

TRANSCRIPT OF PROCEEDINGS

In the Matter of:)
)
SECTION 1201 PUBLIC HEARING:)
PROPOSED CLASS 6(b))
VIDEO GAMES - PRESERVATION and)
PROPOSED CLASS 6(a))
COMPUTER PROGRAMS - PRESERVATION)
)

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BEFORE THE UNITED STATES COPYRIGHT OFFICE

In the Matter of:)
)
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 PROPOSED CLASS 6(b))
 VIDEO GAMES - PRESERVATION and)
 PROPOSED CLASS 6(a))
 COMPUTER PROGRAMS - PRESERVATION)
)

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

Thursday,
 April 18, 2024

The parties convened remotely, pursuant to notice,
 at 11:01 a.m.

PARTICIPANTS:

Government Representatives:

SUZY WILSON, General Counsel and Associate
 Register of Copyrights, U.S. Copyright Office
 MARK GRAY, Assistant General Counsel, U.S.
 Copyright Office
 BRANDY KARL, Assistant General Counsel, U.S.
 Copyright Office
 DIANA MORENO HEYD, Attorney-Advisor, NTIA
 JOHN RILEY, Assistant General Counsel, U.S.
 Copyright Office
 HEATHER WALTERS, Ringer Fellow, U.S. Copyright
 Office

PARTICIPANTS: (Cont'd)

Panelists:

KENDRA ALBERT, Harvard Law School Cyberlaw Clinic,
on behalf of Library Copyright Alliance and
Software Preservation Network

MICHAEL B. AYERS, AACLS LA

JONATHAN BAND, Library Copyright Alliance

STEVEN R. ENGLUND, Jenner & Block LLP, on behalf
of Entertainment Software Association

DRAGAN ESPENSCHIED, Rhizome

CASS FINO-RADIN, Small Data Industries

LAINÉ NOONEY, New York University

ROBERT ROTSTEIN, MSK LLP, on behalf of Joint
Creators and Copyright Owners

PHIL SALVADOR, Video Game History Foundation

DAVID JONATHAN TAYLOR, DVD CCA

1 court reporter. The video and transcript will later
2 be posted on the Copyright Office's website, and we
3 ask that you speak clearly and also keep your audio
4 off when you're not speaking, which helps out our
5 court reporter.

6 Later today, we will be holding an audience
7 participation session. You can still sign up to
8 participate that session using the link in the chat.
9 We just ask that comments during the public
10 participation session be limited, and you can also
11 comment on any of the different classes that we
12 covered this week.

13 So, for today, today's hearing is on Class
14 6(b), Video Games - Preservation. Before we begin, I
15 would like to invite first my Copyright colleagues to
16 introduce themselves.

17 Brandy, can you start us off?

18 MS. KARL: Hi. I'm Brandy Karl, Assistant
19 General Counsel.

20 MR. RILEY: Hello. I'm John Riley. Thanks,
21 everyone, for joining us today.

22 MS. WALTERS: And hello. My name is Heather
23 Walters. I'm the Ringer Fellow.

24 MS. WILSON: And also, we are joined today
25 by one of our colleagues at NTIA. Can you please

1 introduce yourself?

2 MS. MORENO HEYD: Sure. Good morning. I'm
3 Diana Moreno Heyd. I'm an attorney-advisor, NTIA.

4 MS. WILSON: Great. So I'm now going to ask
5 the proponents and opponents of this proposed class to
6 introduce themselves.

7 And just to be clear, we did have sign-ups
8 for this, so it's possible on my screen that I'm
9 seeing folks who have actually signed up for the class
10 that comes afterwards. I will not be calling on you
11 to introduce yourself at this time.

12 So, when you introduce yourself, please
13 identify the organization that you're representing
14 here, and could we start with the witness appearing on
15 behalf of the Video Game History Foundation?

16 MR. SALVADOR: Hi. My name is Phil
17 Salvador. I am the Library Director at the Video Game
18 History Foundation and I'm the author of the Survey of
19 the Video Game Reissue Market in the United States
20 report.

21 MS. WILSON: Thank you.

22 Could we now have our panelist who is from
23 NYU?

24 PROF. NOONEY: Hello. Thank you. I'm Laine
25 Nooney. I am a computer and video game historian in

1 the Department of Media, Culture, and Communication at
2 New York University.

3 MS. WILSON: Thank you.

4 And from I believe it's Rhizome.

5 MR. ESPENSCHIED: Hi. My name is Dragan
6 Espenschied. I'm the Preservation Director at
7 Rhizome, which is an affiliate organization of the New
8 Museum in New York, and, yeah, I've been working with
9 digital art and emulation for, like, more than a
10 decade.

11 MS. WILSON: Thank you very much.

12 And then our panelists who are here on
13 behalf of the Library Copyright Alliance.

14 MR. BAND: Hi. I'm Jonathan Band. I
15 represent the Library Copyright Alliance, which
16 consists of ALA, the American Library Association, and
17 the Association of Research Libraries.

18 MX. ALBERT: I'm happy to go here. My name
19 is Kendra Albert. I'm an attorney at the Cyberlaw
20 Clinic at Harvard and represent the Software
21 Preservation Network, in addition to the Library
22 Copyright Alliance.

23 MS. WILSON: Thank you very much.

24 Now we're going to turn to those who are
25 here opposing the proposed exemption. Can we start

1 with AACS?

2 MR. AYERS: Good morning. My name is
3 Michael Ayers. I'm counsel to Advanced Access Content
4 System Licensing Administrator, normally referred to
5 as AACS LA. We provide content protection technology
6 for Blu-Ray discs, including for those drives found in
7 game consoles.

8 MS. WILSON: Thank you.

9 And Entertainment Software Association.

10 MR. ENGLUND: Good morning. I'm Steve
11 Englund representing the Entertainment Software
12 Association.

13 MS. WILSON: DVD CCA.

14 MR. TAYLOR: Good morning. I'm David
15 Taylor, counsel to DVD CCA, and we provide the content
16 protection technology known as CSS for DVDs.

17 MS. WILSON: And, finally, Joint Creators
18 and Copyright Owners.

19 MR. ROTSTEIN: Yes. I'm Robert Rotstein for
20 the ESA, the MPA, and the RIAA.

21 MS. WILSON: Great, thank you.

22 All right. So, to start off our questions
23 today for Class 6(b), I would like to turn it over to
24 my colleague, Heather Walters.

25 MS. WALTERS: Thank you, Suzy.

1 Our first question is for the opponents. In
2 the reply comments, SPN and LCA amended their Class
3 6(b) proposal. The amended proposal would require the
4 preservation institution to conduct an individualized
5 human review of requests for access to confirm that
6 the uses will be for the purposes of scholarship,
7 teaching, or research, and the phrase "private study"
8 would be removed from the extension test.

9 Could class opponents please provide their
10 views on this proposal? Mr. Englund?

11 MR. ENGLUND: I think my main reaction to
12 the proposal is that while it is movement, it isn't
13 very much movement in the sense that the preceding
14 three years ago, the proponents of this exemption
15 sought to maintain complete discretion over how they
16 would provide remote access to preserve games. And in
17 this proceeding, notwithstanding the changes
18 identified in the reply comments, they were trying to
19 reserve almost complete discretion in how they would
20 provide access to preserve games.

21 And so, with respect to human review, that
22 ensures that the process is not wholly automated.
23 But, nonetheless, it doesn't prevent users from lying
24 or libraries from providing a simple checkbox where
25 users could affirm that they have a purpose of

1 scholarship or research and a human would note that
2 and allow someone in.

3 Similarly, removing the word "primary" from
4 the primary purpose test that was in the language
5 originally proposed in this round doesn't exclude the
6 possibility of use to preserve games for recreational
7 play. It just means that the user has a purpose of
8 research perhaps among other things.

9 So the absence of "primary" is not the same
10 as "solely" and I think the Office's analysis would
11 have to take into account the possibility for
12 recreational game play. And the exemption still has
13 all the other issues that were noted in our opposition
14 comments, including the permits distribution of copies
15 or seems to and does not replicate the experience of
16 accessing preserved games in a library's special
17 collection setting in person.

18 MS. WALTERS: Thank you.

19 Are there any other class opponents who
20 would like to speak on this matter?

21 (No response.)

22 MS. WALTERS: If not, we can move on to the
23 next question.

24 This is for SPN and LCA. ESA objected to
25 the term "private study," which was taken from Section

1 108 and which SPN and LCA have proposed removing from
2 the exemption text here. ESA suggested that allowing
3 private study might be understood as permitting any
4 personal use of the games involved. Do class
5 proponents have comments on how the phrase "private
6 study" has been understood by preservation
7 institutions in the context of Section 108 to date?

8 Mx. Albert.

9 MX. ALBERT: Thank you. Yeah. So, as you
10 mentioned, private study comes out of Section 108.
11 From our conversations with preservation institutions
12 in the software and video game preservation context,
13 you know, I don't think folks are particularly relying
14 on that language for providing access. And I think,
15 generally, we're looking more towards the scholarship,
16 teaching, and research, which is why we were
17 comfortable removing it. But, you know, it was there
18 because that's the language that was historically from
19 108.

20 MS. WALTERS: Anyone else?

21 (No response.)

22 MS. WALTERS: If not, I will hand it over to
23 my colleague, John.

24 MR. RILEY: Thank you, Heather.

25 The next question we have is related to the

1 individual review. In the last Section 1201
2 rulemaking, SPN and LCA suggested that a new rule
3 permitting off-premises access would be a dead letter
4 if it included complex new technical requirements but
5 also suggested that novel or complex requirements
6 would be helpful because institutions might not want
7 to tolerate perceived risk. Would engaging in
8 individualized human review of requests for access to
9 confirm that the uses will be for the purpose of
10 scholarship, teaching, or research be that sort of
11 risk that some preservation institutions would be
12 averse to? If we could get more information on that,
13 that would be great. Mx. Albert.

14 MX. ALBERT: Sure. So the reason we
15 suggested the individualized human review standard was
16 to try to strike a compromise between the concerns of
17 the Entertainment Software Association and the sort of
18 need for flexibility that I think, you know, we've
19 emphasized on behalf of preservation institutions.

20 So I think, in terms of sort of the appetite
21 in the way that the individualist human review relates
22 to the appetite for risk, that's why we talk about it
23 in the context of the special collections model
24 because, as I'm sure my colleague, Mr. Band, can speak
25 to as well, this is the kind of judgment call that

1 preservation institutions that are providing access to
2 works do all the time, right, in terms of, you know,
3 works that are fragile, works where it's difficult to
4 provide other forms of access, and so these kinds of
5 assessments as just a normal part of a routine sort of
6 functioning. In fact, actually, a couple of months
7 ago I myself made a special collections request to a
8 library in California.

9 So we think that this, you know, hopefully
10 addresses some of the Entertainment Software
11 Association's concerns about sort of widespread public
12 access to games while preserving the flexibility to
13 tailor the specific security measures that are offered
14 to the individual needs of a particular researcher who
15 is accessing it and to what the institution feels
16 comfortable providing.

17 MR. RILEY: Mr. Band and then Mr. Englund.

18 MR. BAND: Thanks. So just I agree with
19 everything that was said. And it's like the
20 proponents here are sort of bending over backwards to
21 try to meet every possible concern, however
22 farfetched, that's been raised. You know, we think
23 it's all unnecessary because, again, in all of the
24 history of 1201, there's never been any example of any
25 leakage and so forth. Basically, everything that I

1 ranted about yesterday, you know, we can maybe include
2 by reference in this record. But, you know, we're
3 trying to accommodate all of these, you know, concerns
4 that obviously have no real basis. Thank you.

5 MR. RILEY: Mr. Englund.

6 MR. ENGLUND: Several things. First, it's
7 very clear from the record, and I'd point you to the
8 comments by all of the individual commentators, that the
9 individual commentators are interested in playing games
10 recreationally. So we will all have a careful
11 lawyerly debate about the fine points of copyright
12 here. But we should never lose sight of the fact that
13 out in the real world people want access to preserve
14 games to play them for fun.

15 And so thinking about the human review
16 process here, it is at best incomplete. In the 2021
17 proceeding, the Office, for example, identified
18 verification of identity and affiliation as things
19 that would be potentially helpful in preventing
20 recreational game play and ensuring that they're
21 serious scholarly uses. But we don't have that in the
22 current proposal, which is a good introduction to my
23 second point here, which is that the proponents'
24 comments talk at various points and we heard a moment
25 ago that the goal here is to replicate the in-person

1 special collections experience.

2 But the proponents really are sending mixed
3 messages about that. You know, they're not proposing
4 a clear requirement to know who the users are or why
5 they want to access a game, although they have
6 introduced passingly the concept of human review.

7 And that leads to my third point, where I'd
8 like to respond to Mr. Band's comments a moment ago
9 that the proponents that are represented here are
10 representing responsible organizations and I assume
11 their good faith and desire to provide access under
12 appropriate circumstances. But their comments are
13 full of examples of how the libraries at Ivy League
14 universities would treat preserved games. And it's
15 important to remember that this is not an exemption
16 that would apply only to the universities, Ivy League
17 schools. It potentially applies to any school library
18 or public library and internet-only organizations like
19 the Internet Archive.

20 And so the Office should not and cannot
21 assume that if an exemption is granted with a great
22 deal of leeway for the organizations involved to
23 decide how they want to provide access that any
24 beneficiary of the exemption would act in the same way
25 as the Yale University library. They have to assume

1 the lowest common denominator. And I think any
2 organization under the sun that has a nonprofit
3 library archive that can preserve games online,
4 they're likely to be -- with few restrictions, we are
5 likely to see a situation with the kind of online
6 arcade that I've been warning against for the last
7 several proceedings.

8 MR. RILEY: I have a couple of follow-up
9 questions that I don't know that you're suggesting
10 this, but I want to be clear, if proponents added an
11 affiliation requirement similar to the one that was
12 discussed in the last proceeding, would that just be
13 more "movement," or would that get closer to being
14 something that your constituents would support in
15 terms of an exemption?

16 MR. ENGLUND: I don't think there is at the
17 moment any combination of limitations that ESA members
18 would support to provide remote access, so I would
19 characterize that as progress but not sufficient
20 progress.

21 MR. RILEY: And to your comment about the
22 fact that people want to play video games, they want
23 to engage in recreational play, do you think that the
24 individualized human review is not going to be able to
25 prevent that?

1 MR. ENGLUND: I think the point I was trying
2 to make a moment ago was simply that it's not clear
3 what that means, and the proponents who are
4 represented here may well engage in verification of
5 identity and make a serious determination and they
6 talk in their examples about how some school libraries
7 turn down requests to access special collections in
8 person. I think, once we open this to every public
9 library, every school library, every internet-only
10 organization that wants to provide access to games,
11 put them up on the website, have a checkbox affirming
12 the scholarly play, have a person look at it, grant
13 access.

14 MR. RILEY: So, one other question. People
15 point to the Internet Archive as an example of an
16 online arcade. Would an exemption that had a
17 requirement that the institution has a physical
18 premises and is not online-only address that sort of
19 circumstance?

20 MR. ENGLUND: I'd say, again, it helps, but
21 I believe the Internet Archive has offices, so maybe
22 there is some way to talk about a physical facility in
23 which collections are viewed, but, you know, I
24 wouldn't necessarily put a lot of stock in that kind
25 of language, particularly without seeing it.

1 MR. RILEY: Mr. Ayers, I think you had your
2 hand up next.

3 MR. AYERS: Yeah. Thank you. At the risk
4 of piling on, I would agree with Mr. Englund's
5 comments about paying attention to the practical
6 realities that we're seeing here. There are not a lot
7 of individual comments that come into these
8 proceedings, and I think it's notable that the ones
9 that did were in this class and that a number of them
10 noted essentially the desire to play games
11 recreationally and expressing a preference for games
12 that are in terms of preservation expressing a
13 preference for the older version of games as opposed
14 to new releases that they felt were inferior that had
15 very little to do with scholarly research.

16 So I think that's a very important element
17 here that differs from most of the other classes that
18 we deal with, that there is some representation from
19 individuals in the public that they're looking at this
20 not in the way that we are.

21 And I would also note, sharing Mr. Englund's
22 comments, that certainly the folks that are here are
23 representing parties that are going to be responsible
24 and the fact that they're here is very helpful that
25 we're all trying to work together to come up with

1 something reasonable.

2 But, when something is as vague as human
3 review, I also have to question is checking the box,
4 identifying the traffic lights in the picture and
5 checking the box that I'm not a robot essentially or
6 that I am involved in scholarly research, is that
7 going to take care of it. And, frankly, anybody can
8 have a mailing address, and so I'm not sure when it
9 comes to just checking boxes as opposed to having
10 anything verified, I would have concerns there as
11 well.

12 MR. RILEY: I'm sorry, maybe I don't
13 understand the reference to a mailbox.

14 MR. AYERS: If there's a physical location
15 where the -- anybody can have a physical location.
16 Anybody can open a storefront. Anybody can have a
17 mailing address. So, to the extent that that might be
18 a mitigating factor in helping to confirm that this is
19 a legitimate resource as opposed to an internet-only
20 workaround, it's not clear that that's actually going
21 to be effective.

22 MR. RILEY: And Section 108 has the
23 requirement for a physical premises. It's more than
24 simply an address, though. You have to be making the
25 materials available at that premises. Is that not

1 correct? It's more than a P.O. Box, for example.

2 MR. AYERS: Yeah. That's true. Granted.

3 But what does it mean to make them available? I think
4 the broader point is there needs to be a little more
5 substance in that as opposed to just saying there is a
6 physical location.

7 MR. RILEY: Thank you.

8 Mx. Albert, thank you for your patience.

9 You're up next.

10 MX. ALBERT: Yeah. So I have a more
11 specific point, but I'd like to start by making a more
12 general one. As we just heard from the Entertainment
13 Software Association, there is literally nothing that
14 preservation institutions can do that would permit the
15 kinds of off-premises access that is required for
16 research. And I think that's the exhibited degree to
17 which preservation institutions and the proponents
18 have been willing to make significant compromises,
19 require very, like, specific processes in order to try
20 to prevent the really significant adverse effects that
21 have been caused by these restrictions. You know,
22 that's what we're here with. We noted that in our
23 reply comment.

24 And, you know, what you heard from Mr.
25 Englund is that none of that is ever going to be

1 sufficient to reassure the rights holders that, you
2 know, it will not cause harm. And I think that
3 speaks, you know, to me to the sort of fact that sort
4 of tinkering around the edges, I mean, like, okay,
5 we're going to provide these requirements. Like, I
6 think that if we want to talk about what the practical
7 realities are, our reply comments included two
8 statements from companies that do regular re-issues of
9 video games under licenses, that the types of
10 scholarly access here and, indeed, potentially even
11 more broad access of the type that Mr. Englund has
12 been concerned about with online arcades does not harm
13 the re-release market.

14 So, if we're talking about practical
15 realities, you know, I really want to emphasize the
16 fact that at this point, you know, proponents have
17 repeatedly proposed compromises that allow
18 preservation institutions to provide the kinds of
19 access that is necessary for researchers while sort of
20 trying to address some of the concerns presented by
21 opponents. It's not clear to me that it will ever be
22 enough to satisfy, right?

23 And I think that moreover, those concerns do
24 not actually appear to be a realistic assessment of
25 the entire field, right, the very folks who are most

1 involved in that the Entertainment Software
2 Association is fighting as the examples of the re-
3 release market, that that is potentially of concern.
4 I don't agree with their stance about the potential
5 part.

6 Finally, I want to sort of come to this
7 point about kind of the public comments. I think
8 that, you know, the idea that, you know -- I
9 think, frankly, I find it somewhat upsetting that the
10 fact that people care about these works is being used
11 as a reason to actually make it harder for scholars to
12 access them, right, I think that's a really
13 frustrating and difficult way to treat what is both an
14 art form but also a cultural product that is
15 incredibly important. And I think harming scholarship
16 and teaching because there might be an interest in
17 recreational play, of which it's unclear that the
18 public commentators actually even understand what the
19 specific exemption at issue is, doesn't feel fair to
20 the scholars and institutions that put a lot of effort
21 into making these works available. I have much more I
22 could say, but I'll stop there.

23 MR. RILEY: Thank you.

24 Mr. Salvador.

25 MR. SALVADOR: Thanks. I'd like to respond

1 to the specific hypothetical that was brought up by
2 the Entertainment Software Association about public
3 libraries spitting out these so-called online arcades
4 or, you know, these theoretical irresponsible
5 institutions providing access to games. To continue
6 with this theme of practical realities we've been
7 talking about, building a video game collection is a
8 specialized skill that most libraries do not have the
9 labor to do or the expertise or the resources or even
10 the interest.

11 In terms of libraries that are building
12 meaningful collections of video game materials for
13 research in the United States, I would say it's
14 probably single-digit numbers. There's very few
15 institutions doing that work. That's just for
16 physical collections.

17 When we're talking about remote access, this
18 is an additional layer of building digital
19 infrastructure to provide access to these games that,
20 again, most of these institutions, even the ones
21 building physical collections, do not have. So I'm
22 sure my colleague, Dragan, can talk more to the
23 infrastructure required to provide remote digital
24 access. But just talking, again, about the practical
25 reality, there are very few institutions in the U.S.

1 that would be using this exemption. This is really
2 meant for specialized institutions and specialized
3 collections.

4 MR. RILEY: Thank you.

5 Mr. Rotstein.

6 MR. ROTSTEIN: Yes. Briefly, I concur with
7 Mr. Englund and Mr. Ayers. I just want to want to
8 say, though, that there was a comment that off-
9 premises access is required for research. It's really
10 not required and it's not a TPM problem. It's really
11 a travel problem, an inconvenience problem, so it
12 really doesn't focus on TPMs or depend on TPMs. So a
13 requirement, I think, is certainly an overstatement.

14 MR. RILEY: Mr. Taylor.

15 MR. TAYLOR: Yes. I'm not sure that it's
16 really very, very intellectually honest on the part of
17 the proponents to suggest that they're offering all
18 the flexibility here because, when you read their
19 comments, they are not interested in including such
20 limitations as "solely." And in the absence of
21 "solely," then you absolutely permit the game play
22 that the Register was very much concerned about in the
23 last recommendation.

24 And as far as the representation by
25 providers of re-release arcades or the likes, I'm not

1 sure that they are really legitimate to the extent
2 that they are not the publishers of these works. So
3 the fact that they are interested and support the
4 exemption, they have a commercial interest to make
5 sure that they have some ability to go look at these
6 works themselves and see how they would work with
7 their own business model. So I would not suggest that
8 their representations should be given that much
9 weight.

10 MR. RILEY: Mr. Espenschied.

11 MR. ESPENSCHIED: Thank you. Yeah, I wanted
12 to pick up on what Mr. Salvador was mentioning. So,
13 at Rhizome, we are an online-only organization
14 actually and we run a quite sophisticated emulation
15 infrastructure that makes it possible for remote users
16 to access emulated software environments. And picking
17 up on this, I wanted to say that this is a huge
18 infrastructure effort on our side which, for a very
19 small organization like us which has maybe in the
20 hundreds of users a month for such a service, it costs
21 us thousands of dollars a month to, like, keep this
22 going and to maintain it. And so I don't think there
23 is really a risk of, like, arcades, online arcades,
24 springing up everywhere.

25 And also, from the experience how we have

1 been, like, putting these emulators into public
2 excess, I think what was mentioned before about, like,
3 a sole purpose, I think there is -- what we have been
4 doing, for instance, in 2015 already, when there was a
5 discussion about the role of female game-makers and
6 female gaming, which was like discussing the roles of,
7 like, who is doing what and is this even worthwhile
8 being thought of as a game, we were able to enter this
9 discussion by publishing CD-ROM games online from 1995
10 to 1997, like, showing the history. It was a series
11 of CD-ROMs like showing what kind of history of female
12 game-making days and what, like, today's game traders
13 can, like, refer to or build their current practice
14 on. And so, yeah, these are the two comments I wanted
15 to make to what was discussed right now. Thank you.

16 MR. RILEY: Thank you.

17 Professor Nooney.

18 PROF. NOONEY: Hi, yes, thank you. I wanted
19 to respond to the characterization that the on-premise
20 site requirement is merely an inconvenience or, as I
21 believe it was referred to, a travel problem. As
22 someone who does this work for a living, it is not
23 merely a travel problem. It is a significant
24 financial and logistical impediment to doing research.

25 I live in New York City. The nearest

1 institution to me that affords in-person access is the
2 Strong Museum of Play in Rochester, New York. That's
3 a five- to six-hour drive on a good day or a flight of
4 several hours. And if I were to -- let's say I want
5 to -- you don't go there just to play a game for a
6 couple of hours, right? Games are a unique temporal
7 medium. They can take 60 to a hundred hours of game
8 play. They can take far longer than that to acquire
9 mastery at other kinds of games.

10 These sort of impediments, you know, I have
11 been able to work at the Strong twice because of how
12 expensive it is to go there and do extended research.
13 It costs thousands of dollars to put yourself up in
14 accommodation. And I am a researcher who is fortunate
15 to be at a university that actually funds me to be
16 able to do that.

17 This puts dramatic limitations on the
18 availability of graduate students, scholars employed
19 at universities that do not have extensive research
20 funding, and precarious researchers to be able to do
21 work that, frankly, my colleagues in literary studies
22 or film history have pretty routine and regular access
23 to digitized versions of the kinds of things they
24 study, be it novels, films. The early Kinetoscope
25 films of Thomas Edison are available on the Library of

1 Congress website.

2 These impediments actually are real and
3 significant and they do impede research and they
4 impede it in ways that is not equitable compared to my
5 colleagues in other disciplines. Thank you.

6 MR. RILEY: And we also have video games
7 that are catalogued. My colleague, Heather, has the
8 next question.

9 MS. WALTERS: Thank you, John. So this
10 question is for SPN and LCA. Your reply comments
11 stated this exemption is unlikely to make much
12 difference to anyone other than bona fide researchers
13 who will benefit substantially. Can you define who a
14 bona fide researcher is?

15 MX. ALBERT: Sure. So I think --

16 MS. WALTERS: Yes, Mx. Albert.

17 MX. ALBERT: Sorry. I got ahead of myself
18 there.

19 MS. WALTERS: No worries.

20 MX. ALBERT: So, yeah, so, you know, one of
21 the -- I would turn the -- if the Copyright Office is
22 curious about this frame, I would suggest taking a
23 look at the original comments where we talk about sort
24 of the special collections practices that are just
25 widely implemented. We interviewed a special

1 collections librarian here at Harvard named John
2 Overholt, who talked about actually the process by
3 which they vet and they sort of do the individualized
4 human review that the exemption requires. So that
5 includes, like, sort of looking at who the researcher
6 is, what they want access to.

7 It often does not -- and I want to be very
8 clear about this -- require a specific affiliation
9 because, for all of the reasons Professor Nooney
10 mentions, that has really regressive and problematic
11 effects on the field to say the only people who can
12 access things are folks who already have certain kinds
13 of formal academic institutional affiliations. There
14 are plenty of independent scholars and researchers who
15 put out really meaningful work.

16 So, like, bona fide is not like, oh, there's
17 like a checkbox and you have to check all of these
18 items, but, rather, this is the exact kind of review
19 that institutions are used to doing, especially within
20 the context of a particular kind of or a particular
21 request, right? You know, in our initial comments, we
22 talk about -- Andrew Gorman at the Strong Museum talks
23 about saying, like, hey, even if somebody is a
24 researcher, you know, they're not going to necessarily
25 give them access to the whole Atari collection and

1 that they regularly turn down requests for sort of on-
2 premises access by researchers.

3 So I think, you know, it is a standard, not
4 a rule. There's not a set of checkboxes that you can
5 go through, which is why we require individualized
6 human review rather than coming up with a list.

7 MS. WALTERS: Thank you. So, other than
8 people engaging in recreational play, could you
9 provide some examples of who would be excluded from
10 accessing these works? Mx. Albert?

11 MX. ALBERT: Sure. I want to obey the
12 rules. So, you know, I think, if somebody was like,
13 hey, I want to access this so I can, you know, take
14 video of the entire thing and put it directly on my
15 YouTube channel, I think that would be the kind of
16 request that someone at an institution would maybe
17 look askance at. I think, if someone said, hey, I
18 want access to this work because I want to be able to,
19 you know, like, play it at a party, I guess that's
20 recreational use.

21 But I think, you know, generally speaking,
22 part of the sort of process of looking through
23 individualized review is to screen out requests where
24 the sort of access to the materials is not
25 proportionate to the type of need, in addition to kind

1 of looking at the question of recreational versus
2 scholarly, you know, teaching, et cetera, basis.

3 MR. RILEY: Was there any response from
4 proponents? If not, we can move on to the next ...

5 MR. ENGLUND: I'll just say that it's clear
6 from Mx. Albert's comments a moment ago that the bar
7 here is to be set very low in the judgment of the
8 proponents, that if anyone has any plausible claim to
9 be doing something other than recreational play and
10 it's consistent with the resource allocation of the
11 preservation organization, access will be granted.

12 MR. RILEY: My colleague from NTIA has a
13 quick question.

14 MS. MORENO HEYD: Sure, thank you. So, for
15 the proponents, separate from the limits you're
16 already proposing, you mentioned recreational use is
17 unlikely because preserved games are suboptimal for
18 leisurely play or different from even the re-releases.
19 I believe I have an idea of what you're talking about,
20 but can you expand on this for further clarification?

21 MX. ALBERT: I'm assuming I should go. So,
22 yeah, so happy to talk about this. First of all,
23 oftentimes the kinds of emulation environments that
24 preservation institutions provide access to are just,
25 like, not -- I don't want to say not fun, but not the

1 kind that one might experience if one were sitting at
2 one's TV, you know, sort of playing a game or even
3 sort of on a gaming computer, right? They're meant to
4 replicate the experience of playing it in an original
5 setting. And they have to run affordances from being
6 able to sort of be able to see different parts of the
7 game to sort of having, you know, implementing loading
8 screen times that are equivalent to the times that
9 would have been implemented at the original part of
10 the game. So sort of just on the sort of sheer
11 emulation functions, right, I think that that's, you
12 know, important to know.

13 And my colleague, Mr. Espenschied, can speak
14 more to the specifics about it if it would be useful
15 to the Copyright Office and to NTIA.

16 On the point about sort of, like, what games
17 we're talking about, I think that, you know, it's
18 important to note that, you know, as I think the
19 comments from Antstream and Limited Run suggest as the
20 video game re-release companies, you know, people do
21 routinely buy re-releases of games because they want
22 access on those sort of devices that they play on
23 every day and that the types of games that are re-
24 released, as Mr. Salvador can speak to, are the ones
25 that are often, like, you know, financially viable to

1 do so, right? They are, you know, often going to be
2 popular, they're going to sell copies. Our comments
3 talk a little bit about Spec Ops: The Line, and there
4 are many other examples, but that's just one that was
5 very much on the top of mind for folks because it's no
6 longer available on the commercial marketplace.

7 Where there are lots of games that are of
8 interest to scholars because of their role in video
9 game history, because of their historical importance,
10 but, frankly, like, you know, in my personal opinion,
11 which is not what matters, but, you know, that are --
12 let me put that differently. That they're not going
13 to be likely to be accessed for recreational play. I
14 know Professor Nooney's work often focuses on, like,
15 certain Sierra Online games that are just not actually
16 fun for modern audiences.

17 So there's both a sort of like very
18 straightforward component about kind of how the
19 emulated systems provide access and how that's
20 different from the types of access that recreational
21 players may want. But also, sort of the reality of
22 the types of games that folks are often getting from
23 preservation institutions are different than the types
24 of games that might sort of be viable to re-release.
25 I hope that answers the question.

1 MS. MORENO HEYD: Thank you.

2 And Mr. Salvador.

3 MR. RILEY: I actually have a follow-up to
4 that, if I could jump in, for Mx. Albert. Do you see
5 a tension between the concept of preservation and this
6 discussion about emulation and making edits to the
7 game that make it not the same game that was
8 originally published? Can you talk about that at all?
9 Because, on one hand, if you are making changes to the
10 game, is that really preserving a work? On the other
11 hand, if you are making changes to the game for
12 research purposes, is that undercutting -- I think you
13 talked about this part before, but undercutting the
14 recreational purpose of it.

15 MX. ALBERT: Thanks. Thank you for the
16 opportunity to add. I just want to make sure that
17 I -- I appreciate that question because I want to make
18 sure I'm clear, right? When I'm talking about the
19 types of experiences that emulated access provides,
20 some of them actually may be more true to the original
21 game, right, and that's why they're less fun for
22 recreational play, right? So, you know, I don't think
23 this is actually about sort of making changes to the
24 game in the way that you're describing tension with
25 preservation. It may involve sort of providing access

1 to particular parts of the game or providing access in
2 particular ways that are sort of more valuable for a
3 researcher, right, if it's valuable to play a specific
4 sub-component of the game or to access particular
5 vials as part of it, and I think Professor Nooney can
6 speak to why that's useful for researchers.

7 I think that isn't at all in tension with
8 preservation. We regularly have preserved works that
9 people look at differently than the original users
10 would have. In fact, that's part of what makes this
11 use fair. So I think I don't necessarily see that
12 tension, but perhaps I'm just not articulating sort of
13 it super well.

14 MR. RILEY: Let's see what some other
15 participants think here. I think the order -- forgive
16 me if I'm getting this wrong -- I think Mr. Salvador
17 is up next.

18 MR. SALVADOR: Right. I'd like to comment
19 more on this issue we brought up that perhaps the
20 games that scholarly and research interest exists for
21 are not the same as the ones that are, you know, used
22 for recreational play. In our study, we identified
23 this 87 percent of historical video games that are out
24 of print. And one of the things we emphasized is that
25 the ones that are in print, the 13 percent that you

1 can access, tend to be ones for which there is some
2 business incentive to re-release. It's games that
3 there is a commercial market for or popular interest
4 for. That other 87 percent, there's other systemic
5 issues that are perhaps too expensive to justify re-
6 releasing these individual games.

7 A really good example of this to show how
8 there's a distinction between the popular market and
9 what researchers need, we draw a line through video
10 game history in 1985. That's sort of the dividing
11 line for what I think of as being sort of the modern
12 game industry and the older game industry. Pre-1985
13 games are sort of the silent film of video games.
14 It's these more primitive titles that are still trying
15 to figure out what the rules of this medium are, so
16 they're very useful for historians trying to
17 understand the evolution of video games as a medium.

18 From the sample we took for our research, I
19 think it's less than 3 percent of games released prior
20 to 1985 are in print, which is significantly lower
21 than games post-1985. And that's an example of these
22 games that are perhaps more primitive or have less
23 popular appeal but have strong research interest are
24 not being re-released too often. They are typically
25 not released individually, they're not being sold for

1 \$5 apiece. If they're coming out at all, they tend to
2 be in larger compilation sets, but their availability
3 is still significantly lower than these other games
4 that have more popular appeal that are getting
5 commercially re-released.

6 I think that dividing line pre-'85/post-'85
7 is a really good example of the difference between
8 what is getting made available to the popular market
9 versus what is going to be used for research purposes.

10 MR. RILEY: Thank you.

11 Professor Nooney.

12 PROF. NOONEY: Yes, I just wanted to speak
13 to both kind of the scholarly uses of games and also
14 the kind of relevance of remix in this conversation
15 and their usefulness or not to scholarly research.

16 First of all, right, scholars, to underscore
17 what Mr. Salvador was saying, scholars turn to video
18 games often for reasons very different than a
19 recreational user would. I might be interested in the
20 relation in representational issues inside of a game.
21 I might be looking at the way the software relates to
22 the hardware that it was originally designed on. I
23 might be looking at specific audio or color issues
24 that I can only understand in an environment that is
25 trying to emulate the sort of original experience of

1 using it on the hardware that it was actually designed
2 for.

3 And this is what tends to make re-releases
4 actually, like, not useful. Very often for
5 scholarship, they really do constitute an entirely
6 different kind of game. The IP title might be the
7 same, but I can't -- playing a game made in 1983 on my
8 iPad is not a comparable scholarly experience. The
9 input mechanisms are different. Games have been sped
10 up and sometimes entirely recoded. You're not dealing
11 with the same kind of integrity of the original
12 historical object for which, again, if my only way to
13 access that is to travel to an in-person site, then
14 that puts tremendous kind of constraint requirements
15 on my ability to do that work.

16 MR. RILEY: Mr. Englund, I'm going to skip
17 you so we can do all of the proponents first and then
18 we'll come back to you, okay?

19 Mr. Espenschied.

20 MR. ESPENSCHIED: Thank you. Yeah, I wanted
21 to come back to this point on how access to an
22 emulator is actually managed online and also how that
23 effects, like, recreational use. While it is possible
24 to run, for instance, like, the simpler games that Mr.
25 Salvador was talking about that were released in the

1 1980s to -- I don't know, for people to download them
2 and to run them on their own computer in some kind of,
3 like, local setting because they are so small, they're
4 basically the size of an online ad on *The New York*
5 *Times* in size that you now get with every click.

6 But for more sophisticated games that
7 require, yeah, like, different types of operating
8 systems and, like, more complicated softwares, they'll
9 run on a cloud computer and the user is, like, kind of
10 having a Zoom call with that cloud computer. And that
11 also effects, like, how the game reacts to
12 interactions. There is always, like, in that setting,
13 there's always a delay, so it's like you can play
14 action games, but definitely it will be a different,
15 like, experience with playing that game because
16 there's always, like, if you press a button, the
17 signal travels through the cloud computer. The
18 computer reacts to it and the video and audio comes
19 back to you. So that's really a significant
20 difference. And that also, like, is kind of
21 supporting more reflected access to such software
22 than, like, being completely immersed in that
23 software.

24 MR. RILEY: So, can you give me a little bit
25 more information on circumstances where a code or

1 other game materials are copied remotely to a remote
2 user's computer in an emulation context?

3 MR. ESPENSCHIED: Yeah, I mean, I can use
4 the -- CD-ROM example that I mentioned before, which
5 means, like, that there's an emulator template and the
6 imaged CD-ROM disk is stored on a cloud computer. And
7 when a user asks for access, that is like, in that
8 moment, the cloud computer is rented from a public
9 cloud provider. The emulator and the disk is
10 initiated on that computer and there is an audio/video
11 connection made to that cloud computer. And already,
12 like, bringing up this computer and copying this data
13 over, this is like, how to say, a significant time
14 that people will have to wait for that.

15 And then, when they interact with -- for
16 instance, they see an object on screen, they click on
17 it, this is a remote action, so that means -- and
18 unlike a video, you never know what the next frame is.
19 So these things cannot be buffered beforehand. So
20 there will always be a little delay between the action
21 and the reaction that the users are seeing because it
22 has to travel through the network.

23 MR. RILEY: Right. So I'm not asking
24 specifically about that circumstance where there is --

25 MR. ESPENSCHIED: Oh.

1 MR. RILEY: -- something stored on the
2 cloud. I know it wasn't you that mentioned this, but
3 SPN and LCA referred to the creation of temporary
4 copies on a user's computer. Is that common in an
5 emulation context, notwithstanding your other example
6 where it was just stored on the cloud?

7 MR. ESPENSCHIED: I mean, I think this is
8 usually not common because it puts, like, a burden on
9 the users to understand these legacy systems and to
10 make them run on their own computer. That's, like, a
11 pretty difficult task. And the service of a memory
12 institution and the creators there should actually be
13 to provide, like, better access to these games or any
14 type of software. So, from my experience, that is
15 what institutions do, like, I don't know, the Yale
16 library or something.

17 MR. RILEY: Thank you.

18 Mr. Band.

19 MR. BAND: Yeah, I just wanted to quickly
20 circle back to your question before about, you know,
21 one is preservation-preservation or if you're, you
22 know, shifting formats or shifting storage medium or
23 making a somewhat different copy, is it still
24 preservation. And, you know, the short answer is, you
25 know, there's tradeoffs, and this applies, you know,

1 in all different kinds of preservation contexts. I
2 think, you know, sort of in a perfect world, if you
3 have unlimited resources, you would do X, but because
4 we live in an imperfect world with limited resources,
5 we have to do Y, you know, and so, you know, it's kind
6 of like triage and you do the best you can and you try
7 to preserve things, you try to maximize the number of
8 works you're able to preserve with the resources you
9 have, and that involves, you know, sometimes making
10 compromises and maybe perhaps the quality of the
11 preservation copy isn't as good as you otherwise would
12 want, but, you know, you don't have unlimited
13 resources to make the highest quality copy that you
14 would make if you had more resources.

15 MR. RILEY: I'm going to ask this question
16 because you referred to this ... but I'm also aware
17 because I want to get back to Mr. Englund.

18 Notwithstanding the Class 6(a) exemption,
19 can you distinguish the reasoning in Corley and prior
20 Copyright Office exemptions that said fair use does
21 not guarantee access to a copyrighted material in the
22 user's preferred format? So you just referred to
23 changing formats. Is this exemption a version of
24 asking the Office to bless format shifting?

25 MR. BAND: No, I wouldn't say so. I mean,

1 these are all preservation copies. I mean, you know,
2 we're talking about preservation here. We're not
3 talking about making copies in other contexts. You
4 know, Quarterly was sort of limited to a very -- I
5 mean, that's dicta. That's also limited to a very
6 specific factual context, and, here, we're talking
7 about a different factual context. I mean, yes, you
8 could -- I mean, you know, you could say, well, it's
9 in the preferred format because this would allow a
10 researcher to actually be able to access the work
11 remotely.

12 But I think, you know, for when you're (a)
13 doing the initial circumvention for preservation
14 purposes, remember the circumvention is already done,
15 right? The work was circumvented in order to preserve
16 it, and now we're simply talking about downstream
17 access to it. And in terms of that, you know, I think
18 that enabling a scholar, someone like Professor
19 Nooney, to access something remotely so that she's
20 able to access it and perform the research would
21 clearly be a fair use. I mean, you know, to the
22 extent there are any additional copies made and it
23 would be completely consistent with -- you know, under
24 this fact scenario, it would be consistent not only
25 with the requirements of 1201 but also the

1 requirements of fair use, that this is the kind of --
2 it's not simply the convenience of Professor Nooney.
3 It's to allow Professor Nooney to perform the
4 research, again, because we live in a world with
5 resource constraints and Professor Nooney can't
6 possibly, you know, travel all over the world with the
7 resources at her disposal.

8 MR. RILEY: In the interest of time, I'm
9 going to ask folks ... in the couple questions we have
10 left to try to be as short as possible, particularly
11 in the interest of time.

12 But, before that, Mr. Englund, you've been
13 patient.

14 MR. ENGLUND: Yes, and that is a lot to
15 respond to in the last half-dozen speakers here.

16 So, first, I think it's important to note
17 that for the last 10 or 15 minutes we've been talking
18 about cloud-based emulation. That is consistent with
19 the proponents' written comments, but it's not
20 consistent with the proposed exemption. The proposed
21 regulatory language refers to distribution of copies,
22 and so it does not seem to be an exemption that is
23 focused on emulation. I don't think there's a record
24 that justifies anything other than emulation. I don't
25 think there's a record that justifies an exemption at

1 all, but to the extent the Office disagrees, it seemed
2 like there is a record on emulation, not other ways of
3 access.

4 Second, concerning emulation, it's a major
5 theme in the written comments and in Mx. Albert's
6 comments a moment ago about that emulation isn't fun.
7 But that isn't really what Mx. Albert seemed to be
8 saying a few minutes ago. What Mx. Albert was saying,
9 the emulation is too faithful to the original, but
10 there are audiences for the original games. That's
11 why there's a thriving market for the classic games,
12 and so saying that emulation is too faithful to the
13 original is not the same as saying it is not fun, and
14 I think we have some evidence of that.

15 Most importantly, I think, in our written
16 comments on page 12, we described some reviews and
17 popular reactions to the cloud-based emulation that's
18 provided by the Internet Archive and you have people
19 saying things like, it's something to behold, one of
20 my favorite sites. And so, clearly, there is demand
21 for recreational play of games in an emulation
22 environment. It's not quite on point, but they
23 recently reported some litigation between Nintendo and
24 the maker of a local-based emulator. That was a very
25 popular product.

1 Moving on, Mx. Albert referred to the
2 companies that have filed declarations supporting the
3 proponents here, and they're not ESA members. ESA
4 respects their right to have an opinion and the rights
5 of any copyright owner to distribute their works
6 through whatever channels they want, but I think you
7 should note that both of these are in the grand scheme
8 of things comparatively niche channels. So I
9 understand that limited run is focused on small runs
10 of physical games. I understand that Antstream Arcade
11 is focused on very old games and so not representative
12 of the full market.

13 Finally, Mr. Salvador mentioned the study,
14 and I think it's just important to recognize that what
15 the study shows is that any particular moment in time,
16 only a certain percentage of all the games, no matter
17 how esoteric have they ever been released or
18 available, and windowing is a well-recognized
19 phenomenon against copyright industries, motion
20 pictures, television shows, music. And game companies
21 too have the right as copyright owners to decide how
22 they want to window their works and shouldn't be
23 forced to compete with third parties that are trying
24 to provide online access to those important
25 intellectual properties.

1 MR. RILEY: Looks like Mr. Salvador is next.

2 MR. SALVADOR: Yes. I'd like to respond to
3 Mr. Englund's criticism of the video game re-issue
4 study. This theoretical thing about windowing being
5 the reason that games aren't available, this isn't how
6 the video game re-issue market works. The reason that
7 these games are out of print, this 87 percent, there
8 are a select number for which, yes, this windowing is
9 happening and companies are strategically re-releasing
10 these games at different times. But the reason 87
11 percent are out of print is not because of windowing.
12 It's because of these systemic issues we identified in
13 our study involving the complicated technical issues
14 keeping games out of release involving significant
15 rights issues for games that are still outstanding
16 that are preventing these from getting back on the
17 market at all.

18 So this isn't a temporary problem. If we're
19 looking at video games as a medium as a whole and not
20 just looking at individual anecdotes, it's systemic
21 factors that are keeping these games out of release,
22 not strategic business decisions.

23 I also want to note that none of the
24 proponents have produced any evidence that disproves
25 what we found in the study. The factors we

1 identified, the statistics we found, this has also
2 been corroborated by these comments from Antstream
3 Arcade and Limited Run Games, who I'll mention often
4 work with large rights holders to re-issue their games
5 and encounter these same troubles. Their experiences
6 are valid to this conversation because they're often
7 trying to re-issue some of these larger titles owned
8 by larger companies and simply aren't able to because
9 of the issues we identified. That's what's keeping
10 games out of print, not deliberate business strategy.

11 MR. RILEY: Mx. Albert.

12 MX. ALBERT: I know we're at time, so I'll
13 be very brief. I think that just to conclude, I know,
14 you know, this is -- we've done this many times.
15 We're sort of back here asking again because the
16 adverse effects on the people who actually study these
17 games are quite significant. And every time the
18 Entertainment Software Association and opponents say,
19 well, you haven't done it right, you haven't shown the
20 right things, there are these harms, you know, first,
21 it was games get re-released, and then we have a
22 comprehensive study that says actually most games
23 never get re-released and then it's, well, it's going
24 to harm the re-release market anyway, and then we get
25 specific comments from people who re-release games on

1 the re-release market that actually it will not harm
2 the re-release market.

3 And I think this speaks to what Mr. Englund
4 said earlier, which is that there is no world in which
5 the Entertainment Software Association is actually
6 comfortable with off-premises access to these games.
7 And so I think focusing on all of these sort of, like,
8 specific kind of goalpost moving concerns I think just
9 harms the very scholars who are sort of thinking about
10 researching and training these games and sort of
11 potentially providing that information to future
12 generations.

13 And so I think it's really important as the
14 Copyright Office considers this exemption and the
15 record in front of it to just sort of actually grant
16 the kinds of the uses that are necessary to the
17 institutions that actually have been trying to just
18 preserve these works and make them available to
19 scholars and researchers for a long time, and that is,
20 like, what we're here to ask you all to do. And doing
21 so will not harm the interests of the copyright
22 holders. In fact, it may help them sort of -- it may
23 help. I'll stop there.

24 MR. RILEY: Thank you.

25 I want to go to Mr. Englund and then we have

1 one more question for this class, although there may
2 be some issues that are discussed in the next class as
3 well that overlap with this class here.

4 MR. ENGLUND: Yes, recognizing that we're
5 already over time, I just feel constrained to respond
6 to Mx. Albert's accusations of moving the goalposts.
7 I don't think the goalposts here have moved at all.
8 We're back here repeating essentially all the same
9 arguments we had three years ago because the
10 preservation organizations want a great deal of
11 discretion over how they handle very valuable
12 intellectual property. and they have yet to suggest
13 that there is a willingness on their part to do so in
14 a way that might be comforting to the owners of that
15 valuable intellectual property. And so, at the
16 moment, there is no set of limitations we would
17 support.

18 MR. RILEY: And my colleague, Ms. Walters,
19 has the last question.

20 MS. WALTERS: Thank you. So this final
21 question is for SPN and LCA. Their comments stated
22 that under the current exemption, if a student needed
23 a screenshot of a game, they would have to travel to a
24 university where the game is being preserved. Can you
25 explain why? And is it your position that you would

1 need an exemption for taking a screenshot?

2 Mx. Albert?

3 MX. ALBERT: I was about to just go in the
4 interest of time. So, no, I mean, it's not our
5 position you would need an exemption in order to take
6 the screenshot. It's our position you would need an
7 exemption to get access to the game to take the
8 screenshot.

9 So, if I want to take a screenshot of a
10 particular moment in a particular game, I, you know,
11 presumably need to play that game to get to that
12 moment, especially if it is not already accessible in
13 some way, which is the case for most games. So, you
14 know, yeah, I apologize if it sounds like I'm not
15 answering the question fully, but yeah, no, it's not
16 that you need it to take the screenshot. It's that
17 you would need it to get access to the game, which
18 would be required to then take the screenshot.

19 MR. RILEY: All right. I think we're going
20 to hand it over for some closing comments to our
21 General Counsel. Is our General Counsel available?

22 MS. WILSON: Yes. Thank you so much. And I
23 just want to thank everyone for a really helpful
24 discussion on this subject and for everyone who is
25 listening online for hanging in there as we went over

1 a little bit.

2 We're going to be taking a short break. We
3 will be reconvening at 12:30 for Class 6(a), and so,
4 hopefully, it's enough time for everyone to grab a
5 little caffeine and a little food, and we'll see you
6 again very shortly.

7 (Whereupon, a brief recess was taken.)

8 MR. RILEY: Welcome back, everyone. Again,
9 my name is John Riley. I'm an Assistant General
10 Counsel at the Copyright Office, and I'd like to
11 welcome you back to Day 3 of our Section 1201
12 rulemaking hearings.

13 Before we begin Class 6(a), I'd just like,
14 again, to go over a few logistical items which should
15 be familiar to many of you. My colleagues and I will
16 pose specific questions and we will call on
17 participants to respond. Please use the Raise Hand
18 feature on Zoom to indicate that you'd like to speak,
19 and if that's not working for you, feel free to raise
20 your hand live.

21 Again, we're going to ask that you please
22 try to focus your responses to the particular question
23 asked and we ask that you keep your comments
24 relatively brief. In addition, today's event is being
25 live-streamed and it's being recorded and transcribed

1 by a court reporter. The video and transcript will be
2 posted on the Copyright Office website, and so we
3 would ask that everyone please try to speak clearly
4 and to mute your audio when you're not speaking to
5 assist with the recording and transcription. And, of
6 course, if you lower your hand after you're done
7 talking, that would be great too.

8 Later this afternoon we're going to be
9 holding an audience participation session. Anyone can
10 sign up to participate in that session using the link
11 that's going to be posted in the chat. We will ask
12 that remarks be limited in that session to about three
13 minutes for public participation, which can be on any
14 of the classes.

15 Before we begin, I would like to invite
16 first my Copyright Office colleagues to reintroduce
17 themselves.

18 MS. WALTERS: Thanks, John. My name is
19 Heather Walters and I'm a Ringer Fellow here at the
20 Copyright Office.

21 MS. KARL: And I'm Brandy Karl. I'm an
22 Assistant General Counsel.

23 MR. RILEY: And now my colleague from NTIA.

24 MS. MORENO HEYD: Good afternoon. I'm Diana
25 Moreno Heyd. I'm an attorney-advisor at NTIA.

1 MR. RILEY: I would like to give
2 participants an opportunity to introduce themselves,
3 but I think there is maybe only one new participant.
4 Why don't we go with you. Unless other folks want to
5 reintroduce themselves, we could probably skip that
6 other part of the proceeding.

7 MX. FINO-RADIN: I'm guessing that is me.

8 MR. RILEY: Yes.

9 MX. FINO-RADIN: Hi, everyone. I'm Cass
10 Fino-Radin. I am the founder of Small Data
11 Industries. I'm an art conservator in private
12 practice, which I've been doing for seven years.
13 Prior to that, I was a conservator at the Museum of
14 Modern Art and prior to that Rhizome, same place as my
15 colleague, Dragan, who you heard from previously.

16 And the reason that I'm here is because, in
17 the work that I do as a conservator of art who
18 specializes in art that uses technology, access is
19 essentially inextricable from preservation. So my
20 clients, who are institutions, art collectors, artists
21 themselves, they often hire me to devise means of
22 access and display because, if it's not possible to
23 display, you can't preserve it. Anyway.

24 MR. RILEY: Thank you. We are just going to
25 keep the introductions to a very brief part, but we'll

1 give you plenty of time to say your piece.

2 We're going to start with a question from my
3 colleague, so I'm going to turn it over to Heather
4 Walters.

5 MS. WALTERS: Thank you, John. This
6 question is for the opponents. Do any class opponents
7 have any comments or analysis regarding SPN and LCA's
8 proposal to replace the term "private study" with
9 "teaching" in the exemption? Mr. Rotstein?

10 MR. ROTSTEIN: Yes, I'll first note that
11 that was not in the original proposal, proposed
12 exemption. As I view it, it was only in the reply and
13 fairly surprisingly only pointed out in a footnote.
14 At first, frankly, I thought it was just a change and
15 I saw this morning it was in a footnote.

16 So I think, actually, it's too late. There
17 was absolutely no response. But, you know, turning to
18 the substance of it, teaching is clearly an expansion.
19 The exemption was patterned after Section 108 of the
20 Copyright Act. It no longer is with "teaching"
21 because that necessarily means a proliferation of
22 copies. And, again, at the prior proceeding, there's
23 a lot of talk about emulation, but the exemption says
24 distribution. And, in fact, it turns libraries, the
25 library model, into the copy shop model. So I think

1 the expansion a) is too late and b) overly broad.

2 MS. WALTERS: Mx. Albert?

3 MX. ALBERT: Thank you. Yes, I'm happy to
4 address this. And so I want to note that the teaching
5 language was actually in the original proposal in 2021
6 that was before the Copyright Office and in the
7 exemption that was approved in 2021 without, as far as
8 I can tell, significant commentary on why the
9 exemption should not apply to teaching. The language
10 was replaced with the language from 108 that included
11 private study.

12 And so our attention here was to sort of
13 align the exemption with what I think many folks
14 thought we were already discussing. And even in our
15 initial comments, you can actually see that we cite
16 multiple teaching examples, including the one on page
17 3 involving AutoCAD and the examples from John
18 Ippolito, which I believe is on page 9. So, you know,
19 even if the language change is newer on the reply, the
20 idea that this exemption covers teaching is certainly
21 not new to the reply.

22 Additionally, on the sort of point about,
23 okay, you know, it's too late, I think the Copyright
24 Office regularly modifies these exemptions up until
25 and in the recommendation. And our intention here,

1 you know, teaching is clearly a non-infringing use
2 under Section 107. It's exactly the kind of use that
3 these works need to be put to, and there's a
4 significant need and adverse effect.

5 And so, you know, I want to just reassure
6 the Copyright Office that that is why it's in there is
7 because of sort of that specific need in terms of what
8 the on-the-ground needs for these uses are.

9 MS. WALTERS: Thank you.

10 Moving to Mr. Englund.

11 MR. ENGLUND: So just briefly, I think
12 "teaching" clearly does have to be viewed as an
13 expansion relative to private use, and whether it is a
14 fair use depends on context, as is always the case in
15 a fair use determination. The example that I was
16 thinking about while preparing for this hearing was
17 what about a preserved word processor program. Is
18 this exemption something that would allow providing
19 access to a class to use a preserved word processor
20 program an emulator for purposes of writing papers for
21 class? I don't know. But I think, once you include
22 "teaching," you need to think through those kinds of
23 scenarios.

24 MS. WALTERS: And Mr. Taylor.

25 MR. TAYLOR: Yes, thank you. I think that

1 the discussion on "teaching" is very relevant to our
2 initial opposition to this, is that if this is a non-
3 infringing activity, I mean, teaching demonstrates that
4 they're seeking to do more with this exemption than
5 they're allowed to do in regular brick-and-mortar
6 situations. I mean, teachers regularly have to put a
7 single book on reserve for a classroom and people have
8 to individually go and get the reserve copy. And so I
9 just think it's an extraordinary stretch of our
10 understanding of fair use or non-infringing to somehow
11 make possible for this exemption what we can't
12 regularly do in brick-and-mortar libraries.

13 MS. WALTERS: Mx. Albert.

14 MX. ALBERT: I'm happy to let Mr. Band
15 speak.

16 MS. WALTERS: Of course.

17 Mr. Band.

18 MR. BAND: Well, we're happy to talk about
19 the scope of teaching uses if you want. I mean,
20 there's no question that, you know, you can make all
21 kinds of classroom uses. And, I mean, the reserve
22 situation described, I mean, you know, certainly, that
23 there are sometimes physical reserves, but you also
24 can make, you know, multiples copies, not just one
25 copy. And so, you know, certainly, that was true when

1 I was a student and it's certainly true now that
2 multiple copies are available and then even far more
3 for classroom uses and that's routine.

4 And, again, what we're talking about,
5 remember, this is all in the context of preserved
6 works, and even if we were dealing with the situation
7 that Mr. Englund was talking about, you know, if it's
8 access to a preserved word processing program, you
9 know, sure.

10 Look, we can construct any kind of
11 ridiculous scenario we want, but do you really think
12 that anyone is going to be trying to avoid, you know,
13 licensing a word processing program in 2024? I mean,
14 we all have word processing programs on, you know, our
15 computers and our phones. I mean, you know, this is
16 kind of the farfetched scenarios that we're talking
17 about here. It's not realistic. People want to use
18 this exemption for preservation and then making access
19 to those preservation copies for research purposes,
20 for learning purposes. You know, it's not going to
21 harm the market, and everyone here knows that.

22 MS. WALTERS: Mr. Rotstein.

23 MR. ROTSTEIN: Yes. Just responses. Yes,
24 there might be multiple copies back in the day even in
25 reserve, but if there are five multiple copies, only

1 five users can take advantage of them at a time with
2 books on reserve, and that is the model and that model
3 with teaching has been abandoned essentially.

4 And I think there can be harm to the market.
5 One of the examples that the proponents use is Final
6 Draft 7. If you look on eBay, actually, you can buy
7 Final Draft 7 and there are comments saying it's not
8 useless, but the people who wanted to buy it
9 apparently tried to use it in order to write
10 screenplays. And if you do that, you know, you're not
11 buying Final Draft 13, which is harm to the market.
12 It's harm to a derivative work.

13 So, yes, there can be market harm because
14 these older versions of software often do have, if
15 they could be circumvented, have utility for the
16 purpose, you know, for which they were initially
17 created.

18 MS. WALTERS: Mx. Albert.

19 MX. ALBERT: Yeah, so there's a lot here to
20 respond to, so I'll try to do it in a somewhat
21 structured way. I also want to point out that, you
22 know, to the extent that the opponents are arguing
23 that the inclusion of teaching was a surprise, at
24 least as far as I can tell, the DVD CSS comments on
25 page 6 specifically contemplate discussing prohibiting

1 copy of works for future lessons so are talking very
2 specifically about the rule of spontaneity, which I
3 believe only really makes sense in a teaching context.

4 So, you know, I think that that seems to
5 point to the idea that actually this sort of idea that
6 teaching was such a shock in this exemption may not be
7 driven through at least in those reply comments. Of
8 course, that doesn't necessarily reflect on other
9 opponents.

10 You know, obviously, multiple copies for
11 classroom use is included in Section 107. I won't,
12 you know, insult this room by sort of repeating what's
13 in the statute.

14 I also think it's worth noting that none of
15 the opponents here actually represent the rights
16 holders of these word processing companies, right?
17 The Business Software Association has not opposed this
18 exemption. They have not sort of shown up and
19 suggested that there will be any market harm, and they
20 are the folks who produce the software in function
21 here unless I'm unaware of CSS, ESA, DPCCA, AACS,
22 RIAA, or MPA getting into new business models.

23 On the Final Draft 7 point, you know, my
24 understanding is that Final Draft 7 is no longer
25 available from the primary purchaser -- or from the

1 company which was originally making it. That's why we
2 use it as an example.

3 I think that I, you know, in some ways turn
4 this back a little bit to the conversation about sort
5 of the benefits and barriers of emulation, which is to
6 say that the experience of sort of using these kinds
7 of tools with remote access provided by preservation
8 institutions is useful for folks who are sort of
9 seeking to understand the historical experience or
10 access particular software-dependent materials that
11 rely on an older version. It is not a particularly
12 good -- it is not a particular competition for the
13 existing versions of the work, which is, I believe,
14 why there are no rights holders that represent those
15 organizations here to oppose this exemption.

16 I'll stop there. I'm sure there's plenty of
17 other stuff that we can talk about as we continue.

18 MS. WALTERS: So I do want to follow up with
19 you regarding something that was brought up previously
20 about acquiring software from the marketplace. And,
21 Mx. Albert, you stated -- or SPN and LCA stated that
22 some academic institutions and organizations won't
23 procure software from eBay or other secondary markets.

24 Could you explain why?

25 MX. ALBERT: I think it was a mystery to the

1 person who told us that why that was true. If I was
2 to speculate, I suspect part of it has to do with
3 provenance and that's actually, I think, one of the
4 really important things that matters to preservation
5 institutions, right, which is that you want to make
6 sure that the version of the software you're running
7 is actually -- and my colleague, Mx. Fino-Radin, can
8 speak to this -- like, the version that was sort of
9 released by the company, that you understand the
10 version numbers, et cetera, right. And so I think
11 that when you're getting software on the secondary
12 market that even it can be difficult to fully
13 understand exactly where it's from, you know, whether
14 any modifications were made, et cetera, but, you know,
15 Mr. Band may also know more about that.

16 MS. WALTERS: I do want to pass it to
17 Mr. Rotstein and then we can go to Mr. Band.

18 MR. ROTSTEIN: Sure. The unwillingness of
19 institutions to buy from a particular market isn't a
20 TPM issue. It's an economic issue that relates to
21 whatever business decision the institution is making.
22 So, in fact, it shows that there are alternatives to
23 circumvention because there are avenues of purchase.

24 MS. MORENO HEYD: Mr. Rotstein, you had also
25 just mentioned that the expansion can be a harm to the

1 market, so I just wanted to ask, given the current
2 exemption, has there been any harm to the copyright
3 owners?

4 MR. ROTSTEIN: Well, under the current
5 exemption, I don't know of any. But, certainly, with
6 this expansion, it's conceivable.

7 MS. MORENO HEYD: Thank you.

8 MR. ROTSTEIN: And, you know, that is why we
9 did not oppose the renewal of the current exemption.

10 MS. MORENO HEYD: Thank you.

11 Back to you, Heather.

12 MS. WALTERS: Thank you.

13 Mr. Band?

14 MR. BAND: Right. When you're buying
15 software off of eBay, you also don't know -- in
16 addition to the provenance questions, you don't
17 know -- I mean, if it's used, then you have licensing
18 issues. You don't know if you might be violating
19 license terms by buying it. And so there's a whole
20 thicket of legal issues that come along with software
21 because of the licensing problems that accompany it.

22 MS. WALTERS: Mr. Taylor.

23 MR. TAYLOR: Yes, I just want to respond
24 very quickly that it's not exactly clear to me that
25 DVDs did not at some period indeed host some software

1 programs. It was a brief period in time, but to say
2 that DVDs -- that we don't have any interest in this
3 is fairly overstated.

4 MS. WALTERS: Mx. Fino-Radin. I believe
5 you're on mute.

6 MX. FINO-RADIN: So sorry. I just wanted to
7 speak on this issue of secondary market procurement.
8 You know, coming from a different context not working
9 within an institution, I am more than free to buy
10 things on eBay and I regularly do in my practice.
11 However, in my experience, I think, you know, sure,
12 we're going to cherry-pick some examples. Yes,
13 there's obsolete software you can find on eBay and
14 sometimes it's even shrink-wrapped.

15 However, in my practice, I've found there
16 are many, many cases where you can't and, truly, the
17 only copy available anywhere in the universe is a
18 cracked copy that's, you know, commonly found in
19 piracy communities. And in a lot of cases, those can
20 be sometimes more trusted because they've been vetted
21 by a community of connoisseurs rather than, you know,
22 some thing you found on eBay or can't find on eBay.

23 MS. WALTERS: Thank you.

24 I will pass it over to my colleague, John.

25 MR. RILEY: I think we have one more follow-

1 up from Mr. Ayers.

2 MR. AYERS: Thank you. Just very quickly
3 just to build on what Mr. Taylor had said, actually,
4 in the context of DVDs and in Blu-Ray discs, there
5 actually are a number of software players that
6 incorporate content protection technologies for
7 playing back these disks on PC platforms, on computer
8 platforms.

9 And I would also note that just
10 historically, to the extent there have been attacks on
11 the CSS and AACS technologies that result in
12 distribution of illegally obtained keys, those have
13 generally come from software players. So software in
14 the DVD and Blu-Ray context is actually very important
15 and so we do have a very definite interest in this
16 even if we are not directly publishing ourselves the
17 playback software.

18 MR. RILEY: I'd like to just briefly give
19 proponents a little bit more chance to talk about
20 where software is being acquired generally, if anyone
21 would like to take that. Mx. Albert.

22 MX. ALBERT: I'm happy to start and then I'm
23 happy to turn it over to my colleagues if they have
24 sort of more to say.

25 So I think that, you know, I think you heard

1 it in or saw in our initial comments that I think one
2 of the folks we talked to really said, you know, we
3 try to acquire software whenever we see it because we
4 don't know if we're going to need it. So, generally
5 speaking, I think that, you know, part of that is that
6 literally it can come in as part of, like, a
7 collection, like an archival collection, right. So,
8 you know, if someone is doing their papers, maybe they
9 have a copy of the software with it.

10 Folks might also purchase it sort of
11 directly, although that can be complicated for
12 licensing reasons, as Mr. Band was mentioning, or, you
13 know, there may be sort of like others, you know, it
14 may come in with a sort of broader -- with particular
15 other -- you know, through other means.

16 I think, generally speaking, you know, many
17 of the organizations we talked to, it was not a
18 collection priority, but they understood that they
19 often would need these forms of software in order to
20 access works and that that meant that -- what that
21 means is that folks may be much better at actually
22 acquiring that software now, but, historically, you
23 know, folks were not necessarily acquiring particular
24 versions that might be required to obtain software.
25 And Mx. Fino-Radin may have more to sort of say about

1 the mechanics of that.

2 MR. RILEY: I'll go to Mx. Fino-Radin first
3 and then Mr. Rotstein.

4 MX. FINO-RADIN: Sure. So my colleague
5 raises an important point. I think we've been
6 spending a lot of time talking about the commercial
7 softwares themselves as almost the thing that we're
8 trying to distribute or provide access to. But I
9 think it's really important to remember in most cases
10 in this context those are supporting materials that
11 really aren't the point. However, they are critical
12 for the authentic display and access to the artifact.

13 You know, one particular use case from my
14 practice in the past when I was at Rhizome, I spent
15 years trying to recover the remnants of an electronic
16 bulletin board that was called The Thing. It was the
17 first online community created by and for visual
18 artists in North America.

19 We unfortunately found the board was gone,
20 but eventually we found that a user had saved screen
21 dubs of the board over the years in the form of text
22 files. They at first appeared to be corrupt, but
23 through some forensics we eventually found they were
24 WordPerfect files. And in my preservation work, I
25 looked high and low. Again, happy to buy things on

1 eBay. The particular version of WordPerfect that we
2 needed simply didn't exist. The only copy -- I
3 eventually found something online, a cracked copy, and
4 it was incredibly obscure. And had we not used that
5 and had we not used emulation to access these files
6 with this cracked copy and, therefore, recover, you
7 know, the raw text of this board, it would have been
8 lost and gone forever. And it resulted in the board
9 being shown in an exhibition at the New Museum years
10 ago, and that would have been impossible otherwise.

11 MR. RILEY: Thank you.

12 Mr. Rotstein.

13 MR. ROTSTEIN: Yeah. I mean, the focus of
14 the change is the elimination of the one-user-at-a-
15 time language. And in the examples that we've heard
16 of in the comments, it's I believe Michael Mann -- not
17 Michael -- Madmen and it's the papers of Vladimir
18 Nabokov. I don't get the sense and there's no
19 evidence that more than one person at a time is
20 clamoring, there's not a line down the block to get
21 access to those. The objectives can be met leaving in
22 the one-user-at-a-time language. This just doesn't
23 require elimination of that language. Certainly no
24 evidence of that.

25 MR. RILEY: I'm going to turn to the

1 two folks that have their hands up right now, but I
2 did want to ask another question to the extent you
3 want to answer this as a part of your response.
4 Opponents stated that the current exemption could be
5 interpreted in two ways. The first interpretation is
6 that preservation institutions can allow a piece of
7 software to be accessed by as many individuals as
8 there are circumvented copies owned.

9 The second interpretation is that the
10 preservation institutions can only loan out one piece
11 of circumvented software at a time regardless of how
12 many circumvented copies that they own. Feel free to
13 respond to anything that's been said thus far, but I'm
14 interested in how preservation institutions are
15 currently understanding the one-user-at-a-time
16 component of the current exemption. Mx. Albert.

17 MX. ALBERT: Yeah. So let me tackle I think
18 Mr. Rotstein's comment first about the sort of like,
19 oh, there aren't folks lining up around the block to
20 access Vladimir Nabokov's papers because I think it
21 represents a fundamental misunderstanding of sort of,
22 like, what the issue is here, right, and I want to
23 make sure that we clarify it.

24 So it's not just that one user at a time
25 would be able to access Vladimir Nabokov's papers.

1 It's one user at a time would be able to access all
2 archival materials that require that particular form
3 of software. So, in that way, it's actually much more
4 like saying one user at a time could access the book,
5 right? It is an entire genre of things, not just that
6 one specific collection access.

7 In addition, because of how software works,
8 right, you know, there are often -- there are multiple
9 pieces of software potentially with their own TPMs
10 that are required to access a work, right, so you both
11 have the, like, okay, what kind of software do you
12 need to access that particular archival collection,
13 but in our comments, we provide the example of Windows
14 XP activation, which turns out to be something that a
15 number of software preservationists feel very strongly
16 about in a way that may not be sort of legible to
17 outside folks because of the fact that, you know, so
18 much historical software relies on operating systems.

19 And the sort of fact that it's becoming more
20 and more difficult to activate those operating systems
21 without necessarily circumventing a TPM means that
22 there is sort of on the point advancing harm, right,
23 to the ability to emulate those works.

24 With regards to -- I'm so sorry, Mr. Riley.
25 I totally forgot your question. Would you mind just

1 very briefly repeating it?

2 MR. RILEY: Right. Actually, I hope it
3 leads into what we're talking about here --

4 MX. ALBERT: Oh, sorry. It was about the
5 two different interpretations.

6 MR. RILEY: Yes. And we'd like to know how
7 the current exemption is working and how people are
8 viewing the provisions as they are right now.

9 MX. ALBERT: Yes. So I think that the -- I
10 think that folks have been -- my understanding is that
11 folks are taking a more conservative tack, right, in
12 terms of sort of not necessarily tracking how many
13 pieces of software they have but sort of thinking
14 about it as, okay, we can, like, loan -- we may be
15 able to loan out one copy at a time.

16 But I think that, you know, more generally,
17 I think that in the case of sort of things like
18 operating systems or other kinds of support -- like
19 supporting software that the risk, even if they were
20 saying, like, okay, we can loan one user per
21 individual copy, you know, if you're running a sort of
22 emulation as a service system that is like of the type
23 that is sort of, I think, considered the future of
24 software preservation, right, that may still not be
25 sufficient for the types of supporting software

1 necessary for folks to access archival collections.
2 Mx. Fino-Radin will have much more to say on the
3 specifics of how that works than I do.

4 MR. RILEY: Right. Mx. Fino-Radin.

5 MX. FINO-RADIN: Sure. So I'm so glad that
6 Mr. Rotstein brought up this question about multiple-
7 user access. I have an example from my time working
8 at the Museum of Modern Art that I think illustrates
9 this perfectly.

10 So there was a co-acquisition between MOMA
11 and the San Francisco Museum of Modern Art of the
12 papers of Susan Kare, the graphic designer that
13 designed all the original user interface for
14 Macintosh, Windows 3.1, pretty much every way that we
15 use computers today was shaped by her. And the
16 archive consisted of some notebooks and about 150
17 floppy disks. And a colleague from SFMO and I, both
18 in the conservation departments, needed -- you know,
19 it was our job to provide the curators with a way to
20 understand and see and curate these materials.

21 So what we did is we created an emulation
22 environment and, essentially, we rolled our own
23 emulation as a service, so to speak. And this was
24 necessary for the curators at MOMA and SF-MOMA on
25 different sides of the country to be able to be

1 looking at the same thing. Just simply giving them
2 both copies of the floppy disks and different
3 operating systems that were legal and doing their work
4 independently just wasn't possible in this case.

5 So imposing a one-copy and single-user
6 restriction is simply unnatural in this case. And I
7 think it's important to remember that the software in
8 question here wasn't the object of study. It was the
9 archival materials from Susan Kare, but that
10 supporting material, that supporting software, is
11 inextricable. You can't see it without it.

12 MR. RILEY: So let me ask a maybe clarifying
13 question, but please correct me if this is not right.

14 If a preservation institution has a
15 preserved program that it is dependent on a preserved
16 operating system, is it typical for someone who wants
17 to access as an example an AutoCAD file -- an older
18 AutoCAD file? Would the preservation institution
19 typically have one copy of Windows 98, one copy of the
20 older version of AutoCAD and then for each of those
21 two preserved pieces of software, one person can
22 access an independent piece of material or what is
23 actually happening right now? Mx. Albert.

24 MX. ALBERT: Yeah, so I think that the --
25 what is actually happening right now is I think folks

1 are including together various solutions that mostly
2 are not necessary -- like I think that
3 the institutions generally take conservative positions
4 so I think, yes, right to that extent an institution
5 has -- is very -- it's like really trying to follow
6 the rules, has one copy of each of that they are --
7 that is one copy that might be available to users.

8 I think right now sort of the number of
9 institutions that have copies of the software is so
10 small that frankly, this isn't happening a ton because
11 no one actually can access any of this stuff, right,
12 and that the models that the preservation space is
13 moving to, emulation as a service models, you know,
14 require multiple copies of the underlying software in
15 order to be useful and provide it to users.

16 So I think when we hear from institutions
17 about positions they're taking they tend to be
18 incredibly conservative, right, and that the risk
19 associated with it and the lack of clarity in the --
20 around what is allowed means that right now
21 institutions are often like just not necessarily
22 making things available because they worry about those
23 kinds of risks.

24 I hope that answers your question.

25 MR. RILEY: Thank you.

1 Mx. Fino-Radin.

2 MX. FINO-RADIN: Yeah. So in terms of
3 the -- how things are happening now, I absolutely
4 agree with my colleague in the sense that there's a
5 sort of mix of certainly chilling effects that current
6 law is having on preservation and curation practice.
7 Institutions absolutely erring on the side of being
8 conservative. Even if what they're doing might not be
9 breaking the law because they just don't want to have
10 a target on their back.

11 Simultaneously there's the opposite
12 happening, of course. There are institutions that are
13 just going about doing their work of preservation and
14 curation hoping that it falls within the context of
15 fair use. And I think it's important to remember that
16 there are many contexts where you were asking about
17 one copy of an operating system for one artifact that
18 is preserved. That absolutely is not done within --
19 at least not within art museums, you know. The art
20 museum might be going to the trouble of making sure
21 that they have at least one copy of everything it
22 needs to support it.

23 But let's say -- I'm going back to MOMA.
24 Not to pick on it, but, you know, the Department of
25 Architecture and Design I think is a great example

1 because a curator there, Paola Antonelli, would
2 frequently show, you know, an exhibition of 25 video
3 games or pieces of software or things. And let's say
4 half of that all depends on the same operating system
5 or some specific program.

6 Now you're in the situation where legally it
7 sounds like -- I'm no big city lawyer, but it sounds
8 like you would need to be having unique copies, legal
9 copies for each of those. And if we multiply that,
10 think about the fact that there are these things all
11 over the world showing these things, we very quickly
12 get into a situation where when we're talking about
13 obsolete software, there's just likely not enough
14 copies still in existence to make that happen.

15 MR. RILEY: Just to be clear, I was asking
16 not whether the preservation institution had several
17 copies of, for example, an operating system, but would
18 they need one-for-one if they wanted to make a piece
19 of software, whether it's on AutoCAD or Acrobat. If
20 people wanted one copy of each and using those at the
21 same time, it sounds like they would need two copies
22 of the relevant operating system as well with those
23 operating systems acting as a pinch point. Okay.
24 Thank you.

25 Mr. Rotstein.

1 MR. ROTSTEIN: Yes. Just briefly on the
2 point that institutions are taking conservative views
3 of the exemption, one would think that if there's a
4 perceived ambiguity, the proposal would be addressed
5 to that perceived ambiguity and not radically change
6 the exemption. We don't see, however, kind of
7 discussion of ambiguities and could take care of what
8 some feel are unduly conservative approaches. We see
9 something far different.

10 MR. RILEY: Mx. Albert?

11 MX. ALBERT: I'll just be very brief. Yeah,
12 we tailored that proposed exemption to the needs of
13 the relevant preservation community, which is both to
14 resolve the ambiguity, but moreover to not have the
15 number of copies that someone may have saved of an
16 operating system from 1998 be the thing that
17 determines how many people can ever access an archive
18 or run particular other pieces of software. I think
19 the idea that we should only address the ambiguities
20 rather than actually responding to the adverse effects
21 of the anti-circumvention provision, that does not --
22 seems to me to be a little bit strange.

23 MR. RILEY: Mr. Taylor.

24 MR. TAYLOR: Yes. I would just add to that,
25 but it's not the 1201 that's creating the adverse

1 affect. It's copyright law itself. And while you've
2 suggested that 107 allows you to make multiple copies
3 it does not and there are not libraries out there
4 making multiple copies for the purposes of filling
5 their special reserve requirements. So I mean,
6 you're, again, just asking for something that is not
7 consistent with good copyright policy.

8 MR. RILEY: Mx. Albert.

9 MX. ALBERT: Yeah. So I would point
10 Mr. Taylor at *Corellium* from the Eleventh Circuit
11 which like it -- you know, it's directly factually on
12 point about making multiple copies of software for the
13 purpose of sort of like research other secondary uses,
14 you know, and found those uses to be fair.

15 Moreover, *Corellium* was a commercial use of
16 software that was still on the market. So to that
17 extent, the -- you know, the works covered by these --
18 the exemption are even more likely to be fair use.

19 So, you know, to the extent that, you know,
20 opponents are arguing that we are not -- we're the
21 ones with the problem with copyright law, I would
22 suggest consulting that case, as well as, you know,
23 cases like *Oracle*. I could keep going, but it's in
24 the comments, so I'll just stop there.

25 MR. RILEY: I believe that opponents had in

1 their comments tried to distinguish in those cases, so
2 I'm going to go to Mr. Englund next, but we'll come
3 back to you, Mr. Band.

4 MR. ENGLUND: Just on that specific subject
5 of the *Corellium* case, a couple of points. First and
6 maybe most important, you obviously recognize that
7 that's an unpublished decision by the Eleventh Circuit
8 and under Eleventh Circuit Rule 36.2 that means that
9 it is not a binding precedent.

10 And so, of course, the Office is free to
11 evaluate whether it thinks it's persuasive
12 particularly in light of the subsequent *Warhol*
13 decision. But there's less there than has been
14 portrayed by the proponents here.

15 In terms of the merits, I think, first of
16 all, it certainly doesn't purport to tell the Office
17 how it should analyze its proposed exemptions. It
18 like all fair use decisions in the courts addressing a
19 particular use case and in that case some
20 virtualization software.

21 But as the *Warhol* decision teaches, it
22 involved a specific use and so it analyzed that use.
23 And here, the exemption that's been proposed
24 potentially covers a wide range of uses. And the
25 Office needs to take those uses into account. Can't

1 simply ignore some of them, which is how the
2 proponents would like to use the *Corellium* decision,
3 so I think that it is not particular relevant.

4 MR. RILEY: Go to Mr. Taylor, then Mr. Band
5 and Mx. Albert.

6 MR. TAYLOR: I could have clearly missed it,
7 but I don't think anywhere in the decision it address
8 the fact of whether or not multiple users of the
9 software is, indeed, a non-infringing use. I think
10 they looked specifically at what the technology was
11 doing and reach its conclusion on non-infringing use
12 on that point. And I think it's a very far stretch to
13 say that that's what that -- that case actually stands
14 for what you say it does.

15 MR. RILEY: And I'm going to jump in and
16 suggest that to the extent that people have made these
17 arguments in their written comments, we don't need to
18 go over them again. It's relatively beneficial to
19 hear some factual discussion of what's happening and
20 what the proponents want to happen. So with that
21 context, Mr. Band.

22 MR. BAND: Yeah, but I -- if we're not going
23 to be arguing the legal issues in this behalf, then
24 I'll lower my hand and let Mx. Albert address it.

25 MR. RILEY: I was just suggesting in the

1 interest of time if there are points that have been
2 made in the written comments, we don't need to repeat
3 them here. But if there's new points including the
4 oral arguments, please feel free.

5 MX. ALBERT: Yeah. I just -- so, yeah, we
6 addressed the idea that *Corellium* doesn't talk about
7 multiple uses in footnote 13 of our reply.

8 On the question of how thinking an
9 unpublished case and *Warhol*, so that same Eleventh
10 Circuit rule that you read, Mr. Englund, of course,
11 says that these cases can be cited as persuasive
12 authority. I don't think we were arguing -- anyone
13 argues that circuit case law is binding on the
14 Copyright Office.

15 And so to the extent that, you know, a
16 factually analogous circumstance is obviously directly
17 relevant to the question of what uses are fair and
18 that the Copyright Office has regularly engaged with
19 circuit case law in the past, you know. *Corellium*
20 then is, therefore, useful.

21 And, you know, I believe that in fact then
22 Eleventh Circuit was asked to reconsider *Corellium* in
23 light of *Warhol* and did not. And that *Warhol* doesn't
24 fundamentally I think change the analysis in *Corellium*
25 and I can go into more depth as to why if the

1 Copyright Office is curious, but I will respect the
2 focus on factualness and stop there.

3 MR. RILEY: I'm going to move to a question
4 about emulation again. So comments made addressing
5 emulation as a service. Emulation does not appear in
6 the current exemption text. It may be helpful to
7 understand a little bit more about what is happening
8 with respect to emulation in this context, including
9 whether operating systems are being emulated,
10 computer-dependent digital materials the AutoCAD
11 software and the files. How is emulating working here
12 and to what extent are users who may be remote -- is
13 there any sort of storage of data, files, operating
14 works? How is that working for the end user as well?
15 Mx. Fino-Radin.

16 MX. FINO-RADIN: Sure. So I think just an
17 important distinction. When we're talking about
18 emulation in 99.9 percent of cases, the operating
19 system is not the thing that's being emulated. It's
20 actually the hardware and so -- and this really gets
21 to the fundamental challenge in preservation work when
22 we're talking about digital artifacts. Everything at
23 the end of the day, you know.

24 So we have, let's say, a particular file
25 format that artists worked in. And in order to see

1 that, we have to use a particular piece of software
2 and in order to use that, we have to use a particular
3 operating system, and in order to use that, we have to
4 be running on specific hardware because at the end of
5 the day all software was compiled to run on specific
6 hardware.

7 And you very quickly run up against the
8 challenge that it is just completely impossible, just
9 due to fixed entropy, or the world to have enough
10 obsolete hardware to preserve cultural heritage,
11 period. Eventually it will all be gone and emulation
12 surely is the only practical way to continue to
13 provide access to software that was compiled for
14 certain hardware. So the emulator is essentially a
15 software representation of a particular chip set of a
16 particular hardware design and it's that that allows
17 us to, you know, run this whole complicated stack of
18 dependencies and supporting materials that, you know,
19 extend from the operating system, you know, further up
20 till eventually you get to the thing that you're
21 actually trying to study and observe and curate and
22 write books about.

23 MR. RILEY: Mx. Albert.

24 MX. ALBERT: Yeah, just to expand on
25 Mx. Fino-Radin's comments, right, so part of the

1 reason emulation has been the direction in which most
2 preservation institutions have moved is because it
3 does allow people to access works in more ways that
4 allow much more limitations than sort of running the
5 version locally.

6 So you can say that in most cases emulation
7 as a service context, yeah, you're not -- folks are
8 not running the software on their machine, as I think
9 Mr. Espenschied said in the last hearing. It's sort
10 of being on a Zoom with the software in terms of your
11 level of access.

12 As to one note of caution there -- we don't
13 write that into the rule because there are
14 circumstances under which certain kinds of software
15 materials might run certain kinds of software in a
16 present -- in a context in which you're doing
17 scholarship would require actually like some amount of
18 local data access.

19 For example, if you're sort of uploading
20 materials to run through the program or if it needs to
21 access your camera, that kind of thing. So the lack
22 of specificity there, which I know is something that
23 folks have had objections to has to do with, actually
24 like the mechanics of the fact that different
25 settings require different tools.

1 In terms of the I think -- so I think in
2 terms of the question that you posed, Mr. Riley, about
3 the sort of ability to kind of like lock down these
4 systems and limited environments allow for sort of
5 much more limited access. In addition, they also
6 allow basically -- preservation institutions sort of
7 set up this correct way to beam materials. So if you
8 go on the emulation as a service infrastructure
9 website, you can see that there's a whole bunch of
10 different sort of like default modes through which you
11 can use to access materials and folks can kind of say,
12 hey, actually, this particular archive, this
13 particular piece of art, this particular cer -- you
14 know, work is best access with these particular
15 settings and this particular operating system, this
16 version, and that is a really important thing to be
17 able to do in order to provide end users access in a
18 way that actually allows for them not to have to care
19 about the kinds of very specific things that Mx. Fino-
20 Radin is an expert in.

21 MR. RILEY: Just to follow up on that, if --
22 let's say I'm going to take advantage of the current
23 exemption and I have an old AutoCAD file on my
24 computer. How does it work to view that -- to access
25 that file? There's some references to the emulation

1 service being in the cloud. Am I uploading the file
2 to the cloud? Just a little bit more detail on that
3 would be helpful, I think.

4 MX. ALBERT: Yeah. I believe you are
5 uploading the file to the cloud, but I would like to
6 just confirm with some the emulation folks to make
7 sure I'm not speaking out of turn, so I'm happy to
8 follow up with the Copyright Office with a more
9 specific answer, if that's okay.

10 MR. RILEY: Mr. Band.

11 MR. BAND: Right. I just wanted to again
12 bring this back to what we're trying to do here.

13 So using the examples that we've talked
14 about before, you have the -- you know, the emulator.
15 On top of that you have, let's say, the operating
16 system and maybe circumvention needed to be done to
17 get the operating system to work with the emulator and
18 then on top of that you had the application. But all
19 that has already been done, right. That's all --
20 that's already okay for purposes for the existing
21 exemption, any circumvention that was done to allow
22 that to operate.

23 But the problem is, is that you have -- you
24 might have a large number of works that need to use
25 that stack and right now that stack can only be used

1 by one user at a time. And what we're saying is
2 because that stack might be servicing a large number
3 of works, it's conceivable -- and it's not only
4 conceivable, it happens that there could be more than
5 one user at a time that wants to access part of this
6 corpus of this -- like this Apple developers files.
7 There might be hundreds of thousands of her files, but
8 only one stack that allows access to them and so
9 that's why you might need more than one person to have
10 access at a time.

11 MR. RILEY: Mr. Taylor?

12 MR. TAYLOR: While we disagree with Mr. Band
13 on whether or not this exemption needs to be modified,
14 I do want to make clear, it has not been our position
15 that we have gotten into parsing how they engage in
16 preservation. And we would assume good faith that the
17 way they engage in preservation really is not at issue
18 for us today.

19 MR. RILEY: I'm going to turn the
20 question -- the next question over to my colleague,
21 Ms. Walters. If you want to take question five?

22 MS. WALTERS: Thank you, John.

23 Would the current exemption cover a
24 circumstance where computer-dependent digital
25 materials can be operated by a computer program that

1 is currently in the marketplace, even if an older
2 version is not in the marketplace? For example, if
3 current AutoCAD software is backward compatible should
4 the exemption cover discontinued versions of AutoCAD?
5 Let's start with Mx. Fino-Radin.

6 MX. FINO-RADIN: It's really, really a
7 fantastic question.

8 So I think the best articulation that I've
9 ever seen in this is a report written by a colleague
10 of mine, Euan Cochrane, who I believe is still at
11 Yale. At the time he wrote this paper, he was at the
12 National Archives of New Zealand and it was called *The*
13 *Rendering Matters Report*. And he showed that, you
14 know, even with materials as, you know, seemingly
15 trivial from a visual perspective as Government
16 documents, that just because something opens in
17 contemporary software doesn't mean it's being rendered
18 correctly. And he showed incredible examples, like
19 example after example of evidence, clear visual
20 evidence that there was significant information loss.
21 Just because something can open in Word today, but it
22 was written like in WordPerfect or some other obsolete
23 word processing software, there can be things like
24 charts, graphs, tables, very important data that is
25 simply either rendered illegible or rendered

1 incorrectly, even though it does open, let's say, in
2 the contemporary version. So I would say, yes,
3 absolutely.

4 MS. WALTERS: Mx. Albert.

5 MX. ALBERT: Yeah, I think just to echo
6 Mx. Fino-Radin like, you know, we don't understand the
7 exemption to sort of cover currently available on the
8 market software, even if you could open older software
9 dependent materials with it in part because that
10 isn't a use case. That is unrealistic, right? You
11 know, folks who are attempting to access older
12 materials are going to try and use the actual software
13 that they were created with for the reasons Mx. Fino-
14 Radin flags.

15 Additionally, I want to just come back to
16 Mr. Riley's question because I wanted to just confirm.
17 Yeah, so if you want -- if you had an individual
18 AutoCAD file that you wanted to use the emulation
19 environment, you would upload it, but often those --
20 that process is actually done in partnership with the
21 software's curator or through negotiation because
22 generally what folks are doing is accessing materials
23 that are already owned by or controlled by a library,
24 right, so you're accessing someone's papers, you know,
25 and, you know, you're using the emulation environment,

1 it's much rarer for folks to upload their own
2 materials.

3 MS. WALTERS: Mr. Englund.

4 MR. ENGLUND: So I think this last couple
5 minutes of discussion is important. It was a great
6 question because it really highlights that this is an
7 exemption that exposes a lot of valuable copyrighted
8 software to circumvention. And Mr. Band didn't like
9 the example I gave early in this panel about word
10 processing software, but I think we just heard from
11 Mx. Albert that, yes, even though whether current
12 versions of word processing software in the market
13 this exemption would permit a library to provide
14 access online to last year's version of that word
15 processing software and that may not be helpful for
16 particular research projects. But when then talks
17 about eliminating or user -- single user requirements,
18 I think you're setting up a scenario where a library
19 could post an emulated version of a word processor on
20 a website and as long as it didn't have notice that it
21 was being used for non-research purposes, it would be
22 there for people to use. And that not be the intent.
23 I think probably not the intent of the organizations
24 that are represented here, but that's what the
25 regulation says and I've got to take the regulation at

1 face value and assume that anything that permits is
2 something that someone might want to do.

3 MS. WALTERS: Mx. Albert.

4 MX. ALBERT: Yeah, I guess I -- perhaps I'm
5 confused by Mr. Englund's comment. Yes, you can --
6 you know, the fact that there's an existing Word --
7 version of Word on the market, it still doesn't mean
8 you can't circumvent Word 2003 for purposes of making
9 it possible to preserve and provide access. That's
10 the whole point of the exemption. Indeed, that's the
11 exemption that currently exists and there is not
12 only -- there isn't -- you know, we heard proponents
13 say -- or opponents say earlier that there's no
14 evidence of market harm from that.

15 Like as we I think said in our initial
16 comments, there is no evidence that the -- that folks
17 turn to older versions of the software when they have
18 the option of newer versions. And the -- other than
19 for the exact purposes that Mx. Fino-Radin was
20 fighting in terms of because you need it in order to
21 view the works in which it was originally -- the works
22 in the context in which they were originally produced.

23 You know, again, I do not think providing
24 the fact that folks can now provide access to more
25 users is going -- there's no evidence that this is

1 going to change the lack of market harm.

2 MS. WALTERS: Mr. Band.

3 MR. BAND: Yeah, I'll just go back very
4 quickly to the point -- two points that Mx. Albert
5 made earlier, one that again, the software makers are
6 not here. They don't care. And this also relates to
7 the bigger point that from the previous hearing where
8 Mx. Albert pointed out that Mr. Englund said like
9 there is no condition under which the opponents would
10 sort of agree to the exemption. Look, what's going on
11 here is that you have a few associations that are
12 ideologically opposed to any exemption whatsoever and
13 whenever any new exemption whatsoever is proposed,
14 they oppose it. That's fine. There -- they have that
15 First Amendment right, you know, but that's -- and
16 then they're able to come up with they hire very good
17 lawyers. And Mr. Englund and I in particular have
18 been tangling with each other in these proceedings and
19 in other proceedings for at least 30 years.

20 And that's -- again, that's all well and
21 good, but the Copyright Office needs to take all of
22 these concerns about all these terrible things that
23 might happen with a grain of salt. I mean, it's --
24 none of these concerns have ever come to pass. There
25 is a performative quality to this -- all these

1 rulemakings. I'll stop with that.

2 MR. RILEY: I'll let the record reflect that
3 Mr. Englund is a very good lawyer.

4 Mr. Taylor next.

5 MR. TAYLOR: Yes. Well, I again disagree
6 with Mr. Band over our intentions here and I think
7 there's -- I can point out many times where we've been
8 very cooperative with respect to exemptions and the
9 needs of certain communities. And just in this
10 conversation I'd said that the way you engage in --
11 and preservation was not going to be what we were
12 concerned about.

13 So that being said, I do want to direct the
14 Office's attention that somewhere along the line we
15 did have this discussion about obsolescence and
16 somewhere that has disappeared from the current
17 exemption. But there is a plenty record and precedent
18 on what the Register has considered relevant with
19 respect to your question on. And specifically, I
20 would just direct you to the discussions on
21 obsolescence.

22 MR. RILEY: Mr. Englund?

23 MR. ENGLUND: Mr. Band and I have been
24 friends for more than 30 years I think, so I feel old,
25 but I can't let his suggestion that the associations

1 are without an interest here go without a response.
2 It -- the major copyright owner associations care
3 greatly about effectiveness copyright protection for
4 all kinds of works and also protection for the TPMs
5 that enable commercialization of those works. And
6 that depends upon proceedings like this one being
7 carried out in accordance with the rigorous standards
8 that the Office has always applied. At least -- even
9 though I'm not here as a representative of business
10 software, we definitely care that the Office analyze
11 any proposal rigorously in accordance with the
12 standards that have developed across the last eight
13 triennial proceedings.

14 MR. RILEY: Let me ask a follow up on areas
15 already in the exemption. To the extent that this
16 expansion is asking to remove the single user time
17 requirement, it would have unlimited potential use
18 exemption, is that the concern if the amount of users
19 were bounded to a number, like three? Would that be
20 something that would address your concerns to a
21 degree? Is that what you would call looping
22 (phonetic) as you've made in the past or is it just a
23 non-starter?

24 MR. ENGLUND: As Mr. Band pointed out, these
25 aren't my members' works so I can't speak to what

1 details the copyright owners of particular software
2 might be comfortable with or might not be, but I think
3 you put your fingers on the points that when you're
4 talking one user you're a very controlled experience
5 that really replicates the library special collections
6 experience and once you take that away, you're
7 potentially in a world of instant access. And if they
8 were my works or my client's works at stake, I would
9 find that very scary.

10 MR. RILEY: Mr. Ayers.

11 MR. AYERS: Thank you. Yeah, just to also
12 respond that, as I noted before, ACCSA and DVD CCA
13 both while not direct publishers of software
14 themselves have a very direct interest in the
15 protection of software that -- in which our protection
16 technologies are incorporated which then also impacts
17 the potential unauthorized exploitation of the
18 copyright audio/visual works that we're designed to
19 protect.

20 And I would also clarify that making sure
21 that this proceeding sticks to the standards that have
22 been set out is hardly performative and is actually a
23 very valuable and good faith participation in the
24 process. So, Mr. Band, I would disagree with you on
25 those characterizations.

1 And I would note that while we haven't
2 specifically said that in this proceeding, we've --
3 and we continually -- or we continue to object to the
4 expansion at all under the conditions that have been
5 discussed so far, but as we've noted in many other
6 proceedings and for other classes, to the extent the
7 Copyright Office is considering a recommendation that
8 includes some desire to accommodate the request for
9 the expansion or an exemption, guide -- guardrails are
10 better than no guardrails.

11 And so I share the concern the Mr. Englund
12 expressed about infinite use and recognize the point,
13 Mr. Riley, you raised about, well, what if that use
14 is -- like more than one, but about less than
15 infinity. Certainly there's probably something
16 reasonable that can be reached, although we've not
17 discussed and have no record provided in this
18 proceeding as to what that number might be and whether
19 it's a good idea or not and whether it addresses the
20 concerns or not.

21 So it's -- but anyway, I'll leave it at
22 that.

23 MR. RILEY: Mx. Albert.

24 MX. ALBERT: Yeah. So, wow, a lot there but
25 I'll try to just maybe wrap up a little bit because I

1 know we're close to time.

2 So I hear ACS and the DVD folks saying they
3 represent folks who have TPMs on software. They
4 provide no examples of those in their comments. They
5 have provided no examples here. Despite the fact that
6 there's no market harm from the existing exemption,
7 there is no discussion of the substantive meaningful
8 market harm in the comments with regard to this class.
9 There are no examples.

10 There are no -- not even like Mr. Englund's
11 emulating Microsoft Word instead put -- and students
12 using that are not present there. And I know the
13 Copyright Office in the past has actually been pretty
14 hard on folks for this sort of idea that they can just
15 speculate about the sort of consequences, so I would
16 just turn a critical eye towards opponents' approach
17 there.

18 And so I just want to kind of come back to
19 kind of what we're here, what the proponents have the
20 burden to prove which is that the use is non-
21 infringing. Under *Corellium*, the fact that it's
22 multiple users doesn't even matter. It still means
23 it's fair, even in the context of the commercial use.

24 There's no evidence of market harm here from
25 the existing exemption or even from providing more

1 copies. And that the -- fundamentally, there -- I
2 think we have pointed out in our comments why the
3 single user restriction has significant adverse
4 effects. Saying three copies or five copies does not
5 deal with the fact that the reality of how many works
6 are dependent upon -- as I believe, Mr. Riley, you put
7 it, the "pinch point" of relatively small numbers of
8 sort of underlying software. Like this is the nature
9 of how software preservation works.

10 And the reason we're back here is because
11 when in 2021 we didn't include a single user
12 restriction. And it was something that was added I
13 think because the Copyright Office wanted to include
14 additional restrictions to sort of provide safeguards.
15 It really has significantly harmed and held back the
16 efforts to provide the kind of emulation of service
17 access but is the future of providing access to
18 preserved software.

19 We're back with this exemption because
20 our -- the folks that SPM works with has said that
21 this is really harming their ability to do the work
22 and I really encourage the Copyright Office to take
23 that into account as it crafts -- as it approaches the
24 exemption request.

25 MR. RILEY: Thank you. In the interests of

1 time if people have more comments could keep them
2 brief. We need to go to Mr. Taylor, please.

3 MR. TAYLOR: Yes, I'll make this very quick.
4 The burden is on the proponents to show that it is not
5 infringing. And as far as we have been concerned so
6 far, the proposed activity is indeed non-infringing
7 and it doesn't require much more discussion than that
8 once we demonstrated that.

9 And, yeah, I will leave it at that. Oh, but
10 one more thing is we don't get a reply, so this is
11 structured in a way that we don't get a full back and
12 forth. Thank you.

13 MR. RILEY: You're talking about the written
14 comment's statement?

15 MR. TAYLOR: Yes, Mr. Riley. I mean, so --

16 MR. RILEY: Just clarifying for the record.
17 Yes, Mr. Ayers.

18 MR. AYERS: Just a quick response to a point
19 that Mx. Albert raised and I think a valid
20 clarification to make and to the extent that I was
21 misunderstood or did not state it clearly, I
22 apologize. DVD CCA and ACSLA do not represent
23 directly software publishers and we make no claim to
24 represent software publishers in this proceeding or in
25 any proceeding.

1 However, the software publishers that do
2 make available DVD and Blu-Ray playback software have
3 signed license agreements with ACS and DVD CCA for the
4 respect content protection technologies that are
5 included. There's been an agreement to maintain the
6 security of the secrets that are involved in
7 maintaining the encryption and protecting the content
8 that is played with those software players.

9 So we do still definitely have a very direct
10 interest in how those software applications may be
11 treated, even if we're not representing the publishers
12 directly.

13 MR. RILEY: And I'm just checking if
14 Ms. Heyd has a last question for us.

15 MS. MORENO HEYD: Sure. I'm just trying to
16 get some final clarification from the written record
17 and what's been said at this hearing.

18 Is there a retro-market for the AutoCAD
19 software other than the video games that are mentioned
20 in the record or is it a continued utility of the text
21 like Mr. Rotstein had mentioned that make it a
22 continued viable market? And that's mostly for the
23 opponents. Mr. Rotstein.

24 MR. ROTSTEIN: Well, examples we have found,
25 it's the continued utility of the software and

1 certainly with the final cut there seems to be a
2 continued utility and sort of perhaps with word
3 processing. But I will say that a lot of the
4 proponents examples deal with the need for whole
5 software's utility.

6 MS. MORENO HEYD: Thank you. I'm seeing no
7 more hands raised. I'll yield it back to my
8 colleagues.

9 MR. RILEY: Thank you. We're going to wrap
10 this session up. I want to thank everyone very much
11 for this helpful discussion. The Office is going to
12 reconvene at 2:30 for proposed-Class 7. Thank you
13 again.

14 (Whereupon, at 1:40 p.m., the hearing in the
15 above-entitled matter was adjourned.)

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REPORTER'S CERTIFICATE

CASE TITLE: Section 1201 Public Hearing
Proposed Class 6(b)
Video Games - Preservation and
Proposed Class 6(a)
Computer Programs - Preservation

HEARING DATE: April 18, 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 in the above-entitled matter before the United States Copyright Office.

Date: April 22, 2024



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