

TRANSCRIPT OF PROCEEDINGS

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

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BEFORE THE UNITED STATES COPYRIGHT OFFICE

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

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

Tuesday,
April 16, 2024

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

PARTICIPANTS:

SUZANNE WILSON
JALYCE MANGUM
JUSTICE SHANNON
PETER DECHERNEY
MICHAEL AYERS
STEVEN ENGLUND
DAVID JONATHAN TAYLOR

1 keep your comments relatively brief so we can get
2 through everything and allow all of our questions to
3 be asked.

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

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

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

24 So today's hearing is on Class 2,
25 Audiovisual Works and Online Learning. Before we

1 begin, I would like to invite first my Copyright
2 Office colleagues to introduce themselves.

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

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

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

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

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

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

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

24 MR. AYERS: Hi, good morning, everybody. My
25 name is Michael Ayers, and I'm counsel for Advanced

1 Access Content System Licensing Administrator, LLC,
2 also known as AACCS LA, and we provide content
3 protection technology for the Blu-ray disc format.

4 MS. WILSON: Thank you.

5 Now for the Joint Creators and Copyright
6 Owners.

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

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

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

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

20 MS. MANGUM: Thank you so much, Suzy.
21 Again, thank you all for being here today. Again, my
22 name is Jalyce Mangum, and I will be co-moderating the
23 hearing today. To open us up, I'd like to start with
24 Mr. Decherney. You are the proponent for the proposed
25 class we're discussing today, representing the Joint

1 Educators.

2 The Joint Educators proposed a similar class
3 during our last cycle, expanding the existing
4 exemption for Massive Open Online Courses, or MOOCs,
5 as we'll refer to them today, related to online
6 learning and audiovisual works. Last cycle, the
7 Register found that the record lacked support to
8 expand the exemption to for-profit and/or unaccredited
9 educational companies and organizations.

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

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

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

1 sometimes unaccredited.

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

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

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

21 We've given a number of examples, you know,
22 others. These appear in different kinds of forms, but
23 for the company 2U, for example, they list their
24 educational mission in their Form 10-K as part of
25 their 501(c)(3) registration, and it says, "Our

1 mission is to expand access to high-quality education
2 and unlock human potential." There's the educational
3 mission in a way that is confirmed and verified by a
4 state or a federal government body.

5 MS. MANGUM: Thank you for that response.

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

13 MR. AYERS: Hi. Thank you. Good morning.
14 I think our position as we've stated in our filings is
15 that the evidence shown doesn't -- the evidence
16 provided by the proponents doesn't really advance the
17 ball over what was considered in the last proceeding
18 and that the examples given in the filings this time
19 are actually not very supportive. They're a little on
20 the thin side and not very supportive. We have
21 examples of technology platforms rather than actual
22 creators and a number of, in fact, entities that
23 arguably don't even need the exemption because they're
24 already working cooperatively with content creators.

25 So I think we would look at the language and

1 say that the changes since last time are not supported
2 by -- they weren't supported by the evidence then, and
3 they continue to not be supported by the evidence now.
4 And so we would recommend that those changes not be
5 made to the existing exemption.

6 MS. MANGUM: Thank you Mr. Ayers.

7 Mr. Taylor, your thoughts?

8 MR. TAYLOR: Yes, thanks for the question.
9 I think, if you're specifically referencing the
10 changes between the initial comments and the reply,
11 what I had seen in the reply was that they wanted to
12 add the standard MOOC requirement of qualified online
13 in courses requiring close analysis of film and media
14 excerpts.

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

23 MS. MANGUM: Thank you.

24 Mr. Englund, your thoughts on the revised
25 language?

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

13 And, you know, one of the principal examples
14 here that is relied upon in Professor Decherney's
15 comments is a service called Udemy. And I think, when
16 I first started thinking about this class, I viewed it
17 as providing a school-like experience. After spending
18 some time on Udemy, I think that experience is very
19 incomplete and Udemy is basically a platform that I
20 now think of as akin to YouTube or TikTok, where
21 content creators provide classes and people can go and
22 access on demand streams of informational content.

23 Udemy isn't like a school. The content
24 creators aren't like university professors, and the
25 kinds of courses here are not ones that are being

1 offered at America's colleges and universities I don't
2 think. So this is an important class to really
3 appreciate the breadth of the exemption that's being
4 offered in terms of the full range of content being
5 offered on Udemy courses like "How to get women
6 obsessed with you even if you're homeless," or "How to
7 communicate with your animal telepathically."

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

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

16 Mr. Taylor.

17 MR. TAYLOR: Yes. I just wanted to correct
18 Mr. Decherney. Professor Decherney suggested that it
19 was unintentional. Back in 2015, we spent a
20 significant amount of time examining who could exactly
21 offer a MOOC, and almost the entire discussion was
22 distinctions drawn very carefully around non-profit
23 educational entities versus for-profit entities. So
24 it was not unintentional, something that has resulted
25 from the changes in the marketplace, but by carefully

1 looking at a fair use analysis and what was already in
2 place for educational entities and exemptions.

3 MS. MANGUM: Thank you.

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

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

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

25 And so the question was about who would the

1 exemption apply to. Would it be educators or would it
2 be to the platforms themselves? Similar to the
3 existing exemptions, it would be for the educators,
4 but there's also language in the existing exemptions
5 that allows for staff to support educators in creating
6 the material.

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

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

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

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

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

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

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

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

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

25 MR. DECHERNEY: Yes. So, actually, Khan

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

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

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

1 hire a personal tutor for her.

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

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

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

22 MR. DECHERNEY: Yeah. So there are a number
23 of ways in which these show up. Sometimes through tax
24 documents, sometimes through the establishment of the
25 organization either as a for-profit company or a

1 public benefit company, or in the case of 2U that we
2 used earlier, or sorry, or in the case of other places
3 like Khan Academy through Form 990, which is used to
4 set up a 501(c)(3). Sometimes it's through an SEC
5 filing like a 10-K my legal team tells me is the name
6 of the document. So there are quite a few ways that
7 these organizations are registered, both federally
8 through their establishment, through annual tax
9 filings, or at the state level.

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

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

22 MR. DECHERNEY: Yeah. I mean, so there are
23 different kinds of institutions. Some are
24 unaccredited non-profits; some might be unaccredited
25 for-profits, and so there are a number of different

1 ways that they are established and would interact with
2 different governing bodies. Most of them seem to have
3 a stated purpose that you can find on their home page.

4 So, you know, Coursera is kind of bringing
5 education to all. 2U, as I mentioned, you know, their
6 mission is to expand access to high-quality education
7 and unlock human potential. LinkedIn Learning says
8 that LinkedIn is helping professionals use the
9 platform to connect, learn, grow, and get hired. And
10 so, you know, generally, the mission is somewhere on
11 their website, as well as in these kinds of filings.

12 MS. MANGUM: Thank you.

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

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

22 MR. TAYLOR: Yeah. I think that the problem
23 with it is that we don't understand what "registered
24 purpose" means. I mean, typically, in corporate terms
25 of what an entity's doing, it's corporate documents.

1 And to the extent that you can find in an SEC filing a
2 representation, that representation can be made, but
3 it doesn't necessarily, in my mind as a corporate
4 attorney, speak to the fact of whether or not its
5 purpose as a registered purpose is indeed an
6 educational mission as, you know, we properly
7 understand that.

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

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

17 MS. MANGUM: Mr. Englund?

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

25 And so, in the case of an example that used

1 in his comments of Learn English with Movie Clips, it
2 was uploaded by a user named Zahed Bashradi.
3 Presumably, that is somebody who Professor Decherney
4 would like to have be a beneficiary of this definition
5 but no reason to think that he's got any registrations
6 with any states. So I'm really having a hard time
7 reconciling his description of the definition and the
8 words of the definition with what he said about Udemey.

9 MS. MANGUM: Mr. Ayers, your thoughts?

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

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

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

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

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

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

20 MS. MANGUM: Thank you.

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

25 MR. DECHERNEY: Yeah. No, exactly. That's

1 what I was hoping to speak to. The other issues are
2 all about fraud, and that can obviously appear
3 anywhere but I think might be outside the scope of
4 this.

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

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

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

25 MR. TAYLOR: Yeah. There's a radical

1 difference between Professor Decherney's association
2 as a faculty member of a non-profit accredited
3 institution and what we see at Udemy, where anybody
4 can offer anything and there's no vetting process.

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

11 MS. MANGUM: Thank you for those thoughts.

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

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

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

1 impactful and effective.

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

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

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

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

23 MS. MANGUM: Thank you.

24 Mr. Taylor, your response?

25 MR. TAYLOR: I think that basically what

1 Warhol helps us to understand is that under the first
2 factor, when the alleged infringing work is at issue,
3 we're really looking at the same commercial purpose.

4 And to the extent that we have examples
5 here, which we have very few if not but only one, the
6 example that we're provided here is that this person
7 is using the intrinsic value of entertaining works for
8 the purposes of his work, and so he really is not
9 engaging in something that is truly transformative but
10 really -- how can I say this -- is really relying on
11 the intrinsic value of entertaining works to build a
12 business. And to that extent, I just don't think fair
13 use allows even an educator, educating creator, to rip
14 off other creators for that purpose.

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

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

1 sought here.

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

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

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

25 So you take into account a purpose that's a

1 lot less transformational than typical accredited
2 university teaching and the course that Professor
3 Decherney provides and described a moment ago.
4 Consider also the commercial nature of the activity
5 all around, which Warhol has reminded us matters. And
6 it just doesn't fare well under the first fair use
7 factor.

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

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

25 The argument we've been making is one of

1 equity, that there is an exemption for learners who
2 have access to accredited non-profits. And for all
3 the reasons that that exemption exists and creates a
4 high-quality educational environment for the people
5 who are privileged to have access to it, we'd like
6 that extended. We're hoping that can be extended to
7 non-traditional learners who don't have access.

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

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

24 MR. DECHERNEY: So Coursera offers open
25 online courses, sometimes taught by educational

1 entities, sometimes not. Some are offered by Google
2 and other companies. Many of those courses are free
3 and open to anyone. Some parts of the course are free
4 and open to anyone.

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

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

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

1 room for non-profit unaccredited educational entities
2 in -- that would be --

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

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

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

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

23 So back to the question of Professor
24 Decherney's equity argument, this rulemaking, we can't
25 just say because other educational institutions have

1 these exemptions, we therefore deserve it too. I
2 mean, similarities to other educational exemption is
3 just not enough. There has to be a record on which to
4 make the determination that the underlying activity is
5 indeed non-infringing, and you don't have it for what
6 they propose, and you don't have it for your
7 hypothetical either.

8 MS. MANGUM: Mr. Englund?

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

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

24 MS. MANGUM: Thank you, Mr. Englund.

25 Professor Decherney, can you provide any

1 examples of non-profit unaccredited entities that may
2 be able to use this proposed exemption?

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

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

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

23 So all of these cases exist in the same
24 platform in the same way and can educate students.
25 Obviously, an exemption that is expanded to

1 unaccredited non-profits is better than one that
2 doesn't, but there are also really valuable cases of
3 for-profit unaccredited organizations offering very,
4 very important education through these platforms.

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

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

19 MS. MANGUM: Thank you. We talked a little
20 bit about adverse effects, but I want to give
21 Professor Decherney another opportunity. Opponents
22 state that there's no evidence for the assertion that
23 students are being left behind or that any educational
24 harms are being caused by the limitations in the
25 current exemption. Do you have any measurable

1 evidence that online learning has been or will
2 continue to be hampered by the current prohibition?

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

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

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

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

24 MS. MANGUM: Thank you. So I want to turn
25 to alternatives regarding whether eligible users may

1 access the software through alternate channels that
2 don't require circumvention. I'm wondering if the
3 proponents can speak to any alternatives that could be
4 useful to the proposed class?

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

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

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

15 MS. MANGUM: Opponents.

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

17 MS. MANGUM: I'm sorry.

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

25 Professor Decherney, of course, has his

1 instructive background on the quality of screen
2 capture, but we have at least established in this
3 proceeding that in most instances where high-quality
4 images is not necessary, then the screen capture would
5 be sufficient, and we think that even in the example
6 here, screen capture was more than sufficient.

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

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

20 I would also notice that the examples
21 provided by the proponents have also noted that there
22 are examples of cooperative efforts between these
23 platforms and educators and the content owners
24 themselves in, for instance, a partnership between
25 Khan Academy and Pixar. That shows that not only was

1 circumvention not necessary, not even screen capture
2 was necessary because there was the availability of
3 working directly with the content owner in a very
4 amicable relationship.

5 MS. MANGUM: Mr. Englund?

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

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

19 MR. DECHERNEY: Yeah. So, first, I will say
20 Pixar is a kind of example that also proves that
21 the -- you know, the exception that proves the rule.
22 One of the few courses we've been able to find is one
23 in which there's a direct licensing relationship
24 because fair use isn't available to non-traditional
25 platforms.

1 Again, it's an equity argument, and so we
2 have talked many, many times about screen capture and
3 the available streaming libraries and why they're
4 insufficient, the quality of screen capture, drop
5 frames, pixelation, others, and the clip libraries are
6 very, very narrow and really diminish the range of
7 teaching opportunities. That's been true for
8 accredited non-profits, and it's equally true for
9 unaccredited organizations.

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

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

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

25 MS. MANGUM: Thank you. And are you aware

1 of any educators or preparers of online learning
2 materials that are currently using screen capture
3 technology for course materials?

4 MR. DECHERNEY: No.

5 MS. MANGUM: Thank you.

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

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

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

22 Just last month, I had to give several
23 lectures on Cuban cinema. I could only find two films
24 from the Cuban revolutionary period that are available
25 streaming in any way at all. The vast majority, you

1 know, are just not available, and so I had to search
2 for other means of accessing.

3 MS. MANGUM: Thank you.

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

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

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

21 MS. MANGUM: Thank you.

22 Mr. Taylor?

23 MR. TAYLOR: Yeah. I would just simply say
24 that we have looked at this in the past, and when we
25 looked at the availability of clip licensing, we were

1 looking at the availability of clip licensing for non-
2 profit entities, and we did not consider for-profit
3 entities. And I think, by and large, we were looking
4 at people who are looking to make an offering in the
5 marketplace for profit. They indeed should be able to
6 or at least be required to first check to see if there
7 is availability of a clip license, and there shouldn't
8 be a blanket excuse for not looking for that license.

9 MS. MANGUM: Thank you so much.

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

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

21 MR. DECHERNEY: Yeah. There's obviously a
22 huge growth in the use of online tools, platforms,
23 content, starting immediately as lockdowns began.
24 Those numbers have decreased a little bit, but,
25 actually, for the last 14 years, online education year

1 over year has grown, has grown significantly, even as
2 numbers of students in traditional learning
3 environments has actually decreased.

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

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

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

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

21 I'm not clear how much of that actually
22 relies on motion pictures that have been accessed
23 through circumvention of TPMs, but that option is
24 available for providers of those courses, and the
25 proponents here have just not made a showing that

1 opening up all motion pictures to circumvention by
2 for-profit entities is going to produce more better,
3 different kinds of educational offerings than are
4 already available or could be provided by non-profit
5 accredited organizations.

6 MR. TAYLOR: This is David Taylor. Yeah, I
7 think digital equity just brings us back to many past
8 proceedings where we have looked at very well-
9 intentioned purposes, including in the last one where
10 we had COVID and the Register spent some time
11 addressing the fact that this rulemaking simply cannot
12 say that for the purposes of any one reason that it's
13 going to deviate from the statutory mandate.

14 And if you look back at the 1201 study, we
15 clearly look and see that broad categorical
16 exemptions, even for the best purposes, are not
17 permitted under this rulemaking. So I don't think
18 that for proponents of digital equity, that they're
19 going to be able to find relief in the 1201
20 rulemaking, no matter how many of us agree with those
21 purposes.

22 MR. SHANNON: I have a follow-up for Steven
23 Edmond (sic), Mr. Edmond. What about tutors for
24 courses, right? You have a course, a film studies
25 course taught at a university. How do tutors, for-

1 profit tutors, online work to, like, help facilitate
2 or support students in those courses?

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

10 MR. SHANNON: Thank you.

11 Mr. Ayers?

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

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

23 MR. TAYLOR: Yeah. Just to, I guess, maybe
24 give you what you're looking for a little bit more is
25 that I think traditional copyright analysis would say

1 that a one-on-one experience is probably de minimis if
2 it's truly one-on-one. But what we are talking about
3 here is massive open online courses. So I think that
4 you have the full weight of the copyright law for
5 these kinds of exemptions that we're looking at here.

6 MR. SHANNON: Thank you.

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

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

1 environments of many medical schools.

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

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

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

23 Khan Academy is not a small entity. You
24 know, they're well funded by the Gates Foundation and
25 other organizations and have dramatically moved the

1 needle in terms of education, you know, globally. So
2 they're a very, very important player. But I assume
3 it's going to be much more difficult for a small
4 organization, and, you know, I can tell you the legal
5 fear and exposure really drives and limits their
6 educational offerings. That's what we've heard over
7 and over again for the past during this rulemaking.

8 MR. SHANNON: Thank you.

9 Mr. Ayers?

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

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

21 So I think it is an issue that the market
22 will address as these relationships increase and are
23 refined, and so you will see a benefit that will be
24 enjoyed by smaller entities as well, even if the early
25 days they're not as accessible.

1 MR. SHANNON: Mr. Englund? I hope I
2 pronounced that properly.

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

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

20 MR. SHANNON: Thank you.

21 In discussing the licensing opportunities,
22 there was a distinction made between licensing
23 opportunities for for-profit and licensing
24 opportunities for accredited not-for-profit during the
25 last hearing. It was mentioned that there was a less

1 than 10 percent availability on licensing platforms
2 during the last hearing and earlier today. Do you
3 know the amount, like roughly the amount of
4 availability today? And this is for Professor
5 Decherney and opponents. How much access do you have,
6 Professor Decherney or peers?

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

22 MR. SHANNON: Mr. Englund?

23 MR. ENGLUND: I think it's important to
24 point out that the response that Professor Decherney
25 just gave was an economic response, and Copyright

1 typically does not consider the price to be a reason
2 to grant exemptions or to recognize a particular use
3 as fair use. To the contrary, courts have said things
4 like it's commercial to try to acquire a work without
5 paying the customary price. And so, to the extent
6 this is an issue about economics and not wanting to
7 pay the customary price, that is not a reason to grant
8 this exemption.

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

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

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

20 MR. ENGLUND: I guess the easy answer to
21 that question is they do the same thing that for-
22 profit entities do all the time when they want to use
23 copyrighted works. They either negotiate a deal or
24 they design their products in ways that don't require
25 a use that contains copyright rights.

1 But, in our comments, we identified a number
2 of sources of clips that all have broad catalogues
3 and, as I understand it, would be available to a for-
4 profit educational entity. So I think there's no
5 reason for you to assume that for-profit educational
6 entities could not get a license here in commercial
7 markets.

8 MR. SHANNON: Thank you.

9 Mr. Taylor?

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

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

1 able to demonstrate.

2 MR. SHANNON: Thank you.

3 Mr. Ayers?

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

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

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

23 MR. SHANNON: Could I ask you to explain why
24 the screen capture, why that's not a valid argument?
25 You say that screen ripping or that ripping, not --

1 the lack of a loss of quality when ripping versus
2 potential loss of quality when screen capturing is not
3 a valid argument. Can you explain why?

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

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

25 In fact, the biggest reason, the biggest

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

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

16 MR. AYERS: I would say that it's at least
17 sufficient quality to do the job. One might question,
18 I think reasonably, whether the use of the clip is
19 actually a fair use in that particular circumstance or
20 is it used as essentially a gimmick to make the
21 language lesson more attractive to a consumer. Come
22 take my language lessons; you can watch movie clips.
23 You know, so there's that question, you know, putting
24 aside that question. But just as far as the basic
25 utilitarianism, the basic utility, I'm sorry, of the

1 screen capture clip, it provides just as much utility
2 in most contexts as the ripped copy from a commercial
3 physical medium.

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

6 MR. AYERS: Thank you.

7 MR. SHANNON: Mr. Taylor?

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

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

20 But, in each one of those determinations, we
21 have a solid record where we had proponents and
22 multiple examples of evidence of the non-infringing
23 activity and explanation with those examples of how
24 screen capture fell short and what was specifically
25 the need that was sought by the act of circumvention.

1 Here, we have no record. The only record of
2 use that we have is the one of "learn English through
3 films," and the underlying activity cannot be said to
4 be clearly non-infringing. The for-profit motive, the
5 way it was marketed, every aspect of this example says
6 that this is a non-infringing use, and in the absence
7 of more examples or any successful example, there's no
8 basis for the Copyright Office to recommend a class or
9 exemption in this case.

10 MS. MANGUM: Mr. Englund?

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

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

23 But the copyright analysis is the same. The
24 fair use analysis, most importantly, is still the
25 same. You've still got commercial entities that are

1 engaged in the activity, and it's important to
2 remember, as I said at the outset, that it is a
3 mistake or at least an incomplete vision of what we're
4 talking about here to assume that all of these courses
5 are like Professor Decherney's MOOC.

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

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

23 MS. MANGUM: Thank you.

24 Mr. Ayers, your final thoughts?

25 MR. AYERS: Sure. First of all, thank you

1 for having us all today. Just to essentially
2 reiterate points you've heard, these topics have been
3 discussed and negotiated multiple times in the past.
4 What we're doing now is focusing a little bit more on
5 where the discussion is since the exemption's already
6 been created.

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

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

19 MS. MANGUM: Thank you.

20 Professor Decherney?

21 MR. DECHERNEY: Yeah, thank you. No, thank
22 you so much for all the time thinking through this
23 with us. I mean, it's a really exciting time to be an
24 educator. There are new tools out there. We're able
25 to scale the kinds of education we provide, you know,

1 beyond things we'd ever imagined when I started
2 teaching. It's shocking for me still to say that I've
3 had 80,000 learners who are able to access my course
4 that in the past I could only teach to a hundred
5 students a year.

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

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

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

24 And I think together we've done a really
25 great job of finding a way to narrow the class so that

1 it only applies to true educational institutions that
2 are trying to offer a really high-quality product to
3 as broad a public as possible and really democratizing
4 American education, really one of the great things, I
5 think, that our country has to offer. There's no
6 other educational system like ours. Actually, just,
7 yeah, I'll end there.

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

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

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

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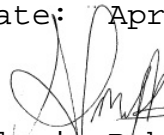
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REPORTER'S CERTIFICATE

CASE TITLE: Section 1201 Public Hearing: Proposed
Class 2: Audiovisual Works - Online Learning
HEARING DATE: April 16, 2024
LOCATION: Washington, D.C.

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

Date: April 16, 2024



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