15 else has created instead of what we're looking at is
16 the students and the teachers -- the students actually
17 are making something new that is their own work, and
18 so why wouldn't they want all the components of their
19 own new work, which would be the fair use piece, to be
20 of the highest quality possible?

21 Why is it -- why is it acceptable to tell a
22 student that they could have a pixelated image of Mona

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1 Lisa if they're making some kind of cultural
2 commentary on it because what they're saying isn't
3 really that important anyway? I mean, what is the
4 logic behind not allowing students or creators of
5 texts that are relying on the exemption to not be able
6 to create the highest quality possible? I don't
7 understand that.

8 MR. KASUNIC: So does that mean that the
9 exemption is being seen as basically, as I think the
10 point was made by Steve, that in all cases that
11 circumvention is necessary?

12 MS. RIFE: Circumvention is necessary. It's
13 seen as that. When I do -- when I've done the
14 workshops at my college, they ask about -- the
15 students, well, what are the students allowed to do?

16 Now, in the current language you have,
17 there's a big ambiguity because if the student is
18 making a non-commercial video, then are they covered
19 under that leg or, if the student is making a
20 documentary film, are they covered under that leg? Or
21 are they not allowed to do those two things just
22 because they're a student?

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1 So, you know, it's almost like you already
2 are including students in the exemption now
3 indirectly. And they haven't demonstrated any harm.

4 I mean, we went through this whole screen
5 capturing conversation in 2010, and it got really big
6 and it lasted into the summer and so forth, but what I
7 see the other side doing is just trying to make
8 barriers so that we don't do it at all, is what the
9 wish is.

10 And I just want to say, just to comment on
11 the smartphone, the taping of (sic) the smartphone,
12 just imagine a room of 40 students and we're watching
13 a current movie and I say, okay, everybody, take out
14 your smartphone now in the classroom and take the clip
15 you want for this montage you're going to make. I
16 mean, you don't just -- I don't think that they really
17 understand the implications of what it would mean to
18 say it's okay to tape movies with your smartphone when
19 you've got all your context in there. It's just --
20 yeah, it's just scary.

21 MR. RUWE: Peter, I wanted to ask you, you
22 pointed to the example of The Immigrant and using -- I

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1 believe it was 16-millimeter and then DVD.

2 MR. DECHERNEY: Beat-up old 16-millimeter
3 print.

4 MR. RUWE: If you had shown the class a
5 screen capture version of it, what do you -- do you
6 know -- did you ever try that, first of all? And do
7 you think they would have gotten the point that it
8 would have been a discussion of immigration or it
9 would have been lacking? Have you tried?

10 MR. DECHERNEY: No. No. You know, actually,
11 I've looked at screen capture versions. I've never
12 seen one that I thought was ready to be brought into
13 my class. Maybe I should do it as an experiment for
14 this rulemaking, but otherwise it wouldn't serve them
15 well. And I've -- you know, I've looked at it. We
16 have screen capture available in the Weigle
17 Information Commons. We tell people about it. It's
18 not used that often because it's just not up to the
19 par. It's not up to the standards we hold the
20 classroom. And our classroom time is available.

21 MR. RUWE: Has anyone else tried and
22 failed -- not gotten the reaction that they were

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1 leaning for -- not -- okay. Give me an example.

2 MS. RIFE: I've tried to use Camtasia to take
3 clips, and it doesn't --

4 MR. RUWE: Okay. But you haven't shown them
5 to the class when it does work and had failed to
6 elicit the point to --

7 MS. RIFE: No. But, I mean, it doesn't tape
8 it all because it just makes it all black no matter
9 what I adjust.

10 MR. RUWE: Okay. Well, sometimes it has
11 worked.

12 MS. RIFE: Okay. Not for me.

13 MR. RUWE: It has worked but has failed in
14 the classroom setting; you actually acquire the video,
15 maybe at a diminished quality than you ultimately
16 desired --

17 MS. RIFE: No, I don't have an example of
18 that.

19 MR. BAND: But I think it's important to
20 remember that, you know, what they're trying to do is
21 teach. Right? That's their objective. And spending
22 a lot of time figuring out every possible software --

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1 I mean, it's -- you know, we have an education crisis
2 in this country, and so the idea to make it more
3 difficult, especially at K-12, you know, when there's
4 a simple solution out there that's not going to cause
5 any harm, to instead say, okay, let's come up with --
6 make -- put a burden on all these teaches, who are not
7 technologists, to figure out all of these ways to get
8 to the same point, it just -- it seems to me to be
9 really short-sighted.

10 MR. KASUNIC: Can I just ask, what kind of
11 DVD ripping software do any of you use -- and it's not
12 a statement against interests at this point -- and
13 what's the cost of that?

14 MR. BOLOS: DVD Shrink on Windows is free,
15 and HandBrake on the Mac, which is also free.

16 MR. DECHERNEY: I use HandBrake. It's free.
17 It's great. You can -- it's very fast. The quality
18 is very good, and it actually gets better all the
19 time. And you can choose short portions.

20 The Blu-Rays are more complicated. One I
21 have not used, but I've read about it -- it was called
22 ACSOFT. I don't remember how to spell it. But that

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1 also works like HandBrake and you can rip short
2 portions, not -- you don't have to rip the entire work
3 and create a copy, a small copy.

4 MR. RUWE: I have one more question that's
5 about various versions of screen capture. I noted
6 that it's been part of the discussion in these
7 proceedings before. And have you re-evaluated -- it
8 seems like there's improvements in that technology.
9 Have you re-evaluated, and what frequency?

10 MR. DECHERNEY: So screen capture has
11 definitely improved in the last three years, but it
12 hasn't kept pace with technology and it's not even up
13 to the place we would have hoped it would have been
14 three years ago.

15 I was working with a team of students at
16 American University, and together we tried a number of
17 different programs, including Camtasia, Snapz Pro.
18 We've tried different settings. We were using
19 top-of-the-line equipment, and still it's just not --
20 it's not the same quality that you can get by using a
21 DVD ripper program.

22 MR. BOLOS: I think ultimately for me it's

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1 the time that you spend capturing. I think that gets
2 lost a lot, the amount of time you spend capturing.
3 You know, to rip a DVD or to rip a CD -- I think you
4 overstate it. Ripping a CD does not take -- it's not
5 instantaneous. It takes time. And it is a deliberate
6 action. And so the time you spend to do that is
7 substantial time as an educator and as a person who
8 may have, you know, 25 students in a lab. It is a
9 substantial amount of time to do the screen cap.

10 MR. TURNBULL: I just wanted to respond in
11 terms of the -- I mean, we demonstrated a screen
12 capture software program that was used by a real
13 teacher who demonstrated it real time here on May 11th
14 on how it was used. I don't think it took an
15 inordinate amount of time. And he had done other --
16 at home, had -- other copies for integration into his
17 classroom presentation and was perfectly satisfied,
18 you know, with that.

19 I can't speak to why Camtasia didn't work in
20 certain circumstances. The lab that we employed uses
21 it regularly and finds it perfectly acceptable and
22 told us, you know, that it was equivalent in terms of

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1 quality and usability to the replay that was
2 demonstrated.

3 MR. CARSON: All right. Dean, you're going
4 to blow our stinginess on time, but all right.

5 MR. MARKS: I just have one tiny, tiny remark
6 to make. I just -- and maybe this is obvious, but I
7 feel that sometimes this gets lost, which is that --
8 understanding in media classes and film classes where
9 often professors are probably showing lots of clips
10 from different movies and need to have those clips,
11 you know, immediately available and not queue up the
12 original is a concern. But for so many other
13 educational uses where you're either going to show the
14 entire film or just show one portion of a film to make
15 one point, the original DVD or Blu-Ray is always
16 available for classroom use. It's not like that
17 quality product is banned from the classroom. And so
18 I just wanted to remind everyone of that.

19 MR. CARSON: Great. Well, that takes care of
20 this particular panel. We may or may not have
21 follow-up questions for you. So the message is, don't
22 call us; we may call you. If not, the record is

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1 closed.

2 We are due to start back at 1:00. It's five
3 after 12:00, so let's say 1:05. But we've got a busy
4 afternoon, so we do need to start precisely at 1:05.

5 For those of you who want to eat, there's a
6 cafeteria on the sixth floor which is better than it
7 was three years ago. Thank you very much.

8 (Whereupon, a luncheon recess was taken at
9 12:05 p.m.)

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1 AFTERNOON SESSION

2 (1:08 p.m.)

3 MR. CARSON: This is the second panel on
4 classes 7D and 7E. And the order of the witnesses I
5 have in front of me, Jim Morrissette followed by
6 Gordon Quinn, Peter Brantley, Bobette Buster, Alex
7 Cohen and Brendan Charney; is that right? Okay. And
8 then I -- Dean Marks, Bruce Turnbull and Steve
9 Metalitz on the other side.

10 So let's get moving. Ten minutes -- yes?

11 MR. LERNER: Peter and Bobette will be
12 speaking in favor of 7E.

13 MR. CARSON: 7E, which is --

14 MR. LERNER: E-books.

15 MR. CARSON: I'm out of order here. I'm
16 sorry. Okay. Good, right. Thank you. Good.

17 Ten minutes each. And, again, we're going to
18 be pretty strict on that, so Jim...

19 MR. MORRISSETTE: Good afternoon, everybody.
20 I'd like to thank you for the opportunity to testify
21 once again. Some of you may have seen my presentation
22 on May 11th with the technical presentations. And

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1 what I'd like to do today is do two things. One is to
2 give my response to the opponents' demonstrations of
3 their technical alternatives to circumvention, and
4 then I'd like to do a short recap of my May 11th
5 testimony to clear up some misunderstandings.

6 The opponents demonstrated two alternatives
7 that have been suggested as an alternative to
8 circumvention. One is screen capture software using
9 Replay Video Capture, and the other is smartphone
10 video scan conversion.

11 Screen capture software allows a computer to
12 play back protected media and then actually record
13 what is on the screen into a file that can be used.
14 We tried this technique as well, and what I observed
15 of screen capture software were the same issues that
16 we observed when we did the test.

17 We noticed an extreme problem with stuttering
18 images due to dropped frames. It's very
19 computer-intensive to try to record live
20 30-frame-a-second video into a file and then have
21 audio all at once. And when you have sections of the
22 video that have a lot of rapid motion or you attempt

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1 to capture them at a higher resolution than DVD by
2 filling the computer screen with them, dropped frames
3 occur and they can never be replaced because they were
4 never recorded. There is no software that can
5 actually replace them. And this is not acceptable for
6 a public television broadcast.

7 There are audio synchronization issues
8 because the audio lags behind the picture. And more
9 serious is that because the vast majority of
10 documentary filmmakers use Macintosh computers for
11 editing and producing their programs, the latest Mac
12 computers do not allow a screen capture software at
13 all when playing back a DVD or any iTunes media,
14 whether it's video streamed or downloaded. So it's
15 really not a work-around that we can work with.

16 The others technique was something that we
17 call smartphone video screen capture. And it's
18 exactly what it sounds. You take a smartphone, use
19 the video portion of it, aim it at a monitor that's
20 playing back a protected media disc, and literally
21 photograph the monitor.

22 Well, this introduces again, unacceptable

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1 problems. Smartphones have automatic exposure and
2 automatic focus that are constantly searching. Every
3 time there's a change in the video settings, it jumps
4 out at you. The audio is only from the camera
5 microphone, so anything else that's in the room, you
6 have to essentially play it back on the speakers or
7 the TV set and pick it up with the microphone.

8 But the most serious is something called
9 video aliasing which occurs when you have very fine
10 detailed dots on a computer screen or a monitor and
11 very fine dots on an image sensor in your iPhone. And
12 when they don't line up exactly right, you get
13 artifacts at the overlap point. And these artifacts
14 show up on top of people's faces, they show up on
15 buildings with fine detail. And this is specifically
16 forbidden in the latest public television technical
17 specifications that came out in March. The image must
18 be free of compression artifacts and aliasing, such as
19 the artifacts associated with scan conversion. So,
20 again, it doesn't work for us.

21 So I tried to come up with some alternatives
22 to this, explore them. And I presented two possible

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1 options that I considered. Alas, neither of them are
2 successful, and I'm tell you why. The first one was
3 to take an analog output from a DVD player or a
4 Blu-Ray player and up-convert it to high definition
5 using a sophisticated expensive box called a Teranex.
6 As can you see, it's a little bit intimidating, even
7 to an engineer like myself, with multiple buttons and
8 connections, and even two power cords are required to
9 fire this thing up.

10 And the manual is 249 pages. And there's 24
11 pages of just telling you what different colors each
12 of the buttons on the front panel might be and what
13 that means. It's not something for the faint of
14 heart.

15 And here is just one example of one menu.
16 This is the menu that is used to adjust the aspect
17 ratio of your signal coming in, because some of the
18 older DVDs, the aspect is 4 by 3; high definition has
19 to be 16 by 9, so you need to convert that. But it's
20 so labor-intensive and confusing that it's
21 impractical.

22 But there's a more serious problem with it.

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1 Since it requires an analog input, we have two
2 choices. We have the component analog signals that
3 are the better of the two analog signals coming out of
4 DVD and Blu-Ray players. And we have the composite
5 signal, which is a much less -- much lower quality
6 signal where all the colors are smushed together and
7 you get all sorts of interaction between the color and
8 the luminance part of the picture.

9 Well, here is an example of a Blu-Ray player
10 from late last year, December 2011. And you can see
11 that it has component analog outputs on the top row,
12 red, blue and green, and in the lower right you have
13 the composite output. Here is the same mid-level
14 model Panasonic that was released early this year.
15 The component output is gone. In the latest version
16 of this Panasonic Blu-Ray player, there's no analog
17 output at all. So without an analog source from a
18 protected disc, the Teranex is worthless because we
19 can't get a signal into it.

20 So another method I explored was to
21 essentially say, okay, what's the problem? We've
22 already stated the problem with software image

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1 capture, so let's investigate hardware image capture.
2 A Matrox box was selected as a test. And the way it
3 works is you play back your protected media on the
4 computer. You take the monitor output from the
5 computer tower, loop it through this box, which
6 extracts that signal and turns it into a recordable
7 video signal.

8 You'll notice that there's no audio
9 associated with this system. Audio is a whole
10 separate signal path, and it requires an audio delay
11 box because the time it takes to process that video
12 signal, if you don't delay the audio, everything will
13 be out of sync.

14 But there are problems with this as well.
15 It's also costly and complex to operate. It requires
16 a high-end computer tower and graphics card, and it
17 will not work with Blu-Ray because Blu-Ray HDCP on the
18 graphics cards blocks any high-definition output. And
19 it blocks the use of hardware scan conversion because
20 you're putting this box in between the computer and
21 the monitor. And once you do that, the
22 high-definition signal stops.

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1 At Kartemquin Films last year we produced a
2 90-minute American Masters show called A Good Man, and
3 we were able to take advantage of our current
4 exemption to pull numerous clips from DVD without ever
5 going through an analog path. And that worked for us
6 back in 2011. And now we're being asked by public
7 television to produce everything in high definition,
8 to release everything in high definition to them.
9 That's all they will accept. And they put a severe
10 limit on any kind of standard-definition clips being
11 up-res'd by analog which, as I mentioned, is fading
12 away, and also the problems I've mentioned with
13 hardware screen capture.

14 So, in summary, both of the alternatives
15 proposed by the opponents will not work for public
16 television and broadcast specifications. We would be
17 rejected. We wouldn't be able to use the clips.

18 Hardware up-conversion and hardware scan
19 conversion are very costly and require an engineer to
20 operate, if you can find one that knows how to do it.
21 They degrade the image because, when you up-convert a
22 signal from a standard-def source, you're creating

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1 quasi-high definition. You're creating image detail
2 out of nothing by duplicating lines and interpolating
3 lines. It's a mathematical trick. It's not HD. It
4 may have the same number of lines of resolution as HD,
5 but it's coming from a bad -- a mediocre source. And,
6 of course, analog is disappearing from all of our
7 sources, our disc playback sources, and PBS severely
8 limits it even when we do have it.

9 I get calls from filmmakers all the time
10 asking me, how can I deal with this? How can I get my
11 archival material into my show? And when I explain
12 these options and the problems that exist, they
13 realize that they don't have the financial resources
14 or the technical resources to even try to use them.
15 And so if, because the existence of this equipment
16 that doesn't even satisfy our needs is going to
17 prevent 95 percent of the rest of the filmmakers from
18 gaining access to protected media that's going to be
19 of a quality enough to broadcast, then it's a real
20 shame. Thank you.

21 MR. CARSON: Thank you. By the way, I should
22 have mentioned this this morning, but all those people

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1 who are bringing PowerPoints or any other audio-visual
2 aids, you will be leaving copies with us, I assume,
3 for our record? Good. Good.

4 (Discussion held off the record.)

5 MR. CARSON: All right. Gordon.

6 MR. QUINN: So we're ready for me?

7 MR. CARSON: Yes, please.

8 MR. QUINN: I'm Gordon Quinn --

9 MR. CARSON: I hate to tell you, but you drew
10 the bad seat. You've got to press that darn button
11 all the time unless -- Peter might be able to --

12 MR. QUINN: Okay. Thanks.

13 So I'm Gordon Quinn. I've been making
14 documentary films for 46 years. I'm the founder and
15 artistic director now of Kartemquin Films. And we are
16 a fairly robust institution, a not-for-profit who
17 produces for PBS, NBC -- theatrical presentation is
18 very important to us -- And other cable outlets that
19 we've been on. And they all have varying technical
20 specifications.

21 We are rights holders and we are also rights
22 users. We are unusual in that we do have a technical

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1 director, Jim, who has an engineering background, and
2 so we consider ourselves a resource for the larger
3 community. And when Jim talks about he gets calls all
4 the time from people with -- in this particular area,
5 but we get calls in a range of areas, and we see that
6 part of our mission is to help people exercise their
7 fair use rights.

8 We're seeking this exemption to continue the
9 fair use that we reclaimed with the publication of the
10 documentary filmmakers statement of best practice and
11 fair use. It's a narrow and a defined fair use
12 exemption.

13 18 years ago when Hoop Dreams was released,
14 we licensed what we should have been able to claim
15 fair use on, but at that time we had lost that fair
16 use, not because of so much court decisions, but
17 because of big players intimidating the broadcasters
18 and insurance companies and other gatekeepers. But
19 we've now won those rights back, and it's terribly
20 important to our work.

21 The Interrupters, which was just on
22 Frontline, had many fair use clips in it, as did A

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1 Good Man, which Jim reported to, which was on American
2 Masters.

3 We are really asking to be able to continue
4 the status quo and merely updating what we've had for
5 the past few years to -- updating the exemption to be
6 able to deal with the new technical standards that are
7 coming from -- that are already here, actually; they
8 have arrived from broadcasters and theatrical
9 presenters.

10 Any solution that involves licensing,
11 managing copies, streaming, anything that involves us
12 having to go and ask permission from the people that
13 we may be critiquing, parodying, using a clip to make
14 an argument about, trying to show something about
15 what's happening in the society -- any of that is
16 unacceptable for a whole variety of reasons. We're
17 exercising a right, and that's -- we learned that, in
18 our struggle in reclaiming the fair use, how important
19 it is to us to have this right and to be able to use
20 it.

21 I should have said up front, by the way, that
22 I'm here speaking for documentary filmmakers in

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1 general, the class, and for the Independent
2 Documentary Association.

3 And just a couple more points. Let me give
4 you two examples of how important having quality that
5 is close to the original -- how important it is to us.
6 In A Good Man, in the film that I just directed, about
7 the dancer Bill T. Jones, there is a scene where is he
8 talking and he's saying, you know -- and it's over a
9 clip that we fair used, and he's saying -- he's
10 dancing and he's -- you know, he's bare to the waist
11 and he's talking about, you know, I became very aware
12 that I was a black body being viewed by white bodies.
13 And you can see the muscles rippling on his body
14 underneath his skin. You can see the sweat on his
15 body. The lighting is spectacular, and you can see
16 every detail of this body that he's talking about.
17 And he goes on and says a little bit more about this
18 point and what it means to be this kind of an artist
19 in a culture like that. And I need that quality in an
20 image like that to get that across.

21 There's another project that we're in
22 conversations with now about a major film critic of

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1 theatrical films, one of the most important film
2 critics in America today. And I can foresee, in
3 making that film, how important it's going to be --
4 this is a critic who constantly makes the point that
5 people should be seeing films in theaters on the big
6 screen. That experience is very important to him. So
7 when we make our film about him, we need to be able to
8 be -- when he's talking about the sensual and subtle
9 qualities of an image that he may be critiquing in
10 some kind of way or helping the audience to understand
11 how to perceive that image, we need to do something
12 that approximates -- it doesn't have to be -- you
13 know, but it has to really be a high-quality image.
14 And, of course, we have to meet the technical
15 standards of PBS and, as I would hope for this film,
16 also the theatrical presentations.

17 I'm also aware that there are films now that
18 are coming out, new films, that are only going to be
19 released on Blu-Ray. That's going to be the only way
20 we'll be able to get them. Or in some encrypted
21 streaming kind of way. And so it's important
22 obviously in this film that we be able to get that.

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1 And we see that as not only -- you know, I
2 mean, this is going be a benefit to everyone who loves
3 movies to have this guy be able to take an audience
4 inside his work and understand what it is that people
5 can actually see in movies to help people to have a
6 real media literacy, to be able to read what's
7 happening in the new technology.

8 Something that I think is pretty significant
9 is that we've had this exemption for three years.
10 There has been no abuse. There have been no
11 documentary filmmakers -- there's no situation in
12 which documentary filmmakers have broken the
13 encryption where they have been using the exemption to
14 exercise their legal fair use rights that has led to
15 any kind of abuse. And I think that would continue in
16 the future.

17 We are, you know, rights holders, as I said,
18 and we care about piracy, too, you know. We're not
19 trying to do anything that enables people to steal
20 anything. What we're trying to do is do our work,
21 make our points, critique things, criticize them and
22 show their meaning.

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1 In conclusion, I just want to say that
2 it's -- in a democracy, we need to be able to comment,
3 to critique, to put into context all of the culture
4 that exists out there. Nothing can be -- you know,
5 you can't be, well, this is a safe; you can use this
6 and you can critique this, but you can't critique
7 something else. It all has to be available to us
8 within the narrow limits set out in the documentary
9 filmmakers statement. We're only talking about fair
10 use. But it's a right. We have to be able to point
11 at it to say, this is what it's like.

12 And we live now in a digital age. We live in
13 an age where the quality of the image is more and more
14 important, and we have to be able to come close to
15 that quality in what we're critiquing, or to duplicate
16 it. We should -- fair use should not be locked out,
17 not by technology and not by permissions.

18 So that's really my presentation.

19 MR. CARSON: Thanks very much.

20 Peter.

21 MR. BRANTLEY: Okay. Thank you. Good
22 morning, West Coast time. Not too bad. Anyway, so

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1 the work that I do is currently focused primarily on
2 transformations in publishing, and I'm here to talk
3 about multimedia and e-books. I'm currently the
4 director of the Bookserver Project at the Internet
5 Archive, and I also run a fairly well-known conference
6 called Books and Browsers with O'Reilly Media and with
7 some major support from Safari Books Online.

8 I'm also a contributing editor and blogger at
9 Publishers Weekly where I cover libraries,
10 intellectual property issues and media. And I'm an
11 ex-board member of the International Digital
12 Publishing Forum, which is the standards body for
13 e-book standards and is responsible for the EPUB
14 format which has recently been updated to the EPUB 3
15 format to accommodate greater interactivity and
16 stronger support for HTML5.

17 I'm here to talk about three things, shortly.
18 First is just rapid advances in e-book authoring tools
19 in software, making it possible for people -- for
20 authors to create multimedia books for the first time
21 with relatively little technical expertise.

22 Second, a DMCA exemption is necessary for

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1 authors to create these works because alternatives
2 would require financial resources that most authors do
3 not have, or, and increasingly the case, result in a
4 deterioration of video quality which consumers and
5 distributors would find unacceptable.

6 And, third, alternatives to circumvention are
7 inadequate in part because of rapid advances in video
8 standards and displays, particularly from mobile
9 displays devices like the recent iPad retina which are
10 compelling content distributors to produce content
11 really beyond even HD video quality and high-quality
12 audio content as well.

13 So first let me briefly talk about multimedia
14 e-book technology and development. For the first few
15 years of the e-book explosion, what we have had are
16 mostly translations of analog or print books into
17 digital formats. But a couple of years into that
18 transition, authors are now beginning to explore what
19 they can do with digital books that were beyond them
20 in terms of what they could do with print. And this
21 has been aided by an increasing integration of e-book
22 standards into web standards.

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1 So for example, IDPF, the standards body for
2 e-books, is now actually coordinating development of
3 EPUB 3 and successors with the W3C and HTML5 standard
4 to support interactivity, high-quality video, audio
5 and other advanced features.

6 An example of this, or an instance of this is
7 an EPUB project, or an IDPF project called Radium
8 which seeks to embed the ability to render or digest
9 EPUB files directly in a browser for the first time
10 without any additional software necessary.

11 New authoring systems are beginning to emerge
12 that take advantage of these affordances on the web,
13 and these tools enable drag-and-drop authoring of
14 multimedia content that we've never seen before. And
15 they also provide support for what we call push to
16 publish.

17 Let me give you a couple of quick examples of
18 these. One, a San Francisco start-up called AirBook
19 (phonetic) just released a tool today called AirBook
20 Maker, which is drag and drop of media into a web
21 browser template and, again, push to publish output.
22 An indication of the importance of video, the

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1 filmmaker Cotty Chubb is a principal of this company
2 and is very much engaged in assisting the integration
3 of video content.

4 AirBook Maker has been demonstrated on Sixth
5 Avenue in New York and a major online retailer in the
6 northwest with great interest in all occasions.

7 Vook, another start-up in San Francisco,
8 initiated with video e-books, but pivoted, realizing
9 that their platform for e-book creation was more vital
10 and more important, and is making that available to
11 authors and small publishers. And then, finally,
12 Apple's iBooks Author, a tool in the hands of
13 millions, and growing, which enables sophisticated
14 multimedia e-book authoring and push to publish into
15 the iBookstore.

16 It's also important to note that Mozilla, the
17 well-known browser company, is releasing, probably
18 around November 1st, a tool called Popcorn Maker.
19 Popcorn is a new video framework which, for the first
20 time, will enable the embedding of external web
21 resources or interactive links within video content.
22 This will enable highly interactive video content for

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1 the very first time. And e-book manufacturers, like
2 AirBook, are already integrating Popcorn into their
3 tool kits. It's -- both the Internet Archive, my
4 organization, and Wikimedia are providing support to
5 Mozilla to integrate this content into their tool set.

6 So I want to also then talk about why -- why
7 DMCA exemption is required and what are some of the
8 other forces pushing on advances here. A DMCA
9 exemption is necessary to prevent a substantial
10 adverse impact on multimedia authoring. Any author
11 that's seeking to use multimedia content today is
12 going to first look in large online archival
13 repositories like the Packard (phonetic) Collection or
14 the Internet Archive, among others.

15 But online collections are very spotty and
16 fragmentary and, as a consequence, most e-book authors
17 are going to have to resort to secured physical media,
18 like DVDs and, increasingly, Blu-Ray. Licensing is
19 not a strong alternative because content is rarely
20 available in fragments, almost always is available in
21 its entirety -- and this is very similar to the
22 problem that we saw in the Georgia State case

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1 involving CCC recently.

2 Additionally, fees and terms are structured
3 for commercial use from one commercial party to
4 another commercial party and are not -- do not tend to
5 be geared toward individual authors or creators
6 seeking educational or entertainment products.

7 Finally, I want to talk about technical
8 advances which are real pushing the bar dramatically
9 in terms of video quality expectations. For the many
10 years in Silicon Valley we've gone through stages of
11 focus on, first, memory, higher quantities of memory
12 storage, then on more and more sophisticated
13 processing. But, today, the focus right now is on
14 displays. And we can see that with the iPad Retina.
15 Already newer mobile displays are coming out, being
16 marketed by LG and other companies with higher
17 resolution. And what we're seeing come now into
18 manufacturing are that level of screen at a far
19 reduced cost as well as newer generation screens that
20 are embedded in plastic and are, therefore, wearable
21 or wrapable or curveable. These are display
22 technologies that are, as I said, coming into

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1 manufacturing. These are not lab-only screens at this
2 point. This will be fairly dominant in a couple of
3 years, or very prevalent in a couple of years.

4 Finally, we see this echoed as well in video
5 standards. For several years there was contention
6 among browser manufacturers over what video standard
7 would be utilized to embed video in browsers, in
8 e-books. And just this spring video -- I'm sorry --
9 browser manufacturers coalesced around a common
10 standard, H.264. So all of the browser manufacturers,
11 Mozilla, Google, Microsoft, Apple, are now endorsing
12 H.264 which supports high-quality HD video.

13 And next year we'll see the release of the
14 successor of H.264 -- understandably enough, H.265.
15 And H.265 is being prepared in concert with this
16 growing innovation in displays. 265 will actually
17 support what are called 8K displays or ultra HDTV
18 displays. So already we're seeing the march of
19 quality content moving extremely rapidly beyond the
20 level of DVD. Thank you very much.

21 MR. CARSON: Thank you.

22 Bobette.

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1 MR. COHEN: I just want to let you know that,
2 for Bobette's presentation, we're just going to turn
3 down the lights, because there's some audio-visual,
4 and we'll make sure to turn them back on right after
5 her presentation.

6 MS. BUSTER: Good afternoon.

7 MR. CARSON: One second, sorry.

8 Thank you. You can go ahead.

9 MS. BUSTER: Good afternoon. Thank you for
10 having me here. I'm Bobette Buster. I've been, since
11 1992, an adjunct professor at the University of
12 Southern California's graduate school of cinematic
13 arts in the Peter Stark producing program. I've also
14 been on the guest faculty of La Femis in Paris, the
15 University of Milan, and I've lectured in film and
16 business programs all over Europe, Japan and South
17 America.

18 Since 2000, I've also been on the guest
19 faculty of Pixar for the last 12 years. In the last
20 two years, I've been developing a specific program for
21 Disney animators, Sony animation, and I've developed
22 an extensive program about the history of Hollywood

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1 economics for 20th Century Box.

2 Basically -- I just want to get into what I
3 do, and that has to do with technological wonder --

4 MR. KASUNIC: Could you actually speak into
5 is the microphone.

6 MS. BUSTER: In the beginning, it all had to
7 do with technological wonder. When Thomas Edison
8 created the first films -- but he saw them like light
9 bulbs, and it took 25 years before D.W. Griffith
10 understood that it was story-telling, combined with
11 technology. And that was the shot heard around the
12 world, and that's the beginning of the industry the
13 U.S. now dominates worldwide since that time.

14 These are all the advances in technology that
15 visionary filmmakers have taken to the next level in
16 story-telling. So this is what I teach: How do you
17 take any idea with current innovations in technology
18 and do what visionary filmmakers have learned to do
19 progressively in our business?

20 I would like to just discuss one of the
21 leading concepts that I do. I'm going to take
22 six-and-a half minutes just to show you some of these

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1 concepts. And let's all remember all Hegel from
2 philosophy class. Actually, it was D.W. Griffith who
3 first understood this. It's the principle of editing.
4 And he got this from Charles Dickens.

5 Basically -- how do you create a big idea?
6 You combine two colliding ideas, and that's what we
7 call juxtaposition. So in 1972, Francis Ford Coppola
8 in the Godfather decided to do the following. This
9 little girl in white crosses over past Barzini. He's
10 the uber villain of the Godfather. What we're doing
11 here is setting up a DNA in the story that every time
12 you see a mafioso, you're going to see an innocent
13 child, the question being, how far would you go to
14 protect your family? In this world, you go as far as
15 murder.

16 So, notice, Tom Hagan right here, the
17 consigliere, he will be surrounded by two little
18 girls, and a pregnant woman will come into the shot --
19 because he's always there at the inception of the
20 murderous idea. The camera pans directly over to Luca
21 Brasi. Notice the little girl in white. He is the
22 man who is the hit man. This is a very deliberate

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1 choice in every single scene and sequence.

2 Notice in the next moment, Luca Brasi will
3 thank Vito for having been invited to his daughter's
4 wedding and he will pledge -- well, you won't see
5 that, but he pledged his undying loyalty. And at that
6 moment, children scattered into the room all around
7 him, showing the visual that Luca Brasi has done many
8 instances of murder for the Godfather.

9 And, finally, in the climax of the movie, the
10 priest asks this of Michael as he's standing godfather
11 to his sister's baby. And then we see that he's also
12 wrought a baptism of blood and -- by killing the heads
13 of all five families in New York City. And the priest
14 says, will you go in peace? And indeed he will
15 because now he's the uber Godfather. How far has he
16 gone to protect his family? He's gone as far as to
17 damn himself to hell in the middle of the Catholic
18 church consciously in a ceremony.

19 So the next instance I want to show you is a
20 turning point in Pixar's history. John Lasseter had
21 given Toy Story 1 two to another director. When he
22 saw it, he was devastated. He said it had no heart.

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1 He took it back. And Ed Catmull said, in the Harvard
2 Business Review, that it was this scene, of which
3 we're only going to see a minute out of
4 four-and-a-half minutes, that was the turning point in
5 Pixar's history.

6 Notice, the reflection of Jessie. She has
7 been thrown under the bed by her child. As it turns
8 out, she will have been there perhaps 10 or 15 years.
9 Notice the dust and, as the pink is taken out from
10 under her, we turn to a world of autumn colors.
11 There's even dust on her hat.

12 And what we're learning here, as Bruno
13 Bettelheim said in the Uses of Enchantment, is that
14 fairy tales very necessarily psychologically prepare
15 children for life's inevitable tragedies.

16 In this sequence, the music is so sad, it's
17 in direct contrast to the rest of the film which is in
18 blues and yellows and upbeat and fun. And what Jessie
19 learns is what we all have to learn, that some day
20 someone we love will throw us away. Our hearts will
21 be broken. We'll be thrown into a nursing home. We
22 will be abandoned. This is extremely important to the

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1 power of the entire film. And once they understood
2 this, Ed Catmull said, that transformed Pixar's
3 history, and they now have the greatest track record
4 of blockbusters in history.

5 But they forget you. And this is Woody's
6 journey. At the very end of the film, he has to say
7 to -- he's standing on the threshold of a window
8 looking out at Andy, knowing he's going to grow up and
9 go away to college. And Buzz says, well, what do you
10 think about that? And he says, I'm going to cherish
11 every day as long as it lasts. I'm going to love
12 anyway. Such is the power of cinematic story-telling.

13 And, finally, I'd like to talk about a
14 concept called the power of rhymes. This is extremely
15 important in cinema story-telling. In Steven
16 Spielberg's tour de force film, Schindler's List, we
17 have the concept of, what is the power of
18 industrialization? Notice, this is a master shot, all
19 in one sequence. As the camera dollies in and out,
20 the lighting, Cartier-Bresson-like lighting, high key
21 whites and darks. Notice, we can see the steam coming
22 out of this, and we are watching in real time as a pot

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1 is made, and it's astonishing; it's wonderful, isn't
2 it? And we are on the same wavelength as this man
3 here who is -- who would have had a destiny going to
4 Auschwitz, but Schindler hired him just to bring him
5 into his -- because he was cheaper -- to be in the
6 factory.

7 Now, this last shot we just saw, that's eight
8 seconds long. That is the fulcrum of the story. It
9 proves that Schindler is going to be a huge success.
10 He's got millions of pots and pans. He's going to
11 make a lot of money with the SS. And, guess what? It
12 shows the volume of industrialization.

13 And then, in our final shot here, this is the
14 shot we call the rule of threes that leads us to the
15 emotional horror of Schindler's List. Because guess
16 who else had this idea of industrialization? Hitler.

17 So in a rhyming shot of dollying, going in
18 and out, very painstakingly with the same lighting
19 gray scale we see how deliberate and intentional the
20 process was for Hitler and the SS to eliminate an
21 entire 6 million race of people. Its volume,
22 industrialization.

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1 And what happens in cinema is all about the
2 orchestration of emotions. What you want to do is
3 take people from the opposite emotion first, which in
4 this case was delight and wonder -- and now, as we're
5 facing this and taking it in, we are waking up and
6 going, oh, my God. And what we are on is the same
7 wavelength as the jewelry appraisers we are about to
8 meet -- and I want you to notice they're all wearing
9 the gold Star of David. They're Jewish men working
10 for the SS. And, finally, one man wakes up. We are
11 on his wavelength. We are waking up to the horror of
12 industrialization.

13 And in this scene, which is a classic
14 Spielberg scene, he makes it very clear now -- this is
15 50 minutes into the story -- what this film is about.

16 And finally it climaxes -- because cinema is
17 the art form of transformation -- in this. I saw a
18 documentary shortly after World War II in which an SS
19 officer said very matter-of-factly, you know, that the
20 job of killing millions of people, it's a messy
21 business, and the big problem is management because
22 the men on the front line go crazy. So it's a

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1 management issue. You need to separate them from the
2 problem. Hence the gas ovens. He said it very
3 matter-of-factly.

4 So what we need to do is, in the madness of
5 this situation, you start asking, what should I have
6 done? It's overwhelming. And in this case -- listen
7 to this line of dialogue.

8 Party, Auschwitz in one sentence. That's
9 juxtaposition, and that's horrifying. What could one
10 person do?

11 And so what Spielberg does -- what he's
12 foreshadowed is he shows a little girl with a red
13 coat, and she's now dead. We had seen her once before
14 alive. She is Schindler's conscience, and at this
15 moment he wakes up. In this scene, we go from madness
16 to enlightenment. And that's what cinema does best.

17 Now, I seek to make an e-book of my course
18 because it's all about technological wonder. This is
19 all I've been able to do right now because I've
20 appealed to the studios, and I have been rebuffed at
21 every turn.

22 First of all, they don't really do business.

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1 They don't return e-mails or phone calls. And once
2 they do, they will give me a very high price, or they
3 will say I have to reach all the descendents who were
4 ever in the scene, including the musicians -- I even
5 got a hostile cease and desist letter from one
6 attorney.

7 And what I would like to do is an e-book like
8 this. Look at this. Ten minutes into Toy Story 2 we
9 see Woody challenge Buster, the dog, to reach for the
10 sky. He then gives Buster a belly rub and says, who
11 is going to miss me when I'm gone? This is the scene
12 of the entire film foreshadowing Woody's journey.

13 I am appealing for exemptions to the DVD --
14 to be able to use DVDs for my life work.

15 And, finally, what I'd like to say is I have
16 tried to do this with only 200 people a year worldwide
17 in the ivory tower. I would like to now be able to
18 broadcast this in an e-book to those thousands or
19 millions would like access to this material which you
20 could only get through the process of mentoring and
21 education. We could only wonder what the
22 technological wonders and story-telling they would

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1 discover then.

2 Thank you very much.

3 MR. CARSON: Thank you.

4 Whenever you're ready.

5 MR. COHEN: So my name is Alex Cohen. I'm
6 here again on behalf of documentary filmmakers and
7 fictional filmmakers and e-book authors to clarify a
8 few points, along with my colleague Brendan Charney,
9 that have been made or discussed over the last few
10 weeks in the hearings.

11 First, there really should be no question
12 that documentary filmmakers, fictional filmmakers and
13 e-book authors clearly make fair use. Everyone agrees
14 on this, and there's a really good reason for that.
15 All three of these groups are supervised and, in a
16 sense, regulated by very conservative gatekeepers, the
17 errors and insurance (sic) companies that ensure that
18 any form of fair use that actually is going to be
19 inserted into these films or e-books is clearly fair
20 use and has been reviewed and opined on by an attorney
21 who has experience doing that.

22 Not to mention the fact that the filmmaking

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1 community has a statement of best practices that deals
2 with fair use and that they are rights holders in
3 their own regard and, therefore, are also very
4 concerned with abiding within the law and being true
5 to the meaning and intent of fair use.

6 In addition, I just wanted to quickly
7 clarify, in case it's unclear, for the e-book
8 exemption we are only asking for DVD and digitally
9 transmitted video. And even though, as Peter stated,
10 the capability of e-books is actually or at above
11 Blu-Ray HD, that is not what we are asking for because
12 we're only asking for what we consider the bare
13 minimum to ensure the ability for e-book authors to
14 make effective fair use.

15 And that leads into the next point, which is
16 that the fair use that has been discussed and, as
17 Bobette has shown, requires the ability to make
18 nuanced and detailed analysis -- and as Bobette did
19 so -- better than I could have ever done -- when you
20 see -- when you need to see the dust on the floor,
21 when you need to see the reflection on the wood or
22 when you need to see the splattering of water in the

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1 Schindler's List scene, that's just not possible
2 unless you have an exemption. It's just not possible
3 with any of the alternatives that have been discussed.

4 And it's not possible because, as Jim
5 discussed, no alternative is sufficient because these
6 alternatives are too expensive, they're two
7 complicated, and they will not satisfy critical
8 technical standards that are set by distributors and
9 broadcasters.

10 In particular -- I just want to make a quick
11 point -- we've discussed a lot or had a lot of
12 discussion about hardware scan conversion and
13 up-conversion. And Jim -- I think Jim is a very
14 modest person. I just really want to make it clear
15 that Jim is in the top of his field, and he has more
16 than 40 years' experience working with film, with
17 technologies and things that could be called proposed
18 alternatives, and that -- there's almost no one else
19 in the U.S. who knows what Jim can do or even has a
20 Jim involved or would even know how to do the work
21 that Jim does.

22 And as Jim stated very, very well, you know,

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1 filmmakers call him because they don't know what
2 they're doing. And that's actually the reality of the
3 majority of filmmakers in the U.S. They don't have
4 technical directors and they don't have access to
5 knowledge, expertise or financial wherewithal to even
6 use these exemptions.

7 And, as a result, if an exemption is not
8 granted, what would happen would be only a handful of
9 filmmakers would be able to make fair use, and they
10 wouldn't even necessarily be able to make fair use;
11 they would be able to attempt to make fair use and try
12 to use things that, for all the reasons that Jim
13 talked about, frequently do not meet these critical
14 broadcast standards and, as a result, nearly all
15 filmmakers, and probably even more e-book authors
16 would not be able to make fair use; they would be
17 foreclosed from that.

18 Finally, for my portion of this testimony, I
19 just want to make two very small points about things
20 that were said at prior hearings.

21 The first is, on May 11th, Jim briefly
22 mentioned the use of up-conversion with regards to

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1 CNN. We would just like to clarify that CNN is a
2 broadcaster in its own regard and does not necessarily
3 have to meet the stringent technical and distribution
4 standards that a third party, like Kartemquin, would
5 have to in order to get distributed on PBS or in
6 theaters. And as Jim talked about very -- you know,
7 very proficiently, up-conversion has many, many
8 issues, and the sources that allow up-conversion are
9 rapidly disappearing.

10 On a second point, you may remember, on
11 May 17th, Mr. Laurence Thrush, who spoke on behalf of
12 fictional filmmakers, talked about sending out a clip
13 for up-conversion in order to get a film in a film
14 festival. We also wish to clarify that the technical
15 standards for film festivals and for ultimate
16 distribution and broadcast are completely different,
17 and the latter, being the true requirements for
18 distribution and broadcast that are critical to
19 filmmakers like Gordon and all of his colleagues, are
20 extremely stringent, and they have very strong
21 restrictions with respect to up-conversion and all of
22 the other alternatives that have been discussed over

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1 the last few months.

2 And, with that, I'd like to hand it over to
3 my colleague, Brendan Charney.

4 MR. CHARNEY: Thank you very much.

5 The opponents have made a lot of screen
6 capture, but it's unclear if it even qualifies as an
7 alternative. Even if rights holders in the room
8 concede -- even if rights holders in this room state
9 that screen capture doesn't violate the DMCA, that
10 doesn't prevent other rights holders or other people
11 who might bring claims.

12 Filmmakers and authors can't rely on screen
13 capture because screen capture is a broad term that
14 encompasses many software products. And these
15 software products involve digital methods that operate
16 within the black box of a program that a user can't
17 scrutinize or understand. These programs can be
18 easily updated without a user understanding how
19 they've been updated.

20 That means that if the Copyright Office were
21 to deny an exemption based on the idea that screen
22 capture could be an alternative, we would see a

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1 situation in which filmmakers would look at this black
2 box product, not know whether or not it would violate
3 the DMCA and, in the face of the risk that this
4 uncertainty creates, many would fear that the crushing
5 liability and sanctions that a DMCA violation brings
6 just aren't worth making fair use in a particular
7 instance.

8 When that's aggregated across the entire
9 filmmaking community, we would see a lot of fair uses
10 not being made, and that's exactly the sort of harm to
11 fair use that this rulemaking is designed to prevent.

12 We'd also like to clarify a few points about
13 licensing. Now, there's no question that licensing
14 forecloses critical uses because, as has been
15 discussed, nearly every license involves a
16 non-disparagement clause that expressly prevents the
17 sort of film criticism and social criticism that fair
18 use really allows and that it is designed to allow
19 under the First Amendment.

20 But we would also like to mention that even
21 for non-critical uses, one license isn't enough. If
22 one rights holder grants a license, that won't

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1 necessarily prevent others from bringing suit under
2 the Digital Millennium Copyright Act. In fact, most
3 licenses contain standard clauses that in some
4 instances state that the license isn't complete and,
5 in other instances, require the licensee to obtain
6 permission from all others who might claim rights to
7 the material. That's the sort of probe that
8 Ms. Buster has encountered.

9 This makes clear that the burden that
10 licensing would impose for even non-critical uses
11 would impose a substantial adverse effect, and that's
12 why an exemption is needed. And that's the point.
13 Congress created this rulemaking in order to prevent
14 requiring licensing for fair use.

15 Finally, this exemption won't lead to any
16 piracy or any other sorts of harm. That's the final
17 point that we want to make and emphasize. And it's
18 the point that's ultimately -- in the face of the
19 adverse effect our filmmakers and authors are
20 suffering, it's the point that shows that this
21 exemption absolutely should be granted. Nobody has
22 alleged any piracy flowing from the previous

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1 exemptions, or even any current perception of piracy
2 or confusion. That's because the previously granted
3 exemption, like the ones proposed today, cover a
4 clearly defined group of responsible creators who
5 themselves rely on copyrights and digital protection
6 for their own works. That's why there's no basis to
7 even speculate that harm would flow from these two
8 exemptions.

9 For the reasons that we've discussed and
10 others have discussed, proposed classes 7D and 7E are
11 perfect examples of the sort of non-infringing uses
12 that Congress intended to grant exemptions for. Thank
13 you very much.

14 MR. COHEN: I'm sorry. Just one last quick
15 point in case I wasn't clear before. When filmmakers
16 do call Jim and ask for his help, because there are
17 very few Jims out there in the filmmaking community,
18 the ultimate answer that they come to is they just
19 can't do it, either it's too complicated, it's too
20 expensive -- they don't even know if it's going to
21 meet the standards.

22 So -- I don't want to take away the thunder

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1 from that last statement. I just want to be very
2 clear that the answer is that filmmakers aren't using
3 it, even when they are able to talk to Jim, because it
4 just can't meet their needs and it can't meet the
5 distributor's requirements. So thank you very much.

6 MR. CARSON: Thank you.

7 Okay. We move on to the other side now.
8 Dean, are you going first?

9 MR. MARKS: Yes. I'm just going to take a
10 second to get set up, if that's okay.

11 So I'll start -- thank you for giving us the
12 opportunity to testify here today. I am, as this
13 morning, representing AACCS LA, the Advanced Access
14 Content System Licensing Administrator. We're still
15 the same organization we've been this morning, so I'm
16 not going to go into that.

17 We respectfully submit that these proposed
18 exemptions for classes 7D and 7E be denied. And the
19 reasons for that are as follows. One, for the
20 filmmakers, we really haven't seen identified AACCS
21 protected works that are unavailable for
22 non-infringing uses. For example, one of the

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1 witnesses testified that there were films available
2 only in BD protected by AACS that were not available
3 in DVD. And we've just really not been able to find
4 that except for certain -- a very small set of
5 director's cuts or bonus material. But, to our
6 knowledge, because, as we testified, that BD is still
7 an emerging format and the dominant format is DVD,
8 that film titles that are available on BD are also
9 available on DVD for which the circumvention --
10 exemption for documentary filmmakers exists.

11 And vidders and e-book creators do not
12 specific AACS technology in the proposed classes and,
13 therefore, should -- we have just -- are confirming
14 that they are not seeking an exemption to circumvent
15 AACS in this rulemaking proceeding.

16 So for the documentary filmmakers as well as
17 the fictional filmmakers, there are alternatives. For
18 the documentary filmmakers, there is the use of the
19 work on DVD. It was stated that, for broadcasting
20 purposes now, the standard definition would not work
21 for documentary filmmakers. But in our looking at the
22 PBS website, it says that PBS will accept video that

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1 is acquired in standard definition and up-converted to
2 Sony HD cam video format for submission.

3 And it may well be, for documentary
4 filmmakers, that clips that they seek to use are not
5 available in high definition. Zapruder footage from
6 the Kennedy assassination that I've seen in many
7 documentary films simply isn't available in high
8 definition. So I don't believe that public television
9 stations are going to ban documentaries and not
10 broadcast them that include that particular footage
11 simply because it's not in high definition.

12 And for documentary filmmakers who have the
13 wherewithal to be obtaining E&O insurance and the like
14 in producing films for broadcast on PBS, we believe
15 this up-conversion capability is not beyond their
16 reach.

17 But the other thing we wanted to demonstrate,
18 in particular for documentary filmmakers and for
19 fictional filmmakers, is the fact that, unlike from
20 the panel this morning, they typically have access to
21 them -- they typically have access to very, very
22 high-quality cameras because they use those cameras to

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1 shoot their films.

2 And so -- David was going to just display a
3 clip that was made from shooting with a camera -- a
4 Panasonic HPX2000. The manufacturer's suggested
5 retail price is \$28,000. They're available on eBay
6 for between 10 and \$12,000. And so here's a clip that
7 was made using a camera taking the recording from a --
8 was it a computer screen?

9 This is from War Horse.

10 (Video played.)

11 MR. MARKS: The point here is that video
12 capture software, which we were speaking about this
13 morning, which costs under \$50 or \$40 and seems to be
14 an acceptable tool, we would contend, for educators --
15 we wouldn't expect educators to have these high-end
16 cameras.

17 If you're a fictional filmmakers or
18 documentary filmmaker, perforce you're going to be
19 making your product with a high-end camera,
20 particularly if it has to be in high definition to
21 meet broadcast standards. And so we believe this is a
22 perfectly reasonable alternatives to use a camera of

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1 high quality to capture and, if you will, camcord off
2 a screen in order to be able to use clips.

3 And then -- we talked about clip licensing a
4 little bit. We believe that -- and since my regular
5 job is really for a studio -- that the studios have
6 really gone -- made incredible progress in making the
7 clip licensing process easier. Universal has an
8 online site. We had testimony from the 17th that
9 Warner Brothers regularly responds to clip requests
10 within 48 hours.

11 We appreciate the fact that, in terms of uses
12 that may be considered very critical and disparaging,
13 that often the clip licenses do have those provisions,
14 so we acknowledge that clip licensing isn't the answer
15 for every single use that a documentary or fictional
16 filmmaker might seek to make, but we believe it
17 shouldn't be dismissed out of hand as not a viable
18 alternative.

19 And, finally, we wanted to -- so we were just
20 displaying some of the screen shots from Universal's
21 online clip licensing service.

22 For documentary filmmakers, we wanted to

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1 display this little bit about -- from a documentary
2 filmmaker named Aron Ranen and his experience with
3 working with the United States National Film Archives
4 where a filmmaker can go in and access the work that
5 is in the archives and create a very good copy by
6 using audio and video cables, which is permitted by
7 the archives. Again, another alternative for that.

8 And, finally, in terms of discussing the
9 documentary filmmakers and the need for the
10 highest-quality material, we were looking at some of
11 the submissions from Tamsin Rawady -- I hope I'm
12 pronouncing her name correctly -- who did the
13 documentary film *Bigger, Stronger, Faster**, and wrote
14 a very interesting piece about fair use and trying to
15 get the outlines of fair use, and was talking about
16 that as well as the access to materials. And what she
17 said is that they ended up mastering from a whole
18 variety of materials, things like old VHS recordings
19 of TV shows, low-res online downloads for which no
20 master existed.

21 So we believe it's typical for documentary
22 filmmakers to access many, many, different sources of

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1 materials of various qualities in order to put
2 together the final product.

3 It was interesting. She said also, in a few
4 cases, we actually decided to pay for the license of
5 clips for which we knew we could employ fair use
6 simply to get the high quality master.

7 So sometimes clip licensing isn't necessarily
8 about the permissions. It can be about getting access
9 to the underlying master material because studios,
10 when they grant licenses, work with the filmmakers to
11 try and deliver the content in the format that's going
12 to be the most useful for them.

13 I just wanted to sort of comment on a couple
14 of the comments that -- it was either Brendan made or
15 one of the other witnesses. We shouldn't confuse the
16 fair use and the access controls measures because, for
17 example, if you're given a no-objection letter and
18 that letter says you may need to get rights from the
19 musicians involved or the talent involved or other
20 parties involved -- we, as a studio, are simply saying
21 that we're not objecting to your use -- the fact that
22 there may be talent rights involved has nothing to do

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1 with access control measures. It simply has to do
2 with fair use rights, or fair use -- rights and fair
3 uses.

4 So if you have fair use and you're confident
5 that your use is a fair use, then you wouldn't need to
6 seek the underlying talent consents because you would
7 be relying on your fair use defense.

8 So to say that that permission somehow
9 negates -- the fact that a letter, a no-objection
10 letter somehow negates its value because it may say
11 that you need to go seek other permissions really
12 doesn't seem to hold water to me because, if it's fair
13 use, it's fair use, and you don't have to go seek
14 other permissions.

15 And so I think it's important not to confuse
16 rights, permissions, fair uses with the notion of
17 whether you actually need to have an exemption to
18 circumvent technical protection measures in order to
19 make the fair uses. And I think there's been a little
20 bit of a mash-up of that in the earlier testimony.

21 And now that I made that detour, let me just
22 go back to this. So it's common practice for

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1 filmmakers to go to various sources with varying
2 degrees of quality to obtain their clips. As I
3 mentioned, clip licensing is available, and the issue
4 is not necessarily the legal requirement, or lack
5 thereof, but rather simply as a mechanism to access
6 the source and the format.

7 Technical protection measures like AACS
8 actually facilitate non-infringing uses because it is
9 those technical protection measures that have made the
10 content owners comfortable to release the content out
11 into the market in the first place where then
12 documentary filmmakers, or other filmmakers, can take
13 advantage of copying that in ways that don't involve
14 circumvention. And, in fact, we think this will
15 actually make it less likely that filmmakers will have
16 to rely on the studios to provide access to the
17 underlying source materials.

18 And I just wanted to just briefly talk about,
19 you know, again, the value of technical protection
20 measures to the studios and the filmmakers for AACS as
21 well as for DVD -- CSS for DVD. We use those measures
22 in order to facilitate our sale of content through the

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1 home entertainment market. It's a market that is in
2 decline over all, even including BD and new digital
3 distribution models. That's what that last slide
4 showed.

5 And from this slide what you can see is that,
6 although the overall market is declining, BD is a
7 bright spot. BD is the little blue bar there, and it
8 is increasing and, therefore, it's one of the bright
9 spots and we think it deserves particular caution
10 before granting any sort of exemptions to the
11 protection measures that protect BD.

12 And, finally, this slide is showing, based on
13 third-party studies, about where we are today in the
14 BD market, the adoption of Blu-Ray players being at
15 around 40 million households, and expected to rise to
16 at least 64 million households in 2015.

17 And, here again, it's showing year by year on
18 a quarterly basis, the growth, the positive growth in
19 BD, which is in excess of 20 percent and, therefore,
20 you know, we believe that that augurs for caution in
21 granting exemptions.

22 That's it. Thank you.

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1 MR. CARSON: Thank you.

2 Bruce, are you ready.

3 MR. TURNBULL: Yep. Again, I'm Bruce
4 Turnbull here, representing the DVD Copy Control

5 Association. As with AACCS, we're the same

6 organization this afternoon as we were this morning.

7 And I want to make a few points in relation to this
8 panel discussion.

9 First, to clarify, DVD CCA does not object to
10 the renewal of the documentary film exemption.

11 DVD CCA does object to the creation of new exemptions
12 for fictional filmmakers or e-book creators.

13 The -- here, our distinction is made in part
14 on the likelihood that a use is fair use in the broad
15 categories that have been described. Where we think
16 that it's much more likely that, in a documentary
17 film, that the use is fair use, in a fictional film,
18 we're not at all as certain. And to have a broad
19 category exemption for all fictional films would seem
20 to invite the possibility that the uses of the
21 exemption would not, in fact, be fair use, and that --
22 we don't believe that it has been demonstrated here

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1 that a sufficiently high number of them would be fair
2 use to warrant an exemption.

3 The same is true with e-books. There, the
4 experience is much less. We have much less experience
5 because this is a new phenomenon, a new market, but
6 our concern is that we don't believe that the numbers
7 of uses that have been put forward in terms of, again,
8 the broad category of all multimedia e-books would
9 necessarily lead to a high percentage of those uses
10 being fair use.

11 We also believe that there are a number of
12 alternatives that are available. We've just seen the
13 high-quality camera shot of a high-resolution screen
14 that would be available for filmmakers who have access
15 to a professional-level camera. Even for those who
16 don't have access to the level of camera that we
17 did -- we didn't go buy a camera like that. We hired
18 a videographer for a relatively minor amount of money
19 per day to work with us to create that. So that's,
20 you know, not beyond -- the fact that you might not be
21 able to afford a 20 or a \$40,000 camera doesn't mean
22 that you don't have access to it.

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1 Similarly, the video capture software --
2 there's been quite a bit of discussion during the
3 course of the day about the quality of that and, for
4 certain purposes, we understand it may not be at the
5 quality, but for other purposes, it should provide the
6 quality images -- the e-book creators, for example,
7 may well be able to make use of video capture
8 software, as we have demonstrated.

9 That was able -- again, just to re-emphasize
10 the point I made this morning -- but in this context
11 to make the point that the Replay Video Capture
12 software was sufficiently high quality -- was able to
13 make an image of sufficiently high quality as to make
14 a distinction in that scene in All the President's Men
15 so you could tell that two parts of the scene were in
16 focus and the in-between was not. We believe that's
17 high enough quality for many uses, if not most.

18 And with regard to the fictional filmmakers,
19 again, the licensing of clips for these types of uses
20 is standard practice in the movie industry and
21 provides -- and actually can provide the actual
22 format, which is a point Dean was making, that may be

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1 needed by a particular moviemaker as opposed to taking
2 either DVD or Blu-Ray and then having to modify that
3 format in any event, having to process that format to
4 become the form that the moviemaker needs.

5 And for all of those reasons, we believe that
6 those two new requests should be denied, and I'm happy
7 to answer any questions.

8 MR. CARSON: Thank you very much.

9 Steve.

10 MR. METALITZ: Thank you. Steve Metalitz,
11 representing the seven national organizations under
12 the name of Joint Creators and Copyright Owners.
13 Thank you again for structuring this hearing in the
14 way that you have, because I think it's important to
15 distinguish among the different types of uses of
16 audio-visual material that are now covered by a single
17 exemption. We think they present significantly
18 different and pretty distinct cases, and we think this
19 is true both -- with respect to the two main, if you
20 will, types of issues here: First, are the uses that
21 are intended to be made through circumvention, in
22 fact, non-infringing, which is the standard for this

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1 proceeding which the proponents have the burden of
2 meeting; and second, whether -- if, in fact, that
3 burden is met, are there alternatives that are
4 available to people who wish to make those
5 non-infringing uses that don't involve circumvention?

6 Both of those categories are present in all
7 three of the flavors of this circumvention of TPMs for
8 audio-visual materials exemptions, but I think the mix
9 is quite different in the three of them. I'll say a
10 little bit about both of them, both the question of
11 alternatives and the question of whether the use is,
12 in fact, non-infringing.

13 Logically, I guess I should start with
14 whether the use is, in fact, non-infringing, and I
15 think it was Alex who said clearly this is all fair
16 use because there are gatekeepers involved. Errors
17 and omission insurance has been obtained, best
18 practices have been followed, and clearly that means
19 everything that's done here is fair use.

20 I think that very much overstates the case,
21 but I do think that productions that meet those
22 criteria are certainly much more likely to be fair use

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1 than the category of -- that's proposed which simply
2 is someone making a documentary film or -- documentary
3 filmmaking or fictional filmmaking, and they have a
4 reasonable belief that the circumvention is necessary.

5 I don't see anything in that proposal about
6 gatekeepers or about obtaining insurance or about
7 these other safeguards, if you will, that I think
8 would substantially increase the likelihood that the
9 uses that we're talking about are, in fact,
10 non-infringing. There is no guarantee and there will
11 continue to be dispute about this, I'm sure, but I
12 think it makes a big difference, and if that's the
13 basis on which this assertion is made, then it's going
14 to have to appear, I would think, in the exemption
15 itself.

16 I think -- with respect to e-books, I think
17 the record is probably not quite as clear on this.
18 I'll get to that in a minute. But the professionals
19 who obtain errors and omissions insurance, I think
20 probably -- even though there's only one Jim
21 Morrissette, I think there's probably other people who
22 won't be intimidated by a 249-page manual for

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1 operating the equipment that's needed. I would be,
2 but I'm not in that business. I think even -- for the
3 professionals, I think there's a greater insurance
4 that the use is, in fact, non-infringing. There's
5 also probably a greater availability of alternatives,
6 so let me turn to alternatives.

7 I think the case for alternatives here really
8 depends on another set of gatekeepers. We're told
9 time and again that PBS requires everything to be in
10 high definition, won't accept up-conversion and,
11 therefore, in order for people to make these uses,
12 these non-infringing uses, they need the exemption. I
13 think -- I would just encourage the office to probe
14 that a bit. I think, as we've already stated, if it
15 were the case that anything that isn't done in HD,
16 isn't native HD, were banned from America's airwaves,
17 we would be losing a great deal of our national
18 heritage. We would be losing a lot of Gordon Quinn's
19 films that he's made over the years. I don't think
20 it's quite that black and white, if you will, or it's
21 not quite that clear, in other words. How tightly the
22 gate is being monitored here.

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1 Even if it were, I would again just call your
2 attention to the legislative history of the provision
3 that you are applying here. If you look on page 639
4 of the House managers' report, page 6 of the Copyright
5 Society reprint of that, and it tells you that adverse
6 impacts on non-infringing uses that flow from other
7 sources, including marketplace trends, other
8 technological developments or changes in the roles of
9 libraries, distributors or other intermediaries are
10 outside the scope of the rulemaking.

11 So in terms -- this is the legislative
12 history of the provision you're expected to apply
13 here, you're required to apply here, so I think that
14 has to be taken into account in evaluating whether the
15 distribution -- the intermediary gatekeepers, the
16 networks and so forth, are really rigorously and
17 without exception requiring HD to the extent that
18 would justify the exemption that's sought.

19 I think, to the extent that that's not -- I
20 mean, this particularly turns on the Blu-Ray question,
21 but it also goes the question of streaming video. And
22 I think if you look at the chart that Dean just

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1 showed, DVD is still very much with us. It's still
2 three-quarters of the volume of -- of the business, as
3 I roughly calculated. Blu-Ray is growing, but it's
4 not a lot yet. And as Dean pointed out, everything --
5 just about everything that's available on Blu-Ray is
6 also available on DVD. So also unless you are
7 convinced that the proponents have met their burden of
8 showing that they simply can't get on television
9 without -- and can't use up-conversion and so forth
10 and are just going to be entirely shut out of that,
11 and if you reconcile that with the legislative history
12 says, I think those are some hurdles that have to be
13 surmounted.

14 Finally, with respect to the e-books, I think
15 the record is probably much less well developed on
16 that both in terms of whether there is an
17 equivalent to the gatekeeping that Alex talked about
18 for documentary filmmakers -- in other words, is there
19 some type of assurance that at least increases the
20 likelihood that the uses will be fair in the e-book
21 setting? I have no quarrel with the uses we were
22 shown here, if they were appearing in an e-book. But,

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1 again, this covers everybody. This would cover all
2 the e-book producers, and that's, you know, a concern
3 that we have.

4 And second, in terms of the other
5 intermediaries, I wasn't clear -- and maybe I didn't
6 fully appreciate Peter's testimony -- but I don't
7 think we have the same situation as described by the
8 documentarians of a rigid gatekeeper who won't let
9 anything non-HD through. So I would just encourage
10 the office to probe those issues a little bit more.

11 I think the demonstration that was shown
12 with -- using professional equipment was pretty
13 impressive. I'm sure Jim will tell us all the areas
14 in which it falls short from his perspective. But I
15 think it helps to show that, just as in the previous
16 panel, one thing we know has changed over the last
17 three years is that the alternatives have become more
18 robust. The availability of the material has become
19 greater. The licensing part of it, which I agree is
20 not the whole answer, but it may be part of the
21 answer, is much more available. The screen capture,
22 video and technology -- editing technologies have

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1 become more robust and more able to deliver a higher
2 quality product. So I think that has to be taken into
3 account in comparison with three years ago.

4 But in the final analysis, I think your
5 decision on this really will need to turn on whether
6 the exemption is defined clearly enough to reduce the
7 currently very high risk that it will -- that a lot of
8 these uses will not be non-infringing, and secondly,
9 on whether there are reasonable alternatives available
10 that will enable the non-infringing uses to be made.
11 Thank you.

12 MR. CARSON: Thank you. One question for
13 you, Steve. I think you may have distinguished your
14 position from that of DVD CCA, but I want to make sure
15 I have a clear understanding. If I understood Bruce
16 correctly, and correct me if I'm wrong, Bruce,
17 DVD CCA, in any event, is okay with the existing
18 exemption for documentary filmmakers.

19 MR. TURNBULL: Right.

20 MR. CARSON: I think I heard the opposite
21 from you; is that right?

22 MR. METALITZ: Yeah, that is not our

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1 position. Again, you have to determine whether
2 they've met the burden based on the evidence that's
3 presented at this time to meet that -- to meet that
4 standard.

5 I think if they are to be -- if there is an
6 area in which -- let me put it this way. It seems to
7 be more likely that that burden can be met if the
8 exemption is narrowed significantly to incorporate the
9 kinds of gatekeeping safeguards that the proponents
10 themselves are -- are repeatedly talking about and I'm
11 sure the proponents sitting at this table abide by.
12 But our position is in opposition to renewal of the
13 exemption.

14 MR. CARSON: And maybe this is cutting it a
15 little too finely, but is your position saying that
16 they haven't met their burden or is your position
17 that, in fact, there is no need for such an exemption?
18 You made a --

19 MR. METALITZ: They haven't met their burden
20 of showing that there is a need because they have to
21 show that the uses are, in fact, non-infringing and
22 that there are no alternatives, and I think on both

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1 counts that could be questioned.

2 MR. CARSON: I will give you folks an
3 opportunity to say anything in direct response to what
4 you've heard from these folks, but on the last point
5 made, which is with respect to the documentary
6 filmmaking exemption that is now in place, I'd like
7 your reaction to the notion of building in some
8 additional protections perhaps centered around the
9 gatekeepers that you've spoken about for, example. Is
10 that workable, desirable, totally unworkable, totally
11 undesirable? What's your reaction to that?

12 MR. DONALDSON: You asked that question the
13 last time with regard to insurance, and I could tell
14 you were wanting to enrich the definition of the
15 restriction.

16 MR. CARSON: I'm just wanting to get answers
17 to my questions. That's all I want.

18 MR. DONALDSON: The insurance clearly won't
19 work. Just comes way too late. I'll be darned if I
20 could think of anything in the documentary field that
21 would work or is needed because the exemption has
22 helped literally hundreds of filmmakers make films

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1 that are impact -- more impactful, get the message
2 across better, without any adverse impacts. No
3 piracy, no expansion.

4 So I did struggle, because I sense your
5 desire there, but I don't see any way to change that
6 rule that would help anybody do anything except
7 perhaps discourage a couple of uses.

8 MR. CARSON: Steve, what about that point
9 that E&O is sort of one of the last steps so -- and by
10 the time you get to E&O carrier, the circumvention has
11 already taken place?

12 MR. METALITZ: That's true, but let's look at
13 this realistically. I mean, again, what we're trying
14 to -- what I think the proponent is trying to avoid
15 here is the risk of a lawsuit from a copyright owner,
16 or anybody else with standing under section 1203
17 against the circumvention, I mean, because, you know,
18 fair use -- there's going to be disputes about fair
19 use, but that's a separate issue.

20 I think it's extremely unlikely that those
21 suits would be brought before the -- in most cases,
22 the potential plaintiff wouldn't even be aware of the

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1 circumvention having taken place until the documentary
2 is released. By the time the documentary is released,
3 there either is insurance or there isn't insurance.
4 And if the producer has decided to go naked and not
5 take on insurance, then perhaps that's a factor that
6 should be taken into account in deciding whether --
7 you know, then this would be a lawsuit -- let's
8 remember, this is not a copyright infringement lawsuit
9 and doesn't have the -- even the remedies that
10 copyright infringement would bring. \$2500 statutory
11 damages. I mean, obviously, if it's an extremely
12 successful documentary that makes millions of dollars
13 and the material involved is, you know, a very large
14 part of the film, then perhaps there's potentially
15 large damages there. But I think -- let's not confuse
16 this with a copyright infringement case.

17 But I think -- as a matter of practice, I
18 don't think it's -- I don't think it would be
19 impractical because I don't think these claims are
20 likely to arise except in cases where a film is
21 actually distributed.

22 MR. CARSON: I get your point as a practical

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1 matter, but yet, in trying to craft an exemption, I
2 guess what you would be suggesting we do is come up
3 with an exemption that is the sort of conditional?
4 Well, conditional isn't even the right word. I'm
5 trying to figure out how it works because the
6 exemption is an exemption from liability or the act of
7 circumvention which you will engage in clearly before
8 you've taken the step of an E&O review. And you don't
9 know at that point what the result of that E&O review
10 is going to be. So --

11 MR. METALITZ: But you have to know what use
12 you're going to make. To qualify for the exemption as
13 proposed, you have to know what use you're going to
14 make of the material that's been circumvented. You
15 have to know that you're circumventing it solely for
16 incorporating short portions for the purpose of fair
17 use, so --

18 MR. CARSON: Right, but you're trying to put
19 in a requirement that you go past that gatekeeper,
20 which is something that's going to happen at some
21 point in the future following the circumvention. And
22 we've certainly never done that before, and it strikes

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1 me as rather odd to craft an exemption that, what,
2 that requires that you have a good faith intention to
3 go to an E&O carrier? Is that it? Or how do you do
4 that?

5 MR. METALITZ: Again, I don't think -- I've
6 heard many times from proponents that if the use turns
7 out -- the court determines that the use is not fair,
8 the exemption would not apply. That, again, depends
9 on the use that's made after circumvention occurs.

10 MR. CARSON: But that's different, of course.
11 That's a question of law. In every case the use has
12 got to be non-infringing. And in some cases, maybe
13 many cases, you're never going to know that till the
14 end of the day. But that's a question of law. This
15 is a question of fact. This is a factual prerequisite
16 for your being able to exercise the exemption, and yet
17 that factual prerequisite is, in fact, a
18 post-requisite, and that just strikes me as being a
19 bit difficult to do.

20 MR. METALITZ: Well, I think it is a little
21 different than what you've done in the past. But you
22 have -- all of these exemptions have conditions. They

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1 have factual conditions. I mean, you have to prove
2 that -- a reasonable belief is a factual condition.
3 There's a lot of factual matters that would -- you
4 know, if you look at the other exemptions, there's a
5 lot of factual matters that would have to be proven,
6 and they don't all -- they haven't all come into
7 fruition, I think, at the time -- at the moment of
8 circumvention is the point I'm making.

9 I hear you that it -- that, in theory, you
10 would be committing an act of circumvention and it
11 wouldn't be clear at the time whether or not you're
12 entitled to the exemption. But I think, if you're in
13 the business of making documentary films, you know
14 that if you're going to release it in anything more
15 than a very limited release, you're probably going to
16 seek insurance. And -- so it's pretty foreseeable.
17 And, as I said, there are other instances where you
18 don't know whether you qualify for the exemption until
19 after you've done the circumvention.

20 MR. CARSON: Dean, you were going to add
21 something?

22 MR. MARKS: I mean, this is a little bit out

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1 of my area of expertise, but my understanding is that,
2 you know, when seeking errors and omission insurance,
3 it's not just about reviewing the film once it's in
4 the can and once it's finalized. It's an ongoing
5 process that can involve review when it's still just a
6 script and there hasn't been shooting that's begun.
7 And, in fact, in Tamsin Rawady's whole article that
8 she writes about getting, actually, fair use advice,
9 she talks about how you need to be consulting with the
10 lawyers as you're in the process of making the film,
11 not when the film is finished because, like
12 Mr. Donaldson, he will review potential uses of clips
13 before they're actually put into the film to say, I
14 think this one qualifies as fair use, I think that one
15 doesn't, or you may need to do more commentary.

16 So the notion that these gatekeeping
17 functions, whether it's legal review or errors and
18 omissions insurance, happens all post-facto I just
19 don't think is accurate. I think it happens --

20 MR. CARSON: Michael, can we get your
21 reaction to that?

22 MR. DONALDSON: On a couple of levels. First

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1 of all, to respond to Steve's point about the timing
2 of lawsuits. Last Sundance Film Festival we had 19
3 films that we worked on, mostly documentaries but some
4 shorts and some fictional films. We had two cease and
5 desist letters prior to the first screening at
6 Sundance. One of them was Mr. Thrush's film from This
7 American Life. They mistakenly thought, from the
8 publicity, that his film was based on one of their
9 episodes. So I didn't jump in. I didn't have two
10 nickels to rub together, so I just did it, you know,
11 to get him out of that so he could stay on his way to
12 Sundance.

13 And the other one was the Queen of Versailles
14 where the subject of the film ended up not liking the
15 description of it being a rags to riches to rags
16 story, even though it was -- came out of his mouth.
17 And he actually ended filing a lawsuit before it ever
18 showed publicly or he saw it or any representatives of
19 him saw it, just based on the publicity.

20 So the sequencing of when you find out you
21 have a problem is different.

22 Now, in the case of Queen of Versailles, we

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1 had insurance. In the case of Mr. Thrush, he didn't
2 then, doesn't now, and, you know, I don't know if
3 he'll ever get insurance, not because he couldn't --
4 if he could afford it, but that film, black and white,
5 no professional actors -- it will have some
6 distribution, but it will not have much in the way of
7 monetization, to use a common word.

8 To go more to what Dean was saying about this
9 article -- and we might as well out it here. This was
10 a film I worked on, and the article did talk about our
11 early involvement working with filmmakers so they
12 understand fair use, and we apply it fairly
13 rigorously. We also apply other laws we know about
14 fairly rigorously. This was before the DMCA
15 exemption, so we were telling our filmmakers, you
16 can't rip a DVD.

17 And if you look at that article, the head of
18 the paragraph, that -- all the quotes that came
19 from -- the head of the paragraph said, "The downside
20 of fair use," which was that you have to go find a
21 good source. And the author of the -- the producer of
22 the film, author of the article, goes on to describe

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1 all those things as things they had to do because we
2 wouldn't let him rip the DVD. That was before the
3 exemption.

4 This is a classic case of why the exemption
5 is needed for documentary films and, in fact, this did
6 end up -- this film did end up running into some
7 resistance with -- and it's been too long, so I can't
8 dredge out of my memory who it was, but I remember
9 being on the phone with some techie who did not want
10 to accepted the film because the degraded clips were
11 too numerous because they couldn't rip DVDs pre the
12 exemption.

13 MR. CARSON: I still haven't gotten the
14 answer I need out of Michael.

15 MR. DONALDSON: I'm sorry. Maybe I forgot
16 the question.

17 MR. CARSON: Let's see. Typically --

18 MR. DONALDSON: Yes.

19 MR. CARSON: -- when you're making a
20 documentary film which is destined ultimately to go to
21 an E&O carrier --

22 MR. DONALDSON: Yes.

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1 MR. CARSON: -- do you typically just not
2 engage in any legal review whatsoever until the film
3 is done and then you send it off to the carrier? Or
4 is there some kind of review done pre-filming, pre
5 putting it together, during the process and so on?

6 MR. DONALDSON: As the article says, ideally
7 we like to get in early at the concept stage and
8 educate the filmmaker for his or her particular film,
9 what will help, what won't help.

10 Very often -- I mean, our busiest month is
11 December because that's when Sundance announces
12 their -- and we get a flood of people who have no
13 attorney, hadn't thought about it, but Sundance tells
14 them, they better have their clearances in order. And
15 they come in -- nobody in our office takes a Christmas
16 vacation. We're just crushed with work of unprepared
17 filmmakers who made their films out of credit cards
18 and family and friends and didn't have a spare nickel
19 for attorneys, and we're busy clearing, so it happens
20 both ways.

21 Films like This Film is Not Yet Rated we were
22 in a year early because the Independent Film Channel,

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1 that was paying for it, was worried at the
2 commissioning stage. They wouldn't commission the
3 film until they knew I was aboard because they were
4 worried about the reaction of the MPAA. But that
5 doesn't usually happen.

6 It happened in the film that this particular
7 article was about that Dean was reading from. I wish
8 it happened more often, but I would say -- I would say
9 today, with this kind of work being better known, it
10 breaks not quite 50/50 yet. I'd say 60 percent of the
11 films come in pretty late in the game.

12 MR. CARSON: Jack, did you have something you
13 wanted to add?

14 MR. LERNER: Yeah, two things, and then
15 Gordon has something to say about just briefly about
16 that. The quote that Dean put up on the screen
17 actually proves our point. The point was we couldn't
18 make fair use because we couldn't get the high quality
19 material. We had to go and seek permission and pay
20 for permission for something that we had every right
21 to use, and that should be noted.

22 The other issue is that if you required

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1 E&O -- and I think Gordon can speak to this more. If
2 you required E&O at the outset, what you'd end up
3 doing is pricing out a lot of filmmakers who can't
4 afford that until the end stage or who decide they are
5 making fair use -- and thousands of filmmakers do that
6 regularly. They make fair use and they go for it and
7 it's not a problem. Many get E&O. We have training
8 that permeates throughout the community and other
9 resources -- and Alex is going to make the point,
10 too -- that it's not just E&O; it's also the statement
11 of best practices and fair use, which many filmmakers
12 have.

13 Gordon.

14 MR. QUINN: Also, I just -- I'm going to come
15 back to this point that you guys were talking about,
16 but since you're talking about that now, I want to
17 pick up on that, this whole idea of E&O insurance and
18 gatekeepers, like PBS and that kind of thing.

19 And for some of us, that is our outlet and we
20 work with those people. But I'm here speaking for the
21 entire class of documentary filmmakers. And a bit of
22 history.

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1 For 20 years, approximately, we lost the
2 right to use fair use because of the aggressive
3 tactics of the people that you represent. They wrote
4 cease and desist letters. They threatened everybody.
5 They never sued because they didn't have a case. But
6 the gatekeepers would not accept it.

7 When we first published the statement of best
8 practice and fair use for documentary filmmakers, we
9 spent years speaking to people -- to teachers in
10 schools, to broadcasters and to E&O insurance and to
11 lawyers to re-educate everybody in the field about
12 what the law really said. And we finally got some
13 traction and finally -- PBS was the first. They came
14 in and they said, okay, we will accept it, and we went
15 on PBS; we didn't have E&O insurance. Now we've come
16 even farther.

17 But what's important and what I think we're
18 facing now is a situation in which, if you are
19 concerned -- we've had no cases in the last three
20 years of abuse, but if you are concerned that there
21 are filmmakers out there who are going to be making
22 uses that are not fair use, then go after them for

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1 that. The problem with the way that the Digital
2 Millennium Copyright Act constrains us is that the
3 mere act of acquiring something for a legal use has
4 been made illegal. And so you never get to test the
5 question -- without this exemption, we never get for
6 the courts to test the question of what I did, is it
7 fair use or not fair use? Steve is right. We can
8 have E&O insurance, we can have PBS, and we could
9 still be sued. We understand that.

10 And when I speak about it, I make people
11 understand that you are asserting a right. But if we
12 can't get that test into the courts, we're screwed if
13 you were actually able to be able to enforce the DMCA.

14 So I just wanted to get that out there, that
15 there are many, many kinds of documentaries, there are
16 all kinds of new markets now and ways that people are
17 distributing. We happen to distribute a lot of our
18 work in broadcast and theatrical, and we do work with
19 E&O insurance and we do work with PBS, and that's
20 important.

21 I want to come back to this thing, although,
22 about when do lawyers get involved. And everything --

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1 I agree with everything that Michael said. But I want
2 to be clear. Different filmmakers work with lawyers
3 and make different decisions about at what point you
4 need to get the lawyer involved to give you the letter
5 that you need to get your E&O insurance. If I was
6 doing something like This Film is Not Yet Rated -- and
7 Michael knows there have been projects that I have
8 talked to him about before we even started. I want to
9 get some idea of what -- you know, how would this
10 look. But there are many, many films, and the two
11 examples that I mentioned, A Good Man and The
12 Interrupters -- it's kind of classic fair use.

13 I'm a filmmaker with a great deal of
14 knowledge about this, so I actually go and get my
15 letter from the lawyer really near the end of the
16 process. We're in fine cut, we've delivered it to PBS
17 and we're looking to get the insurance. Because I
18 feel that I know it quite well.

19 There are other filmmakers -- and sometimes,
20 when I talk to people, when they talk to me, they're
21 saying, well, what about this? What about that? I
22 said, you need to start talking to a lawyer earlier in

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1 the process. So both -- you know, we do both kinds of
2 things. It's a relationship between two kinds of
3 professionals that people define in their own way.

4 And I think that anything that, you know,
5 kind of predefines when we have to do that would be a
6 barrier. And I certainly think, you know, that we do
7 not need, you know, more stringent kind of
8 gatekeeping. That's not the problem. The gatekeeping
9 gives them some security, and I'm happy about that,
10 and we mentioned that, that we're not, you know, going
11 beyond fair use. But if you have problems with fair
12 use, make that your issue. Don't make the issue that
13 somebody ripped a DVD if what they're doing -- you
14 know, make that the issue. Take them to court for
15 that, not for something else. And that's why we need
16 this exemption, so that when there are test cases,
17 when we do get into the courts, we're going to get
18 into the courts discussing the proper thing.

19 MR. METALITZ: I don't think you'll find that
20 there have been any cases in which documentary
21 filmmakers have been sued for violating 1201(a)(1).
22 Have there been? I don't think we're aware of it,

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1 so --

2 MR. CARSON: All right. What I think I'm
3 hearing loud and clear from this side of the room, but
4 correct me if I'm wrong, is that it would be
5 unacceptable to impose any requirement, in order to
6 get the advantage of the exemption, that you get E&O
7 insurance or that you run it by a lawyer. Good idea
8 to do it, but you would resist having that as part of
9 an exemption, correct?

10 MR. QUINN: Correct. That's exactly how I
11 would put it. And you're absolutely right. I would
12 say to people, get E&O insurance, get a lawyer
13 involved, but it should not be a requirement.

14 MR. CARSON: Okay. A good deal of what we've
15 been hearing from you folks in L.A. and here is how we
16 shouldn't be concerned because there's E&O insurance
17 and there's this legal review. Shouldn't we ignore
18 all of that because you've basically just told us you
19 can't rely on that and you don't want to be bound by
20 that? Why is that relevant to anything we're thinking
21 about?

22 MR. QUINN: What we are talking -- okay,

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1 that's a good point. What we are talking about here
2 is a continuum. We're talking about a process.

3 And so, for instance, they were making the
4 point that there is very little material right now
5 that is out on Blu-Ray that is not available in
6 standard DVD, you know. Well, if I'm a filmmaker and
7 the piece of material that I need is on an extra on a
8 Blu-Ray DVD to make my point, that's the piece I need.
9 We're talking about a right. We're talking about
10 freedom of expression.

11 And so it's -- in the same way it's like I
12 can't tell you what the needs are of every filmmaker
13 in my class. What I can tell you is that we, as a
14 class, have tried to be very responsible with this
15 exemption and to make sure that it's not being abused,
16 that we are saying, don't confuse locking something up
17 with fair use. Fair use is what we're asserting.
18 That's the right that we need to be able to use. And
19 we need this exemption to be able to use it.

20 So it is true we bring up E&O insurance, we
21 bring up -- and it's not the only thing we base our
22 argument on, but we bring it up because we do

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1 understand that for most high-visibility documentaries
2 and most cases in which they're looking it, that's the
3 reality of the situation.

4 But I'm sure that there are exceptions, that
5 there are films that are out there that are absolutely
6 important and have audiences and are playing a role in
7 the range of information in our democratic society
8 that do not have those two requirements met that are
9 using it with absolutely solid legitimate fair use.
10 So that's why we're saying it would be a problem.

11 MR. CARSON: We're running out of time, and
12 we've just been talking about one little tiny topic.
13 If you feel compelled to something, you've got one
14 minute.

15 MR. QUINN: Those were the two --

16 MR. COHEN: Just to follow up on what Gordon
17 said, we don't want the understanding to be that it's
18 all about E&O. And we have presented evidence about
19 the prevalence of E&O practices, the frequent
20 requirement of E&O practices as one piece or one
21 factor that will push documentary and fictional
22 filmmakers and e-book authors over the threshold of

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1 likely to be non-infringing. But this is part of a
2 larger community with many other factors that also put
3 us over that threshold, including the use of a
4 statement of best practices, including the use of
5 being rightful within their own regard and, therefore,
6 you know, more likely to be responsible.

7 And we don't feel that E&O is -- it's an all
8 or nothing. It's an important factor, but it's not
9 the decisive factor for determining it. And then
10 Brendan is going to do one quick thing.

11 MR. CHARNEY: If I may respond to the point
12 that was made about licensing earlier. We're not
13 saying that talent rights and other contractual rights
14 are the issue here. Under 1203(a), anybody who has a
15 right protected under title 17 can sue for a violation
16 or an alleged violation of 1201(a)(1)(A). That means
17 it's very hard and a great burden for filmmakers and
18 authors to avoid DMCA liability by licensing. Even if
19 the studios that are represented here today grant a
20 license, they still have to go after -- go and get
21 licenses from all of the other individuals who might
22 have been involved in the film and whose rights may be

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1 included in the film, such as composers or people
2 whose recordings are used, et cetera.

3 And also, if a filmmaker or author signs a
4 license with the studios, for example, that license
5 will often obligate them to seek all of these myriad
6 permissions, which is, you know, furthering that
7 burden.

8 And in response to the legislative history
9 that the opponent cited, about a page before the
10 language that was quoted there's a very telling
11 section that Congress put in there. The point is that
12 the harm here is not flowing -- the harm here is
13 flowing from the implementation of a technological
14 protection measure, and in order to measure that harm
15 we have to look at the facts that are confronted by
16 fair users -- in this case, filmmakers and authors.

17 And so what Congress said was, The committee
18 is concerned that marketplace realities may some day
19 result in less access, rather than more, to
20 copyrighted materials that are important to education,
21 scholarship and other socially vital endeavors. The
22 result could flow from a confluence of factors,

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1 including the elimination of printer or other hard
2 copy versions, the permanent encryption of electronic
3 copies, et cetera.

4 And they created this rulemaking -- and this
5 is the term they used -- a failsafe mechanism to
6 prevent that sort of harm.

7 I respect your time, and so I'll end there.

8 MR. CARSON: From this --

9 MR. MARKS: May I just respond?

10 MR. CARSON: -- point on, the standing rule is
11 keep it short and say it only if you need to say it,
12 because we're running out of time, and Steve has got a
13 lot of questions he hasn't been able to start asking.

14 MR. MARKS: Really quick. It's just to that
15 standard that Brendan just quoted, which is about the
16 less access to copyrighted materials. I don't think
17 we have seen one shred of evidence that technical
18 protection measures have led to less access to
19 copyrighted materials. In fact, there's been a
20 plethora, a growth of copyrighted materials released
21 into the marketplace precisely because of the
22 existence of technical protection measures that give

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1 the copyright owners the security to release this
2 stuff into the marketplace.

3 MR. CARSON: Jack.

4 MR. LERNER: I have a very short response,
5 which is that I would ask you to read our pleadings
6 which discuss many instances where filmmakers could
7 not access materials because of the DMCA.

8 MR. CARSON: I think, Dean, that you were
9 probably speaking about two different things, but
10 okay.

11 MR. RUWE: To Peter, and others, I suppose,
12 I'm looking for a better idea of what an e-book is.
13 You were mentioning the standards of -- e-book
14 standards and associating with web standards. That's
15 concerning to me. Is it everything? Is it very
16 defined? Can you help me with this? I'm coming from
17 something stated at an earlier hearing. When someone
18 said, well, if we don't have this exemption, we're
19 going to probably look towards another one. In that
20 case, it was documentary. We're not going to go back
21 to E&O right now. But some sense of defining that.
22 If it's not E&O insurance or some -- it needs to be

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1 something, I think. There's a compelling reason to
2 think there needs to be something to further define
3 these terms, be it documentary and e-book. For
4 e-books, do you --

5 MR. BRANTLEY: Just to address the
6 specification issue -- but your presumption is exactly
7 right. The IDPF EPUB specification is often
8 informally referred to as a website in a box. But
9 what it really is is a set of constraints on HTML and
10 display, CSS, cascading style sheets, that limit what
11 an author can do to produce a valid e-book. And so,
12 in the new standard of an EPUB 3, EPUB 3 embraces
13 HTML5 which is a newer version of HTML which is
14 embedded in the browsers you use on your desktop if
15 you use a fairly contemporary browser.

16 And HTML5 inherently supports greater
17 interactivity, greater support for embedded video and
18 audio and other media. And EPUB 3 is a specification
19 that determines which of those web behaviors are
20 considered legitimate in a publication.

21 From this point on, IDPF considers EPUB 3 to
22 be evolving with web standards in the sense that there

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1 will be a defined set of allowable behaviors. From
2 the publisher's perspective, as well as the author and
3 reader's perspective, it's desirable to know what you
4 have. So just -- gates open means that books get
5 created that might not be able to be read widely. So
6 there's an interest in defining what an e-book can
7 encapsulate.

8 MR. COHEN: Can we make one quick point?

9 MR. RUWE: I'd rather -- we are tight on
10 time. I want to get this specifically to Bobette, who
11 is not obviously the author of an e-book coming out,
12 so --

13 MS. BUSTER: Okay. I'd like to be an author
14 of an e-book -- you know, my Godfather lecture alone
15 is about five, six hours, much sought after all over
16 the world. What I would like to do is be able to show
17 the salient points. And the one thing I want to say
18 is that Jack Lerner and the International Documentary
19 Association have done an excellent job of educating
20 the documentary community and anyone who wants to use
21 fair use with four specific guidelines.

22 And so I would use the discipline of that in

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1 selecting the clips -- precise clips that I need to
2 illustrate key points. As much as I'd like to show
3 the five-hour lecture, and many people would like me
4 to do that, I'm only asking to do an e-book with fair
5 use.

6 MR. COHEN: So also just to clarify, I know
7 Peter talked more generally about kind of what is
8 going on in the larger world of things that could be
9 called e-book publishing or multimedia e-book
10 publishing. I just want to direct you, on page 3 of
11 our initial comments, for the comment of Mark Berger,
12 et al. We have a discussions of, I think, what you're
13 trying to get at, Mr. Ruwe -- and I'm sorry if I'm
14 mispronouncing your name. And it reads, Electronic
15 books, or e-books, are digital files capable of
16 displaying written words on an electronic reader, or
17 e-reader, generally without Internet access.

18 And so we -- the examples we've given, these
19 are people who are trying to take video clips and put
20 them into a device that can display the video
21 off-line, which is very -- you know, very distinct
22 from kind of the general concept of the website, even

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1 though there might be standards out there that would
2 be, you know -- in general, our concept that we've
3 been advocating for in our comment is a narrower
4 subset of that.

5 MR. CHARNEY: The difference, really, is that
6 the underlying technology may have come from the web,
7 but an e-book is a discrete and very specific type of
8 format that is not the web.

9 MR. BRANTLEY: In fact, the way an EPUB (sic)
10 is packaged and distributed is actually as a zip file.
11 So the display of an e-book that you would see on an
12 e-reader or on a computer essentially uses HTML
13 rendering technology, but the presumption is that it's
14 a packaged, portable digital file that has to be
15 downloaded or moved, and consumable portably and
16 off-line.

17 MR. CARSON: Sounds like a podcast.

18 MR. RUWE: It sounds extremely broad as a
19 definition. What I think I was putting forward is, if
20 you have any narrowing principles, it might be helpful
21 to give us an idea. If it's not, if that's just what
22 it is --

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1 MR. BRANTLEY: I mean, again, I think the
2 EPUB 3 specification -- I'm not asking you to take a
3 look at it, but it's very specific and very detailed
4 as to what is a permitted type of behavior in an
5 e-book and what is constrained. So, you know, if it
6 helps, for example, one advance of EPUB 3 over EPUB is
7 simply to support CJK fonts.

8 MR. RUWE: Just to briefly go back to a point
9 that we talked about at length with regard to
10 documentary, is there any other gatekeeper role that
11 you would be able to point to that does narrow this
12 concept of an e-book?

13 MR. CHARNEY: We would be amenable to
14 narrowing the definition to include specific e-book
15 formats that are in existence today, such as EPUB and
16 others, that we could, you know, provide in later
17 correspondence.

18 MR. RUWE: Anything about a gatekeeper role
19 that's been mentioned for e-books? I know we -- I'm
20 trying to get back to that for documentary, but if you
21 have anything to add with regard to the e-book.

22 MR. LERNER: The type of nonfiction e-book

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1 authors that we're talking about would use a lot of
2 the same mechanisms to make sure that they're making
3 legitimate fair use. E&O -- insurance companies do
4 offer E&O insurance. The documentary filmmakers
5 statement of best practice and fair use applies in the
6 e-book context very well. You could apply that to
7 Bobette's work and come out with a very rigorous
8 product.

9 MR. TURNBULL: Could I just ask whether that
10 was a clarification of the class, that it's intended
11 to be nonfiction?

12 MR. LERNER: It was not. I was just giving
13 an example.

14 MR. RUWE: Back to documentary films. Can
15 you tell me more specifics about the requirements for
16 distribution outlets? You talked about the notion
17 that the up-converted content, use of threshold is a
18 requirement, that you can't have too much of it. What
19 are the specifics?

20 MR. MARKS: I'll just read two paragraphs
21 from the latest PBS technical specifications which
22 came out in March. One of them I showed in my

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1 PowerPoint which talks about artifacting associated
2 with scan conversion. But there's also one where it
3 says -- it talks about, in the case of archival
4 content where no better copies are available, that the
5 image still has to be free of composite video, i.e.,
6 analog artifacts.

7 So PBS is not the gestapo. I mean, they do
8 recognize that there are older pieces of source
9 material that are necessary to put in the
10 documentaries. But what they're saying is that the --
11 you can't just throw everything together at YouTube
12 quality and then up-convert it at the end. They
13 specifically forbid that.

14 MR. RUWE: Is that in our record? Has that
15 been submitted into the record, those remarks?

16 MR. MORRISSETTE: I can. I mean, we can. It
17 hasn't been --

18 MR. RUWE: It hasn't been thus far?

19 MR. MARKS: -- at this point.

20 MR. COHEN: We're more than happy to provide
21 that.

22 MR. QUINN: Just to give you some

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1 perspective, it's like, yes, the first 25 years of my
2 work are on film. When you go back to film and you
3 digitize it into high def, when you scan it, you are
4 in high def. It's a very high-quality image.

5 And so working with PBS, the reality is, yes,
6 if you've got the Zapruder film or something like
7 that -- they are practical people. But what has been
8 happening, and this is what I've been understanding
9 from Jim, is they're looking more and more for the
10 overall look and feel of the thing to meet their
11 standards.

12 So the kinds of things that -- right now I
13 have a sense, and, you know, regulations change -- but
14 the sense that I have right now, if you have
15 something, like a image from a contemporary film and
16 you're making a point about what goes on in the
17 culture, and that's a low-quality image, that's not
18 going to be acceptable to them. In other words, if
19 they're looking at it and they're saying, hey, come
20 on, guys, this is ridiculous; why don't you give us
21 the quality of image that the rest of your
22 presentation has, that's the kind of thing that they

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1 would flag.

2 If I'm using the Zapruder film, if I'm using
3 something else in which common sense would tell you --
4 like in A Good Man we had some old up-res VHS, you
5 know, from like the early days when Bill T. Jones was
6 a very young dancer, and we used that in the film.
7 There is nothing else. We have no alternative.

8 But if I'd used this piece that I described
9 to you where you see the sweat coming off of him in
10 one of his major works at the peak of his career, they
11 would have said, hey, come on, that's ridiculous.

12 So I think -- they are practical people and
13 they do look at that, and it's certainly not like, you
14 know, a bell goes off and they said, oh, well, you
15 didn't meet the standard, as long as we have done all
16 these things that Jim talked about to meet the
17 technical requirements.

18 MR. RUWE: Yes, Dean.

19 MR. MARKS: Just one quick note on that with
20 the PBS requirements. They also have a provision that
21 says it is not necessary that your submission meet
22 these requirements for submission and initial review.

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1 So just confirming that for documentaries or other
2 works that are submitted to PBS for initial review to
3 see whether they're interested in moving forward, it's
4 not a requirement that all those technical
5 requirements be complied with, which I think we're
6 agreeing --

7 MR. QUINN: Yeah, that's absolutely true.
8 We're in agreement there.

9 MR. MARKS: Right.

10 MR. QUINN: They will review it even though
11 you haven't done all the up-res'ing and everything to
12 get it or, you know, gotten back to the original
13 source material.

14 MR. MORRISSETTE: And I'd just like to make
15 two very quick points. One is that it was because of
16 the current exemption that we were able to get the
17 kind of quality necessary to pass the mustard (sic) a
18 year ago, the PBS specs from a year ago, for this clip
19 that Gordon was talking about. Without the exemption,
20 we couldn't have done it. There would be no way to
21 bring it in completely digital and work with it in a
22 way that it would be passable.

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1 The second thing, just to respond very
2 quickly to the camera, the high-quality camera
3 demonstration, obviously, when you use a \$10,000
4 camera, it's going to look better than a cell phone.
5 However, without the original footage to compare it
6 to, the only real way to compare it is to play a
7 Blu-Ray disc side by side on identical projectors and
8 see the difference.

9 My evaluation was that there was an excessive
10 amount of overexposure and blooming on the highlights,
11 which I don't think was in the original film.

12 MR. RUWE: Going to the alternatives, for the
13 e-books, the examples you've put forward, Ms. Buster,
14 showing juxtaposition of various films, can you tell
15 me more specifically why some of these alternatives
16 wouldn't have worked for those sort of juxtapositions?
17 It seems like -- for some of them, I get it. You
18 know, if the dust doesn't show up and if that's
19 something you're making a specific point about, I can
20 understand that.

21 Some of the other ones, I felt like -- it
22 seemed apparent that some alternatives would have

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1 functioned to be able to show contrast between a
2 mobster can a child.

3 MS. BUSTER: Well, no, because I teach at the
4 top film schools in all the world, and we deal with
5 the highest level of standards in all departments, so
6 I'm talking about the seven arts of cinema. I'm
7 talking about cinematography, Gordon Willis got the
8 academy award for the cinematography of that. You
9 need to be able to see the highest gradation of his
10 choices, and he effectively lit that film as if it was
11 a neo-realism film from the Italian era, and so you
12 have to be able to see the distinctions in color, and
13 that's a very important point. You also have to show
14 what the production design department did, costumes,
15 music. And sound design in that film is exceptional.

16 So I teach from the point of view of, how
17 does technology affect the story-telling in all
18 departments? And how does the director -- in this
19 case, he's also the writer -- employ this central idea
20 in all the departments? So it makes no sense to use a
21 degraded quality, and besides, I'd be laughed out of
22 the room because I'm dealing at the highest level in

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1 the studios and in the ivory tower of what cinema can
2 do best.

3 MR. CARSON: Well, you prefaced that by
4 talking about where you teach. And it sounds like --
5 the point you just made is a very good point perhaps
6 with respect to what we were discussing this morning.
7 I'm not sure it's necessarily germane to the e-book
8 issue that you brought up.

9 MS. BUSTER: Well, why would anyone want to
10 buy a book with degraded quality materials?

11 MR. CARSON: If that's the only thing out
12 there, they might well.

13 MS. BUSTER: Well, they're going to get it
14 otherwise. They're going to be pirates about it.
15 They going to go to YouTube. And, besides, why not --
16 it only advances the quality of the copyright holders;
17 it drives people to see the real film.

18 MR. CARSON: So you are okay with it, guys?

19 MR. CHARNEY: If I may, Ms. Buster wants to
20 take the scholarship that she currently can provide to
21 the top universities in the world and make that
22 available to the people at large. And so if she's

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1 using a degraded copy, they're not going to get the
2 same quality of analysis that she's talking about.
3 They're not going to be able to see this lighting.
4 They're not going to be able to see the costume
5 design. That's the point. The degraded images won't
6 work any better in an e-book than they would in the
7 classroom.

8 MR. LERNER: And also, Bobette, would you
9 care to talk about your ability to make use of these
10 alternatives?

11 MS. BUSTER: Well, first of all, I find that
12 whole process to be cumbersome beyond belief and
13 absurd. I mean, I don't know -- I could not get
14 through that. I'd have to hire a specialist beyond
15 the caliber of someone like Jim, and I would have to
16 raise the money to find a camera like that. And it
17 feels like to me they're only creating extra work. I
18 have a career that takes me all over the world. I
19 would have to be retrained in this in order to access
20 all the materials I already have the from the current
21 exemption for an educator. Why would I want to do
22 that?

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1 And besides that, say at USC, we are
2 constantly upgrading all of our equipment that -- the
3 manufacturers are giving it to us. Dolby is now
4 installing in all our mixing stages Atmos, which is an
5 advance beyond THX. We get -- Abbott came to USC and
6 put in their editing facilities to train the students
7 in the state of the art. And Pixar came to USC and
8 said, we need someone who can actually do Abbott help
9 us do it.

10 We don't have the old equipment. We only
11 have the latest equipment. We only go forward.

12 MR. RUWE: I wanted to go back to -- I think
13 it was Bruce. Or maybe it was Steve. I forget which.
14 Discussing the notion of, if there was a no-objection
15 letter issued, that a user would not be subject to a
16 lawsuit for a 1201 violation for other material. I
17 think that was -- you took issue with that. Do you
18 have any reaction to that?

19 MR. MARKS: I think that was my -- my issue.
20 What I was saying is the studio issued a no-objection
21 letter and -- I think Brendan is correct, that if an
22 actor who -- or a musician who also had a right in the

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1 film decided that they felt their 1201 -- there was
2 circumvention, that they would have standing to bring
3 a lawsuit if they so chose.

4 It's hard for me to imagine that that would
5 really happen when the underlying copyright owner of
6 the film had issued a non-objection letter to -- to
7 permit the use in the context for which it was being
8 made.

9 So I think it's a pretty -- while I think
10 he's correct on the law, I just think it's -- it's
11 such an attenuated contingency that I don't think
12 that's what an exemption should be based on.

13 MR. LERNER: I would refer you to pages 52
14 and 53 of our initial comment. We pointed out two
15 disparagement clauses that are standard in studio
16 contracts. But if you look on the same page, there
17 are actually clauses that contractually obligate the
18 filmmaker to go and get permission from these other
19 entities.

20 So a no-objection letter that would contain
21 this, which again is standard, or an actual license,
22 would still have these requirements.

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1 And, Dean, thank you for promising not to
2 sue, but I'm a little concerned that others might not
3 have the same attitude.

4 MR. MARKS: I can't speak to every studio's
5 no-objection letter, but I can certainly speak to
6 Warner Brothers' no-objection letter. And Warner
7 Brothers' no-objection letter does not contain
8 non-disparagement provisions about education uses.

9 MR. DONALDSON: Warner Brothers does not.

10 MR. CARSON: I gather we have nobody on this
11 side of the room who can speak on behalf of everyone
12 else.

13 MR. MARKS: Given that Warner Brothers has
14 the largest film library, it's not an inconsequential
15 practice.

16 MR. CARSON: So you're suggesting we exclude
17 Warner Brothers films from this class?

18 MR. MARKS: Please do.

19 MR. CARSON: I have a question about the
20 documentary filmmakers best practices that we've heard
21 about. First of all, I'd like a reaction from this
22 side of the room. Does a filmmaker who follows those

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1 best practices, is that someone who you think ought to
2 be able to go ahead and use what he takes, following
3 those practices, in a motion picture, or do you have
4 problems with those best practices?

5 MR. METALITZ: We have some problems with
6 those best practices, but your question -- I think
7 your question is whether that's the type of condition,
8 if you will, that would help to narrow this exemption,
9 and I think it would. I do think -- I'm not sure that
10 everything in best -- in the statement of best
11 practices necessarily has been done at the time that
12 the circumvention occurs, which was your objection to
13 the idea of conditioning it on insurance. So it may
14 be subject to that same objection.

15 But I think Steve's question really hit it on
16 the head, which is that documentary filmmaking is not
17 defined. There's fictional filmmaking -- I mean, I
18 hear that the proponents have read into the record the
19 definition of e-book, but -- you know, we heard this
20 morning that -- a video production made by a student
21 in a community college class might qualify as a
22 documentary film and, therefore, be subject to this

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1 exemption that exists now.

2 So I think it would be helpful to sharpen
3 this and, in my view, narrow this so that you increase
4 the chances that the use will be non-infringing.

5 MR. CARSON: Well, that certainly has been a
6 concern here, and last time around it was a major
7 concern. And we tried to figure out all sorts of ways
8 to figure out who qualifies and who doesn't. And we
9 came up with nothing.

10 MR. METALITZ: Well, as I recall, and I may
11 be wrong -- perhaps the IDA people can help remind
12 me -- I think we actually had agreed -- the parties
13 had agreed on one, and then the office decided not to
14 recommend it.

15 MR. CARSON: My recollection --

16 MR. METALITZ: I understand you're struggling
17 with this, and I think that's appropriate. And, in
18 fact, I guess this might be the time to pose, if I
19 could put on the record a question, that a lot of
20 these exemptions and their viability will come down to
21 drafting questions, and I recognize this is not an
22 easy problem. And I'm wondering if the office would

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1 consider treating this rulemaking more as a
2 conventional notice of proposal rulemaking would be
3 done under the Administrative Procedure Act, and put
4 forward to the public the -- what they plan to
5 recommend.

6 MR. CARSON: Looking at a calendar, Steve, I
7 can tell you that, as desirable as it might be, I
8 can't conceive of us being able to do it in the time
9 frame we're stuck with.

10 MR. DONALDSON: Well, the nice thing about it
11 is, since the last rulemaking, the federal judge in
12 New York has given us a definition of documentary
13 filmmaking in one of the Borax (phonetic) cases.

14 MR. LERNER: And we also --

15 MR. DONALDSON: You've got it.

16 MR. LERNER: We also, in this comment and in
17 the previous comment, propounded a definition that
18 you're welcome to adopt if you feel like it. But I
19 would also point out that you didn't end up with
20 promulgating a definition of documentary filmmaking in
21 the last rulemaking, and there were absolutely zero
22 adverse consequences to that, but we had a real

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1 effects on documentary filmmaking nationwide.

2 MR. CARSON: Let me ask this side of the
3 table, if we were to impose, as a prerequisite for
4 qualifying for this class, that one follow the
5 documentary filmmaker best practices, what would your
6 reaction to that be?

7 MR. DONALDSON: If you're all looking at me
8 because I'm one of the authors, of course I think it's
9 a great idea.

10 MR. COHEN: You know, I think -- so, I mean,
11 I think, again, this kind of goes back to our point.
12 We don't think it's a silver bullet. The purpose
13 of --

14 MR. CARSON: We'll take a bronze one.

15 MR. COHEN: Touche.

16 MR. DONALDSON: Or a brass one.

17 MR. COHEN: You know, the best practices for
18 documentary and fair use of documentary filmmaking was
19 meant to classify four, you know, quote/unquote,
20 very -- as close to as clear fair uses you can get,
21 you know, understanding that it's a factual
22 determination made by a court after the fact. It is

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1 not meant to represent the universe of fair uses.

2 And so in this case, even more so than E&O, I
3 think we would be concerned that this would be, you
4 know, kind of limiting the definition of fair use not
5 by the law, but by what was meant to be kind of a
6 starting point for documentary filmmakers.

7 MR. DONALDSON: I think a broader test, which
8 actually takes in every case decided since January 1,
9 1978, is the three-question safe harbor approach
10 you'll hear about in -- whenever it is, in June up in
11 New Jersey. So there's another -- there's even a
12 better approach which we'll...

13 MR. CARSON: Michael, I'm afraid that will
14 not be in our record, so I am going to have to leave
15 the room when someone talks about it.

16 MR. QUINN: I just wanted to say that I think
17 from our perspective -- it's like I agree with
18 everything that they said; on the other hand, that is
19 the kind of thing -- I mean, I think there are reasons
20 why implementing that kind of a thing can have
21 unintended consequences. On the other hand, the
22 reality is when we, as a community -- we use that

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1 document in schools and everywhere we would go with,
2 you know, budding young documentary -- Steve's kid in
3 class, we say, you should pay attention to this,
4 everything is not okay, and this gives you some really
5 clear guidelines of when you are within fair use.

6 So, you know, I think it could have
7 unintended consequences, but I don't think we would
8 see it as, oh, my God, that's a catastrophe, you know,
9 that -- if you did something like that. I think it
10 needs to be thought through, what would the
11 consequences be?

12 But we do -- it's exactly how we use it in
13 reality. We're constantly pointing to it and
14 constantly pointing to people who -- you know, there
15 are people out there that think whatever you take is
16 okay. And it's like we're saying, no, no, no. We're
17 talking about this, and that's why we published this
18 statement of best practice.

19 MR. CARSON: Well, we're only five minutes
20 over. Let's try to be back at 3:30 for the final
21 panel. Again, the record is closed unless we re-open
22 it with specific questions to you. That remains to be

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1 seen.

2 (Whereupon, a short recess was taken.)

3 MR. CARSON: First, an announcement about
4 tomorrow, for those of you who want to be at this to
5 the very end. Not here. Not here. That's why I'm
6 making the announcement. It is across the street in
7 the Jefferson building in a room called the Whittall
8 Pavilion -- W-H-I-T-T-A-L-L, I think. And that's on
9 the ground floor.

10 So the easiest way to get there and not get
11 lost is to go in what is called the carriage entrance
12 at the front of the Library of Congress. That is the
13 actual ground-level entrance. Do not go up the steps;
14 go underneath the steps, and there's an entrance
15 there.

16 If you go through that entrance, once you're
17 into the foyer, I suppose you call it, turn left and
18 you'll find yourself going into a corridor. The
19 Whittall Pavilion is one of the first couple of rooms,
20 anyway -- doors the right. And it's got -- it's
21 marked as the Whittall Pavilion, so you should be able
22 to figure that out once you're in the corridor. We'll

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1 put a sign up out there tomorrow morning for those
2 people who just come here out of habit. But it's very
3 important that you end up in the right place tomorrow
4 or you'll be in a copyright royalty hearing, and I
5 can't imagine a worse fate, so...

6 On to our final panel of the day, which is
7 for proposed classes 7B and 7C. And our witnesses
8 will be in the following order: Rebecca Tushnet,
9 Francesca Coppa, Tisha Turk, Martine Rife, Corynne
10 McSherry and -- Dean, you're not testifying this time?
11 We'll miss you, Dean. Bruce Turnbull and Steve
12 Metalitz. And that's it, I guess, right?

13 Okay. Very good. Rebecca.

14 MS. TUSHNET: So thank you so much for the
15 opportunity to testify again. My name is Rebecca
16 Tushnet. I teach law at Georgetown. On behalf of the
17 Organization for Transformative Works, I'm asking for
18 a renewal of the 2010 exemption as well as a version
19 of the exemption that would cover works that aren't
20 available on DVD but are available through authorized
21 sources, such as the recent television shows used by
22 vidders, like Giandujakiss, whose work we focused on

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1 in our submissions, and cultural institutions like the
2 Lear Center, which commission Joe Sabia's Prime Time
3 Terror as part of its report on how200.

4 Popular culture depicts torture in the U.S.

5 So every month I see the positive impact of
6 the 2010 exemption when we're able to tell vidders and
7 other creators of non-commercial transformative works
8 that they can contest take-downs sent by copyright
9 owners because they're making a fair use. That's the
10 advice I couldn't give before the exemption.

11 No one we've ever worked on with a
12 counternotification ever heard back from a copyright
13 owner, which is one indication that when
14 transformative works get individualized review as
15 opposed to being swept up in automated take-downs,
16 which is usually what happens, copyright owners tend
17 to understand that they're seeing fair uses.

18 A remix exemption is actually simple to
19 understand and hard to misuse. It's very consistent
20 with the ethics of remixers who purchase copies of the
21 works that they use as building blocks for their own
22 creative works.

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1 And I think it's worth spending some time
2 talking about what lines we can expect artists to
3 understand because I think the opponents are offering
4 some misconceptions about how people who don't do
5 copyright law for a living can reasonably be expected
6 to think about the practice of taking short clips for
7 use in creating new works. People don't understand
8 counterintuitive rules, and the rules without an
9 exemption, especially in the presence of screen
10 capture, are counterintuitive.

11 So let me give you an example. Last year I
12 was involved in a discussion on a trademark e-mail
13 list for practitioners who register marks at the PTO.
14 They discussed using a video clip as evidence in a
15 proceeding that a term was generic or descriptive and,
16 thus, not entitled to registration.

17 When I mentioned the DMCA on the list,
18 several trademark lawyers kindly explained to me that
19 there couldn't be a DMCA violation because use of a
20 video clip as evidence is fair use, which is, of
21 course, entirely correct. These are conscientious
22 lawyers. They're working on behalf of trademark

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1 owners in a coordinate field, and they had no idea
2 that the DMCA potentially made it illegal to present
3 relevant evidence to a court in the most useful,
4 convenient and persuasive ways. Now imagine what it's
5 like for an artist.

6 The broader point is that people, highly
7 experienced lawyers among them, generally try and
8 figure out what makes sense and guide their behavior
9 thereby. That's why we see things like best practices
10 for online video as well as best practices for
11 documentary filmmakers achieving such success. It
12 doesn't make sense to a non-copyright lawyer, even a
13 trademark lawyer, that a fair use might still violate
14 anti-circumvention law, so they don't think of it or
15 even believe it when I told them. The idea of
16 alternatives to circumvention, like screen capture,
17 it's simply not meaningful in this environment. The
18 question is whether fair uses that are carried out
19 through circumvention are going to be made illegal
20 despite the resulting harm to fair users and the
21 failure to decrease infringement. Vidders and
22 non-commercial users, like these trademark lawyers,

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1 generally find out about the DMCA only after they
2 receive a take-down notice.

3 This dynamic, where the alternatives don't
4 really make sense and thus provide no practical
5 alternative to circumvention, is one I've called the
6 digital literacy test in the past. They're like the
7 classic literacy tests used to disenfranchise minority
8 voters in the past. We expect you to understand
9 something that is not intuitive and not relevant to
10 the task that you're actually trying to perform right
11 now -- in one case, to vote; in another case, to
12 participate in a cultural conversation.

13 And this problem is enhanced by the
14 uncertainties surrounding these supposed alternatives.
15 So let's start with the legal uncertainty.

16 We aren't worried about being sued by AACIS
17 and by the DVD CCA. We're worried about the studios.
18 And it's not clear that Mr. Metalitz can even bind any
19 individual studio with his very qualified statement
20 about what might possibly be true if the technology
21 works as promised.

22 Even if he could, as far as I can tell, the

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1 major anime producers aren't members of the MPAA.
2 There's a huge genre of anime vidding, which we
3 discussed in our submission, and Mimi Ito has written
4 about, and they're not bound at all by anything he
5 might say.

6 Adding to the legal uncertainty is the
7 technical uncertainty. The most Mr. Metalitz is
8 willing to say is that if screen capture works a
9 certain way, then it's not circumvention, but no one
10 using the technology to make video knows how it works
11 or whether a particular technology is on a list of the
12 stuff that's been tested by the AACIS and whether it's
13 been changed since it's tested.

14 Without an exemption, we have to factor in
15 the possibility of a battle over the unknown facts of
16 circumvention, even if there's a clear fair use. And
17 that's a huge deterrent to an artist, especially one
18 who isn't making any money from her work.

19 And an example we talked about last time was
20 the woman who contacted us before the exemption was
21 granted, and she had made something that we thought
22 was clearly a fair use. And we said, how did you make

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1 it? And she said, well, my daughter made the clips.
2 And if there's -- you know, I can't take a chance that
3 she's going to be asked about how she made it. I
4 mean, that's it; she gives up. And that's the kind of
5 thing we're facing without an exemption.

6 In fact, without an exemption, an artist is,
7 frankly, better off having downloaded their source
8 where at least they have an argument for intermediate
9 use, and their output is fair use and they don't have
10 to face the DMCA.

11 So even if copyright owners really committed
12 to the message that screen capture was okay, something
13 that, by the way, the DVD anti-piracy warnings on
14 every screen sort of argue against, it would still be
15 a confusing message because it's detached from the
16 underlying question of relevance to any artist, which
17 is, is the use justified? Is the new work one that
18 conveys a new message, which is what the artists are
19 going for.

20 And, of course, I haven't even mentioned the
21 biggest problem with screen capture and the
22 alternatives from an artist's perspective, which is

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1 whether it works. And let's talk about basic
2 functioning first, then artistic success.

3 As our comment and the appendices thereto and
4 the experiences of others indicate, whether screen
5 capture even produces an output is unpredictable
6 depending on the particular DVD, the setup and the
7 particular program. You saw one user review. I
8 invite you to check out the others on Amazon and CNET.
9 They have a dual hump distribution. There are some
10 people who find it a five-star program, and some
11 people who find it a one-star program, so it works
12 well for some people, badly for others.

13 Here is a competing review of Camtasia: \$300
14 is a lot to spend for something that doesn't work and
15 wastes your time. See the attached video for an
16 example. I'm using Camtasia on a brand new standard
17 Toshiba laptop with 6 gigabytes of memory, a
18 high-speed video card and Windows 7. The final video
19 that Camtasia produces, a completely black video.

20 Another one from CNET: It gets bogged down
21 and crashes when you work with higher resolutions.
22 For the price -- and these are people who paid for the

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1 \$300 version -- I would expect better performance.

2 This isn't about convenience. This is about,
3 in order to do what the opponents want in terms of
4 alternatives, a vidder would have to have both a Mac
5 and a PC and five programs in case one works on the
6 particular DVD she's using. This would function,
7 again, as a sort of digital poll tax for someone who
8 wants to comment on culture.

9 Moreover, the speech we're talking about
10 here -- it's not, like, replaceable. Someone who
11 gives up when Camtasia doesn't work or when replay
12 doesn't work isn't replaced by someone else making a
13 cultural commentary. That's not how commentary works.

14 Finally, the opponents concede that screen
15 capture produces lower quality which, among other
16 things, contributes to the difficulty that we have
17 explaining the rules to a non-copyright lawyer in the
18 absence of an exemption. We don't generally tell our
19 artists that they have to use bad tools or tools that
20 produce ugly results.

21 I also want to mention that clip licensing
22 services are completely inadequate. Studios offer a

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1 few clips of the parts that they think are important
2 or cool for use as promotional tools. Vidders take
3 films and shows apart and focus on the parts that they
4 think are important, or sexist and racist, or
5 important because they're sexist and racist.

6 Take the clips of sexual exploitation and
7 violence that -- we talked about Giandujakiss bid, It
8 Depends on What You Pay that's critiquing Dollhouse,
9 or the footage that a vidder called ThingsWithWings
10 uses to identify and critique male tropes about
11 masculinity across 30 different sources in which harm
12 to a woman is only important because it gives a man an
13 impetus to become a hero.

14 Those clips are never going to be offered to
15 remixers. Even the limited clips available for
16 embedding can't, as a technological matter, be edited
17 in order to comment on them. Even if they were
18 editable, they invariably have restrictive licenses
19 that prohibit offensive or critical uses. And this is
20 definitely true of the online services. The WB, you
21 know, may, for an established documentarian, not issue
22 a no -- or issue a no-action letter, but they're not

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1 going to do it for us.

2 And the bottom line here is that remix, like
3 textual quotation when the subject of discussion is
4 words -- it's an important source of cultural,
5 artistic and political criticism and commentary. Vids
6 are exactly the kinds of socially beneficial uses that
7 fair use is designed to promote. They are
8 transformative in meaning and message. They copy only
9 small parts of the original. They often say things
10 that copyright owners don't want to have said. And
11 they're made not in order to achieve commercial
12 success, but to express something about the world.

13 And on a more theoretical note, it's unwise,
14 as a matter of respect for authors, to say it's true
15 that these are transformative works and it's true that
16 you made them to communicate a message rather than for
17 profit, but you nevertheless don't deserve an
18 exemption because people outside your artistic
19 community believe that you should have made a less
20 beautiful work, and that that less beautiful work
21 would have worked okay.

22 A core reason copyright has a

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1 non-discrimination principle is that it's not a great
2 idea for lawyers to judge the merits of art. The
3 vidding community, as the comments in our submission
4 show, highly values quality footage which, among other
5 things, allows for more advanced editing techniques
6 that contribute to the meaning of vids. And those
7 artistic judgments are worthy of respect even if not
8 everyone has the same reaction.

9 We don't tell oil painters that they could
10 get okay results with water colors. We don't tell
11 sculptors that they could achieve many of the same
12 results with a trowel instead of with a knife. In
13 part, we don't do this because most lawyers aren't
14 particularly expert painters or sculptors, and it's
15 easy to make a mistake about the technical
16 possibilities of the medium compared to someone who
17 actually practices in it. But we also don't do that
18 because it's not the law's proper rule.

19 Perhaps an art critic could say, that would
20 have looked fine at a lower frame rate and with more
21 pixelization, but the Copyright Office shouldn't once
22 it makes the initial determination that a

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1 non-commercial remix includes a substantial number of
2 non-infringing uses, which is the standard.

3 Everyone agrees that screen capture, when it
4 works, makes a copy that could suffice for casual
5 entertainment purposes. This makes the question of
6 what harm the exemption might do basically irrelevant.
7 Anyone who wants to make a full copy of a work for
8 pure consumption purposes can concededly do so if they
9 invest in three or four programs. The only question
10 is how an exemption would affect people who are making
11 clips for other purposes.

12 So with an exemption in place, we focus on
13 educational efforts and our assistance to the fan
14 artists, as we've been doing, on the crucial question
15 of fair use. And there are numerous transformative
16 non-commercial remix videos put online every day. We
17 talked about a video that commented on a widely
18 publicized story line on Glee about a gay teen's
19 experiences. None of these exemptions have been shown
20 to cause any harm and -- or anyone who's misunderstood
21 it to suggest that you can distribute an entire work.

22 The line between editing, remix and creating

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1 a new work and copying an entire work is really pretty
2 clear, and that's a message that we can take back. So
3 that's what I suggest you should continue to do.

4 Thank you.

5 MR. CARSON: Thank you.

6 Francesca.

7 MS. COPPA: Hi. I'm Francesca Coppa. I'm
8 professor of English, and I'm the founding director of
9 film studies at Muhlenberg College. I'm also one of
10 the founders of the OTW, the Organization for
11 Transformative Works, and I'm here to give a bit of a
12 cultural and social picture of remix video and remix
13 vidders, particularly the 35-year practice known as
14 fan vidding, which was the subject of much of our
15 comment.

16 Vidding, the making of music video by setting
17 mass media images to music, predates the digital. In
18 fact, it predates YouTube, the DMCA and the Internet
19 itself. In the '70s, fans made vids using stills. In
20 the '80s, they used footage that they taped off TV
21 before commercial TV was sold. Then they used
22 commercial VHS tapes, and then they started using DVDs

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1 in the '00s.

2 Vidding is an art with a long history. Vids
3 are shown live at conventions and often reviewed
4 afterwards in critical panels, as well as distributed
5 on the web. Vidders congregate and trade aesthetic
6 and technical tips on mailing lists and in other
7 community hubs. Vidders themselves make documentaries
8 celebrating their art and the work of other vidders.
9 Some vidders release DVD commentaries discussing the
10 choices that they made in their own vids. So this is
11 an advanced art form with its own sophisticated,
12 albeit amateur, non-professional, non-commercial
13 community.

14 But vids in other forms of remix video have
15 also received mainstream and are starting to receive
16 mainstream critical attention in museum exhibitions,
17 like the currently running Spectacle: The Music
18 Video, which is on in Cincinnati and is coming to the
19 Museum of the Moving Image, on NPR, in mainstream
20 magazines like New York Magazine, and in film studies
21 journals like Cinema Journal and Camera Obscura.

22 To make a music video out of mass media

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1 footage, out of TV and movies, is to transform it, to
2 distill a two-hour movie or a multi-seasoned TV show
3 into three or four minutes of video is to radically
4 change the story and the emphasis of the image, to
5 edit footage to emphasize its musicality rather than
6 to renarrate or rehash a plot is to make something
7 very different of it.

8 In my more recent scholarly work, I've been
9 talking about the way in which music video and remix
10 video demonstrates poetic qualities, like lyricism,
11 tone, emotion, and density of symbolism and imagery,
12 rather than kind of traditional mass media film
13 qualities. I say this to emphasize that I believe
14 that the making of music video is a creative and
15 transformative act even before we get to the content.
16 To turn five seasons of The Wire or seven seasons of
17 Buffy or 16 hours of Harry Potter into a three-minute
18 music video is a significant transformation of form
19 before you even get to content and the message of the
20 piece.

21 But the content of remix video and vidding is
22 transformative as well, and vids tell stories and make

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1 arguments that articulate the perspective of vidders,
2 who are primarily women and racial and sexual
3 minorities. This makes sense. Vidding is a lot of
4 work, and you need an incentive to talk back and
5 rewrite culture.

6 It is overwhelmingly women and sexual and
7 racial minorities that I'm here representing and that
8 who vid, who feel the need to change the focus and the
9 form of mass culture to make better sense within their
10 reality and to appeal more closely to their tastes.

11 The changes that vidders make range from the
12 more overt kinds of critical readings, making queer,
13 feminist, other kinds of politically charged readings
14 of the kinds that we discussed in our comment, to the
15 more implicit criticism of changing the filmmaker
16 perspective or the narrative emphasis, saying, this is
17 the important character, this background moment was a
18 key moment, right, saying, as artists always do, I'm
19 going to make you see this material through my eyes
20 the way I see it.

21 To vid is to, therefore, be part of a
22 conversation with others who are interested both in

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1 making art and in being part of a vibrant critical
2 community that discusses culture. This is a
3 grassroots art world.

4 The existing exemption has been extremely
5 helpful to artists of the vidding community, as well
6 as to me in my work as former OTW communications
7 chair. The existing exemption for non-commercial
8 remixers is easy to explain and it fits easily, as
9 Rebecca said, within fandom's own internal ethical
10 codes. Fans believe in paying creators, and the
11 general feeling is that if you buy the DVDs, you
12 should be able to criticize them and make something
13 new out of them.

14 The line that people understand is not
15 particularly between DMCA-compliant and
16 non-DMCA-compliant technology, but between paying for
17 your source, whether it's DVDs or Amazon Unbox, and
18 not paying for your source footage.

19 For remixers, mainstream culture is then not
20 just a product to be consumed, but an invitation to
21 create more art and to participate in a cultural
22 discussion.

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1 What these exemptions mean in practice for us
2 is that we've been able to say to people, look, if you
3 think your vid is a transformative fair use, you
4 should feel free to fight a take-down or a cease and
5 desist notice. That assurance is particularly
6 important in the non-commercial remix community
7 because vidders tend to come from demographics that
8 don't necessarily assume that their voices are wanted
9 or even legitimate.

10 As Gordon said earlier for documentary
11 filmmakers -- similarly, as with documentary
12 filmmakers, non-commercial remixers felt that they
13 could not stand up and say, my vid is fair use, my vid
14 is legitimate, it should be restored on YouTube
15 because they were worried that they had broken some
16 law in the making of the thing that they thought was
17 fair. And with that out of the way, we have seen a
18 huge rise in people being able to challenge
19 mainstream -- increasingly commercially owned
20 broadcast systems and distribution systems to say, no,
21 look, please restore my video; my work is important.

22 So, you know, it's important to understand

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1 that vidders come from this culture of fear, a culture
2 in which it's assumed their speech is not valuable,
3 and this is part of what it means to speak from the
4 margins when it comes to mass media culture.

5 These vulnerable speakers -- and, in fact, I
6 should say that, you know, in my own work I often
7 speak about the vidders who are the most sophisticated
8 high artists, the peoples whose work, as remixers, is
9 contiguous with feminist remixers, with appropriation
10 artists like Cindy Sherman, with experimental collage
11 filmmakers of the '60s, but a lot of vidders are young
12 people. They're 15, 16, 17-year-old girls, and they
13 don't necessarily have the same sense of entitlement
14 that you might see in more male-dominated
15 sub-cultures. They don't assume that their voices are
16 wanted or defensible. And older vidders, who are the
17 20, 30, 40, 60 -- we have 60-year-old vidders, many of
18 them -- pink-collar workers who do make the kinds of
19 works that end up in museum exhibitions, by and large,
20 are differently vulnerable. They're not willing to
21 risk a lawsuit. They're not going to jeopardize their
22 own finances, or their families' finances. And so

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1 it's easier to go away if you get a take-down and not
2 fight it.

3 So it's been very, very important to say to
4 these artists, if your work is fair, if it's
5 transformative, you should take a chance to defend it
6 because 95 percent of the time you're not the victim
7 of a person; it's an algorithm. Right? They're not
8 judging your work, they haven't seen your work, and as
9 Rebecca said, when we do tell people this, and a
10 person looks at it, we have never had anybody come
11 back and say that this work does not look fair.

12 And we, at the OTW, have done fairly well at
13 getting that message out, which has been a positive
14 good of this exemption in terms of encouraging diverse
15 kinds of speech, and I, as others have said, have
16 heard nothing to suggest that there's been any harm or
17 downside or problem with the exemption whatsoever.

18 Lastly, in film and media studies, we've been
19 talking -- as the teachers were saying this morning,
20 we talk more and more about multimedia literacy,
21 teaching students how to read and write in a variety
22 of media. And fan artists and remixers, like vidders,

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1 are currently being studied in art schools, in media
2 departments, in film studies departments, because
3 they've been having multimedia conversations longer
4 than the rest of us. They're becoming the model,
5 right, that teachers are using.

6 In a recent book, Paul Booth's Digital
7 Fandom, he suggests that media studies re-invent
8 itself along the lines and using the practices that
9 non-commercial remixers have developed over these last
10 30 years. So we're in a place where, in fact, the
11 mainstream is starting to kind of copy the artistic
12 and discursive innovations of the minority community.
13 Right?

14 So it's really important to leave a window
15 that you don't have to be a certain kind of authorized
16 speaker to speak, and to allow these kinds of
17 grassroots artistic practices by some of the people
18 whose voices are most fragile to continue and not to
19 sort of set up a situation where you have two classes
20 of speakers, kind of a high speech and a low speech
21 where professional get to speak in a particularly
22 glossy kind of language and non-commercial workers

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1 have to speak in a kind of degraded vernacular. So
2 thank you very much.

3 MR. CARSON: Thank you.

4 MS. TURK: I'm going to have visual examples
5 in a minute, so my lovely assistant Francesca is going
6 to get that set up, but I'm going to go ahead and
7 start.

8 I'm an associate professor of English at the
9 University of Minnesota at Morris, and my research
10 focuses on the rhetoric of remix video, but I'm also a
11 vidder myself, and that's the perspective from which
12 I'm going to be speaking today. Professor Tushnet and
13 Professor Coppa have spoken about the legal and the
14 cultural aspects of remix video. I'm going to talk
15 more about the aesthetic and the technical concerns.
16 I am no Jim Morrissette. I am an English major. I do
17 not have an engineering background, but I'm going to
18 try to walk you through a little bit of the technical
19 stuff that goes into vidding.

20 So there are two main points that I want to
21 make. The first is that vidders need high-quality
22 source for both rhetorical and aesthetic reasons.

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1 This second is that the screen capture solution posed
2 at the tech day hearings doesn't work.

3 So let me start by staying that 15 to 20
4 years ago we were all accustomed to fuzzy images.
5 Right? We watched VHS tapes of -- I don't know --
6 L.A. Law and Twin Peaks recorded on super long play,
7 maybe recorded over two or three times if your, you
8 know, family was cheap and didn't want to buy lots of
9 new tapes. And even now we're still used to seeing
10 fuzzy images in certain contexts. Right? We've all
11 seen streaming video on YouTube that's kind of blurry
12 or grainy. Right? Cat videos, dancing babies, that
13 kind of thing. Those kinds of videos are essentially
14 home movies, and most of us are still pretty forgiving
15 about mediocre quality in home movies.

16 But when it comes to commercial media, our
17 standards have changed. People are starting to lose
18 their tolerance for fuzzy versions once they've seen
19 TV shows and movies on DVD or Blu-Ray on a 46-inch or
20 a 55-inch high-def TV or, for that matter, a good
21 23-inch computer monitor. Even streaming services
22 like Netflix have improved dramatically in quality in

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1 the last few years.

2 And what this means is that when people see
3 bad versions of good source, they hit the back button
4 on their browser. Right? Why should they spend any
5 time watching that?

6 So if I want to comment on or critique or
7 even celebrate Lost or Mad Men or True Blood or
8 whatever, I need high-quality source. I need it in
9 order to communicate to my audience and I need it in
10 order to make something that meets my own artistic
11 standards.

12 So with that in mind, I want to talk a little
13 bit about why some of the procedures suggested by the
14 opponents of class 7 won't work. I would love to be
15 able to talk about their suggestion that I use my
16 smartphone to record DVDs, but I can't because I don't
17 have a smartphone to test it with. I was actually
18 kind of disappointed when I heard that smartphones
19 were pretty ubiquitous and I ran and looked in my bag,
20 but alas my cell phone had not magically transformed
21 into a smartphone, so I couldn't do that.

22 So let's talk about screen capture software.

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1 When I watched Tim Short's demo at the tech day
2 hearings, I was really impressed by how easy it made
3 the screen capture process look. And I should back up
4 here for a moment to explain, for those of you who
5 haven't done it, that preparing ripped DVD footage for
6 editing is a pretty complicated process.

7 When I rip a DVD, I get a .VOB file which my
8 editing software can't handle directly -- and, in
9 fact, most editing software can't handle directly. So
10 I have to feed the VOB file through an indexing
11 program that makes my editing software think it's
12 working with an AVI file. Then I have to deinterlace
13 the file. Do you all know what deinterlacing is?
14 Okay. I don't have time to explain that, but ask me
15 if you have questions.

16 The short version is that motion pictures are
17 interlaced or telesced for showing on a TV, and they
18 have to be deinterlaced or inverse telesced somehow
19 before they can be edited or you get a disaster.
20 That's the short version.

21 There are several ways you can do this. I do
22 it by writing a little piece of code called a

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1 script -- this was a little bit of a stretch for an
2 English major, but I learned how to do it. These
3 days, DVDs are usually encoded anamorphically. Do you
4 know what that means? Again, ask me later. The short
5 version is that the image comes out stretched
6 vertically. Right? Everyone is really skinny. And
7 so the image has to be resized. It either has to be
8 stretched horizontally or it has to be squished
9 vertically so that it will look right, or else
10 everyone looks really anorexic. So in order to get
11 the correct aspect ratio, you have to do something to
12 the file.

13 Then the file has to be clipped somehow
14 because you can't just throw a two-hour movie or an
15 hour-long episode of TV into the editing timeline. I
16 mean, I guess you could, but you would get the blue
17 screen of death really, really fast. So, practically
18 speaking, you can't do it.

19 And I have to do all of this really boring
20 and complicated prep work for every single disc that I
21 want to use, even if I'm only using three seconds from
22 it. So when I saw the screen capture demo, I thought,

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1 that could save me a ton of work.

2 Then I actually tried it. And the problem is
3 that the process is easy, but the results are
4 terrible. So when you think about it, it makes sense
5 that the results are bad. These are programs intended
6 to capture still images or low frame rate tutorial
7 videos. Right? Here is how you move your mouse.
8 That's what they're made for. And I think it's
9 telling that the top-reviewed capture programs often
10 don't even mention DVD capture in their product
11 descriptions.

12 But Tim Short's tech day demo used Replay
13 Video Capture, which I had not heard of, but which
14 does bill itself as being able to capture DVDs -- so
15 that's what I used in the examples that we're going to
16 see. It's 40 bucks I will never get back, which I'm a
17 little cranky about, but okay. So Tim Short talked
18 about the tech, and I want to talk about the results
19 of the tech, what we actually see. So we're going to
20 start looking at that.

21 Okay. So let me tell you what I did. I
22 captured, using Replay Video Capture, the first ten

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1 minutes of the 2009 Star Trek reboot movie using
2 Replay Video Capture. I captured at 24 frames a
3 second, since that's what I get when I rip a DVD. And
4 then I ripped the same ten-minute scene, and I pulled
5 some individual frames and put them side by side so we
6 can compare them. And that's what we're looking at
7 here. The captured footage is on top, and the ripped
8 footage on the bottom.

9 MR. CARSON: Can someone lower the lights a
10 bit so we can see this a little better.

11 MS. TURK: Please do.

12 Okay. So let's look at this first image.
13 When we look at these two frames, there's not actually
14 much difference here, I would submit. This is from a
15 shot that has minimal motion and relatively low light
16 contrast from one frame to the next. So screen
17 capture actually does a pretty decent job with that
18 kind of shot.

19 Okay. So if you think back to Tim Short's
20 example from the May 11th hearings, he used a scene
21 from the movie Gattaca that's essentially sepia toned
22 talking heads. That scene may be great for prompting

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1 a discussion about ethics in a high school biology
2 class, but visually it is about as interesting as a
3 bowl of oatmeal.

4 Once you try to capture scenes where people
5 and objects are moving, or where there's high contrast
6 or bright light, you start to see problems. Okay?

7 So this is another frame. It looks like the
8 same thing, but this is from a different point in the
9 scene where we've just had some bright light. And you
10 can see now that there's a difference between what
11 we're seeing on the top -- that's the captured
12 footage -- and what we're seeing on the bottom --
13 that's the ripped footage.

14 That blocky effect that you see in the top
15 example is called pixelation. What happened is that
16 the video data has been reduced by converting color
17 gradations into blocks of solid color. And that's why
18 you see, especially if you look at his face, right,
19 you see lots of individual little squares. So 16
20 pixels of very slightly different colors have become a
21 16-pixel block of a single color. Right? So if you
22 look at the trim on the uniform, if you look at the

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1 face, if you look at any of the diagonal lines,
2 they're starting to get a little weird.

3 Now, here's the things about digital copies.
4 We often think of making digital copies as simply
5 duplicating something. And sometimes this is true.
6 If you copy an MP3 from your computer to your MP3
7 player, you get an exact copy. Or if I send all of
8 you guys a PDF, you now have the same file, right, on
9 your computer that I had in my computer.

10 But editing video is different. When you
11 edit video, when you add effects to video, when you
12 export video, when you compress video to make it
13 smaller so you can district it on the web, you lose
14 quality. It's more like a photocopier. Right? So if
15 you make a photocopy of a book, what you get is
16 readable. It doesn't really look like the book
17 anymore, but it's -- you know, it's still okay.

18 But then, if you make a photocopy of that and
19 then if you make a photocopy of that and then you make
20 a photocopy of that, you start to get degrade. In
21 fact, it is a lot like what happens in analog if you
22 make a copy of a tape and then you copy the copy and

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1 then you copy the copy. Because you're not just doing
2 a pristine version of the file anymore; you have done
3 something to the file in the interim when you're using
4 lossy compression.

5 You think about what Jim Morrissette said at
6 the previous panel about losing frames. That's the
7 kind of data loss that we're talking about.

8 Okay. So here I'm going to quote directly
9 from the Microsoft website's explanation of digital
10 video compression, their recommendation for editing
11 practices. They say, Every time you save your file in
12 a lossy file format, it discards more of the data,
13 even if you're saving it in the same format. A good
14 rule of thumb is to move to a lossy format only as the
15 very final step in your project.

16 Okay. So converting video means losing
17 quality. If the original quality is good, that's a
18 manageable loss. But if the original quality is not
19 good, then every time you do anything to that image,
20 things get ugly. Okay?

21 So this is the same frame that we just saw.
22 What I did, in effect, to it, as I might if I were

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1 making a vid, if I were going to zoom in on that
2 frame, if I wanted to get a close-up of this
3 character's expression -- so I cropped it down, and
4 then I resized it so it would be the same size as all
5 the other frames in the video.

6 This is what we mean when we say
7 garbage in/garbage out. As someone who has been using
8 powerful video editing programs for ten years now,
9 there is nothing I can do to fix that top image. I
10 cannot make it look more like the bottom image, not
11 with technology, not by sheer force of will. It
12 just -- I've lost data. I can't get that nice image
13 on the bottom back.

14 It's easy to degrade source quality, but it's
15 almost impossible to improve it. And so if I start
16 from an image as compromised as that screen capture
17 image, I can't say what I want to say either because
18 people won't watch, because it looks like that, or
19 because they literally won't be able to see what I am
20 trying to do.

21 So the point I want to stress is this: In
22 this movie, in this Star Trek movie and, by extension,

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1 most of the movies that get vided, screen capture
2 will get you acceptable quality, but only on a very
3 small fraction of the frames in the movie. I had to
4 actively look for a shot that was not aggressively
5 pixelated. Okay? I had ten minutes of movie, and I
6 found two shots: The first one that I showed you, and
7 then another -- a very tiny ship moving very slowly
8 through space, another very low contrast, low motion
9 shot.

10 If you take a look at the tests that the OTW
11 has provided and that we linked in our original
12 proposal, you will see that vidders do use some
13 relatively still shots in vids. That's not unusual.
14 But we also use a lot of shots where things are
15 moving, or shots where the camera itself is moving, or
16 shots where there's high light contrast and bright
17 flashes. And if I am limited to using the clips that
18 screen capture renders well, then I can't vid unless,
19 apparently, I want to vid the most visually boring
20 scene in Gattaca.

21 So the whole point of vidding a show rather
22 than writing an essay about the show is to use the

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1 visuals. That's the value of multimedia speech. I'm
2 an English professor. If I want to write an essay
3 about it, I could do that. But if I want to use the
4 image, then I want to use the image.

5 So Cesca is showing some additional examples
6 that I pulled from the first just three minutes of the
7 movie. These images are now all up at the OTW test
8 suite if you want to look at them more carefully,
9 which I would really encourage you -- and we also have
10 a video. I did a side-by-side of the captured footage
11 and the ripped footage so that you can see -- it's
12 kind of funny; when characters move through the
13 middle, you can see them, they're clear, and then
14 suddenly they're pixelated, and then they're clear
15 again.

16 So we will not show a ton of this, but just
17 to give you a little bit of a sense. See how the
18 green flash goes from clear to blocky.

19 You can also see here what Jim was talking
20 about with the dropped frames. You can see that the
21 two are out of sync. The one on the -- the one on the
22 left is what it's supposed to look like, and then on

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1 the right we've got -- I don't even know what's going
2 on over there. We're just missing some frames.

3 Okay. So after working through this exercise
4 and looking at the captured and the rip footage side
5 by side, I have to tell you I was more confused than
6 ever by the argument that screen capture should be
7 good enough for me. If the quality of screen capture
8 is that great, I would think that it would be a
9 terrific technology for piracy. I would argue that
10 the quality is not great, or at least it is not good
11 enough for my purposes. I mean, maybe as a consumer I
12 could tolerate a screen cap'd version of that movie,
13 although I can't imagine why I would. I personally
14 would rather just buy and watch the DVD. But as an
15 artist, I can't work with the quality problems that
16 capture creates.

17 So I want to conclude by noting that
18 high-quality source does not guarantee that I'm going
19 to communicate successfully or that I'm going to
20 create great art. Anybody who has seen much art at
21 all knows that there is a lot of professional art that
22 is ineffective or just plain bad, to say nothing of

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1 amateur art, like non-commercial remix.

2 I will admit that I myself have made some
3 pretty bad vids. There is a reason that I am an
4 English professor and not a professional artist. But
5 I have also made some good vids. I've made vids that
6 I am proud of and that my community has responded to
7 really well. So if I fail as an artist, I want it to
8 be because I failed, not because I was forbidden to
9 use the tools that I need. Thank you.

10 MR. CARSON: Thank you.

11 Martine.

12 MS. RIFE: Hello. Thank you for listening to
13 me speak. I'm Martine Courant Rife. I'm a writing
14 professor at Lansing Community College, and I spoke
15 earlier today, so I'm not going to talk at length
16 because a lot of what I said earlier is relevant to
17 this discussion.

18 I'm here to support classes 7B and 7C that
19 are put forward by the EFF. The points I made earlier
20 are that the exemption, as crafted, currently was
21 greatly appreciated. I felt it was an expansion over
22 what was present in 2006. It's appreciated and being

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1 used in the educational community.

2 The EFF's proposed class 7B is broad. I
3 mean, you could read that to -- that it actually could
4 encapsulate the class proposed by Decherney's group,
5 so -- if you inserted the word "non-commercial" or
6 "educational videos" in there, it's broader.

7 So one of the things I mentioned earlier is
8 that -- I hope that maybe it can be addressed in this
9 round -- is there's an ambiguity in the current
10 exemption in that it separates out media studies
11 students as being eligible for the educational use
12 piece, and then the three -- the little Roman numeral
13 (i), (ii) and (iii), they're separated by semicolons,
14 and then it says it's also okay to use this exemption
15 if you're a documentary filmmaker, and it's also okay
16 for a non-commercial video maker.

17 So if it was premised on that any of these --
18 one or more of these categories would make you
19 eligible to use the exemption, that would be helpful
20 because now I'm asked, well, what if it's not a media
21 studies student but it's a student who is making a
22 non-commercial video, wouldn't that fall under the

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1 exemption?

2 And in the lengthy recommendation that was
3 written up in July 2010, I think a point was made that
4 the expansion wasn't made to include all students, and
5 yet, you know, the argument is that if a student who
6 is not a media studies student is making a documentary
7 film or a non-commercial video, that they should be
8 able to fall under the exemption somehow.

9 So I just -- I'm speaking in support of the
10 EFF's proposed classes. They're broad and they would
11 actually work for the educational community,
12 especially if that was discussed in the
13 recommendation. But if there's a way that, in this
14 next round, that we could connect the vidder exemption
15 with the educational exemption, I think that that
16 would be really helpful.

17 Obviously, some of the vidders are also
18 college students, so if it's way more explicit, then I
19 and other interested teachers can develop lesson plans
20 and actually feel confident about addressing how to
21 legally construct these types of texts in our writing
22 classrooms. And that's all I had to say. Thank you.

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1 MR. CARSON: Thank you.

2 Corynne, you did testify in Los Angeles. And
3 I think the reason we invited you back was basically
4 because we had some folks who weren't here before in
5 L.A. so I'm just going to pose a question -- your
6 choice: Does it make sense for you to go after
7 they've gone or do you want to go now?

8 MS. MCSHERRY: Well, what I had wanted to do
9 is do just a couple of minutes, sort of sum up, and
10 then sort of reserve my time for after they go.

11 MR. CARSON: Go ahead.

12 MS. MCSHERRY: Is that okay? I was conscious
13 of that very thing, so I promise, just a couple of
14 points. So -- first point. I think, with respect to
15 this exemption, one of the things that -- we've had
16 reams of paper, we've had hours and hours of
17 testimony. Here's what we haven't had: A single
18 shred of evidence of harm. I think many people have
19 pointed this out, and it applies equally well to
20 non-commercial videos as to the other exemptions. We
21 just have no reason to think there's been harm.

22 What we heard in L.A. is -- and what we've

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1 heard here I think is speculation that there might be
2 harm, that some copyright owners might feel
3 uncomfortable making their works available, but that,
4 it seems to me, is entirely speculative. We've heard
5 that digital distribution methods depend on DRM. No
6 one is arguing that. Of course they do.

7 But this exemption doesn't prevent anyone
8 from using DRM. It just takes away the Sword of
9 Damocles that hang over the head of folks who want to
10 break that DRM to engage in lawful purposes.

11 We've heard here and in Los Angeles that an
12 exemption might send a message, an unfortunate
13 message, that content is DRM-free. But it seems to me
14 that if you're worried about a message that's being
15 sent, the right way to respond to that is more and
16 better education about 1201, which I think is sorely
17 needed, and I would suggest that -- it seems to me
18 that the large content owners are in a really good
19 position to get that message out. And we, of course,
20 are doing our very best at EFF and at OTW to do that
21 very thing on very limited budgets.

22 Secondly -- and I won't belabor this because

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1 I think it's well-covered -- but I hope that it's been
2 put to bed, the notion that screen capture is an
3 acceptable alternative for remix artists. I just -- I
4 hope that we've heard enough to be comfortable that
5 that's simply not adequate.

6 And just -- I just want to stress that -- and
7 I think that Professor Coppa really hit on this -- is
8 that we certainly don't want to treat remix art as
9 some sort of second-class art form. It's not. It's
10 actually a very important and old art form, and it's
11 just one that's been marginalized until very recently.
12 And on that point, I want to stress that this is what
13 I have heard from folks -- from remix artists. The
14 exemption that -- the existing exemption sent a
15 message to remix artists that their work actually is
16 legitimate, and that was really important; that was
17 very important in helping people sort of come in from
18 out of the cold and fight back and, you know, defend
19 their fair uses and stand on their fair uses.

20 Clip licensing. I feel like this came up --
21 we agreed on this in L.A., but I just want to
22 reinforce it. It just seems to me that clip licensing

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1 is simply not a viable alternative for remix artists
2 because of cost -- many remixers are working on a
3 limited or no budget whatsoever, so they just simply
4 can't afford even minimal licensing fees. Logistics,
5 not just the logistics of getting all the licenses
6 that you might need in advance, but also even figuring
7 out in advance what you need.

8 In our reply comments we point to the
9 testimony of Elisa Kriesinger, who is a remix artist,
10 and she said, look, I need the whole alphabet in
11 advance. I just can't pick a few letters in advance
12 and decide what I'm going to need. It doesn't work
13 that way. The creative process doesn't work that way.

14 And then, frankly, for remixers, as for
15 documentarians and other filmmakers who are engaged in
16 criticism and commentary, the licensing process simply
17 isn't going to work. I don't think that the makers of
18 the Twilight show would have been thrilled to
19 authorize Jonathan McIntosh to use all the clips that
20 he used critiquing the stalking vampire Edward that we
21 saw a couple of weeks ago, much less the kind of
22 feminist critiques that we're talking about here

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1 today.

2 Finally, I respectfully actually have to
3 disagree a little bit with my witness, Martine Rife.
4 I actually don't think our exemption is all that broad
5 at all. I would point you to the numerous limits that
6 are built into the exemption. I mean, we heeded, in
7 crafting it, many of the limits that were imposed
8 by -- or proposed by the Register in 2010. So purely
9 for-profit uses need not apply. There is an objective
10 limit. The artist must not just believe, but
11 reasonably believe that circumvention is necessary.

12 There's only one authorized purpose, which is
13 the extraction of short clips, right, which can have
14 no conceivable impact on a market for the work.

15 With respect to 7C, you can only turn to
16 digital distribution methods if it's not -- if the
17 work need is not available on DVD. Only
18 non-infringing uses. So if you lose under 107, you
19 lose under 1201. Important limit that's in all of
20 these, but I think crucial to keep in mind.

21 And, finally, I just want to reiterate
22 something that I mentioned in Los Angeles, which is

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1 that we have no particular objection if you also want
2 to build in some language saying for purposes of
3 commentary and criticism. And that's because the
4 works that we're talking about are all for purposes of
5 commentary and criticism. So there's no problem with
6 that as far as we're concerned.

7 So, to close, these exemptions are just
8 designed to bring the existing exemption up to date,
9 to bring it consistent with technological and
10 practical developments, and also to reflect the actual
11 ethical practices of the communities that we're
12 talking about.

13 That's all. Thank very much.

14 MR. CARSON: Thank you.

15 Bruce, you're next.

16 MR. TURNBULL: David is going set up briefly.

17 I do want to show a couple of things. The first --
18 again, I'm Bruce Turnbull representing the DVD Copy
19 Control Association. I did want to -- let me just
20 note, although Dean is not on the panel, I've been
21 authorized by Dean to say that with regard to the
22 screen capture software with regard to his studio,

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1 they would endorse and agree with the positions that
2 were taken -- have been expressed here with regard to
3 the violation of the DMCA, or lack thereof.

4 Okay. We wanted to spend a moment on
5 something that I alluded to this morning, and that is
6 the loss in DVD revenue. Again, as a overall matter,
7 the video entertainment market is in a decline. The
8 yellow line on this chart is the DVD part of that.
9 And as you can see, it has gone down dramatically in
10 the last five or six years.

11 And, again, while we don't attribute this,
12 you know, as a cause and effect to the exemptions that
13 were granted first in 2006 and then in 2010, our view
14 is that you need to take into account, I think, the
15 marketplace in which DVD exists as you look at the
16 range of exemption requests that have been submitted
17 this time and take into account that it is not a
18 market in great shape at this point.

19 This is another depiction of much the same
20 point, showing some projections forward that were done
21 by Morgan Stanley over -- the decline over the next
22 three or four years.

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1 Now, our overall point is that we believe
2 that there has not been the requisite showing of
3 adverse effect. And, again, I want to go back to the
4 points that I made at the outset this morning in my
5 testimony on the educators-related panel and points
6 that Steve Metalitz has made at a number of points
7 during the course of the day, and that is that there
8 needs to be a direct linkage between the works
9 distributed on CSS of protected DVDs that are -- that
10 the requesters have been unable to make use of that if
11 they did not enjoy the benefit of the exemption.

12 Let me talk for a moment about take-down
13 notices. I was -- we were perplexed by what we heard
14 about -- the testimony in L.A. and I'm, again,
15 perplexed by the testimony here today. The take-down
16 notice under section 512, which was another part of
17 the DMCA, does not include 1201 violations. And we
18 did look on chilling effects, as we're displaying
19 here, for copies of and examples of take-down notices
20 that have -- cease and desist notices that have been
21 filed under this, and we couldn't find any that had
22 any reference whatsoever to circumvention or

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1 section 1201. So we think that is actually, as
2 indicated, a red hearing in the proceeding and not
3 something that I think needs to be taken account of.

4 Now, with regard to the alternatives to
5 circumvention, we continue to believe that the video
6 capture software certainly for many uses. Streaming
7 websites we do think that although -- sorry that the
8 witness doesn't have a smartphone, but there are many,
9 many people who do have smartphones -- that is
10 ubiquitous and, as was indicated in I think one of
11 Dean's slides this morning, between smartphones and
12 tablets that are video recording-capable, we're
13 talking about hundreds of millions that are going to
14 be in consumers' hands in the next couple of years.

15 Also, video editing software which can
16 enhance the recordings that are made either by video
17 capture or by smartphone would improve, you know,
18 where there may be a quality issue.

19 I'd also note that -- I appreciate the
20 witness' suggestion that -- that the technology that
21 we demonstrated is probably good enough for biology
22 classes, so we'll apply that to this morning's panel.

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1 The -- also, I appreciate the fact that
2 unlike the panels this morning, the people on the
3 other side of the room this afternoon, or the late
4 afternoon, actually use the technology that we
5 demonstrated and so -- for their purpose.

6 Now, the question is whether, in many
7 instances, perhaps not all, but in many instances that
8 technology is good enough for -- as an alternative to
9 circumvention. One of the things that we did hear
10 about the demonstration that was made on May 11th was
11 that it did not show action scenes and did not show
12 special effects. Now, that was because, again, we
13 gave this to our teacher and said, okay, how would you
14 use this in your classroom and pick the kinds of
15 things that you would depict in your classroom. And
16 that demonstration reflected what his choices were,
17 you know, for that particular use.

18 Now, having heard criticism of that, as I
19 indicated, we've done another use of the video
20 capture -- same video capture software, which we can
21 demonstrate. This is a scene from Battlestar
22 Galactica which has a lot of action and a lot of

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1 special effects, and so side-by-side, if I'm doing
2 this right, David, on the left-hand side is from
3 the -- first we'll see the video capture.

4 (Video played.)

5 MR. TURNBULL: The point is that -- this is
6 actually, for many purposes, for -- you know, it has a
7 lot of action, a lot of special effects. For many
8 purposes it looked -- I mean, to my eye, it looked
9 like something I would be perfectly happy to watch for
10 whatever purpose. The -- to see what it looks like
11 sort of side-by-side with the original...

12 (Video played.)

13 MR. TURNBULL: What -- this is showing the
14 video capture software to which we've applied, again,
15 the inexpensive video editing program that we talked
16 about earlier. Again, our view is that this is really
17 quite good quality, can we made a little better with
18 the video editing software.

19 The -- again, video editing -- this slide
20 shows that it doesn't really matter whether you're
21 using a Mac or a PC; there are video editing -- good
22 video editing software programs available. This is

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1 from one of the vidding sites themselves where
2 we're -- the point is that the kind of software that
3 we think can enhance even the video capture that I
4 thought was pretty good to start out with is available
5 for use by the vidders.

6 So, basically, our view is that the --
7 denying the requested exemption will not harm vidders.
8 We also think that the standards have been sort of
9 turned around here, and I wanted to comment on that,
10 that what's happened in the -- these are all de novo
11 proceedings, and so the burden remains on the
12 requesters to show that they would be harmed if there
13 is no exemption and that the balance favors creating
14 the exemption; it does not fall on us to say that for
15 the past three years there was or wasn't harm caused
16 by the fact of the exemption previously.

17 We think there are an array of alternatives,
18 and that, as we heard, the video -- vidding process
19 is, in fact, a -- something that people spent a lot of
20 hours with and use a lot of time and effort, and
21 you're using video editing software as it is and, as
22 consequence, using video editing software to enhance a

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1 little bit on some of the alternatives is not a
2 significant burden in terms of the use of the
3 alternative.

4 I will say, if you're going to the extreme of
5 sort of blowing up the pictures, as we saw before,
6 there may be certain circumstances where perhaps the
7 video capture software is not ideal. I'm not going to
8 deny that. On the other hand, if you're using it,
9 there are many purposes for which it would be
10 perfectly acceptable, as we've demonstrated. So thank
11 you.

12 MR. CARSON: Thank you.
13 Steve.

14 MR. METALITZ: Thank you. Good afternoon.
15 I'm Steve Metalitz, here on behalf of seven national
16 organizations of copyright owners and creators. We
17 appreciate the chance to comment on these proposed
18 exemptions, and I want to thank all the proponents who
19 I think have done an excellent job of presenting the
20 case for these exemptions. I also want to thank the
21 office for structuring this hearing in a way that each
22 of these exemptions is looked at separately.

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1 I have to disagree with -- I think it was
2 Professor Rife who said the problem was this isn't
3 linked up enough with the educational exemption. Our
4 concern, as we've expressed earlier, is it's
5 probably -- the boundaries between these exemptions,
6 or the links between them, are totally unclear.
7 There's a lot of -- a great deal of overlap, and we
8 think these are all very different situations, the
9 educational, the documentary and fictional filmmaking
10 and then non-commercial video or fandom or vidding.
11 They differ in a lot of different ways.

12 I think it makes sense -- I think they should
13 be -- you know, the different proponents should be
14 talking to each other. I thought it was interesting
15 that -- I thought Professor Turk was saying that it's
16 easy to do screen capture, even though she thinks the
17 results are terrible. Maybe she needs to give a
18 tutorial to Mr. Bolos who thought it was very
19 difficult to do screen capture and much easier to
20 simply rip.

21 But in any case, I think these really are
22 different cases, and they differ both in terms of how

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1 viable the alternatives are and, perhaps more
2 importantly, to what extent can the proponents bear
3 the burden of showing that the uses that they wish to
4 make of the material that they access through
5 circumvention is, in fact, non-infringing, which is
6 the test that the statute, as interpreted by the
7 office, sets up.

8 And, I mean, I hear the concern about a
9 two-tier system and professionals being held to one
10 standard and amateurs to another. I think that's a
11 legitimate concern and one that should be addressed in
12 the definitions. But the fact is that we really are
13 talking about two very different types of animals here
14 when we contrast the documentary films that were
15 discussed in the last panel and the vids that are
16 discussed here.

17 Just for one -- just to highlight one
18 difference, of the vids that I looked at in the test
19 suite, there is virtually no material that is original
20 to the film -- to the maker of the vid. The
21 authorship there consists -- if there is authorship,
22 it consists of selection, coordination or arrangement

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1 of material that's appropriated from someone else;
2 it's used. It's created by someone else and then used
3 by the artist here.

4 That doesn't mean it's not fair use, but it
5 does mean that it's I think in a somewhat different
6 category than the documentaries that we were talking
7 about in the last panel where the vast -- you know, I
8 think in most cases a lot of the material that you
9 would see on the screen is original to the
10 documentarian.

11 Obviously, they may use a lot of clips from a
12 lot of different sources, but I don't think there
13 would be -- there would be few, if any, that would
14 approach 100 percent, which I think is the case of
15 most of the vids that were cited by the proponents.

16 Again, this is not in any way conclusive on
17 fair use, but I think it stands to reason that it may
18 affect the likelihood that the uses are, in fact,
19 non-infringing.

20 Let me say two things about the existing
21 exemption, and then I have a couple of concerns about
22 the proposed expansions that are on the table now.

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1 First, Bruce already mentioned this -- what
2 we're sometimes calling the DMCA issue, which is kind
3 of confusing. We're really talking about the
4 interplay between section 1201 and section 512 of the
5 copyright act, both of which were part of the Digital
6 Millennium Copyright Act.

7 And I heard the previous witnesses saying
8 that now that this exemption exists on 1201, their
9 clients feel free to fight a take-down. They can take
10 a chance to defend their work as fair use. And, to
11 me, this is just a non-sequitur. As Bruce pointed
12 out, you can't send somebody a take-down notice under
13 section 512 regarding an alleged violation of section
14 1201.

15 And it's only about infringement, only about
16 infringement of copyright. And the
17 counter-notification isn't about 1201; it's only to
18 say that mistake or -- you believe your material has
19 been misidentified -- mistake or misidentification has
20 occurred.

21 So -- you know, counter-notifications are
22 very rare if you look in the overall scheme of -- I

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1 don't know what the figures are now. When we looked
2 at it several years ago, it was, you know, thousandths
3 of a percent perhaps of all notices stimulated
4 counter-notification. I suspect that's probably true
5 before or after this exemption. I don't think there's
6 any evidence that it's changed.

7 And then once counter-notifications are made,
8 the only option that the copyright owner has under
9 section 512 -- all they can do is, if they don't like
10 the counter-notification, they can file a lawsuit; you
11 have to file it within a certain time limit or else
12 the material is automatically reinstated by the
13 service provider.

14 I don't think we've had any -- I don't think
15 that -- I don't think there's any evidence that this
16 exemption has affected that one way or another. It
17 doesn't seem credible that copyright owners who think
18 that a use is not a fair use would somehow, only if
19 there's the add-on of section 1201 would they then
20 bring a claim against the -- what they view as an
21 improper counter-notification and claim there was
22 infringement and that it was not fair use.

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1 So I -- there's a lot of talk about what
2 message the different exemptions send. This message
3 is pretty garbled, in my view. I don't really think
4 there's anything to do with the notice of take-down
5 process.

6 The second point about the existing exemption
7 is that it talks about reasonable grounds for
8 believing that circumvention is necessary, and I think
9 the thrust of what Professor Tushnet talked about, and
10 others, is that, in the approaches taken by the
11 beneficiaries of this exemption, that's just a totally
12 irrelevant question. They're not -- they don't know
13 what circumvention is. They don't know what
14 circumvention isn't. It's just not a factor in their
15 determining how they're going to proceed. They're
16 after the best quality material. They're going to use
17 a circumvention tool if that gives them the best
18 quality material.

19 So it seems to me that this is a -- kind of a
20 meaningless limitation -- it appears to be a
21 limitation, but actually has no practical effect, I
22 think, based on the -- the world view that I think has

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1 been well presented by the advocates for the -- by the
2 proponents here. So I think I would encourage the
3 office to take that into account.

4 Let me just mention three concerns about the
5 proposed expanded exemptions. First, the move to
6 primarily -- so this would cover primarily
7 non-commercial videos rather than non-commercial (sic)
8 videos. And that's clearly expressed in the EFF's
9 submission as meaning any video that does more than
10 propose a commercial transaction. So we're way, way
11 beyond the kinds of examples that are shown in the
12 test suite, for example. We're into infomercials,
13 we're into really anything that isn't simply a
14 commercial. And to me, again, that -- that means
15 we're getting very close to saying for any type of use
16 whatsoever.

17 The second point is that the -- both -- I
18 think both of these proposed exemptions -- the
19 existing exemptions speak in terms of motion pictures.
20 Both of these exemptions speak in terms of
21 audio-visual works. That's obviously a broader
22 category, and we had some testimony this morning about

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1 video games. It turned out that no circumvention was
2 involved in that testimony. So I -- again, I don't
3 think we've seen any indication that anything other
4 than motion pictures is really in play here. So I
5 would very much question the expansion of this to
6 cover audio-visual works.

7 And, finally, with regard to, I guess, 7C,
8 when the works in question are not readily available
9 on DVD, then the circumvention would take the form of
10 hacking online streaming services. I think this is an
11 exceptionally risky approach for the office to
12 endorse, and talk about the message that would be
13 sent. The message that would be sent to the producers
14 of much of this content -- as you heard in
15 Los Angeles, they are constantly seeking new channels
16 and new methods for disseminating this material to the
17 broadest audience as possible. A lot of that has to
18 do with the online -- what's sometimes in these charts
19 referred to as digital; that's obviously a misnomer
20 since a DVD is digital also -- but the online means of
21 streaming as well as downloading. This is a critical
22 part of the future means by which the public will

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1 access these works.

2 And to say that, even if it's a
3 streaming-only service, you could then hack that
4 for -- in order to make just about any kind of video
5 other than a commercial, and even -- you know, you
6 take your chances as far as the fair use is concerned,
7 I think that sends very much the wrong message.

8 Because we heard from the studios in Los Angeles that
9 this is really an essential for the expansion of the
10 online distribution means that they are increasingly
11 using.

12 So I think the office needs to be extremely
13 cautious about that and really, again, as -- to come
14 back to where Bruce started, to insist that the
15 proponents bear their burden of showing that they
16 can't make the non -- that the use that they want to
17 make is, in fact, non-infringing and that they just
18 can't make it without being able to engage in that
19 type of circumvention.

20 So I thank you for your patience. I know
21 I've gone over some issues that were raised earlier in
22 the day as well, but I -- I would like to try to

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1 answer any questions.

2 MR. CARSON: Okay. Do any people on the --
3 oh, Corynne --

4 MS. MCSHERRY: Well, why don't I just start
5 by responding because I think that's where you were
6 going anyway --

7 MR. CARSON: That's where I was going, and
8 then anyone else who has anything -- again, when we're
9 talking about response, directly in response to what
10 was said. Don't -- this is not an excuse to start
11 talking about something else.

12 MS. MCSHERRY: Understood. Thank you.

13 Let me start with the concerns about -- I'll
14 say market harm, which I realize is imported a little
15 bit from another standard, but let's just talk about,
16 you know, potential harm that an exemption might
17 cause.

18 First, with respect to DVDs, I think that
19 Bruce concedes that there may be some losses in DVD
20 revenue, but they can't attribute them to the
21 exemptions, and I think they probably have a lot more
22 to do with the rise of alternative services. And

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1 also, you know, I can submit some supplemental
2 materials, but the MPAA has been touting its record
3 profits in movies for years now, so I'm a little
4 surprised to hear that the sky might be falling,
5 particularly with respect to -- and the notion that
6 the vidding community might be contributing to that is
7 fundamentally wrong because one thing we know for sure
8 is vidders are fans. They will buy every version of
9 Twilight or Buffy or any -- pick your show pick, pick
10 your movie -- that's available. Extra features and so
11 on. You know, these are people who buy DVDs. These
12 aren't people who encourage others not to.

13 And with respect to the streaming services,
14 you know, I realize that these are emerging services,
15 although I would say they're pretty well entrenched at
16 this point, and growing rapidly -- and I don't want to
17 repeat what I said in L.A., but I would encourage the
18 committee to sort of -- you know, treat this a little
19 bit like a court. Let's look at circumstantial
20 evidence.

21 12 years ago we had DVDs and CSS, and we
22 heard that, if an exemption were applied, DVDs would

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1 never take hold. And so we waited. DVDs flourished
2 even though -- there was also record that the CSS has
3 been long since hacked. And that didn't cause the end
4 of DVDs and it didn't ruin the emergence of DVDs as a
5 viable business model. All it did was make it harder
6 for legitimate fair users to rip from DVDs.

7 And I think it was really important that we
8 finally came to a conclusion that that was not
9 appropriate. I would encourage the Copyright Office
10 not to wait another ten years with respect to these
11 new services where, again, we know that there are
12 already tools available to rip from these services and
13 manipulate the video from these services.

14 With respect to the -- I think I need to
15 clarify the 1201, 512 content ID interplay. There is
16 no one who is claiming that you can send a take-down
17 notice based on 1201. That's not what the take-down
18 notice does. What we are seeing is that when people
19 get a take-down based on their video, they -- if they
20 consult a lawyer, their lawyer is going to look at the
21 video and say, slam dunk fair use, absolutely no
22 problem, but how did you make it? And depending on

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1 the answer to that question, the lawyer has to say
2 very different things to that person about whether
3 they want to fight back or not and what the legal
4 risks of fighting back or not are.

5 That's what we're talking about here. We're
6 not talking about 1201 take-downs. We're talking
7 about, you know, standard take-downs under 512 or
8 effective take-downs under the content ID system. If
9 something is posted on YouTube, things just get taken
10 down and you have to decide whether you're going to
11 dispute that.

12 Again, if you talk to a lawyer, and it's
13 probably the first time you are talking to a lawyer,
14 or you're talking to the good people at OTW, they're
15 going to have to have the same conversation. So
16 that's what we're talking about.

17 And I think that we've heard testimony from
18 the witnesses who explained that thanks to the
19 exemption that was granted in 2010, they can now give
20 really different advice, and that's a really wonderful
21 thing. So that is what we're talking about.

22 Now, adverse affect. I'm not quite sure how

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1 I'm supposed to show adverse effect with respect to
2 the exemption that's already in place because the
3 exemption is in place. So I think, rather, pointing
4 out that we're able to do this positive thing and that
5 actually is occurring, which means that people are
6 consulting and there isn't a phenomenon happening, I
7 think is a better way of showing that.

8 But with respect to 7C, what we have is a
9 situation where we have a lot of people who are
10 incurring legal risk, or likely to incur legal risk,
11 and they likely don't even know it. And if that's not
12 an adverse effect, I don't know what is.

13 Let's see. I don't want to hit every single
14 thing. With respect to whether these videos are
15 non-infringing or not -- so what we're hearing is
16 that, well, remixing doesn't involve original material
17 so, therefore, maybe it's not fair use, which I
18 think -- there's no court in the United States who is
19 going to agree with that proposition. And I would
20 urge you, once again, as I did in L.A., look at the
21 videos that we've submitted in the record. There are
22 many. Look at the videos in the test suite.

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1 And I know that you guys did this last time
2 and I imagine that it takes a lot of time, and I'm
3 sorry for that, but if you look at them, you will see
4 these are all fair uses, and there are lots of them.
5 Okay? So -- and I think, again, it is telling that
6 none of those examples have been picked apart by the
7 opponents of this exemption. It seems to me that, if
8 they could do that, they certainly would. I would if
9 I were them. And they're not able to.

10 And it's not just that they're
11 non-infringing. I want to point out -- this is
12 something that the Register found last time, and I
13 really want to stress it. They're not just
14 non-infringing. They're really socially beneficial.
15 These are people who are participating and sparking
16 further cultural conversation. That's important.
17 That's valuable. That is a core -- that sort of
18 reflects our core First Amendment values, and we are
19 supporting socially beneficial fair uses. And that
20 strikes me as crucial.

21 Last thing. I'm sure there's more, but I'm
22 sure you don't want to hear any more from me. The

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1 question of whether the -- reasonable grounds for
2 believing language has any meaning or not. I think
3 there's no question that remix artists want the best
4 quality available. You ask them, would you like the
5 best quality, the highest quality you can get? They
6 will say, well, of course I would the highest quality
7 I can get. No, I don't want crappy video. I'm an
8 artist. I'm trying to do good work.

9 But that's not the end of the story. They
10 have to believe it, but they also have to have
11 reasonable grounds to believe it. And that means if
12 you ever go to a court, if we have a fight about this,
13 they're going to have to show that they had a
14 reasonable grounds for that belief. So it's not a
15 silly limit. It's not an irrelevant limit. It's a
16 limit that sets up, should a fight ever need to
17 happen, an actual objective limit on the exemption.

18 So I will stop there and let other folks talk
19 about quality and other questions.

20 MR. CARSON: Okay. Anyone else on this side
21 have anything directly in response?

22 MS. TUSHNET: Just four quick things. So I

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1 hear the opponent saying that vidders should be making
2 different art without cropping and without effects
3 because it does look really terrible that way. That's
4 not really what we, as lawyers, should be doing. It's
5 not a role of a fair use determination to say, make
6 different art. It's to look at the art we have.

7 Also, I think there's a little bit of a story
8 not being straight on whether DVDs are in decline or
9 going strong. And, of course, more importantly,
10 there's still no link between short clips made for
11 remix purposes and full copy, which is an easily
12 understandable dividing line that vidders have fully
13 internalized.

14 Third, your ability to speak shouldn't depend
15 on your ability to navigate technical hurdles
16 unrelated to the content of your expression, which is
17 sort of the extra hours I guess you're supposed to put
18 in fixing up the unfixable footage. And it also
19 shouldn't depend on your position as one of the
20 one-third of Americans who can afford smartphones.
21 And of course, I should say smartphone footage is no
22 better for all these other things. They drop frames.

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1 Right? Kids don't have a frame rate, so you can take
2 smartphone video of your kids and it will look fine.
3 But if you take -- you know, the frame rate will
4 differ if you hold it up on a screen. So all the
5 things we've been saying about screen capture are
6 completely true of smartphone footage.

7 Finally, just a point. Mr. Turnbull's quote
8 from the fan video site about your awesome options if
9 you're a Mac and PC, those options are HandBrake and
10 Mac the Ripper. That is -- that video site is talking
11 about circumvention.

12 MS. TURK: I would just add a couple of
13 things. One, Mr. Metalitz seemed unsure as to whether
14 vids are authored, and all I can say is that the
15 nature of remix video is exactly what he said. We
16 don't shoot things ourselves; we take existing source
17 and remix it, hence "re."

18 The second -- I would simply echo what
19 Professor Tushnet said, the fact that smartphones are
20 available does not mean that they are affordable or
21 usable. You know, I live in Minnesota, which is one
22 of the big states in the middle, in a very rural area,

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1 and cell phone service is not always as reliable as
2 one would like.

3 The other thing about effects -- I think,
4 again, if you look at the vids in the test suite, you
5 will see that the kind of extreme cropping or zooming
6 that one of my examples was intended to illustrate is
7 in a lot of cases the norm, not necessarily that
8 effect in particular, although yes, zooming is done a
9 lot, but other kinds of effects as well.

10 So changing speed, right, altering color.
11 Imagine putting a filter, you know, or changing the
12 color of a clip with that kind of blocky pixelation.
13 Right? So the image is already looking a little
14 peculiar. If all the blocks of color change in sort
15 of unpredictable ways when you change the color -- you
16 know, so if you imagine layering a color effect on top
17 of a zoom effect on top of a speed effect on top --
18 you know, so effects are not a choose one and choose
19 one only. They're often used in conjunction with each
20 other.

21 And I confess that I did not take the time,
22 because it is very time-consuming, to show an example

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1 of a clip that has, you know, 10 or 12 different
2 effects. But if you look at the test suite videos,
3 you will see a number of vids that do have that kind
4 of layering of effect. And if those are not
5 immediately obvious, which I understand that they
6 might not be to someone who is not familiar with the
7 original source, but that is the kind of thing that we
8 are happy to provide a sort of walk-through of, if you
9 want, you know, a sort of a run-down: Here are the
10 effects that are used at particular moments in a vid.
11 We can contact the vidders and provide that sort of,
12 here's what you're actually seeing when you see this
13 vid that you may not be aware of because the whole
14 point is that they're seamless. Right? Those effects
15 can be made invisible if the quality of the source is
16 good enough.

17 You can think, well, didn't it just always
18 look like that? No, it didn't always look like that,
19 but because, you know, someone was able to rip the
20 source, you can produce extremely sophisticated
21 combinations of effects.

22 MR. CARSON: I have a couple of questions

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1 before I turn it over to Steve.

2 First of all, a point made by Rebecca, I'm
3 not sure I've heard you too clearly, and maybe it's
4 just the time of day, and it's been a long day, but I
5 did get a sense that your -- well, I'm not going to
6 characterize what I heard. Let me start by just
7 asking a question. Have the two of you looked at
8 least some of the examples that the proponents have
9 given of various vids that they say are fair use?

10 MR. METALITZ: Yes, I looked another most of
11 the vids in their test suite.

12 MR. CARSON: Okay. And, Bruce, how about
13 you?

14 MR. TURNBULL: No.

15 MR. CARSON: Okay. Well, then, Bruce, you're
16 welcome to pitch in, and I encourage you to, because I
17 want to hear your point of view, but with respect to
18 you, Steve, I'm not sure I heard clearly from you
19 whether you think most, some or all of those do
20 constitute fair use or do not.

21 MR. METALITZ: I didn't look at them very
22 much with that in mind. So I'd want to look at it

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1 more thoroughly to -- before giving you any opinion.
2 I'm happy to say that many of the vids that are talked
3 about here probably are fair use. I don't want to
4 talk about the specific ones. But this exemption is
5 extremely broad, and it doesn't just cover the people
6 who are active in the Organization For Transformative
7 Works and who are benefitting from the advice and
8 counsel that Professor Tushnet and the others are
9 giving.

10 And especially if it's expanded, as is
11 proposed here, I just don't think that you can meet
12 the -- indulge in the assumption that this use is, in
13 fact, non-infringing, which is the test. And I think
14 this is an area where there is a meaningful difference
15 between professionals and amateurs. It doesn't, to
16 me, denigrate the amateurs at all to observe that they
17 are probably less knowledgeable about the legal issues
18 involved than are the professionals.

19 So, you know, if they're ignorant of it, then
20 undoubtedly they're not going to be conforming their
21 conduct to this, or they're less likely to be
22 conforming their conduct to those standards. So it

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1 just seems to me that you need to draw some
2 distinction between the two groups and perhaps treat
3 them differently, which is not the case under the
4 existing exemption.

5 MR. CARSON: And the two groups are
6 professionals and amateurs?

7 MR. METALITZ: Well, the documentarians and
8 the fictional filmmakers that were talked about in the
9 last panel I think are quite differently situated.

10 MR. CARSON: Okay. So let's assume we
11 concluded that an appreciable number of the vids that
12 we've seen do constitute non-infringing uses, and
13 let's assume -- and we'll get into this in the time
14 left to us, but let's assume that we've been persuaded
15 that there's no real way to get the quality you need
16 to make the point you're making without circumventing.

17 Then we're put in a position where we seem to
18 be on route to an exemption, although you may say
19 there are still other things we have to decide, but at
20 least we seem to be going in that direction. How do
21 we cabinet, to address your concerns, while still
22 permitting the non-infringing uses that these people

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1 want to be able to make, to take place? Are there
2 ways we can narrow this that sort of takes care of
3 those who need to do it but doesn't allow the other
4 kinds -- circumvention in other cases where it's not
5 necessary?

6 MR. METALITZ: I don't think I have a very
7 good answer to that right now.

8 MR. CARSON: We didn't three years ago, which
9 is why we ended up where we are.

10 MR. METALITZ: Because -- first of all, I
11 guess I have to question the premise, but, you
12 know, we've already been through that, as far as the
13 extent to which these uses are, in fact,
14 non-infringing. In the previous panel, there was a
15 lot of discussion about various factors that could be
16 looked at to help increase the likelihood that the use
17 would be, in fact, non-infringing, and I don't think
18 that the proponents have -- I'm not sure there's much
19 in the record that you could grab onto here to -- to
20 narrow that.

21 I don't know that that means that you throw
22 up your hands and say, well, we'll just let anybody

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1 who is making a primarily non-commercial video take
2 advantage of the exemption.

3 MS. RIFE: One of the things, if I recall
4 correctly, reading the history of these hearings, is
5 that the focus is supposed to be on the class of work.
6 That's one of the reasons why I admire the way that
7 the EFF has fashioned these two classes, because they
8 aren't distinguishing between types of human beings,
9 they aren't distinguishing types of users, which isn't
10 what the exemption is supposed to be; it's supposed to
11 be focused on the class of work.

12 So the limitations that are present should
13 focus on the work, and that's -- you know, that's why
14 the exemption you have now -- they're not parallel
15 because, with the educational use, that is focused on
16 the type of user. But the other two uses are, as they
17 are supposed to be, focused on the class of work.

18 So in crafting the limitations, because I
19 know -- I remember from last time that the panel was
20 asking, how can we limit this? How can limit this as
21 much as possible? I would ask that everything
22 possible is done not to make categories of users, but

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1 to focus on the work itself that comes out at the end.

2 MR. CARSON: We've got two people who want to
3 speak. Bruce.

4 MR. TURNBULL: If we're going to go back to
5 that, then we go back to 2003 basis for the decision.

6 MR. CARSON: And you folks might agree with
7 her, by the way, but for different reasons.

8 MR. TURNBULL: And I would quite agree,
9 because I think that leaves no exemptions at all.

10 MR. METALITZ: I mean, I think you've taken a
11 fork in that road six years ago. And we think you
12 took the wrong fork in the sense that we think
13 Congress was concerned about the class of works and
14 did not want you to define this in terms of users and
15 uses. But some water over the dam on that question.

16 But, even then, the focus was not on the work
17 that was produced. The --

18 MS. RIFE: But that's what --

19 MR. METALITZ: -- focus of the statute is on
20 the work that is -- as to which access controls are
21 being circumvented. And we now have a extremely broad
22 category. We have motion pictures, any kind of motion

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1 picture, and we're -- it's proposed that we have
2 audio-visual works, any kind of audio-visual work
3 that's subject to an access control.

4 So I think we have an extremely broad and not
5 well-defined class of works. The only thing we have
6 is some use and user-type limitations.

7 MS. TUSHNET: So my copyright professor hat
8 impels me to say that, as of course you know, the
9 statute is not crystalline on audio-visual works
10 versus motion pictures, and I think that's a bit of a
11 tempest in a teapot, and the uses we're talking about
12 are going to be the same either way. So getting hung
13 up on that is probably not the most helpful.

14 The limitations that we propose are remix
15 that is primary non-commercial that is done as speech
16 rather than profit-seeking. And by the way, that in
17 itself is a big thumb on the fair use scale. It's one
18 of the big factors. Non-commercial uses are favored.
19 They receive special presumptions, right, as per Sony,
20 and that in and of itself is an inherent limitation.

21 And, of course, second, being non-infringing
22 is part of the definition of the proposed class. So

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1 to the extent we're worried about that, we believe we
2 proposed a definition that, you know, incorporates
3 that.

4 MR. METALITZ: Again, this is a field that's
5 been well plowed in L.A. and elsewhere, but simply to
6 define out the infringing uses and say everybody else
7 is fine, that isn't really a limitation as far as
8 we're concerned. It's simply to say -- because, by
9 definition, this only applies to non-infringing uses.

10 MR. CARSON: We don't use the word "remixes"
11 in the proposed class.

12 MR. TURNBULL: I was going to suggest that
13 that might be useful.

14 MS. TUSHNET: That is true. So I actually
15 think -- so I think we can define it as a new work of
16 authorship, for example, which has a background that's
17 quite -- if we want a definition -- right? It's quite
18 consistent -- you know, selection, coordination and
19 arrangement are classic forms of authorship. Again,
20 there's plenty of law on that. So if we're concerned
21 about that, a new work of authorship seems to me a
22 fine way. And that would also -- we would then

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1 segregate out educational uses where you might want
2 the stand-alone clip. And, again, you know, that's
3 standard face-to-face teaching.

4 So that -- but I would perfectly support
5 something -- a standard that was, you know, create a
6 new work.

7 MR. CARSON: Is that a step in the right
8 direction, however small it might be? Or does that
9 not help you guys at all?

10 MR. METALITZ: Well, it doesn't actually --
11 you could create a new work that could be an
12 infringing work. So it doesn't tell you whether it's
13 non-infringing.

14 MS. MCSHERRY: You could create a new
15 non-infringing work.

16 MS. TUSHNET: Yes. Yes.

17 MR. CARSON: Corynne, did you have your hand
18 up?

19 MS. MCSHERRY: I did. I wanted to just call
20 your attention to -- I just came across this;
21 otherwise, I would have submitted it with our original
22 proposition. But I notice, as I was looking around

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1 for definitions of non-commercial and thinking about
2 this primarily non-commercial point, which I
3 understand is troubling -- and I looked at how
4 Creative Commons defines non-commercial with respect
5 to their non-commercial licensing. And they struggle
6 with this a bit too, as you can imagine, because
7 people want to understand what they mean when they do
8 a non-commercial license.

9 And the way they define it I think is
10 actually kind of useful, which are uses that are not
11 primarily intended for or directed towards commercial
12 advantage or private monetary compensation. And I
13 think that's really what we're trying to get at here.

14 When we propose that, what I'm thinking about
15 is folks that I think arguably are engaging in
16 non-commercial uses, but we want to remove any
17 ambiguity. So someone like Jonathan McIntosh who has
18 a new project that he's launched a kick-starter
19 campaign for to keep the lights on while he makes his
20 video. Okay. He's a professional remixer. This is
21 what he does. But he's not in it for the money and he
22 makes his videos available completely

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1 non-commercially, not for profit.

2 That's the kind of use that we are trying to
3 create a space for.

4 MR. CARSON: But, you know, PBS is
5 non-commercial, and everyone accepts that, and they
6 take donations. So is that really an issue?

7 MS. MCSHERRY: Well, actually, I think if
8 you're making a remix video for PBS, it might --

9 MR. CARSON: I guess my point being if that's
10 the only reason -- and maybe it isn't -- that you have
11 primarily non-commercial, except the situation where
12 someone might take donations to fund it, then we've
13 got plenty of real-world situations where actors,
14 which everyone understand to be non-commercial, take
15 donations to fund what they do. So do you really have
16 a problem?

17 MS. MCSHERRY: Well, I think both with this
18 and with the AV Works, I fear that -- we introduced
19 this language in order actually to try to clarify the
20 exemption, bring it more in line with the statute and
21 the case law. I fear that we might have muddied the
22 waters a bit, but it certainly was the intention.

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1 I do think -- I don't know that a court would
2 found that a video funded by a kick-starter campaign
3 was commercial. I think it probably wouldn't.

4 But this way, remix artists don't have to
5 worry about that. They can be comfortable that they
6 aren't losing the exemption simply because of how they
7 funded their --

8 MS. TUSHNET: So here's who we're concerned
9 about. We're concerned about, say, somebody like Joe
10 Sabia who is commissioned to do this report for, you
11 know, core political speech. But he got paid. Right?
12 So we want to make clear that since the result is this
13 freely distributed, you know, piece of cultural
14 expression -- so maybe we want to focus on the output.
15 You know, I think we could easily do that. We just
16 want to make clear that he's within it.

17 MR. CARSON: Why isn't what he did a
18 documentary film?

19 MS. TUSHNET: So -- one could define a
20 documentary as anything that has a video component
21 that is integrated -- that is factual and has a video
22 component. But if you look at Prime Time Terror and

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1 if you look at some of the other examples, like In the
2 Cut that we talk about, which is this online journal
3 where they show a clip and do a shot-by-shot analysis
4 in text, they're really multimedia works.

5 Now, if you want to go ahead and craft a
6 multimedia exemption that covers this, I would also
7 say that would be awesome, too.

8 But in some sense we're sort of pushing the
9 definitional questions around, and I agree they ought
10 to be answered, and there are a variety of ways one
11 could answer them. If you want an expansive
12 definition of documentary, that could deal with it.
13 Absolutely. Or, you know, primarily non-commercial,
14 and say, what we mean is, you know, people who produce
15 stuff that is disseminated for free, even if they are
16 ad-supported or commissioned.

17 MR. METALITZ: Even if they're ad-supported?
18 So everything that's on broadcast television is
19 non-commercial?

20 MS. TUSHNET: So -- here's the thing. You
21 said this in the brief to the Supreme Court in the
22 video games case, and you're totally right, that

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1 movies are non-commercial speech. They're entirely
2 protected by the First Amendment.

3 Now, if you want -- that's why we put in
4 "primarily non-commercial" because we do want to have
5 some flexibility to recognize, right, there might be
6 places where, you know -- at some point, a court is
7 going to call it commercial, but we want to talk about
8 those instances like *In the Cut*, right, which is -- by
9 the way, has advertising from *Variety* and the major
10 Hollywood studios, because that's where their audience
11 is -- and *Joe Sabia* are covered by this they're doing
12 exactly the kind of work that we want people to do in
13 terms of engaging in critical commentary.

14 MR. METALITZ: I think maybe the muddying of
15 the water that has occurred here, to use *Corynne's*
16 phrase, is commercial speech obviously has a
17 definition in First Amendment terms, and then we also
18 have a body of law about commercial works that
19 obviously is relevant to, although not determinative
20 of unfair use and so forth. But those standards are
21 different.

22 We would certainly agree that, for purposes

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1 of First Amendment protections, Hollywood films are
2 non-commercial speech. But it's also clear that, if
3 you are using something in a Hollywood film, that
4 you're probably not going to do too well with the
5 argument that it's a non-commercial use for fair use
6 purposes.

7 MR. CARSON: Let's move on to another topic.
8 Put yourselves in our shoes -- well, don't do that. I
9 wouldn't ask that of you.

10 We're confronted here with a couple of
11 examples that seem to point us in two very different
12 directions, and maybe you can help us out in figuring
13 out how to reconcile them. We've got the examples you
14 folks showed on May 11th of the screen capture
15 software and how it replicated something in what you
16 characterize as being very, very good quality, serve
17 just about anyone's purposes.

18 We've got what you did Tisha, today, and
19 showed, which I think everyone in the room could see
20 the pixelation.

21 So I guess, for you, I'd say, do you accept
22 that, at least in the case where Tisha was using the

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1 software, that it didn't do the job, or is it just
2 that she didn't know how to use it?

3 In your case, do you accept that, in the one
4 case where they actually showed an example on May 11th
5 was perfectly fine for any conceivable purpose one
6 would have in that particular case?

7 Let's start with that, just to get a baseline
8 and see if people aren't going to agree on anything,
9 or if at least in some cases it works; in some cases
10 it doesn't. Bruce, start with you.

11 MR. TURNBULL: I would say that I wouldn't --
12 I wouldn't defend the image that was presented here as
13 being, you know, acceptable for the use that they were
14 looking to put it to. So for that -- in that
15 particular case, the screen capture software was not
16 usable for the purpose.

17 I do think that that doesn't mean it's not
18 usable in a -- I think it is usable in a variety of
19 other instances, including the one we showed on
20 May 11th, including what we showed today, the example
21 that we showed today. But I'm not going to defend the
22 image that we saw earlier.

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1 MR. CARSON: Okay. So before we get to you
2 folks, then, what do we do with that? I mean, one
3 might have walked out on May 11th and said, okay,
4 problem solved, we don't need an exemption; screen
5 capture software does the job. I just heard an
6 acknowledgment that it doesn't always do the job. So
7 there are cases where it doesn't do the job.

8 Do we just say, well, too bad about those
9 cases; we're not going to have an exemption? Or do we
10 narrow the class to deal with that? What do we do?

11 MR. TURNBULL: Well, two things. One is that
12 I -- let me -- on my previous statement, I wasn't
13 going to defend the image that we saw. Whether the
14 software was used to its greatest effect or not, we
15 don't know. I mean, there are ways to adjust it and
16 that sort of thing, so I don't know.

17 I think, at a minimum, we would say that
18 where it is usable, useful for the purpose, it ought
19 to be used as opposed to circumvention.

20 MR. CARSON: Okay.

21 MR. TURNBULL: And if, in a suite of
22 alternatives, you sort of line up the various

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1 alternatives and you say, okay, among the
2 alternatives, there should be something there that
3 would be useful for the vast majority or a large
4 majority of cases. The fact that a handful of cases,
5 a small number of cases might fall out would not be
6 the basis for an exemption.

7 MR. CARSON: Realize, if you throw all that
8 in, you're still ending up with what, at the end of
9 the day, is a rather mushy standard that's going to
10 sort of be an eye of the beholder situation.

11 MR. TURNBULL: Well, I said two things, and
12 the second one -- let me make sure you got the second
13 one, which was that if you look at the range of
14 alternatives that we put on the table, you know, here
15 and in other contexts and say, well, okay, there are a
16 number of alternatives. For some reasonable
17 percentage of the cases, of the use, those would be
18 acceptable, then the fact that a handful of cases that
19 might not be acceptable would not form the basis for
20 an exemption.

21 Even if you get -- and say, well, there are
22 enough cases that are outside that form the basis

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1 for -- you know, we think necessarily there should be
2 an exemption because of the cases that are -- that
3 don't fit any of the alternatives, then I do -- but I
4 do think that, while it's a mushy standard, I would
5 encourage you to put in -- you know, because I
6 think -- something that says you need to look to the
7 alternatives as your first resort and circumvention
8 only if it's necessary.

9 MR. CARSON: So -- okay. We've got at least
10 two hands over here. So -- three hands, four hands.
11 Okay. Whoever wants to talk first, talk first.

12 MS. MCSHERRY: I'll just say one sentence.
13 That sound like you need to reasonably believe that
14 the circumvention is necessary.

15 MR. CARSON: That occurred to me.

16 MS. MCSHERRY: Okay. That's it. I'm done.
17 I'll let Tisha talk because she's the expert.

18 MS. TURK: I'm thinking out loud here, and I
19 will try not to ramble. I'm thinking about the two
20 examples that we had before us, so the Gattaca example
21 from May 11th and the scene that I captured and
22 ripped.

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1 I guess what I would say about the Gattaca
2 example is that I would not capture it in the first
3 place because it was an incredibly boring scene. And
4 so as a remix artist, that is not the kind of thing
5 I'm looking for.

6 Now, I don't want to say that no one would.
7 I mean, maybe there is someone who wants to make an
8 incredibly visually boring vid. That person is not
9 me, and so perhaps I am not the best person to speak
10 to that.

11 Thinking about the Star Trek example, I guess
12 part of my concern is that you can't know, going in,
13 what the screen capture is going to do. You do know,
14 going in, what DVD rip is going to do, which is that
15 it is going to give you exactly what was on the DVD.
16 You're going to have all the frames. You're going to
17 have all the visual information that you can possibly
18 have, and also all the audio information but I don't
19 deal with the audio, so I cannot speak to that.

20 If I had taken that ten-minute scene and I
21 had wanted some clips from that to make a vid, I would
22 have to capture the entire thing and then scrub

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1 through it, and perhaps one of those two usable
2 moments would be something that I wanted to use in a
3 vid. And perhaps there were three other moments that
4 turned out to be unusable.

5 And so having captured that scene, I would
6 then have to go back and rip that chapter of the DVD
7 to get the stuff that I had decided could not
8 reasonably be used for my purposes. And perhaps
9 legally there's a super reason for doing that. I
10 don't know. But practically it seems -- I'm looking
11 for a synonym -- a more diplomatic synonym for stupid,
12 and I'm not finding one. It just seems really
13 counterintuitive to me that I would have to capture
14 it, scrub through it frame by frame, and then rip it.
15 I'm baffled, I have to say.

16 MR. CARSON: Rebecca.

17 MS. TUSHNET: I'm just going to say, again,
18 an artist is being asked here to master a skill
19 orthogonal to her art, despite her testimony that it
20 won't work for her, and we're told she must have been
21 doing it wrong despite the fact that she's spent more
22 time with video editing than the rest of us at these

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1 tables put together. And this fits into a message
2 that unfortunately women and minority artists often
3 get: Your concerns don't matter; your priorities
4 don't count.

5 And I just think that's not -- if we hold out
6 for the hypothetical screen capture that, you know,
7 works, and we'll just hope it works on the next DVD
8 because it turns out, you know, sometimes it works;
9 sometimes it doesn't, each one of those that doesn't
10 get made because it doesn't work is a loss. Right?
11 Each black screen is a piece of speech that didn't
12 happen because these are new works. And so it's not
13 as if, you know, we make it up on the backswing or
14 anything.

15 MR. CARSON: You were starting to --

16 MS. COPPA: I had just wanted to point out
17 that, you know, to the extent which we're focused on
18 transformative works and we're looking at video as the
19 building block for other works, we're looking at
20 footage that the first capture or rip is really the
21 starting point of an artistic process. Right? And so
22 that you need a higher quality to remember that you're

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1 going to be making something out of it. You're going
2 to bend it and stretch it. And that that is, you
3 know, overwhelmingly consistent in the group of
4 non-commercial videos that we're talking about, that
5 these are things that -- you don't accidentally make a
6 remix video. It's an active artistic process of you
7 doing something and making something out of a thing.

8 And so, consequently, the group of videos
9 that we're talking about are very likely that you need
10 the high quality because you're about to kind of bang
11 on them with tools in a way that may not be the case
12 with other -- and you can speak more to this, but it
13 is part of what -- it's a transformative work -- you
14 know, the OTW is for transformative works. I mean,
15 they're works that people have made things with.

16 MS. TURK: The other thing I would say is
17 that that is only becoming more true. I mean, ten
18 years ago when I started vidding, there was a limit --
19 there was more of a limit to the number of effects
20 that you could practically put on a piece of footage
21 because, at some point, your computer would start to
22 choke. Right? This was when -- like, a 20-gig hard

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1 drive was riches unimaginable and, you know, a gig of
2 RAM, you just -- how could it be? It was the promised
3 land. Right?

4 And so, as computers have gotten more
5 powerful -- I mean, iMovie can do things that now that
6 my computer -- you know, the programs that I was using
7 when I first started could barely handle.

8 And so especially when you think about the
9 younger users, people who are not using the kind of
10 equipment that I'm using -- you know, they're using
11 whatever came standard with the laptop that their
12 parents got them for, you know, their 16th birthday or
13 whatever. They really want to use a lot of these
14 effects. And more and more of those effects are
15 coming standard on the sort of entry-level software
16 that comes packaged with new computers.

17 And so we see more and more people who, it's
18 just their default to make things glow, to adjust the
19 color, to fool around with the contrast, to stylize
20 the footage in various ways.

21 I am kind of old school. I mean, i don't do
22 nearly as much of that as some of the younger people

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1 for whom that is sort of the standard, to fool around
2 with the footage in that way. I mean, I do quite a
3 bit of it, but I would certainly not describe myself
4 as one of the most advanced users of those kinds of
5 effects. And often those advanced users are some of
6 our youngest users, interestingly.

7 MS. COPPA: And most talented.

8 MS. TURK: Yeah, and most talented. I mean,
9 I wish I could do that, but -- they're not going to
10 grow up and be English professors, apparently.

11 MS. COPPA: They are going to film school. I
12 mean, they are. The young generation of women who can
13 do these sorts of things -- you know, we're working to
14 keep up -- they do go to film school. They vid
15 through high school and then they go film school or
16 they go to arts programs, which is wonderful, you
17 know. Wonderful.

18 MS. TURK: We're only slightly jealous.

19 MS. COPPA: Yeah, a little.

20 MR. METALITZ: Could I offer just two
21 comments on this? First, I don't think that what
22 we've been talking about is the same thing is having a

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1 reasonable belief that you have to circumvent.
2 Because how would a court -- let's assume you'd ever
3 get to court. How would a court resolve that? They
4 would say, what would the reasonable vidder would do?
5 And we're just hearing that every vidder would do the
6 same thing; they would rip. So it just would never
7 occur.

8 What you're talking about is a little
9 different. It would be to say --

10 MR. CARSON: It's saying --

11 MR. METALITZ: -- you have to try it first.

12 MR. CARSON: -- what you need to get there.

13 MR. METALITZ: Yeah. You're only eligible --
14 I mean, obviously, it's a user-defined and use-defined
15 aspect of this. You have to try using capture first
16 and see if it's suitable for your needs. So that
17 might be one way to approach it.

18 The other point I just want to make is, you
19 know, if you talk about what your authorship is, it's
20 taking all the most interesting parts of a motion
21 picture and remixing them. We have case law on taking
22 the most interesting parts of the motion picture -- we

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1 have it in the trailer situation where presumably the
2 idea is to get the parts that get people's attention
3 the most -- the Video Pipeline case, and that wasn't
4 fair use.

5 MR. CARSON: I don't think that's -- I'm not
6 sure they characterize what they do as taking the most
7 interesting parts necessarily.

8 MR. METALITZ: Well, I just heard Professor
9 Turk say the most visually boring parts -- she would
10 never use the shot that Tim Short used in his
11 classroom. He was not trying to make a remix. He was
12 trying to do something different. She would only use
13 the most visually interesting parts. Again, I just
14 don't think this is conclusively fair use, or even
15 necessarily, in fact, non-infringing, which is your
16 standard.

17 And if you look at the way this has played
18 out in other contexts, when you take the most
19 interesting parts and condense them, that's not --
20 sometimes that's not fair use.

21 MR. CARSON: Francesca?

22 MS. COPPA: I'm going to trust you.

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1 MS. TUSHNET: I just want to point you to our
2 discussion of Giandujakiss' Der Kommissar which, you
3 know, we've seen alternate readings of in our
4 materials. Right? The vidder provides an
5 explanation. Her community understood what she was
6 trying to do. The fact that -- you know, not
7 everybody gets all pieces of art; that's not what art
8 is about. But if people are perceiving separate
9 messages, which is not the case in the Video Pipeline
10 case, then that's transformative.

11 And, you know, we invite you to look at Der
12 Kommissar, in fact, even though we didn't submit it,
13 or It Depends on What You Pay, which we did submit,
14 and see. You know, it's not a trailer.

15 MR. RUWE: Rebecca, would you have any
16 objection to reinserting the cultural criticism
17 requirement?

18 MS. TUSHNET: So -- you know, I -- this is
19 what our community does. I don't think it makes -- I
20 think non-infringing, you know, is probably better
21 since there is a body of case law about it. But I
22 don't think it's inherently objectionable.

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1 MR. RUWE: Ms. Turk, I have some technical
2 questions for you. First, can you react to the notion
3 that -- I'm trying to read my handwriting. Do you
4 have any evidence of people actually leaving
5 low-quality videos and hitting the back button? That
6 was something that you mentioned, but is there any
7 evidence of people actually turning away from material
8 that is produced in a way that produces lower
9 quality -- that is using lower quality original
10 material?

11 MS. TURK: Sure. I mean, so I will say that
12 my examples are several years odd, so they are not
13 perhaps the most recent examples. I've been busy
14 doing things like getting tenure, so I have not been
15 spending as much time with the community as I would
16 like.

17 But on a couple of vidder discussion lists or
18 vidding discussions lists and live journal communities
19 there have been examples of someone recommending a
20 particular vid and other people saying, I found that
21 unwatchable. Right? You know, I clicked through to
22 it, and it just looks terrible and I looked away.

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1 So I don't think that every single person --
2 I mean, people have different standards. Right? And
3 I think it's possible that a particular person might
4 find a vid interesting enough that they would watch it
5 despite low quality. I would never want to say that
6 no one would ever look at something pixelated. I
7 don't know that. I can't control that.

8 But there are instances, yes, where people
9 look at the quality of something and say -- you know,
10 one of the things that you have to remember is that
11 there are thousands and thousands and thousands of
12 vids. If you have a favorite character or favorite TV
13 show, I guarantee you there are vids for it.

14 And so if someone sees a low quality vid, why
15 should they lose that three minutes of their life when
16 they can go find a shiny one somewhere?

17 MR. RUWE: Very specifically, if you can
18 answer that, your comments seem to be the closest
19 thing you have to evidence of people actually turning
20 away. Is that --

21 MS. TURK: Right. I mean --

22 MS. TUSHNET: Can we mention -- actually, we

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1 also -- in our submission, we actually do have some
2 quotes about that.

3 MR. RUWE: Similar type of --

4 MS. TUSHNET: Yes.

5 MR. RUWE: -- comments, not just some sort of
6 view of people turning away from -- I don't know if
7 that's available.

8 MS. TUSHNET: So most research in the
9 community is qualitative for a variety of reasons,
10 including the difficulty of doing, you know, what is
11 basically Internet-based research. So essentially any
12 research is going to be qualitative, I mean, other
13 than Michael Wesch's (phonetic), who just has raw
14 numbers.

15 MS. COPPA: Can I add also that there's a
16 practice in the community of video remastering where
17 fans will go and, for instance -- as I said, there
18 were vids made with VHS footage, which looks really
19 terrible now, but people love these vids so much, but
20 find them so unwatchable, that later fans will take
21 later DVDs and remaster, matching shot for shot so
22 that the vid now becomes watchable to a community that

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1 can't tolerate the older, uglier footage.

2 And so sometimes it's the vidder themselves
3 who will remaster, right, their own work and say, I
4 did a great vid and now I'm going to -- hit the 2010
5 with shinier clean footage. Or sometimes fans will
6 remaster another fan's work as a tribute, because they
7 love this piece of work so much, and they want it to
8 look good.

9 MR. CARSON: Is that fair use?

10 MS. COPPA: It's taken in our community as a
11 gift and as a critical -- as a celebration of the
12 thing. Right? And -- but, yeah, I mean, I think that
13 shows you that people are willing to actually put in
14 work. It's seen as a labor. I mean, you don't claim
15 it as your own. You say, this is so-and-so's vid done
16 with clean, beautiful footage.

17 MR. RUWE: Back to Ms. Turk. You talked
18 about moving to lossy format as a last step. Is that
19 possible in what you're doing, in making the vid? Can
20 you just put that -- only moving to the lossy format
21 as the last step so you don't lose any intermediate
22 steps?

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1 MS. TURK: Yeah, I mean, that's the ideal,
2 right. So I if I rip a DVD and I -- and so I load --
3 I do the necessary preprocessing and I load that
4 into -- which does involve some loss of quality, I
5 mean, like -- you know, the stretching or shrink --
6 squishing something that was encoded anamorphically
7 involves losing some data. But that's a necessary
8 trade-off. Right? I can either lose a little bit of
9 visual data and have people that don't look like
10 people, you know -- have people that look right, or
11 the other way around. I'm sorry. It's the end of the
12 day. I apologize. I think you get what I'm saying.

13 Then I do all the editing which -- the point
14 of that kind of nonlinear editing is that it doesn't
15 change the original files. Right? So I have the
16 original clips from the DVD that are on my hard drive,
17 and whatever I do to them in Premier does not change
18 those original files. I'm manipulating sort of
19 phantom versions of them.

20 MR. RUWE: So what I'm getting at is if the
21 intermediate steps using that presumably ripped
22 original material don't degrade that, can the same be

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1 said for if you acquired the original material through
2 a screen capture or a smartphone capture? At that
3 point, are those -- is the editing also lossless?
4 What's the difference? Why would steps in editing the
5 ripped material not lose data but editing with the
6 captured material lose data?

7 MS. TURK: Right. It loses quality on
8 export. So as soon as I have taken --

9 MR. RUWE: But only the screen capture path?

10 MS. TURK: No, they both do. But if you
11 remember -- okay. So the example that I showed where
12 I had taken the pixelated captured version and the
13 not pixelated ripped version. The difference -- then
14 when I zoomed in, cropped and zoomed in, the
15 difference between the cap'd and the ripped footage,
16 when you do the crop and the zoom, the difference
17 between the frames was much more exaggerated for the
18 captured footage than for the ripped footage. Because
19 if you're starting from lower quality, then the hill
20 that you're rolling down is much steeper. Does that
21 make sense?

22 MR. RUWE: It makes sense, and I thought I

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1 was hearing that each step involved -- necessarily had
2 degradation, just each step no matter what you were
3 doing with the editing. I'm not clear if that's only
4 the case for one format. I understand when you're
5 actually -- the capture of a larger screen, and then
6 you're only seeking one -- the upper right-hand
7 corner, and you're backing out -- yes, saw it on the
8 screen; more pixelated. It was whether each -- any
9 kind of editing step also degrades the shot, taking
10 away the notion of just taking a portion of the
11 screen.

12 MS. TURK: Right. What an effect does is it
13 manipulates a particular -- it manipulates every pixel
14 in the frame. Right? It make it lighter or it makes
15 it darker or it changes its color or whatever.

16 And when your clip has a lot of visual
17 information to begin with, then each of those pixels
18 gets manipulated individually, and the result is
19 pretty seamless.

20 When you're starting with source that has
21 quality problems, you can't do that as well because
22 you're missing frames, because pixels have gone from

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1 being individual pixels to being blocks. And so weird
2 things can happen. I mean, you start to get really
3 unpredictable results when you do things like try to
4 blur something or change the color of something or do
5 any of the other effects that you might do, you know,
6 change the speed or whatever. So what you get, then,
7 when you do the final export may look quite
8 dramatically different.

9 And, here again, I have to admit that I did
10 not actually try to vid with the screen cap'd footage.
11 I mean, I sort of recoiled from it as from a poisonous
12 snake and did not want to even go there. But you just
13 get potentially really different results because,
14 again, you've lost -- you've lost information, right,
15 in the form of those pixels that you cannot get back.

16 MR. RUWE: One of the examples -- at the tech
17 day, the social studies teacher, I believe, he screen
18 captured originally -- he only wanted the upper
19 right-hand screen, just for an example, and that's
20 what he screen captured. So, therefore, there wasn't
21 the need to just then take that portion -- so you're
22 getting that as original -- or screen capturing the

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1 original source of just what you're needing.

2 I think the same might be able to be done
3 with regard to speed manipulation where you're
4 manipulating the speed at the outset of the playing of
5 the original source material. And I realize, as you
6 just said, you didn't -- recoiled from the screen
7 capture, but I have to ask, do you have any reaction
8 as to whether that's possible and would be sufficient?

9 MS. TURK: So the thing about capturing just
10 a piece of the frame is that then, if I'm going to use
11 that in the context of a larger video, either I have
12 to resize it, I have to blow it up, or else I have,
13 you know, lots of shots that are filling the entire
14 frame, and then suddenly I have a little piece up
15 here.

16 So, sure, you can capture just this piece.
17 You know, your frame is like this, and you capture
18 just this piece. But then to make it this size again,
19 you have to resize it. And that's -- and you saw what
20 happened with my example when I cropped something and
21 then resized it, because --

22 MR. RUWE: I saw your example, and I

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1 understand -- I'm just -- we're getting two
2 alternatives. We're talking about alternatives, and
3 using this -- using the screen capture, trying to take
4 into account -- we talked about advances of, you know,
5 ten years ago of computing power. And I think we're
6 trying to take into account the potential for advances
7 in other technology that might limit the areas in
8 which an exemption is necessary.

9 MS. TUSHNET: But resizing the capture window
10 doesn't change the number of pixels it takes in.

11 MS. TURK: Right.

12 MS. TUSHNET: So you could make it smaller,
13 but you can never make it better.

14 MR. TURNBULL: But what -- I think the point
15 was that if you originally take only the upper corner
16 of the picture, you will be getting a higher
17 percentage of the pixels from that upper corner of the
18 picture than if you take the entire screen. That's
19 the point. So you would be starting with a better
20 original.

21 MS. TURK: The problem is that that's not
22 actually true. I mean, the number of pixels is the

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1 number of pixels. You can't just sort of say I wish
2 this were -- I mean, if I could say I wish there were
3 more pixels, believe me, I would. But that's just --
4 I mean, if --

5 MR. TURNBULL: But your point was that the
6 screen capture -- I'm not -- I will candidly admit I'm
7 not an expert on this, but I'm trying to replay in my
8 mind logically what you've said. And my point is that
9 if you are capturing an entire image, it has however
10 many pixels --

11 MS. TURK: Yes.

12 MR. TURNBULL: -- and you're going to lose
13 some percentage of those. So you're losing some of
14 those. But if you're taking -- or you're only going
15 to capture a certain number of them. If you're taking
16 only a smaller portion, then it seems to me you're
17 going to get a better image of that smaller portion
18 than you would of the whole --

19 MS. TURK: No, you're not, because it is the
20 number of pixels that it is. I mean, so if the
21 original frame, as it would be on a ripped DVD, is 720
22 by 480, that is -- 720 by 480 is the number of pixels.

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1 If you capture over here, you're going to get
2 something like, say, 350 by 200. And so you can
3 either make a video that is 350 by 200 pixels or you
4 can resize it to be 720 by 480, and so you have
5 stretched the pixels outs. So something that was one
6 pixel is now going to be a block of, say, 9 or 16 or
7 some other, you know, square of pixels. That's what
8 pixelation is.

9 MS. COPPA: The speed issue is you're often
10 speeding up clips in order to make them in sync with
11 other clips. So you wouldn't necessarily know at what
12 speed you would need to -- I mean, just kind of
13 following your example. Do you see what I'm saying?
14 If you played the original faster, you often don't
15 know what you're matching to because the idea of the
16 remix is -- it's like trying to get one piece of a
17 cake without the rest of the cake. Do you know what I
18 mean?

19 MS. TURK: It's back to the you need all the
20 letters --

21 MS. COPPA: You need the letters first --

22 MS. TURK: You can't just decide, I will --

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1 MS. COPPA: You don't know what speed that --
2 you might be trying to match five movies, and you want
3 a character -- there is a vid called One Girl
4 Revolution, and there's five shots in a row where a
5 woman is running left to right across the screen, and
6 actually it's five different women, but they're
7 matched up so that you have an effect of one woman
8 running across the screen. How would you know how
9 woman number 3 -- how fast does woman number 3 need to
10 go? Do you see what I'm saying?

11 So what the video editor is going to do is
12 have the five women run in such a way so that the
13 effect is one woman running across the screen, but you
14 couldn't do that in advance. Like no -- nobody would
15 do that.

16 MS. TURK: Here is the other thing that I
17 would say, because I appreciate the sort of attempt to
18 look ahead and anticipate, you know, what uncharted
19 wonders are we going to be dealing with.

20 We had, three years ago, demonstrations of
21 screen capture technology. I would say that the
22 improvements in screen capture technology have rather

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1 decidedly not kept pace with other kinds of
2 improvements. So screen capture was bad three years
3 ago. It may be marginally less bad now, but I guess I
4 personally haven't -- and I will freely admit I'm not
5 an expert on screen capture software. I have not seen
6 enough of an upswing to suggest that we're headed
7 towards some magical promised land wherein screen
8 capture is fabulous for things other than what it is
9 designed for.

10 Screen capture software is great for what is
11 it's designed to do, but capturing video is not what
12 it is meant for. I think it's a little bit unfair to
13 ask that of it, to be honest.

14 MR. RUWE: Thank you. I have one more
15 question. It's for Corynne, and that is, tell me why
16 shouldn't any limitation -- any exemption for online
17 distribution -- why shouldn't those be limited to
18 specifically cited-to things?

19 MS. MCSHERRY: I'm sorry?

20 MR. RUWE: Why should any exemption for
21 online distributed content be limited to the exemption
22 of -- prevent circumvention and circumvention methods

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1 that are cited to in the record? There are only a
2 handful that are specifically cited, yet the requested
3 exemption is for -- is broadly stated.

4 MS. MCSHERRY: Fair question. We pointed to
5 the examples that we could gather based on our
6 research. A lot of the access controls are
7 proprietary. We don't know the details of how they
8 work. So we provided the examples that were readily
9 available to us. And I think -- you know, we're
10 looking at something that's going forward for the next
11 three years. The technology is going to change. It
12 may change quite rapidly.

13 So if we want an exemption that actually
14 really does protect non-infringing uses, we need one
15 that's flexible enough to take advantage of those
16 advances in technology.

17 MR. RUWE: I guess this shouldn't just be
18 directed to Corynne. Does anyone else have anything
19 to add about why we shouldn't limit it to the TMs that
20 are mentioned in the record?

21 MS. TUSHNET: It's the same thing. We
22 actually don't know. Like, we have some guesses.

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1 There's some public reporting about what Unbox uses.
2 Right? But a lot of that is trade secret. So if
3 you're asking us to identify what the DRM is, we don't
4 know, you know, and probably couldn't find out without
5 extensive discovery, which, you know, I don't think
6 anyone wants us to take.

7 MS. MCSHERRY: Actually, if they want to
8 share, we'd amplify the record.

9 But I realize -- the other thing I would just
10 reiterate that was brought up last time, and it
11 certainly is true in L.A., is that with respect to
12 cell phone unlocking, I mean, there's different modes
13 of unlocking your cell phone, and that wasn't
14 considered a really serious problem. And I think
15 that, here, it's the same kind of thing. You need to
16 give people the flexibility so that this exemption is
17 actually stable for three years or works for three
18 years until we can all come back again.

19 MR. METALITZ: I think -- if I can just add
20 to that, I think the consequence of that is that you
21 would be saying to content owners, no matter what
22 technological protection measure you use in order to

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1 distribute your material online, it can be hacked
2 under this exemption. It really doesn't matter what
3 you do, it doesn't matter whether you use a different
4 one or the same ones that you're using now.

5 Again, I think -- I heard testimony about the
6 importance of the online channel. I would hope that
7 that would not be the result of the rulemaking.

8 MS. TUSHNET: Like screen capture. Like
9 screen capture. No matter what you use, you can --
10 everyone has apparently conceded now, except not
11 entirely you -- but you conceded that some things are
12 legal, so we have to tell that --

13 MR. METALITZ: Well, we've explained what the
14 particular -- what the criteria are that make it
15 legal.

16 MR. KASUNIC: Just to clarify that, neither
17 of these exemptions address Blu-Ray or AAC3, right, so
18 there is no need --

19 MS. TUSHNET: That is true. This does not
20 ask for Blu-Ray, that's correct.

21 MR. CARSON: One more question. It's the
22 reverse of a question I asked Steve earlier on. I

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1 haven't read every fair use case, but I've probably
2 read most of them. I can't think of a single one in
3 which a court has actually held that someone who
4 simply took a bunch of preexisting material and
5 rearranged it was engaging in a fair use. Are we on
6 totally unplowed turf here or is there case law on
7 that front?

8 MS. TUSHNET: Well, the most obvious, of
9 course, are the Google cases. They are not the same
10 what's created there is actually a new reference work,
11 and of course there's underlying code that is created,
12 much like there's an underline structure -- selection,
13 coordination and arrangement.

14 But part of this is -- you know, this is a
15 form of art that felt like it had to be underground
16 for a long time, and you did have some examples --
17 there's actually a somewhat famous for the art world
18 thing about Wonder Woman from the '70s where an artist
19 actually did this Wonder Woman -- clips from Wonder
20 Woman.

21 But part of this is -- you know, we've seen
22 courts find transformation where artists like Jeff

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1 Koons are engaging in, you know, transformative
2 recontextualizations -- we've seen, you know, the
3 large-scale database uses which, again, you know, are
4 repurposing works. And, you know, we're actually
5 ready to do this.

6 The problem is that, without an exemption,
7 you know, we are -- we have to tell a client, no, you
8 know, there's a -- or, here's the risk. The risk is,
9 if you counter-notify, there's a slam dunk 1201 case
10 against you. Why would a copyright owner ever
11 litigate the fair use under those circumstances? So
12 that's actually -- you know, if we want the evolution
13 of fair use to continue, especially in non-commercial
14 uses where -- you know, there's a lot of value there,
15 we need an exemption.

16 MR. CARSON: You want the evolution of fair
17 use to continue, right?

18 MR. METALITZ: Absolutely. And I just think
19 that the herring has gotten redder and redder. I
20 think the advice -- I mean, I've advised clients in
21 this situation. So if I'm confident it's a fair use
22 and then you get to the question of how did you make

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1 the work, you would tell someone no one has ever been
2 sued for a violation of 1201(a)(1), certainly not
3 without a claim of infringement.

4 So if the copyright owner is not persuaded by
5 your counter-notification and decides they want to
6 pursue it, yeah. They may well throw in a 1201(a)(1)
7 claim as well.

8 MR. CARSON: By that logic, we shouldn't have
9 any exemptions then.

10 MR. METALITZ: But the idea that somehow this
11 has changed the dynamic of -- of the notice of
12 take-down process, it really -- I think this has
13 crossed the line from advice to agenda, to be
14 perfectly blunt about that, and I think -- the
15 copyright owners have very little incentive to bring a
16 standalone 1201(a)(1) case when they don't think
17 there's an infringement matter, and that's why there
18 haven't been any.

19 MS. TUSHNET: Okay. So you described a
20 complaint, and I actually agree. The problem is the
21 summary judgment motion. Right? So let's have
22 summary judgment on whether this is a fair use an a

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1 1201 violation.

2 Well, the 1201 violation summary judgment for
3 the plaintiff -- right? Because, without an
4 exemption, you violated the law. So it is absolutely
5 true, I agree, that it is unlikely for the average
6 copyright owner to bring a standalone claim. The
7 problem is they don't have to.

8 MS. MCSHERRY: Just two things. One is I
9 would also submit that Steve's clients are probably
10 not the same kind of people as the remix artists that
11 we're talking to, by which I mean that they are not in
12 the same position to take on legal risk, I suspect, as
13 the remix artists that we're talking about. And,
14 secondly, I want to circle back to the point of, has
15 there been a fair use case that's specifically on
16 point, and if there's not, where does that leave us?

17 And I think we had this fight last time, and
18 I think it came out the right way, which is that can't
19 be the rule because then -- well, for one thing, fair
20 use case law doesn't evolve, but also it sort of
21 suggests that you guys aren't able to make fair use
22 evaluations, which of course you're perfectly capable,

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1 more capable than many, of making fair use evaluations
2 and making evaluations as to whether a group of works
3 and uses are likely to be fair uses. You don't need
4 to wait for the Supreme Court to tell you that this
5 use is specifically for fair use.

6 MR. METALITZ: This is probably not an issue
7 you want to inaugurate at 5:45 p.m., but I think --
8 you know, our view is that you should be guided by
9 what the case law is and you should be extremely
10 cautious about issuing pronouncements about fair use
11 ex cathedra. And I think you asked a very good
12 question. I mean, as I said an hour or so ago, the
13 fact that these works do not contain one iota of
14 original material -- they do contain, or they may
15 contain selection, coordination and arrangement of
16 other people's material, material created by other
17 people, but I think that is a factor to take into
18 account. It distinguishes them from your previous
19 panel, and it doesn't mean that they're never fair
20 use. I would never say that. But I think it's a
21 factor that you should take into account in applying
22 the standard that Congress wants you to apply, which

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1 is, are these uses, in fact, non-infringing.

2 MS. COPPA: I'm sorry. I can't really -- I'm
3 not a lawyer here, so a lot of this is over my head,
4 but if you've been in an art galley in the last
5 century, collage appropriation, particularly in kind
6 of feminist art, and the history of that, you know,
7 whether it's through Duchamp stand alone or putting a
8 mustache on the Mona Lisa, as an art professor, I find
9 the conversation a little baffling, the idea that the
10 standard is this sort of requirement of originality,
11 when I can cite reams and reams of kind of feminist
12 art criticism that talks about appropriation and
13 collage as legitimate artistic techniques, which is
14 not to say that every single copied thing is fair, but
15 there's a big scholarly history on my side of the
16 field -- so I don't understand this conversation.
17 That's all I --

18 MR. CARSON: Going to law school would only
19 depress you.

20 MR. METALITZ: I would also never say that
21 these works have no artistic merit. I'm not the one
22 to gauge that. I'm really looking at a body of law

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1 which does depend on originality. Originality is the
2 touchstone of copyright protection. So I just think
3 it's a factor that -- and, again, I'm not saying that
4 all of these uses are unfair, but I think it's a
5 factor that you would legitimately take into account.

6 MS. TUSHNET: And, again, you know, we have
7 this whole category, selection, coordination and
8 arrangement, where we -- I mean, you guys issue
9 registrations every day. Right?

10 MR. CARSON: We're trying to cut back on
11 that.

12 MR. TURNBULL: So I've heard.

13 MR. CARSON: Keep your eyes open.

14 MS. TUSHNET: But that's original and, you
15 know, there are a variety of editors, there are a
16 variety of artists, producers who would actually be
17 surprised to hear that selection, coordination and
18 arrangement are not original.

19 I believe, you know, Congress would be
20 surprised to hear that it's not, since it's explicitly
21 in the act.

22 And the question then is, what is the

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1 original selection, coordination and arrangement? And
2 we've given you many examples of selection,
3 coordination and arrangement that combine to have a
4 powerful communicative effect that is distinct from
5 the original, which is why it was made in the first
6 place.

7 MR. CARSON: Okay. Very good. I think we
8 can call it a day. Everyone will agree with that, if
9 nothing else here today. And we will see some, maybe
10 many of you, tomorrow across the street. 9:00.

11 (Whereupon, at 5:47 p.m., the proceedings
12 were concluded.)

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1 CERTIFICATE OF COURT REPORTER

2 I, Denise M. Brunet, the court reporter
3 before whom the foregoing proceedings were taken, do
4 hereby certify that the proceedings were taken by me
5 stenographically and thereafter reduced to print by
6 means of computer-assisted transcription by me; that
7 said proceedings are a true record; that I am neither
8 counsel for, related to, nor employed by any of the
9 parties to this litigation and have no interest,
10 financial or otherwise, in the outcome of this matter.

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Court Reporter

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