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UNITED STATES COPYRIGHT OFFICE

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PUBLIC HEARING
ON
EXEMPTION TO PROHIBITION ON
CIRCUMVENTION OF COPYRIGHT PROTECTION SYSTEMS
FOR ACCESS CONTROL TECHNOLOGIES

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37 CRF PARTS 201
DOCKET NO. RM 2005-11A

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MONDAY
APRIL 3, 2006

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MUMFORD ROOM
LM-649
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COMMENTERS:

SANDRA AISTARS, Time Warner Inc.
FRITZ ATTAWAY, Motion Picture Association of
America

JONATHAN BAND, Library Alliance

SANDRA BENEDETTO, Pioneer Corporation

PETER DECHERNEY, The University of Pennsylvania

BILL HERMAN

STEVEN METALITZ, Joint Reply Commenters

KATHERINE SENDER, The University of Pennsylvania

BRUCE TURNBULL, DVD Copy Control Association

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

9:36 a.m.

1 REGISTER PETERS: Good morning. I am
2 Marybeth Peters, the Register of Copyrights, and I
3 would like to welcome everyone to our final Washington,
4 D.C. hearing on the Section 1201 rule making. This
5 hearing, as you know, is part of an ongoing rule making
6 process mandated by Congress under Section 1201(a)(1),
7 which added to Title 17 - which was added to Title 17
8 by the Digital Millennium Copyright Act. Section
9 1201(a)(1) provides that the Library of Congress may
10 exempt certain classes of works from the Prohibition
11 Against Circumvention of Technological Measures that
12 control access to copyrighted works for three-year
13 periods.
14

15
16 The purpose of this rule making proceeding
17 is to determine whether there are any particular
18 classes of works as to which users are, or are likely
19 to be, adversely affected in their ability to make non-
20 infringing uses if they are prohibited from
21 circumventing the technological access control measures
22 that have been used by copyright owners. Pursuant to
23 our Notice of Inquiry, which was published in the
24 Federal Register on October 3rd of 2005, the office
25 received 74 initial comments for posing exemptions to

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1 the prohibition on circumvention, and 35 reply
2 comments. All are available for viewing and
3 downloading on our website.

4 This is the fourth and final day of
5 hearings in this rule making. We had originally set
6 aside four days in Washington and two days in Palo
7 Alto, but based on the number of persons who requested
8 to testify, we didn't need all of those days. We only
9 had one in Palo Alto and three in Washington. We
10 intend to post the transcripts of all of the hearings
11 on our website when they are available within the next
12 few weeks. The comments, the reply comments, the
13 hearing testimony reform the basis of evidence in this
14 rule making, which, after consultation with the
15 Assistant Secretary for Communications and Information
16 of the Department of Commerce, will result in my
17 recommendation to the Librarian of Congress. The
18 Librarian will make a determination by October 26,
19 2006, on whether exemptions to the prohibition against
20 circumvention should be instituted during the ensuing
21 three-year period and, if exemption should issue, what
22 particular classes of work should be exempted.

23 The format of this hearing will be divided
24 into three parts. Mr. Metalitz knows the process well.
25 First, witnesses will present their testimony, and this

1 is your chance to make your case to us in person,
2 explaining the facts and making the legal and policy
3 arguments that support your claim that there should or
4 should not be a particular exemption. The statements
5 of the witnesses will be followed by questions from the
6 members of the copyright office panel. The panel may
7 be asking some difficult questions of the participants
8 in order to try to define and refine the issues and the
9 evidence presented by both sides. This is an ongoing
10 proceeding and no decisions have been made as to any
11 critical issues in the rule making. So, if a questions
12 seems that a decision has been made, it hasn't. It's
13 just to illicit more information.

14 In an effort to obtain as much relevant
15 information as possible and, therefore, evidence, the
16 office reserves the right to ask questions in writing
17 of any participant in these proceedings after the close
18 of these hearings. He's just telling me about our time
19 problem. After the panel has asked it's questions, if
20 there is time - that's the insertion - we intend to
21 give the witnesses the opportunity to ask questions of
22 each other. So, hopefully, if we haven't asked all the
23 difficult questions, one of the members of the panel
24 will raise these questions and get answers from the
25 members of the panel.

1 Let me start now by introducing the other
2 members of the copyright office panel. To my immediate
3 left is David Carson, our General Counsel, to my
4 immediate right is Jule Sigall, who is Associate
5 Register for Policy and International Affairs. To
6 David's left is Robert Kasunic, Principal Legal Advisor
7 in the Office of General Counsel, and for those who
8 have participated, he has been involved in the 1201
9 process since the beginning, and for a while was known
10 as Mr. 1201. On Jule's immediate right is Steve Tepp,
11 also a Principal Legal Advisor in the Office of the
12 General Counsel.

13 Now, with regard to our panel, I'm going to
14 go in the order that you have seated yourself and I
15 understand that the order that you have seated yourself
16 is the order in which you want to testify. So, we have
17 Peter Decherney and, I guess, with him is Katherine
18 Sender, who is University of Pennsylvania Annaburg
19 School. We have Bill Herman, Jonathan Band, Steve
20 Metalitz, Sandra Aistars. And then from Pioneer, I
21 understand we have Sandra Benedetto and then Bruce
22 Turnbull and, finally, Fritz Attaway.

23 There's two -- are we doing these one at
24 time? Okay. There's two proposed exceptions that we
25 are focusing on. One is audiovisual works included in

1 educational library - in the educational library of a
2 college or university's film or media studies
3 department, that - protected by technological measures
4 that prevent their educational use. That's one.
5 Second, derivative and collective works which contain
6 audiovisual works that are in the public domain and
7 that are protected by technological measures that
8 prevent their educational use. So, let's start over
9 here with you.

10 MR. ATTAWAY: Thank you and thank you to
11 the other members of the copyright office for the
12 opportunity to testify today. Michael Delli Carpini,
13 Katherine Sender, and I, teach media studies at the
14 University of Pennsylvania. This is an important field
15 representative of virtually every major American
16 university. As media becomes more pervasive in every
17 aspect of our lives, teaching students to be literate
18 and critical viewers and listeners becomes a more and
19 more crucial job.

20 The use of digital clips is essential to
21 our teaching and our careers and our profession. The
22 swell of support our comment has received indicates
23 that we are not only speaking about our own experience.
24 Professional organizations representing over 6,000
25 media educators have supported us with reply comments.

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1 The latest multi-media technology has been employed in
2 classrooms at least since Columbia University started
3 a film program in 1915. It seems inconsistent with the
4 past 90 years of copyright and educational history to
5 prohibit students and educators from using technology
6 that's necessary to their pursuits.

7 The use of clips has greatly improved media
8 education. As we have demonstrated in our initial and
9 reply comments, educators need quality digital images.
10 And I'm going to add today that educators also need to
11 be able to use these clips as effectively as possible.
12 I will use one course as an example. I regularly teach
13 a course called The Hollywood Film Industry, which
14 examines the way that the business of Hollywood has
15 always driven the art of the movies. I'm going to
16 stress that I'm an educator, not a consumer.

17 It's my job to teach the history of the
18 American film industry from Edison to the DMCA. Yes.
19 Of course. Timing is absolutely crucial to what I do.
20 I have 35 hours to cover 110 years of history. Ten
21 minutes less a week means that I don't get to cover the
22 black list, or film noir, or another important area of
23 film history. In addition, though, time is crucial to
24 the classroom dynamic. Many of the reply comments
25 suggested CSS devices that could be used to show clips

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1 without using decryption. Most of these devices are
2 DVD jukeboxes with bookmarking capabilities. I'll call
3 this a method of using clips disk shifting. We were
4 actually very happy to hear about these devices and
5 thought that our problem had been solved. But when we
6 investigated a little further, we were disappointed
7 with the available technology.

8 Right now all the devices are far too slow
9 to be effective. The fastest method of disk shifting
10 turns out to be using the bookmarking feature on my
11 Macintosh laptop, and changing disks by hand. It's
12 actually the mechanical disk switching which slows down
13 the machines. At peak efficiency, it takes the Mac
14 only 30 seconds to shift disks by hand. That doesn't
15 sound like a long time, but it feels like an eternity.

16
17 Just let me demonstrate. This is more
18 effective with sound, but we don't have sound today.
19 Here is the digital clip on top and the disk shifting
20 clip will come in eventually. Hopefully, you can hear
21 the sound in your head. Right? That's 30 seconds. As
22 you can see, after a 30 second delay, you'll probably
23 have forgotten the point I was illustrating. How many
24 people checked their Blackberry's in those 30 seconds?
25 Right? And we're trying to keep student's attention.

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1 So we hope that these devices will improve,
2 but we cant imagine that they'll be sufficient within
3 the next three years. But I don't want you to take my
4 word for it. Let me offer some further evidence from
5 the people who count - the students. I have taught
6 this class twice, once in the fall of 2004, once in the
7 fall of 2005. I taught practically the same syllabus
8 and the same clips. The only significant difference
9 was that I used the disk shifting method the first time
10 and I used digital clips the second time. The
11 tremendous impact of using digital clips is evidenced
12 in the evaluations that students fill out at the end of
13 the course.

14 After teaching the course using the disk
15 shifting method, the course received a 2.5 out of a
16 4.0. Which, I'm embarrassed to say, is pretty
17 mediocre. It means that it wasn't a successful
18 teaching or learning experience -- educational
19 experience for the students. When I taught the course
20 using digital clips, however, the evaluations soared to
21 a 3.7. And you can -- and it's sort of like you're
22 switching back and forth, right? So that's a 25
23 percent increase in educational experience with the use
24 of digital clips over disk shifting.

25 Now, I want to very briefly show you a

1 typical class slide. One of the subjects that I cover
2 in this course is the impact of television and home
3 video on movies. Responses include the adoption of
4 wide screen and 3-D formats. This slide illustrates
5 the difference between the DVD letterbox and VHS Pan
6 and Scan versions. You can see that characters are cut
7 out of the frame. We rarely see more than four of the
8 seven children. When characters exchange glances, we
9 confusingly only catch one set of eyes. The setting,
10 the Alps, almost entirely disappears.

11 It was a film made to compete with
12 television and, in the Pan and Scan version, it looks
13 like television. The vistas that place the characters
14 in their landscape are reduced to close-ups and medium
15 shots. The expansive sweeping feeling of the wide
16 screen version is transformed into an intimate dialogue
17 between characters. The Pan and Scan copy isn't the
18 same as the film. Moreover, as you can see, the VHS
19 copy of the film represents a dramatic loss in detail.
20 The image is washed out, the sunny day becomes hazy,
21 the depth of field is reduced because of the decreasing
22 sharpness. As a result, the foreground again becomes
23 emphasized and, in addition, facial expressions are no
24 longer readable in long shots. And you don't even want
25 to get me started on the color differences.

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1 It's much easier to see the differences in
2 a side-by-side comparison, I think you can see, than it
3 would with a 30 second delay between images. It's also
4 essential in this case to have access to multiple
5 formats. From the media professor's vantage, VHS and
6 DVD aren't different versions of the same object and -
7 this I think is very very important - they are
8 different objects, with different histories, and
9 different educational uses.

10 It has also been suggested that VHS tapes
11 are a suitable substitute. Putting aside the quality
12 issue, availability is an increasing problem. Only 37
13 percent of the DVDs in the Penn Cinema Studies Library
14 are still in print on VHS, and only four percent of
15 those exist in the VHS widescreen format. And the
16 VHS/DVD divide is growing. According to the NPA's own
17 figures, DVD sales are soaring, while the VHS market is
18 plummeting. And I can give - I'll give you more detail
19 -- have a more detailed document about this later.

20 I've argued that educators need quality
21 images. We need to be able to work with clips fastly
22 and quickly, we need to be able to plug clips into
23 presentations for effective demonstrations, and we need
24 access to all available media objects. I have also
25 demonstrated that VHS is a format in decline, although

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1 I would stress that this is not a replacement for DVD's
2 to begin with. This is an aside. The arguments and
3 evidence I have presented all support both exemptions
4 we proposed, from media studies libraries and public
5 domain works bundled with copyrighted works.

6 In conclusion, I would just ask you to
7 consider the use of clips I just demonstrated,
8 including the 30 second time lag for disk shifting and
9 the classroom slides. I don't think any of my points
10 could have been made as effectively with disk shifting.
11 And finally, I would remind you that the stakes here
12 are actually very high. It's not only the success of
13 the film industry that you're weighing, you are also
14 deciding on the success of the educational experience
15 of students in the 21st Century, and ultimately how to
16 balance the two. Thank you.

17 REGISTER PETERS: Thank you, Mr. Herman.

18 MR. HERMAN: First and foremost, allow me
19 to thank the staff at the copyright office and the
20 Library of Congress for their time and effort, and I
21 thank you for allowing me to testify here today. I'm
22 sure those of us on both sides of the issue can
23 appreciate the amount of work that goes into this
24 triennial exemption rule making.

25 I'm here in support of the two exemptions

1 proposed by comment number five, submitted by Peter,
2 Katherine, and Michael Della Carpini, from the
3 University of Pennsylvania. I'm currently a PhD
4 student at Penn. While I know and respect each of the
5 three professors who submitted the original comment,
6 I'm here speaking on my own behalf exclusively. In
7 fact, let me give them reason to distance themselves
8 from me right away. I actually believe that the
9 proposed class should be expanded and I support
10 something, like, audio-visual works on DVD's protected
11 by CSS. Again, though, I'm here speaking just for
12 myself.

13 I'm here to speak as a student, researcher,
14 scholar, and, if I'm fortunate, future professor of
15 media studies. I had initially hoped to speak at some
16 length about a number of issues, the first of which is
17 to attempt to detail the negative effects that the ban
18 on circumventing CSS has on teaching and scholarship.
19 By the time I really considered these effects and all
20 their details, however, I realized that even my full
21 statement would barely be enough time to sketch a rough
22 outline. I will, therefore, attempt just that.

23 When I began graduate study in the field of
24 communication in 2000, I was excited by the power of
25 digital technology to catalyze the creative re-

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1 accommodation of media content. Beginning with this
2 fascination, I began studying theories of authorship
3 and originality, and I quickly came to the belief that
4 there is no such activity as creating something totally
5 new, and drawing from the creative works that came
6 before. This very quickly became apparent to me in my
7 own writing.

8 The very idea of scholarship as we know it
9 is built upon a bedrock of quotation, paraphrase,
10 critique, and integration of previous writing.
11 Paraphrase is not always adequate either. In many
12 cases, specific quotations are an inescapable
13 necessity. Further, it's only possible in a culture of
14 permissiveness. If I had to pay a clearance fee for
15 every time I had to use a direct quote, I would simply
16 quit producing scholarship.

17 The education sector is notoriously
18 underfunded, especially when compared - and I mean this
19 in all respect, envy, and awe - especially when
20 compared to the media industry. When I applied to PhD
21 programs in 2002, I had high hopes that I could be
22 among a new wave of media scholars. We would apply our
23 technological savvy to the problem of media criticism.
24 Not criticism in the sense of media as bad, but in
25 pursuit of the question, "What does it mean to live in

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1 a media-saturated world?" I had hoped to create non-
2 linear or multimedia essays, bringing print rolled
3 scholars into the digital space where they could
4 interact virtually with characters from movies and
5 television shows. After all, we were entering the
6 digital millennium, and our scholarship would have to
7 keep up. Then, I started studying copyright law, and
8 boy did that slow my ambitions for a culture of
9 scholarly re-mixing.

10 In fact, by the time I actually understood
11 what Section 1201 meant, I had long since realized that
12 it was helping to drown out the potential for such
13 cutting-edge work. How am I supposed to take clips
14 from my Daily Show Indecision 2004 DVD's? I can't dub
15 the VHS version because it was never released in VHS.
16 If I try to use the analog output, I need to buy
17 special purpose equipment costing hundreds of dollars,
18 some of which is illegal to manufacture and sell in the
19 states, and it's even harder to buy because importing
20 it is also illegal. Even scarier is the word provide
21 from that same subsection. If I buy this box and loan
22 it to a fellow scholar so that she too can circumvent
23 the Macrovision scrambling, I've committed a federal
24 crime, perhaps of the same magnitude as the people who
25 made the box in the first place. I face long odds

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1 convincing my Department Chair to buy a box that's
2 illegal to make and sell, especially since, by
3 providing it, the department may itself be violating a
4 federal law.

5 But let's say I'm stubborn, I really want
6 to use this clip for my Daily Show DVD. I think the
7 skit about Rob Corddry's return to Boston is a great
8 example of product placement. There's one shot in
9 particular I want to use to illustrate this claim,
10 where there's Rob's face on the left-half of the
11 screen, and a Sam Adams logo on a beer pitcher is
12 prominently fore-grounded on the right. It steeds to
13 look so like Rob's drinking buddy just happens to put
14 it down on the bar, but the pitcher lands so that the
15 entire Sam Adams logo comes into the screen and is
16 exactly, perfectly facing the camera. The camera is
17 focused on Rob's face, which is about six times farther
18 than the beer pitcher, so the words Sam Adams aren't
19 quite in focus.

20 When you watch it on DVD though, you can
21 see it. It would take a lot of work, however, to
22 recapture it properly using the analog hole. Maybe,
23 just maybe, if I'm willing to shell out the extra
24 hundreds and buy something that I'm legally forbidden
25 from sharing, I can get a clear enough reproduction to

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1 illustrate my claim that this is clearly a product
2 placement. But maybe not. In which case I've spent
3 hundreds of dollars for nothing.

4 The notion advanced by the motion picture
5 industry in previous rule makings, that I should just
6 get the clip via a screen shot from a video camera, is
7 even less realistic. A computer monitor, video camera,
8 and tri-pod of sufficient quality to create a product,
9 that could even snickeringly be called professional,
10 would cost into the thousands. Even then, the quality
11 will be inferior, even relative to the first analog
12 hole solution, which was already problematic. So, I'm
13 still left describing something to my virtual audience
14 that may or may not - they may or may not be able to
15 see for themselves.

16 In comment five and in reply comments
17 addressing it, the arguments have generally revolved
18 around the impact of Section 1201(a)(1) ban as - that
19 it has on classroom teaching. That impact is
20 substantial - a point to which I will also return, but
21 I want everyone to think for just a moment about what
22 the ban on circumventing CSS does to the potential of
23 multimedia scholarship that would otherwise make new
24 and creative fair uses of audiovisual works on DVD's.
25 Even if we accept the idea that each of the thousands

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1 of teachers who regularly use DVD's in their classrooms
2 should buy expensive carousel DVD players that can be
3 programmed to cut straight to relevant scenes, that
4 still gets them no closer to using a Daily Show clip in
5 their actual scholarship.

6 The ban on circumvention has the effect of
7 chilling the production of scholarship befitting the
8 digital millennium. If you look at the media study
9 scholarship that is being produced today, you will see
10 thousands of scholars who are technology savvy enough
11 to produce multimedia scholarship and who honestly
12 believe it would be valuable almost to a person, but
13 who are scared of the legal liability and Section 1201
14 is part of that fear. Were the copyright office to
15 grant an exemption for DVD's however, it would send a
16 strong message to these scholars. Come out and play.
17 It is safe to make innovative uses of digital media
18 texts in your scholarship.

19 Now, that's just my version of where a
20 media study scholarship could go. But let's get back
21 to the classroom, a value we all already agree on. In
22 the reply comments the DVD Copy Control Association and
23 the Joint Reply Commenter are quite forthcoming with
24 what they expect of teachers who use DVD's in the
25 classroom. Throw money at the problem. This is

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1 similar to 2003, when publishers made the same
2 recommendation to the American Foundation for the
3 Blind. In both cases, a profitable industry is telling
4 cash-strapped non-profits who serve vital social rules
5 to buy their way out of a legally created problem.

6 Of course, Penn is hardly the model for a
7 cash-strapped school. But Penn is certainly the
8 exception. An honest appraisal of the approximately
9 4,000 colleges and universities in the U.S. will tell
10 you that perhaps 100 could be characterized as
11 financially well-off. The rest of these schools are
12 highly unlikely to have the kind of five-disk carousel
13 DVD player with bookmarking features described in the
14 DVD CCA's reply comment. These schools would have to
15 buy one for every classroom in which the playing of
16 DVD's is a regular part of their curriculum.

17 Consider a typical state university, the
18 kind at which I taught before resuming my graduate
19 work at Penn. If they are fortunate, the Department
20 of Speech Communication alone has five AV equipped
21 rooms and another couple TV on a cart-style systems.
22 Again, if they're lucky, most or all of these rigs
23 will contain at least one DVD player, but the odds are
24 slim that the player will be a five disk carousel with
25 advance features such as bookmarking. Especially an

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1 advanced enough system to remember dozens of disks so
2 that multiple faculty can prepare the machine in the
3 days before a lecture.

4 This means buying new players at,
5 conservatively, \$100.00 a piece. Buying and
6 installing them will also cost, perhaps, \$50.00 each
7 in person hours and extra equipment, such as mounts
8 and locking cables. So, one department in one school
9 has to shell out \$150.00 per machine, times seven
10 machines, or \$1,050.00. Let's call it \$1,000.00 even.
11 Now, the university is down \$1,000.00, but far from
12 done following the CCA's advise to buy their way out
13 of this problem. At a typical university there will
14 be at least two to three departments that show
15 audiovisual works on DVD's as a substantial part of
16 the curriculum. These are departments such as film
17 studies, theater, and journalism and tech.com. At
18 typical "State U", let's call it, the Department of
19 Technical Communication and Journalism has to spend
20 the same amount to retro fit their seven audiovisual
21 units. So, the school is out another thousand dollars
22 and the university still isn't finished.

23 Departments strung across campus will also
24 have faculty who make regular use of materials on
25 DVD's. Obvious candidates for heavy media use include

1 English, history, foreign languages, and political
2 science, but these of multimedia teaching materials is
3 becoming increasingly important across the academy.
4 In perhaps, ten of these departments, DVD use by one
5 or more faculty members will occupy a substantial
6 portion of class time. Each will also have to shell
7 out \$150.00 a piece, give or take, to buy and install
8 a new DVD player.

9 To re-equip typical state universities to
10 media center departments and ten audiovisual stations,
11 the university has now shelled out \$3,500.00. That's
12 a need-based scholarship that might make the
13 difference in whether a student can go to college or
14 can go to a full four-year university. Now, let's add
15 up these expenditures. Typical State U is bigger than
16 most of the 4,000 colleges and universities in this
17 country, so we can't just multiply \$4,000.00 times
18 3,500. There are lots of mid-sized two and four-year
19 schools. Let's approximate what it looks like when we
20 add them up.

21 The National Communication Association
22 alone has 7,700 members. And there are thousands more
23 scholars in media studies-related departments who are
24 not NCA members. Further, even a small community
25 college, teachers and departments from communication

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1 to English and history will need these new DVD players
2 to deliver lectures inviting comparing contrast
3 analysis, or perhaps, making historical claims about
4 the difference between theater genres. If we include
5 all of these other departments, we can easily estimate
6 that, on average, each school will need at least five
7 DVD players, and that's a very conservative estimate.

8 In other words, the U.S. Post Secondary
9 Education Industry requires 20,000 DVD players. Let's
10 say that, on average, they will already have two of
11 these five DVD players as newfangled DVD changers, the
12 ones recommended by CCA. In other words, we're
13 recommending that 40 percent of these 20,000 DVD
14 players are of sufficient quality to support the
15 change disk methods. This leaves higher education in
16 the U.S. with a bill for buying and installing 12,000
17 units at \$150.00 a piece, for a grand total of \$1.8
18 million. Let me say that again. Twelve thousand
19 units, \$150.00 to buy and install each, totaling \$1.8
20 million. And that is the conservative estimate. To
21 comply with the CCA's suggestion to throw money at the
22 problem, is expensive indeed. Think about the
23 opportunity cost in terms of the education lost.
24 That's the annual salary for 36 assistant professors.
25 That's a four-year full tuition to state university

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1 scholarship for 90 students. To the higher education
2 sector, \$1.8 million is a lot of money.

3 In the Joint Reply Commenter's reply
4 comment, on page 29, he writes, "At bottom, these
5 submissions asked the register and the librarian to
6 grant an exemption in order to relieve educators of
7 some degree of inconvenience." To ask the education
8 sector to spend millions of dollars to facilitate the
9 classroom use of a media format that is already on
10 it's way out the door, is to ask them to suffer more
11 than mere inconvenience. It is to ask them to
12 sacrifice precious resources from classrooms that are
13 already underfunded.

14 I urge the copyright office to follow its
15 own lead in exempting ebooks in 2003, so that the
16 visually impaired could have greater access to audio
17 books. The American Foundation for the Blind would
18 suffer more than "Some degree of inconvenience" were
19 it forced to devote more resources to creating audio
20 books via traditional read-aloud volunteers. Without
21 an exemption there will just be fewer audio books
22 available because resources are finite. Again,
23 something the Register recognized in 2003.

24 Without this proposed exemption there will
25 be less education. Under one scenario, teachers waste

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1 precious class time, the value of which has not been
2 contested in these proceedings. Under another
3 scenario, schools buy less books, teachers, and
4 facilities improvements, and they're still wasting
5 some degree of class time, as illustrated by Peter.
6 In either scenario, there's simply less education. As
7 a society, we value education and enlightenment for
8 the visually impaired specifically, and the population
9 generally. If the harms resulting from the resource
10 trade off were significant enough to justify an
11 exemption in 2003, they're significant enough again in
12 2006.

13 Last week, I conducted an informal survey
14 on a cultural studies list serve in order to probe the
15 extent to which the resource trade off is occurring in
16 higher education today. The results suggest the worst
17 of both worlds - a lot of lost classroom time and a
18 sizeable expenditure of resources.

19 I asked, "How do you use materials from
20 DVD's and classroom instruction and/or in multimedia
21 scholarship (please mark all that apply)?" I gave
22 them six choices, as well as allowing them to explain
23 any other techniques they used. I also asked them to
24 tell me a bit about their college and/or department,
25 if they wanted. The six choices I offered were; a) I

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1 fast-forward to appropriate clips, b) I program the
2 DVD player in the classroom using e.g., a bookmark
3 feature, c) I hack the encryption and I make excerpts,
4 in other words, I violate 1201(A)(1), d) I plug VCRs
5 and/or other equipment into my DVD player's output and
6 make excerpts, e) I use cameras or software to take
7 screen shots and make excerpts, and, f) I avoid DVD's
8 and use VHS.

9 The answers to this very simple survey
10 show, pretty convincingly to me at least, that
11 educators suffer both substantial lost class time and
12 substantial financial costs in order to use DVD
13 materials in class. Consider a) I fast forward to
14 appropriate clips; out of 23 respondents, 18 do this
15 at least some of the time. Multiplied by tens of
16 thousands of teachers and millions of students
17 affected, this represents a social cost that, if
18 monetized, would vastly outweigh even the costly
19 investment of replacing all of these classroom's DVD
20 players. As one respondent describes it, this is "the
21 worst possible option," yet, one to which he sometimes
22 resorts. Next, consider answer b, I program the DVD
23 player using e.g., a bookmark feature. Only 9 of 23
24 ever do this, supporting my earlier claim that perhaps
25 two in five, or about 40 percent of classroom DVD

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1 players are equipped to do so. One response in
2 particular is instructive. A woman who teaches as an
3 adjunct at; a) A large university, b) A liberal arts
4 college, and c) A community college, either uses the
5 fast-forward button or the bookmark feature, depending
6 on which campus she is teaching at that day. In other
7 words, without circumvention of CSS, students get more
8 or less instruction per hour of classroom time,
9 depending on the resources of their school that they
10 attend. And I frankly think that is a tragic
11 injustice.

12 I'm going to jump ahead a little bit and
13 consider f) I avoid DVD's and use VHS. Only four of
14 23 chose this option, and both those who do and do not
15 choose it, do write it as a seriously sub-optimal
16 solution; many materials are simply not available on
17 VHS. This list includes many television shows such as
18 Indecision 2004, the Daily Show, 3-Disks DVD set. If
19 I rely on this option, I am excluding a number of
20 works, as well as DVD extras, such as trailers, out-
21 takes, and commentary. Further, at least one person
22 noted that classrooms often have DVD players, but not
23 VHS cassette players.

24 Next, consider e) I use cameras or
25 software to take screenshots and make excerpts. Only

1 seven out of 24 ever do this. Unfortunately, those
2 who do so did not often answer questions about
3 department size and strength, but the two who did are
4 from relatively large departments in large schools,
5 with relatively solid funding. And nobody who
6 describes themselves as underfunded does this. This
7 is an expensive solution that would not be funded,
8 even in many communication departments, let alone the
9 rest of the department - the rest of the academy.

10 Option d) I plug VCRs and/or other
11 equipment into my DVD player's output and make
12 excerpts, is another example of how different schools
13 enjoy different levels of access, as long as the basic
14 ban applies to DVDs. Eight out of 24 do this, but of
15 those five who identified school information, four are
16 from large departments and large schools with decent
17 funding.

18 Finally, let's consider answer c) I hack
19 the encryption and make excerpts. Six of 23 do this.
20 All five who provide any information on their
21 departments are from large schools with relatively
22 solid funding. In other words, about one-fourth of
23 respondents are willingly violating 1201(a)(1) because
24 they believe it a system as they do their jobs and
25 they do so even the departments that can best afford

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1 other solutions. A few choice quotes illustrate why
2 instructors often resort to breaking federal law. One
3 person argues, "Budget isn't the primary reason. It
4 just produces better quality - the best quality image,
5 and it most accurately represents the material I want
6 the students to analyze." Another laments, "I break
7 the DMCA because it is the ONLY way to do my job
8 effectively." Finally, one person begs, "Please tell
9 the folks at your hearing that this is just one of the
10 ways recent encroachments of traditional fair use
11 rights are seriously damaging education."

12 We're talking about sensible people here.
13 Otherwise law-abiding citizens, who simply want to
14 teach their students about the significance of media
15 in our society. But they already know that which I
16 have told you, that the legal ban on circumventing CSS
17 cost them millions in cash and person hours, and lost
18 educational opportunities.

19 It is especially in light of the historic
20 and continuing failure of the Copyright Coalition to
21 successfully identify a class of people who are
22 willing to violate Section 106, but unwilling to
23 circumvent CSS on route. In other words, considering
24 the other lack of unique threat of infringement posed
25 by even the most ambitious exemption for DVDs, this

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1 heavy financial and social cost is tragic and
2 unacceptable. I urge you to ameliorate these costs
3 and grant as broad as possible an exemption for DVDs.

4 REGISTER PETERS: Thank you. Mr. Band?

5 MR. BAND: We've heard a lot of worry
6 about how this - the Prohibition on Circumvention is
7 affecting the classroom, and we've also heard how the
8 basic solution that is offered by the CCA is basically
9 buy a Pioneer. We've also heard how buying a Pioneer
10 really doesn't solve the problem. How there is this
11 incredible disk shifting inefficiency, that it just
12 takes time because you have to load the DVD - it just
13 takes time for it to key into the right place. On top
14 of it, what wasn't mentioned, was just - imagine, sort
15 of, the programming costs we heard just now but you
16 have a - even if you have a Pioneer that's installed
17 in every classroom, still somewhat the teacher has to
18 go and program that Pioneer and they have - there's a
19 lot - and the Pioneer can only hold so much - how it
20 only has the capacity for storing so many bookmarks,
21 so that still would involved probably teachers having
22 to go into the - find the time to get into the
23 classroom beforehand, program it, program the machine
24 there, and then, you know, then they have to do that
25 programming every - before every single class. And

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1 that's, again, just an incredible inefficiency.

2 But rather than focus on that, let me, you
3 know, because we've heard a lot about now what the
4 problem is and how the proposed solution really is not
5 even second best, it's the third best alternative. I
6 mean, it's great for Pioneer, but it's not really very
7 good for the - not a very good solution for the
8 students or for the educators. But, let's step back
9 and see what's really going on here. We have CSS,
10 right, that's the encryption system. There's also
11 DCSS, which is widespread - it's all over the
12 Internet. You can, you know, I'm sure Bill, right
13 now, could probably, if he had Internet access, he
14 could probably find literally a hundred thousand
15 sites, if not two-hundred thousand sites, from which
16 he could download DCSS.

17 We've already heard how, in his informal
18 survey, a quarter of the professors are already sort
19 of using DCSS, because that's the only way they could
20 teach their class effectively. So, the point is this,
21 is that the technology that allows the circumvention
22 is out there, it is already being used by some
23 professors because it's the only way they can
24 effectively teach their class. The others would like
25 to use it because, again, it's the only way to

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1 effectively prepare and teach their class, but they're
2 afraid of breaking the law. The obvious solution is
3 to give them the exemption - to allow them to do
4 something that everyone clearly acknowledges - if you
5 read these comments - they acknowledge it's a fair
6 use, it's a valuable use.

7 Will it have any negative impact at all on
8 the revenue of the MPAA members? Of course not. Zero
9 impact. We're talking about film clips. And the
10 notion that somehow this is going to open - this
11 little exemption is going to open the floodgates, come
12 on. DCSS is widely available. If people want to
13 circumvent to access full movies, they can do it
14 already. They don't need this exemption.

15 This exemption will only be used by a
16 narrow group of people who want to do the right thing.
17 They would like to be not the four or five
18 respondents, but they want to be the ones who are,
19 you know, it's the ones who are currently obeying the
20 law, they want to do the right thing, they want to
21 obey the law but teach their classrooms effectively.
22 So, this, a narrow exemption of this sort will allow
23 them to do that and will cause absolutely no harm to
24 the motion picture industry. Thank you.

25 REGISTER PETERS: Okay. Thank you very

1 much. Mr. Metalitz.

2 MR. METALITZ: Thank you very much and I,
3 excuse me, I appreciate the opportunity to be here
4 again to present the views of the 14 organizations
5 that have joined together as the Joint Reply
6 Commenters. I'm going to be very brief at this point
7 because I think we've heard a lot from the proponents
8 of the exemption about the issue of alternatives. Are
9 there alternatives that don't involve circumvention
10 that can be used to carry out the non-infringing uses
11 that they wish to make? And our other witnesses here
12 will be, to a great extent, responding to that.

13 I think Mr. Turnbull and Ms. Benedetto
14 will be making a presentation that indicates that we
15 can - that technology is readily available to allow
16 the educators to do exactly what they want to do in
17 this situation. And I guess another way of putting
18 that would be that, when you consider in light of this
19 technology, the class that Professor Decherney is
20 proposing is pretty close to a null set. I wouldn't
21 say that's true of Mr. Herman's much broader
22 formulation, but just responding to Professor
23 Decherney. So, that's one of the demonstrations that
24 we'll be showing today.

25 We also mentioned in our reply comments

1 about other means of making the non-infringing use
2 that's at issue here, and these means have already
3 been presented to the copyright office in the rule
4 making three years ago and the conclusion was reached
5 at that point that these alternatives certainly were
6 strong arguments against recognizing an exemption in
7 this area. And Mr. Attaway is going to demonstrate
8 one of these in his demonstration.

9 Another alternative that the office
10 recognized was significant in 2003, was the
11 availability of VHS versions of these audiovisual
12 works. I'll say about that - only two things about
13 that, first, in the original comments, there was a
14 list of holdings of the Departmental Library and I
15 think we took a sample of those and found that, in
16 every single case, a VHS version was available.

17 And then attached to the reply comment was
18 another list, this one an alphabetical list of A
19 through L of the films on the register that's been
20 created by the Library of Congress and we've looked at
21 those and will submit, for the record, a survey that
22 shows, at least in our survey, only seven out of these
23 200 were available in DVD versions, but not available
24 in VHS versions. So, the statistic that you were
25 showing earlier I think has to be put in that context.

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1 There are other issues relating to this
2 exemption and we will talk about them briefly, and I'm
3 sure a lot of them will come out in the questions. I
4 think the last argument that Mr. Band made and a
5 variant of it was put forward by EFF in its reply
6 comments, it really is - well, there's already a lot
7 of tools out there, there's a lot of which are used
8 for infringement, but these uses that we're talking
9 about here are not infringing uses, so what is the,
10 you know, because there's not going any harm because
11 there's not going to be any marginal increase in the
12 level of infringement.

13 I think one - a response to that, which I
14 hope we'll be able to make today, is to look at this
15 in a broader context. This issue is not just about
16 CSS, it's not just about the existing means of
17 controlling access to audiovisual materials and the
18 existing tools that are available to circumvent them,
19 but also about the technological protection measures
20 that we can expect in the near future. And I think
21 Ms. Aistars and Mr. Turnbull and others will be
22 addressing that in their comments. So, I would
23 suggest that I just yield the floor at this point to
24 the other witnesses and then, if I could be recognized
25 again at the end, if there's any sum-up that's needed

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1 very briefly, I would appreciate the chance to do
2 that.

3 REGISTER PETERS: Okay. Ms. Aistars.

4 MS. AISTARS: Thank you very much. I'm
5 not sure if you can hear me or not. On behalf of Time
6 Warner and of it's divisions, I want to first extend
7 my thanks for your attention and allowing us to
8 participate in the hearings. As I noted in our
9 written testimony, Time Warner is a very multifaceted
10 media company. Our businesses are quite diverse.
11 They encompass everything from content creation to
12 content distribution. Our divisions include filmed
13 entertainment, networks, cable, publishing, Internet
14 service providers, and I think that the diversity of
15 those businesses and the sorts of conversations that
16 we have within our own company amongst our divisions
17 about how to strike the appropriate balance between
18 being able to have fair use for our news and
19 entertainment businesses and have appropriate business
20 models for our cable and Internet service providers,
21 are the sorts of conversations that we find ourselves
22 then later having with other industries as we try to
23 solve the sorts of problems that you're faced with
24 today that some of the exemption seekers are
25 highlighting for you. So I think we're uniquely

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1 situated to comment on some of these points.

2 I'm not going to review my written
3 testimony. I don't think that would particularly
4 helpful. But I'd like to highlight just a couple of
5 points about our activities in the digital marketplace
6 and also the role that's played by technological
7 protection measures in enabling those activities. And
8 then I'd like to spend a couple of minutes providing
9 a bit more detail about the sorts of cooperative
10 efforts we undertake with education institutions and
11 other non-profits, as Warner Brothers, to try and
12 facilitate educational access to our filmed
13 entertainment library.

14 So, as I noted in my written testimony,
15 Time Warner, Inc. and its divisions make a broad array
16 of content available digitally in a wide variety of
17 forums and virtually all of this depends in one
18 fashion or another on the use of technical protection
19 measures. I highlighted a couple of examples in my
20 written testimony, for instance, IntoTV, which is a
21 newly announced offering that Warner Brothers and AOL
22 are collaborating on. It streams full-length episodes
23 from TV series on-demand and for free, that's
24 protected by a digital protection measure provided by
25 Microsoft, Windows DRM, Version 10. GameTap is

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1 another example of a new business that we've offered
2 that couldn't be offered, unless we had the ability to
3 protect it with technical protection measures.
4 GameTap is offered by Turner. It makes video games and
5 related entertainment programming available, and it's
6 protected by an encryption and authentication system
7 that's been developed by a company that's called
8 Extent.

9 Our cable division relies heavily on the
10 availability of technical protection measures to
11 enable the sorts of offerings like VOD and pay-per-
12 view services. Those are all protected by proprietary
13 systems that are delivered to the home and then
14 protected by various multi-industry developed
15 technologies as the content is transmitted to various
16 parts of the home from the Time Warner cable box.
17 Other examples are Movie Link and Cinema Now, again,
18 services that wouldn't be available unless we had the
19 ability to protect them by technical protection
20 measures. And you've heard of course about the use of
21 CSS on DVDs and we are very much engaged in developing
22 technologies to use with next generation optical
23 media, whether it's HD/DVD or blue ray technologies -
24 those will be protected by a technology called
25 Advanced Access Content System.

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1 And I would note, with regard to AACCS,
2 that that's an example of a technology that's been
3 developed through multi-industry cooperation between
4 CE companies, IT companies, content providers, and
5 it's been developed with the spirit of trying to
6 enable a lot of business models and consumer offerings
7 that we've seen demand for in the marketplace over the
8 years, in using CSS. And it will facilitate new uses
9 including the making of managed copies within one's
10 home and, I believe that that's something we might
11 want to explore a little bit further to see how the
12 ability of making managed copies might address some of
13 the educational uses that have been identified as
14 well.

15 So that gives you a sense of the sorts of
16 technical protection measures that we use and how
17 important they are in bringing new services to the
18 marketplace. With regard to developing technical
19 protection measures, I've already noted for you that
20 we cooperate very closely with CE and IT companies.
21 Most people or many people mistakenly believe that
22 technical protection measures are sort of developed in
23 a vacuum and applied to content without, you know, due
24 consideration for how it will affect consumers and how
25 it will affect others who use the technology and the

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1 services, and that's just not been our experience.

2 Time Warner and its divisions have, as I
3 said, been very active in various multi-industry
4 efforts and, in fact, some of the most widely-used
5 and best known methods, such as CSS and such as AAC3
6 for the next generation, 5C for home networks, 4C for
7 secure recordings, all of these technologies are the
8 product of multi-industry cooperation. And, when
9 these technologies are developed in a collaborative
10 fashion, they depend on protections against their
11 convention that are provided by the DMCA, and it's
12 important for a variety of reasons.

13 The intent in developing these technical
14 protection measures is not to build the best
15 mousetrap, not to build the best DRM technology, you
16 know, known to man, but rather to create something
17 which, you know, draws the line for a consumer to say,
18 this is where the service that you've purchased ends.
19 If you're, you know, hacking this technology, you know
20 that you're doing something beyond what you've
21 contracted for in terms of the service that you've
22 purchased.

23 And, when we develop these technologies,
24 we're also interested in offering them in a fashion
25 where they can be flexibly implemented by the CE

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1 companies and the IT companies that have to use them,
2 and so that they can be implemented in the most low-
3 cost and least intrusive manner in devices. And
4 that's a benefit for consumers, as well as for the CE
5 and IT companies that are building the products,
6 obviously, it certainly reduces the cost. But not
7 also, in terms of the cost of the technologies, all of
8 these technologies that I've mentioned that are
9 developed through multi-industry cooperation are
10 licensed on what are essentially cost recovery terms
11 to maintain the licensing, not to, you know, license
12 the actual IP that constitutes the technical
13 protection measure, but just to keep the effort
14 running.

15 If the goal is, as we said, to enable new
16 digital businesses, to enable new services being
17 offered to consumers, then I would suggest that it is
18 the benefit to all of us to limit the sorts of
19 circumventions that are possible of these
20 technologies, so that we don't get into a spiral of
21 having to constantly replace, update, renew, these
22 technologies, because that will increase the cost
23 across the board for all users and for the developers
24 of the technologies as well. I think that's probably
25 enough said about technical protection measures, and

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1 I'll just mention a couple of things about educational
2 uses in particular and some of our licensing work in
3 that regard.

4 Warner Brothers has a clip and still
5 licensing department and, through that department, we
6 regularly, you know, cooperate with educational
7 institutions and non-profit requestors to accommodate
8 requests to use clips or stills from the Warner
9 Brothers movie library for things like classroom uses.
10 I'll note that we've got the largest English language
11 library of films in the world. So, the sorts of
12 things that we do to enable educational uses, I think,
13 are quite significant in meeting the concerns of
14 requestors.

15 I reviewed the request that we received in
16 2005, and interestingly none of the requests actually
17 seeks permission to circumvent in order to make a
18 clip, or seeks a more, you know, a greater quality of
19 a clip. For the most part, the requests that we
20 receive are requests for a variety of classroom uses,
21 and uses not only to, you know, illustrate lecture
22 points or to motivate students to understand the
23 relevance of a particular point that they've been
24 discussing in class, but also for use in things like
25 web based interactive instruction, use in, you know,

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1 various fundraisers, use in thesis works that students
2 are preparing.

3 We've approved uses for clips in student
4 movies, we approved uses of clips in talent shows,
5 uses of clips on websites developed in conjunction
6 with various classroom uses. We've also approved uses
7 for interactive CDss that are displayed or performed
8 in public at various educational events. So, I think
9 it's probably worthwhile to note that, even in
10 instances where the requests may go beyond what is,
11 you know, normally considered, you know, an approved
12 classroom use, we've taken steps to try and
13 accommodate the needs that folks have expressed to us.

14 Of the requests that I reviewed, only a
15 hand full were denied - I don't remember the precise
16 number, but it was, you know, in the single digits -
17 and those were denied either because the use was a
18 commercial use, where the materials would be developed
19 and then sold further, or it was because we were not
20 the rights holder anymore for the particular clip that
21 was being sought, so.

22 I guess I'll stop here. The only other
23 thing that I would say to add to what Steve had
24 mentioned in response to some of the points about how,
25 you know, DCSS is already out there, so it's not

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1 really significant if you allow this hack to be used,
2 I guess I'd just note that, with regard to the use of
3 DCSS, CSS is still a relevant technology in terms of
4 protecting our works and we still rely on it in making
5 decisions to put works out in digital form. And we do
6 so because none of the legitimate devices that are
7 sold in the marketplace actually rely on this hack.
8 If you, as a consumer, want to use DCSS, you have to
9 affirmatively go to a web site and download DCSS and,
10 you know - I think it's consistent with the message
11 that we're trying to send - you have to do something
12 that feels like it's not quite right. You realize
13 that you're breaking the law and doing it.

14 So I think CSS is still a viable
15 protection method and still something that we rely on,
16 so I would dispute some of the assertions made at
17 least in written comments, I believe, by EFF and
18 others. I'd also point to the fact that we do try and
19 close down websites that distribute DCSS illegally and
20 it's my feeling that normal consumers still don't use
21 DCSS on a daily basis. So, again, the purpose of
22 having CSS technology applied to our disks is still
23 served.

24 I'll stop there and I'll be happy to
25 answer questions about any of my written testimony or

1 anything else relevant to the technical protection
2 measures that we've discussed.

3 REGISTER PETERS: Thank you. Ms.
4 Benedetto.

5 MR. TURNBULL: If I could --

6 REGISTER PETERS: Oh, you're going to go
7 first?

8 MR. TURNBULL: If I could, well, we're
9 together here. It's a DVD/CCA. Okay. Thank you. I
10 am Bruce Turnbull, of the Law Firm of Weil, Gotschall
11 and Manges. I am pleased to be here today
12 representing DVD Copy Control Association, to be
13 adjoined by Sandra Benedetto from the Pioneer
14 Corporation. We thank the copyright office for the
15 opportunity to appear. Ms. Benedetto is going
16 demonstrate one of the products that was cited in our
17 reply comments, with regard to the clip playback
18 issue. We'll also be happy to respond to any
19 questions on any other issues that were addressed in
20 the reply comments. I'm going to let Ms. Benedetto do
21 the demonstration and then if I could come back and
22 make a couple of points following.

23 MS. BENEDETTO: Thank you. Good morning.
24 Again, thank you very much for the opportunity to
25 testify this morning. I am going to show you a piece

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1 of hardware, a DVD player, produced by Pioneer called
2 the DDVD 5000. It is a player that, one of its target
3 markets has been for the education community to use
4 DVD in the classroom. Additionally, I'm going to show
5 a technology that we developed, again for teachers,
6 which uses bar codes. And I'll be using a bar code
7 reader and actual lesson plans that have been created
8 by teachers, two teachers in particular, to utilize
9 DVD in the classroom. The two disks that I'll be
10 using are The Matrix, by Warner Brothers, and To Kill
11 a Mockingbird. Both are commercially available, both
12 have CSS, Macrovision, and other copy protection on
13 them, and this player is fully compliant with copy
14 protection and content protection.

15 So, what I'll start with again, I'm going
16 to start with The Matrix, utilizing a presentation by
17 a teacher in Iowa, who is using this film and clips
18 from this film to talk about discrepant events for
19 teaching Newton's Law of Motion and Physics. And I
20 wanted to use something that was contemporary, that
21 her students were aware of, that she can then grab
22 their attention and begin to teach those particular
23 points. So, I'll put the disk into play mode here.
24 I think we're all set up with - and the first clip
25 that she uses - I just scanned the bar code, which

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1 contains the information that will search through this
2 clip. It's a five second clip. I'll show it again.
3 But again, it's a special effects in the movie that
4 shows the character, Trinity. I scan the bar code.
5 Hear that beep? That's the bar code scanning. I sent
6 it to the player. You get another beep, and starts at
7 the top of that clip, playing the clip.

8 Now, just to show you what we're looking
9 at here, if I put the display on on the player, you'll
10 see some information here. And in particular, what
11 I'm looking at is the number, which is to the right of
12 the word "frame", 184467. And that's telling me the
13 exact frame number that I am on in the video content.
14 And this technology that I'm using is simply - it
15 allows the teacher to-it's a piece of software that
16 will work on a Mac or PC -- allows the teacher to be
17 able to identify the in-point and the out-point of the
18 clip, create a bar code, the software does it for you,
19 all you say is here's my in-point and here's my out-
20 point, and the bar code then contains that
21 information. I then, again, can scan it, and send it
22 to the player.

23 Just to let you know, we're at the end of the
24 movie, we're an hour and forty two minutes into the
25 movie. This is the conclusion. So we've immediately

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1 gone to that section on the disk. We bypassed
2 everything at the beginning of the movie.

3 Again, another clip used to demonstrate
4 this point. And again, in teaching Newton's Law of
5 Physics, there's a lesson that's associated with this
6 that asks the student if Keanu Reeves is 6-foot tall,
7 and 175 pounds, please calculate his center of
8 gravity, and is this actually possible? This little
9 position here. So, again, using interactive clips
10 from the movie to demonstrate the point, and then
11 finally, in using a section from the special features
12 of the making of -- so again, this clip now showing
13 that what we've seen in the movie took a fair amount
14 of effort and is not humanly possible. And again,
15 asking the students to work through some physics
16 problems in order to determine that.

17 I'm going to move to the second disk here.
18 And, again, I do need to manually remove the disk from
19 the player. And we'll move to the disk, To Kill a
20 Mockingbird. There are a couple of other things that
21 I want to show here as well. Yes, there's the FBI
22 warning. This is actually a lesson taught by a high
23 school English teacher to -- on the structure of the
24 novel, using the book, To Kill a Mockingbird, and
25 obviously using then the disk and the movie, To Kill

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1 a Mockingbird, to support those lessons.

2 One of things that I want to be able to
3 show is that, in here, in the lesson plan, it's
4 telling me if I want to be introduced to the
5 characters, that I can actually - and this was
6 actually an activity for the student - I can actually
7 put in a frame number - you see the frame number one
8 there, it's telling me on the lesson plan, that I can
9 search to 1576 - did I hit six? No. Okay. 157655
10 search, and that should introduce me to the character,
11 Addicus Finch. So all the characters are introduced
12 to the students in this way. This is searching to a
13 still frame within the video content, immediately
14 getting to the content.

15 There's also, from the instructor's point
16 of view, there are bar codes here that allow you to
17 look at -- actually the plot structures, from
18 exposition to conflict. If I were to take a bar code
19 reader and look at the conflict, having read the novel
20 I could go to that section in the movie. Okay. So
21 there's the clip, again, presenting the conflict, not
22 only in the movie but in the novel.

23 A couple of other things that I'd like to
24 show here with the final presentation. There is also
25 a student lesson here, where the student sits down

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1 individually in front of the DVD player with a set of
2 bar codes that the teacher has asked them to stand
3 through, and basically there are 12 scenes and the
4 student needs to order those scenes, having read the
5 book, in how they're presented in the book, from
6 beginning to end. So they're randomly on this page
7 and then the student, as part of their quiz, needs to
8 order them properly.

9 But one of things before that, that I'll
10 show you, is that if I go to - this player has
11 something called a command stack. A little bit
12 different than the playlists that the folks have made
13 reference to this morning. This is basically - if I
14 move down, I'm using just the remote control unit that
15 comes with the player - you move to the command stack
16 and this is a list of commands that the teacher can
17 put into the player prior to the class. It's very
18 easily done.

19 I'm going to back out of here and show you
20 how that's done in a second. But this is something
21 that is saved in the player's memory and non-volatile
22 RAM, you can pull out the plug, you can, you know,
23 send it across country, and plug it back in and this
24 information is here. So, once you create this, this
25 stays in the player. You can create up to 300 of

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1 these groups, with 999 commands in each group, so
2 that's quite a bit of information and interactive
3 video clips that you can store.

4 So let me just sort of back - let me back
5 out of here and show you how this is - I'm going to
6 just stop the disk playing here and move into - the
7 disk needs to be in the drawer, but not playing. You
8 go to the command stack area, the van setup icon.
9 Here's the first group that I created which actually
10 does support The Matrix. Here's the second group that
11 I created that I'll show you, that deals with To Kill
12 a Mockingbird. Here's a third group, and let's say I
13 want to create a fourth group. I'll create that here.
14 I'm now in the first command of the fourth group, and,
15 having made these bar codes, I can scan a bar code,
16 send it to the player, and there's the command. It
17 actually rehearses it beyond the scene so that I can
18 see whether or not I've made the appropriate
19 selection.

20 If I wanted to, and I didn't have these
21 bar codes previously made, I can go to the command and
22 it will come up. And using the remote, I just hit
23 enter, and it says well, what kind of segment play do
24 you want. It would ask me what title, what frame
25 number, what n-frame number, do I want a particular

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1 subtitle to be shown, which audio track, etcetera, Or
2 I could simply use the chapters that have already been
3 predetermined by the producer of the disk, and say I
4 want chapter 35 to play, I switch to 35 right here,
5 and then play to the chapter that I want it to end at.

6 So that's how I would create the group.
7 Let me go back here and back out. So now - I'm going
8 to move back out of here - now if I go into the
9 command stack, I can actually - it's group two that
10 actually supports this disk. There are 12 commands in
11 there. But before I actually move through it, I want
12 to just give you an idea of that command stack
13 supports this particular quiz for students.

14 And, again, there are clips here that ask
15 me to go through - I'm going to scan a particular
16 clip, send it to the disk, and this is a scene title
17 called Wood Carvings. As a student, I need to
18 determine where this appears in the novel. So, a very
19 short clip - the student needs to figure out where
20 that's placed in the novel. I'll just show you
21 another one in the interest of time. And another
22 quick scene. So now as the student, I move through
23 all of these, I order them appropriately, but if I
24 move back now to the teacher's position - I'm in the
25 classroom and now want to go through these - and say

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1 to the students, okay, well we've all submitted our
2 answers to the quiz, let's now look at what the
3 correct order is. I can move around the classroom and
4 I don't have bar codes with me, I just have the remote
5 control, I go into the play mode, I've already saved
6 the command stack in the proper order that supports
7 this particular exercise. I can say, begin to play,
8 and now it will move to the very first clip in the
9 right order. Clip one. Searches now immediately to
10 clip two. This is a little bit of what we saw earlier
11 with the conflict - setting up the conflict. And clip
12 three. And I want go through all the clips. There
13 are 12 of them. They go in order as they appear in
14 the novel.

15 So, just in closing, this is a player that
16 allows you to take commercially available disks and to
17 create interactive clips exactly - with a piece of
18 software and some other tools - exactly to the points
19 that you want - to play the in and out-points - that
20 you would like to use to illustrate your points to the
21 classroom. I think that's pretty much it. Thank you.

22 MR. TURNBULL: Maybe if I can just spend
23 another couple of minutes. I think, obviously, this
24 demonstration was intended to show that there are
25 products in the marketplace - this product in

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1 particular - but there were a number of others that we
2 cited in our testimony that have similar
3 functionality, including the MAC OS DVD playback
4 system, that permit the kind of playback experience
5 that at least some of the exemption requests have
6 requested. There are, of course, other means, as
7 people have said, of enabling clip compilation and
8 playback capabilities. Mr. Attaway will demonstrate
9 one of these.

10 Ms. Aistars's comments talked about other
11 technologies, both coming into the market and also
12 direct authorization rights that can be obtained.
13 And, in that regard, let me emphasize a point that
14 DVD/CCA has made in its submissions in each of the now
15 three proceedings of this type. If there are
16 particular uses that a group or individual wishes to
17 make of CSS protected DVD content, we are open to
18 requests, presentations, and discussions about how we
19 might enable those to be accomplished in an authorized
20 licensed fashion. To date, we have been disappointed
21 that no one has ever approached us for such
22 discussions. And I also want to make a point,
23 underscoring what Ms. Aistars said, that with regard
24 to CSS, the system still works.

25 Now, ten years after its introduction, six

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1 years after the much publicized of the hack of the
2 encryption technology, DVD players, DVD-ROM drives,
3 and DVD playback software that is sold in legitimate
4 channels of trade are licensed and compliant. When
5 products have appeared at retail distribution that are
6 either not licensed or not compliant, DVD CCA or the
7 content owners, exercising their third-part
8 beneficiary rights under the CSS license, or they're
9 DMCA anti-circumvention rights, have sought out the
10 manufacturers and distributed, requested voluntary
11 action by those parties to bring products into
12 licensed compliant, and I might say, that's actually
13 the largest number of cases. There are voluntary
14 efforts. And, where that has not succeeded, have
15 pursued our rights in court to get those products off
16 the market and off the shelves. As a result, to our
17 knowledge, there are no legitimately sold products
18 that make use of DCSS or unlicensed CSS playback
19 systems.

20 The DMCA Protections Against Circumvention
21 of CSS have been a vital part of the legal regime that
22 has supported CSS and the DVD video business.
23 Exemptions of the kind requested in this proceeding
24 are not necessary and would undermine the legal regime
25 that has worked so well for the benefit of consumers

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1 and the businesses that participate in the DVD
2 industries. As indicated, we will be happy to answer
3 any questions. Thank you.

4 REGISTER PETERS: Thank you. Mr. Attaway.

5 MR. ATTAWAY: Thank you. Once again, I'd
6 like to introduce my colleague, Kelly O'Connell, who
7 is going to set up a little demo for us. My message
8 here is very simple. The issue of fair use with
9 respect to audiovisual works that can legally be
10 displayed on a television screen simply does not
11 exist. There is no fair use issue. There are many
12 ways of exercising fair use without violating the DMCA
13 and hacking CSS. Ms. Benedetto just displayed one of
14 those and I think this is a great product. It
15 occurred to me, as she was demonstrating it, that this
16 is an example of an industry responding to marketplace
17 demand. We do it as motion picture producers. The
18 consumer electronics industry does it with respect to
19 equipment and consumer devices. If people simply
20 ignore the law and become free riders, equipment like
21 this isn't developed. The DMCA I think can be
22 credited for developing equipment like this that
23 provides greater opportunities for educators to do
24 their job. However, if this equipment is too
25 expensive or if disk shifting is too cumbersome,

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1 there's yet another way as Kelly will demonstrate. I
2 hope.

3 MS. O'DONNELL: This is just a tape that
4 I made off of a television at my office and it's just
5 clips of a movie that our intern picked out for us,
6 so.

7 MR. ATTAWAY: With what you just saw
8 directly from a DVD. Note this is the full 9 by 16
9 aspect ratio. It's not Panned and Scanned.

10 MS. O'DONNELL: That was my assistant
11 right there. He's pretty high tech. Okay.

12 REGISTER PETERS: Can you identify what
13 the camera is?

14 MS. O'DONNELL: This camera is a pan-in.
15 This is a Canon digital video camcorder, NTSCZR-85
16 model.

17 MR. ATTAWAY: That's Kelly's personal
18 camera and she would be the first to take issue with
19 Mr. Herman's suggestion that we in the media industry
20 are lavishly paid. I can assure you she is not. And
21 she can assure you as well.

22 REGISTER PETERS: I notice the telephone
23 book supporting ...

24 MR. ATTAWAY: This is a very inexpensive,
25 relatively low-tech way of producing film clips.

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1 These movies that you saw clips of just happened to be
2 in the library of our current legal intern and he came
3 in last Friday and we did this - or I should say, he
4 and Kelly did this - in just a very few minutes. The
5 point is, and I'll say it yet one more time, there
6 simply is no issue of fair use for educational
7 purposes or any other purpose with respect to
8 audiovisual material that can be legally displayed on
9 a television screen.

10 And, finally, I just want to quote from
11 the Second Circuit Court of Appeals in Universal
12 Studios, Inc. v. Corley. I'm sure you've heard this
13 hundreds of times before, but I think it bears
14 repeating. I quote, "We know of no authority for the
15 proposition that fair use, as protected by the
16 copyright act, much less the Constitution, guarantees
17 copying by the optimum method or in the identical
18 format of the original. The DMCA does not impose even
19 an arguable limitation on the opportunity to make a
20 variety of traditional fair uses of DVD movies, such
21 as recording portions of the video images and sounds
22 on film or tape by pointing a camera, a camcorder, or
23 a microphone at a monitor as it displays the DVD
24 movie. The fact that the resulting copy will not be
25 as perfect or as manipulable as a digital copy

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1 obtained by having direct access to the DVD movie in
2 its original form, provides no basis for a claim of
3 unconstitutional limitation of fair use. Fair use has
4 never been held to be a guarantee of access to
5 copyrighted material in order to copy it by the fair
6 user's preferred technique or in a format of the
7 original." And end of presentation. Thank you very
8 much.

9 REGISTER PETERS: Thank you. Mr.
10 Metalitz, you asked to have the opportunity to end.

11 MR. METALITZ: I think in view of the
12 testimony we've heard, I'd be glad to yield whatever
13 time remains and go directly to questions.

14 REGISTER PETERS: Before we go directly to
15 questions, however, we learned from last from last
16 Friday morning, it is probably a good idea to take a
17 short break so that people can do whatever they need
18 to do. So we will resume in, what, ten minutes.

19
20 A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

21 11:08 a.m.

22 REGISTER PETERS: We're going to start
23 the questioning with Rob Kasunic, and then we're going
24 to go to Mr. Sigall and Mr. Carson, and then me, and
25 then Mr. Tepp.

1 LEGAL ADVISOR KASUNIC: Thank you. First,
2 I'd like to just start where we sort of left off with
3 the - Ms. Benedetto, can you walk me through how the
4 bar codes are created? I was not real clear on that.
5 How is that generated?

6 MS. BENEDETTO: Sure. I don't have my
7 computer set up with the software now, but this is a
8 disk, that I'm holding in my hand, that contains
9 software called DVD Bar and Coder, that Pioneer
10 created, that we give to educators, where it's on both
11 MAC OS and Windows OS. And basically what the - there
12 are a number of different ways that you can use this
13 software to create bar codes. The easiest way is that
14 there's also a cable that can connect to this
15 particular player and you can control the player
16 through the software, scanning to or putting in a frame
17 number, and getting the exact location that you want,
18 simply hitting a button on the screen on the software
19 that says, "Get that frame number." And it takes it
20 and puts it in its appropriate location, and then you
21 move through the video and you say, that's my end
22 frame, that's what I want, let me rehearse that clip,
23 and the computer software now is controlling your
24 player, say, that's exactly what I want, make the bar
25 code, and the software will actually generate a bar

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1 code. You can then take that bar code - you can see
2 this - this is a printed document which is actually a
3 Microsoft Word document. You can actually take that
4 bar code and cut and paste it into your Word document
5 so that, as an instructor, you can say, okay, here's
6 the bar code and you can label it. The scene, title -
7 and what the instructor has done here is asked the
8 student to name the characters, the setting, the
9 context, etcetera. So it's a piece of software that
10 does -- you don't need to know anything technological
11 about bar codes and how they're made, you just need to
12 know what your in- and out-frame numbers are. Or, you
13 don't even need to know the frame numbers. You can
14 connect the computer that's running the software to
15 the player and say, "Oh that's where I want to start,"
16 hit click, and that information will be sent from the
17 player to the computer, software, and it's already in
18 the software program. So, does that help?

19 LEGAL ADVISOR KASUNIC: Yes. And, what
20 would be your estimate of how long it would take to
21 create, for instance, that page that you just showed
22 of the bar codes?

23 MS. BENEDETTO: I actually think that the
24 selecting and creating this page is not so long. I
25 think the time is spent in identifying the clips that

1 you want to be able to show, which is obviously the
2 time that the teacher/professor needs to spend, in any
3 event, to be able to identify what sections they want
4 to show.

5 LEGAL ADVISOR KASUNIC: But, if the
6 teacher had in mind a certain group of selections that
7 they want to do, how long would it take them to create
8 that?

9 MS. BENEDETTO: I would say this
10 particular sheet, and the woman that I know who
11 created this, probably a half an hour to 45 minutes.
12 These are the 12 clips that she created for the quiz
13 for the students.

14 LEGAL ADVISOR KASUNIC: And now, in order
15 to create that, you would have - you would just need
16 the software and, would you need that DVD player, the
17 Pioneer, in order to create it and to show it then?

18 MS. BENEDETTO: Yes. No. You don't need
19 it - you don't need this particular DVD player to
20 create it. There are some features of the software
21 that facilitate the creation of the bar codes with
22 using this player. And that allows the computer and
23 the player to talk to each other. But if you didn't
24 have this player, you could just simply have your
25 software on your computer and watch the disk on any

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1 DVD player, and say, okay, that's my in-point, that's
2 my out-point, and label that in the software.

3 LEGAL ADVISOR KASUNIC: Label it by frame
4 numbers and time code --

5 MS. BENEDETTO: Or time code or chapter.
6 Yes.

7 LEGAL ADVISOR KASUNIC: And so that would
8 then take longer, you're saying, because this would -
9 if you had that player, it would facilitate, meaning
10 it would --

11 MS. BENEDETTO: Yes. Yes.

12 LEGAL ADVISOR KASUNIC: -- speed the
13 process up. What is the cost of everything together,
14 the bar code reader, the player and the software?

15 MS. BENEDETTO: The player's list price is
16 \$375.00, the bar code reader list price is \$100.00,
17 and as I mentioned, the software is something that we
18 will give to educators.

19 LEGAL ADVISOR KASUNIC: You will send that
20 directly --

21 MS. BENEDETTO: We will send - yes.

22 LEGAL ADVISOR KASUNIC: -- to them. So
23 they have to request that independently.

24 MS BENEDETTO: Yes. Yes. And usually, we
25 don't sell directly to educators. We work through

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1 educational dealers that sell our products. So, that
2 of course, is ordered through the dealership.

3 LEGAL ADVISOR KASUNIC: Thank you.

4 MR. TURNBULL: If I can just note as well,
5 the prices that were given were the list prices, and
6 when you're going through a dealer or a retailer, or
7 whatever, obviously they can do whatever they do with
8 those prices.

9 MS. BENEDETTO: Exactly.

10 LEGAL ADVISOR KASUNIC: For the record,
11 we'll go with the list price for now. Professor
12 Decherney, aside from the issues of costs, why isn't
13 the Pioneer player a sufficient means to accomplish
14 your pedagogical purposes? Is switching the disks and
15 that startup sequence that we saw with copyright
16 notice still a problem in that situation?

17 Professor Decherney: Yes. I'm actually
18 of the opinion that I'm willing to put any amount of
19 time into making my classes effective, and the cost
20 issue is significant, as you know, for universities
21 with small budgets. But, the much more serious issue
22 is the effectiveness of teaching in the classroom.
23 We're trying to keep the attention of 19-year-olds,
24 who have cell phones with SMS technology, you know, at
25 the ready, and so, being able to teach quickly and

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1 effectively to move between clips quickly is
2 significant.

3 I mean, you saw the difference a 30 second
4 delay could make. It was -- someone else timed it --
5 but a one to two minute delay between disks here, in
6 which, you know, you have to go through the FBI
7 warning and the corporate logos, in addition to having
8 to then find the clip. And so if you're using more
9 than one disk, it's not terribly effective. But even
10 more than that, you can't compare clips, show them on
11 the screen at the same time. You know, there's
12 certain kinds of manipulation label things, as the
13 same way you could with a digitally made clip. So, I
14 think this would be a significant detriment to the
15 effectiveness of teaching.

16 But it's actually -- I'm very heartened to
17 see that the technology is there and I would hope that
18 continuing to work with educators working with
19 Pioneer, that maybe in a few years -- I don't know how
20 long it would take -- that this technology would be
21 there. And, so a three-year exemption would be able
22 to buy educators enough time until the technology
23 caught up with their needs.

24 LEGAL ADVISOR KASUNIC: Now, how important
25 is the digital quality in all aspects of clips that

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1 you use within the classroom? I can understand that
2 there may be certain situations where quality is very
3 important, but I would imagine, in other situations,
4 it may be less important. Can you comment on that?

5 PROFESSOR DECHERNEY: Yes. If you were
6 teaching, maybe, the plot of a film, or if you're
7 using film as an example of a historical period, then
8 quality might not be an issue. But in media studies
9 classes, where generally film is taught as an
10 aesthetic object as well as an industrially created
11 object, the quality is absolutely essential. We're
12 looking at the image and that's what's being studied.
13 It would be like studying a text that was fuzzy and
14 hard to read. Or which had been damaged in some way.
15 And so, the clarity of the image is ultimately
16 extremely important and, I mean, essential.

17 LEGAL ADVISOR KASUNIC: And, could you
18 also comment on the images we saw that were taken by
19 means of the screen capture, and what was the
20 usefulness of those particular types of images?

21 PROFESSOR DECHERNEY: Yes. I mean, they
22 were terrible. If anyone - If I found that anyone,
23 any film educator was using those clips, I think
24 they're card should be revoked. They're an example of
25 something, and if I were teaching, maybe the kinds of

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1 pirated DVDs and tapes that are distributed widely,
2 that would be a good example - of kind of camcorder
3 examples that exists. But there was tremendous
4 problems with the image. It's transformed by being
5 moved to a new media, so there was a lot of
6 pixelation, it was a flatter image, the color,
7 especially in Snatch was dramatically altered. The
8 sound in all of them was very different -- there was
9 a humming in room sound. Contrast was different.
10 There was actually glare from the screen that you can
11 see in the upper lefthand corner, and there was
12 actually re-framing in some of the shots, so even
13 though we did have the widescreen film in one example
14 -- in The Third Man, there was a hat in the right side
15 was actually cut off a little bit. So, there's a
16 dramatic change and a student will have to analyze
17 that in a different way than they would analyze the
18 DVD copy because they're different objects.

19 LEGAL ADVISOR KASUNIC: Now, why haven't
20 you contact the DVD Copy Control Association or Warner
21 Brothers or anyone else to obtain permission to
22 circumvent?

23 PROFESSOR DECHERNEY: Yes. The whole
24 question of licensing, I think, is interesting. I
25 actually believe that this is a - that classroom use

1 is a fair use of clips, and moving from fair use to
2 licensing agreements would be a dramatic change in the
3 way that, actually, the universities work. So this
4 seems beyond the scope of the hearing, but it's
5 something interesting to talk about. In - I have had
6 a student look into the Warner Brothers licenses for
7 past month but hasn't gotten very far. He hasn't even
8 been able to get an agreement for one clip. We do
9 have one colleague who did this to create a DVD for
10 educational use that was only about four or five
11 minutes long, and he actually cleared every clip and
12 it cost -- his name is Joseph Turow - and this is
13 going to be used in a number of classes, not just his
14 own - but it cost in the tens of thousands of dollars
15 for one four or five minute clip compilation.

16 LEGAL ADVISOR KASUNIC: Ms. Aistars, in
17 your reply comment on behalf of Time Warner, you state
18 that Time Warner is utilizing technological protection
19 measures in ways that are responsive to legitimate
20 consumer expectations, and that the development of the
21 Advanced Access Content System, intended to be used
22 with the next generation of optical disks, might
23 enable an educator who wishes to make a clip
24 compilation for use in a media class, to obtain
25 authorization to make several short recordings of

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1 clips. What does that mean? Does it mean that Time
2 Warner accepts clip compilations for pedagogical
3 purposes is a reasonable expectation and, if so, why
4 would an educator need to obtain authorization? Is
5 this authorization for circumvention or what?

6 MS. AISTARS: Yes. Let me explain a bit
7 further. I think what I was referring to was the
8 capability of the Advanced Access Content System,
9 which will allow the making of, what's referred to as,
10 a managed copy within the user's device. At present
11 the concept is that every content participant that
12 signs up to use the technology to protect their works
13 would be bound to extend an offer to a consumer to
14 make an entire copy, full-quality resolution of any
15 disk that's protected by AACCS. And my comment was
16 intended to suggest that certainly if you can make a
17 full managed copy, the technology could also
18 accommodate the making of clips if that was something
19 that was desirable.

20 So, if instead of making - if instead of
21 relying on a technology like the Pioneer technology
22 that allows you to, you know, navigate the disk using
23 the bar coder, you felt that you needed to make an
24 actual copy of the work to use it in your classroom
25 presentation, the AACCS technology can accommodate that

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1 sort of copying in a secure fashion.

2 LEGAL ADVISOR KASUNIC: Now, how far along
3 is the AACCS system?

4 MS. AISTARS: It is currently being
5 licensed both to content participants and to adopters.
6 The licenses are available on the AACCS website. This
7 is, I guess, the, what, a month or so since adopters
8 have started signing up for technology licenses.

9 LEGAL ADVISOR KASUNIC: Okay. Well, let
10 me switch gears for a minute and just get to the
11 nature of the use that is at issue in these proposals.
12 After six years of dealing with CSS and this rule
13 making process, it's fairly settled that CSS is a
14 technological protection measure that protects access.
15 But what about this specific use? Do any opponents of
16 the exemption, and I would actually ask more
17 pointedly, possibly Mr. Metalitz because there seemed
18 to be some indication in your reply comment that there
19 was a question about the non-infringing nature of this
20 specific type of use.

21 But, generally do any opponents of the
22 proposed exemption question the non-infringing nature
23 of making excerpts of motion pictures for pedagogical
24 purposes in film and media classes? Is this not
25 paradigmatic fair use? A single copy, not multiple

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1 copies as in the preamble of Section 107 of a small
2 portion of the work solely for purposes of the display
3 that would be authorized by Section 110. What is the
4 opponent's view on this particular type of use?

5 MR. METALITZ: I think we've been
6 operating from the assumption that many of the uses
7 that are being talked about here by Professor
8 Decherney are non-infringing uses. Certainly, the
9 performance in the classroom, 110 would apply. The
10 issue we raised in our reply comments was that, of
11 course, that doesn't have to do with the reproduction
12 right, and it's a separate question whether
13 reproductions of portions of motion pictures would
14 constitute fair use or fall within any other
15 exemption. But - so you can't give a blanket answer -
16 it all turns on the application of the fair use
17 factor. But certainly a lot of the kinds of things
18 we've been seeing and talking about there would
19 probably fall within fair use as far as the
20 reproduction is concerned.

21 LEGAL ADVISOR KASUNIC: So every one is in
22 agreement with that.

23 MR. TURNBULL: I think the concern that we
24 have is less the fair use of the types of proposals
25 that have been made, but a combination of the -- if

1 there were an exemption permitted here, the
2 legitimization of the DCSS technology and the
3 potential for misuse of an exemption that permitted
4 the use of that technology. And that's why our
5 proposals were to say that there are a variety of
6 other ways of accomplishing the same basic purpose.
7 And I did also make clear that when I was talking
8 about getting a license from DVD/CCA as a possible
9 alternative to some of this, that that's not a license
10 for the clips, that's a license to permit the use of
11 the CSS technology in a way that is not now permitted.
12 To decrypt the content and then have, in some
13 protected manner, a mini DRM or whatever, so that when
14 you actually make the copies in the technology that
15 you use to make the clip copies is not the sort of
16 general DCSS, which can then be used to make a copy of
17 the entire work. I mean, there are various
18 technologies - and that's, I think, what Ms. Aistars
19 was referring to as well - that could be used to
20 permit clip copies in a, what we'd describe as a
21 protected manner.

22 MS. AISTARS: I can comment from the
23 Warner Brothers perspective that typically when we're
24 approached by an educator seeking the permission to use
25 a clip, our response is typically this falls within

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1 the classroom exception and you don't need our
2 permission to use this clip, but here's a letter
3 anyway, so.

4 LEGAL ADVISOR KASUNIC: Well, let me
5 return for a minute to the concern that you mentioned,
6 Mr. Turnbull, about the ramifications were this
7 exemption to issue. Given the present easy access to
8 DCSS, and I, you know, just yesterday, in thinking
9 about this, did again a quick Google search and came
10 up with pages and pages and pages of links to
11 locations for DCSS. One of which I remember from -
12 has been up for - Gallery for DCSS Descramblers at
13 David Touretzky's site - and a number of others that
14 just linked directly to DCSS or a host of other
15 similar variations. And also then looking at other
16 sites, for instance, and this actually refers back to
17 something that Ms. Aistars mentioned about the
18 unseemly nature of places where you might be able to
19 purchase some of this material.- Went to one site
20 that was, it's called Top Ten Reviews, and it lists a
21 review of a number of different types of software,
22 gives you the prices up top, and then has a
23 interesting little feature. Along with all the other
24 few pages of features that are offered here and what
25 compatibilities -- and the printout did not print out

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1 the checkmarks that were on the screen -- but there's
2 also a subcategory for CSS decryption. Copy
3 protection removal built in? the question asks. And
4 then after going through each of these, it lists
5 whether -- in each particular case -- whether the CSS
6 hack is either built in, which it defines as the CSS
7 decrypter -- copy protection removal is included as a
8 feature in the application. There are no additional
9 downloads, installations, or executables necessary.
10 And that's listed as best. Integrated, which is
11 listed as good, the software provides an easy link to
12 an external CSS decrypter -- copy protection removal
13 -- which you must first download and install. After
14 installation the decrypter works in the background and
15 is invisible. The process to copy a DVD, including
16 the decryption, is started and finished with the DVD
17 copying software.

18 And then the last feature, which some of
19 the software listed have is that it's separate, and
20 that's categorized as fair. And you must first find,
21 download, and install an external CSS decrypter, then,
22 depending on which decrypter you use, there may be
23 additional steps that you must complete for each DVD
24 before you use the DVD copying software to compress,
25 and/or burn your copy. So this particular site, if

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1 someone were to stumble upon this, which they could
2 fairly easily, doesn't really look like a hacking
3 site, it looks like a standard commercial site and I
4 would think that many consumers might not -- who were
5 not well versed in the subtleties of Section 1201 --
6 might not be aware of what they are doing.

7 So, given the easy access to DCSS and a
8 multitude of other tools to decrypt CSS that are
9 readily available online, how would an exemption for
10 a socially beneficial purpose adversely affect the
11 market for, or value of, motion pictures?

12 MR. ATTAWAY: May I respond to that?

13 LEGAL ADVISOR KASUNIC: Please.

14 MR. ATTAWAY: You've hit on exactly why we
15 are all here. None of this on this side of the table
16 have any intention or desire to prevent the fair uses
17 of material on DVDs for educational purposes. We're
18 here to maintain the DMCA Prohibition Against
19 Circumvention because most people are honest and they
20 don't want to violate the law. I find it disturbing
21 that so many people, so many responses to Mr. Herman's
22 survey said that they break the law, that they're
23 above the law. It doesn't say very good things about
24 the people who are teaching our children. But most
25 people don't want to break the law.

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1 Once you start creating exceptions to the
2 Prohibition Against Circulation, that line becomes
3 very fuzzy. You create confusion. Okay. Well, it's
4 okay to circumvent for some purposes but not others.
5 What are those purposes? Then we have a real problem.
6 We're here to maintain the simple proposition that it
7 is illegal to circumvent and there is no need for
8 educational purposes or any other purpose to have to
9 circumvent to exercise fair use.

10 MR. TURNBULL: Two things. One is that I
11 think these sites -- and you didn't identify them
12 exactly -- but I would be very surprised if any of
13 those sites would be recognized as retail, either
14 online or brick and mortar, kind of retail stores that
15 consumers are used to buying legitimate products in.
16 And that, as I've said earlier, so far as we know,
17 there a no such, sort of, known retail sites or
18 retails stores that sell products that are in
19 violation of the CSS license agreement.

20 The second thing is, imagine if you will,
21 that the sites that you looked at all of a sudden say,
22 "As authorized by the copyright office to permit
23 teaching. This is a teaching tool." For years and
24 years and years, the Macrovision stripper products
25 that were sold, before the DMCA went through and

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1 prohibited them directly, we sold as image
2 stabilization products. Now, they didn't stabilize
3 the image on your television, they stabilized the
4 image on the copy that you made from the VHS tape that
5 was encoded with Macrovision. And I would say that
6 the concern we have is that you would have the same
7 thing -- it would be a teaching tool -- for the making
8 of clips for classroom use. And there would be
9 disclaimers and all kinds of wonderful things, but it
10 would say 'as authorized by the copyright office.'

11 And we would much prefer to deal with
12 individual situations that, first of all, the Pioneer
13 player, for lots of purposes, the camcorder that Fritz
14 showed, work very well for lots of purposes. Where
15 those don't work well enough, where there are other
16 needs, let's deal with them on a particular case basis
17 and we're happy, as DVD/CCA to work with people to
18 enable that without having a broad exemption that
19 would have the effect that I talked about.

20 LEGAL ADVISOR KASUNIC: But doesn't a
21 bright line rule that doesn't -- that just says all
22 circumvention is bad, illegal. That provides clarity,
23 but it doesn't provide any subtlety. I mean, how can
24 we -- how can -- misinformation is something that is
25 going to exist no matter what happens. We're seeing

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1 that all the time with Section 117 and what people
2 claim you can do about backup copies and of whatever.
3 That's reality, and misinformation on the Internet is
4 not a great surprise.

5 But, the point here being that CSS
6 decryption tools are readily available on -- and also
7 have to note that the DVD market seems to continue to
8 be strong -- how would an exemption that would allow
9 honest people to make non-infringing uses cause any
10 harm if -- infringers can currently infringe and then
11 violate the prohibition with ease, but law abiding
12 educators or citizens, well, in this context,
13 educators, are being constrained in uses, that it
14 seems to be agreed, is non-infringing. Isn't this
15 really an intolerable result that adversely affects
16 the legitimacy of copyright in the eyes of the public?

17 MR. ATTAWAY: I don't hear anyone saying
18 that legitimate uses are being constrained. Unless
19 you think the Second Circuit was wrong, the Second
20 Circuit set forth the law on fair use and, to quote
21 again, "Fair use has never been held to be a guarantee
22 of access to copyrighted material in order to copy it
23 by the fair user's preferred techniques, or in the
24 format of the original." If you don't agree with
25 that, well then we have a different discussion. But,

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1 I think we're here talking about the law as it is
2 today.

3 MR. METALITZ: This whole argument that
4 because DCSS is widely available, this kind of
5 justifies or broads the basis for an exemption, is
6 kind of a curious one to me because it's basically --
7 I mean, we've already heard the testimony from the
8 DVD/CCA and from, we've heard it in the past from the
9 copyright owners that they have pursued people -- and
10 the whole Corley case was about someone who was
11 purveying DCSS. We've heard about other cases. We've
12 heard from Mr. Turnbull that when people put out
13 products that are not licensed or non-compliant,
14 DVD/CCA and/or the right-holders pursue that and are
15 either voluntarily or necessary, they initiate
16 litigation to bring that to a halt or to bring them
17 into compliance or require them to get a license.

18 So, I think that the argument kind of
19 boils down to, I guess, boils down to, yes, we
20 understand that the right-holders and, in this case,
21 the proprietors of the technology have tried to stop
22 this, but we still think they've done a good enough
23 job, and, therefore, we're going to hold that against
24 them in terms of whether an exemption would be given
25 the imprimatur of the copyright office, the Librarian

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1 of Congress, and the law in this area. And I think
2 Mr. Turnbull's absolutely right about how that would
3 be portrayed to the public.

4 But I think the more fundamental point is,
5 I don't think that the availability of an exemption
6 ought to turn on someone's critique of how well or how
7 poorly right-holders and the proprietors have
8 succeeded in enforcing their rights, and in preventing
9 the non-licensed, noncompliant products from getting
10 to the market. Of course they haven't totally
11 succeeded. They've had to make decisions about
12 resources and what's the best way to proceed, and
13 those decisions certainly could be debated and
14 discussed about whether they were the right decisions,
15 but they have in no way abandoned the effort to do
16 this. And, the fact that they have not totally
17 succeeded in keeping these items out of the
18 marketplace, they have, I think to a great extent,
19 succeeded in keeping them out of the most
20 conventional, legitimate parts of the marketplace, at
21 least in the United States, and I think that that's a
22 rational way to kind of prioritize enforcement here.
23 But the fact that they haven't succeeded in the
24 Internet at large, I don't think should be held
25 against them.

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1 LEGAL ADVISOR KASUNIC: But would the
2 misinformation that would occur as a result of an
3 exemption change that situation? I mean, would we see
4 Best Buy and other stores selling this software now
5 with that disclaimer on it or would we only see that
6 where we see it now, the misinformation now, in the
7 Internet context?

8 MR. METALITZ: Well, I don't -- I hope
9 that we wouldn't see it in the Best Buys of the world,
10 and I think that DVD/CCA and the right-holders would
11 try to make sure that that didn't happen. But I think
12 it would be significant if the copyright were to say,
13 in effect, yes, you can use DCSS for -- under certain
14 circumstances.

15 MR. BAND: If I could just respond to a
16 couple of these different arguments. First of all,
17 there's no -- no one on this side is arguing that the
18 reason an exemption should be given is because DCSS is
19 available. I mean, the reason exemptions should be
20 given is because these people want to engage in a
21 legitimate activity and are being prevented by the
22 DMCA from doing so. So that is the basis.

23 Now, when we then go drill down further
24 and talk about some of the factors the copyright
25 office should consider -- and one of them is the

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1 effect of the circumvention of technological measures
2 on the market or the value for the copyrighted works
3 -- then we look at the real world. And when we say,
4 okay, now we've talked about the legal basis, we've
5 talked about the theory, now let's talk about the real
6 world, the real world in that context, the
7 availability of DCSS is relevant because the point is
8 this will have zero impact on the market for, or value
9 of, copyrighted works because, you know, they're not
10 going to engage in any kind of infringing conduct and
11 it's not like they're going to be developing new
12 technologies that will somehow escape and be used by
13 others and so forth. So that's -- it's only relevant
14 to the extent that we're talking about factor ruminant
15 four here in the statutory factor.

16 The other thing in terms of bright lines,
17 I must say I find Mr. Attaway's argument a little
18 bizarre that in terms that he wants people -- is he
19 saying that he wants to encourage people to start
20 camcording off of plasma TVs? I mean, the notion that
21 that's an encouraged behavior really seems very odd
22 given the position the MPAA has taken and the statutes
23 that they've tried to enact at the state levels and
24 have succeeded in enacting at the federal level
25 against camcording. And talk about sending a

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1 confusing message to consumers, to basically say, yes,
2 it's okay to camcord off of the TV for a classroom use
3 but not okay to camcord off of a TV if you want to
4 share it with your friends. I just think it's very
5 odd.

6 I -- it would seem to me that it would be
7 much more effective in terms of sort of setting bright
8 lines as rather than relying on this vague notion of
9 people understanding when they should camcord off of,
10 you know, Hi Def TVs and when they shouldn't, that
11 instead you all come up with a very clear exemption
12 under the circumstances under which people can do the
13 right thing -- people want to do the right thing --
14 that would be a much better way to have bright lines,
15 rather than letting people camcord or basically, you
16 know, having all of the urban legends that go around
17 on the Internet about when you're allowed to use DCSS,
18 when you're not.

19 It just seems, in terms of the messages
20 that are being sent, it would seem that the clearest
21 message would be for you to have an exemption that
22 allows people to engage in an activity that everyone
23 sort of acknowledges as lawful.

24 MR. ATTAWAY: Just for the record, I would
25 like to ask Mr. Band to support his statement that

1 MPAA or any member company has ever said that people
2 should not be allowed to camcord off of televisions.

3 MR. TURNBULL: Could I just add one point?
4 We focused here and, from the standpoint of my client,
5 that is the focus on CSS. The requested exemption is
6 actually not a CSS exemption as I read it, it is an
7 exemption for all forms of technological protection
8 measures that don't permit the making of clips. And
9 so, to the extent that AACS in its initial form would
10 not allow that this would be an invitation to the
11 hacking of AACS under the guise of somebody doing it
12 legitimately for an exempted purpose -- the superaudio
13 CD was sited here as well, as there's a technology
14 that protects it. So while we focused on CSS and,
15 again, from my client's standpoint, that is the focus,
16 the exemption is much larger and there are not
17 existing hack tools available for these other
18 technologies that I'm aware of.

19 LEGAL ADVISOR KASUNIC: If I could switch
20 gears for a minute and, Mr. Metalitz, you
21 characterized Mr. Decherney and the Library Copyright
22 Association's proposals as use-based exemption
23 proposals, and state that this proceeding is without
24 authority to recognize such an exemption. How do you
25 harmonize your view with the mandatory factors the

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1 Librarian must examine, three of which require
2 examination of the effect of the prohibition on use,
3 and two of which focus on particular types of use,
4 including education, criticism, comment, teaching,
5 scholarship, and research. Isn't the use at issue
6 here central to the Librarian's requisite inquiry?

7 MR. METALITZ: Well those -- certainly
8 those are appropriate factors to be looked at as
9 Congress directed, but I was referring to the decision
10 that the Register made and the Librarian supported in
11 the past two rule makings, that you can't define a
12 particular class of work primarily by -- on the basis
13 of what use is being made or what users are making
14 them. This is really more of a user-based as well as
15 use-based. Professor Decherney is not seeking an
16 exemption for everybody, he's seeking an exemption for
17 educators or people that are making uses in an
18 educational environment.

19 So, the point that we were making in the
20 reply comments is that this is a approach that the
21 Register and the Librarian have consistently rejected
22 as inconsistent with the statute, even though the
23 statute does direct this proceeding to look at
24 particular kinds of uses. And that's certainly the
25 appropriate inquiry. That's why we're trying to

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1 explain that the non-infringing use that's being
2 talked about here can still be made without
3 circumvention in a variety of ways, and perhaps there
4 will be even more ways in the future as we move into
5 new forms of technological protection measures that
6 may have some different rules that apply to them. But
7 even today, the non-infringing uses that the
8 educators wish to make can readily be made without
9 circumvention and, therefore, the class that consists
10 of audiovisual works protected by measures that don't
11 allow these uses, I would submit doesn't exist.

12 LEGAL ADVISOR KASUNIC: Well, to what
13 extent is the office's interpretation of the term
14 "class of works" a source of the problem? If a class
15 could be defined in relation to a specific type of
16 use, or relation to a specific user, wouldn't we be
17 able to define a class in a much more refined manner
18 in this situation? Wouldn't use or user-based class
19 limit the unintended or adverse consequences of an
20 exemption?

21 MR. METALITZ: Well this is -- I think you
22 characterized this as a problem. I'm not sure it's a
23 problem that the office is consistently interpreted
24 the statute this way. But, of course, the office
25 could change it's interpretation or the Librarian

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1 could change his interpretation if it. I think one of
2 the problems that you see with moving into a use-based
3 approach is really exemplified by the case that we
4 have here, where there is a widespread concern, as
5 you've heard, that legitimizing the use of DCSS, even
6 for some purposes, is sending a very unhelpful message
7 and a contrary message that will be basically read by
8 the public as much broader than what the office
9 intends.

10 One of the advantages of the approach that
11 Congress asked the Register and the Librarian, at
12 least Congress asked that, if your prior
13 interpretations of the statute are correct, is that it
14 helps to minimize that problem by focusing on the
15 nature of the work and perhaps on the type of control
16 that's applied to it, rather than on certain
17 categories of users, certain categories of uses. And
18 I think that this is particularly difficult when you
19 talk about fair use, which is really what we're
20 talking about here in terms of the reproduction --
21 again, not in terms of the display and the performance
22 in the classroom, but in terms of the reproduction,
23 it's fair use that's being talked about here. And,
24 therefore, it's particularly difficult to spell out
25 what category of user is eligible to exercise this.

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1 Certainly anybody -- uses by any person could be fair
2 use under the appropriate circumstances.

3 So that's particularly true, I think, of
4 Mr. Herman's proposal. But even of Mr. Decherney's
5 proposal, the problem comes more if you change the
6 interpretation that you've consistently made, rather
7 than if you maintain it.

8 LEGAL ADVISOR KASUNIC: Is there any
9 difference, though, where fair use generally as a use-
10 based class may be a problem when there's a much more
11 specified type of use? Does that change the
12 situation, I mean, and avoid some of those problems?
13 You said anyone could claim fair use. Well, if you
14 define the specific type of fair use that you are
15 intending to allow, aren't you minimizing that
16 concern?

17 MR. METALITZ: Again, let me look again at
18 the approach you have taken in this consistently over
19 the past six years. Look at the exemption that was
20 granted to the Internet Archive. Theirs was not based
21 primarily -- they did reference fair use -- but
22 basically, they were making a Section 108 argument as
23 to the types of uses they wished to make. And, in
24 that circumstance, at least it's a somewhat defined
25 category of entities that could take advantage of it.

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1 And even so, you were very reluctant to
2 grant -- and decided not to grant the exemption that
3 they wanted or they originally asked for, because you
4 said we can't define it by use or by the class of
5 user. Even though, in that case, you could define the
6 class of user much more definitively than you could
7 perhaps in the Section 107 example. You instead
8 fashioned it in a way that you felt did meet the
9 requisites of the statute and it would, to at least
10 some extent, satisfy the concerns of the Internet
11 Archive.

12 So I think, particularly with Section 107
13 -- but even when it's not a Section 107 issue, you've
14 consistently taken the approach of not defining it
15 based on use, and I think that's been a good
16 interpretation of the statute. Obviously, if you are
17 planning to change that interpretation, you know, the
18 analysis might be somewhat different. But, we've been
19 operating on the assumption that, of course, it's the
20 proponent's obligation to persuade you why you should
21 change your interpretation, and I haven't heard
22 anything that would -- I guess, that's really the
23 question that would be before you on this.

24 PROFESSOR DECHERNEY: I actually think
25 that there will be advantages to a use or user-based

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1 exemption, but I don't think that's what we proposed.
2 I think we've stayed within the limits of the -- we
3 thought very hard about this, and I think we have
4 proposed something that's really a class of works.
5 And, what's really been difficult here is to try to
6 separate consumers from educators. Actually, many of
7 the things that we've been discussing are applied to
8 consumers, but are not necessarily to educators.

9 I'm not even sure that the Second Circuit
10 decision that Mr. Attaway keeps referring to is
11 specifically for educators. It may only apply to
12 consumers. But I'm not a lawyer. And, so the kind of
13 -- our first exemption that we proposed is really
14 specifically about keeping basically this kind of
15 copying within an educational sphere. We -- it's a
16 proposal for a very specific kind of library within a
17 very specific type of department within an educational
18 institution. Libraries and educational institutions
19 have always had, you know, a wider -- are always been
20 looked on as special cases, especially more thinking
21 about fair use. So I didn't know what a class of
22 works was when I first came to thinking about this.

23 And so, the only thing I have to go on is
24 the current exemptions. All the exemptions modify a
25 certain category in some way. So, when is about the

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1 way a dongle or obsolete technology modifies the way
2 that you can actually access certain video games and
3 some types of software. Sometimes it's about
4 functions that are turned off. Like audiobook
5 function, right? So these are all ways in which a
6 class of works or a category of works is actually
7 modified by something else. In every case, it's the
8 technology. In our case, it would be modified by an
9 institution, not a technology. It's a specific kind
10 of university library. I'm not sure that -- and so I
11 don't think this changes the interpretation of class
12 of works in any way. And it wouldn't open up a wider
13 category for more classes of works or new types of
14 classes of works. It would just be a new class of
15 works in exactly the same mode as the four current
16 exemptions that are exempt.

17 I would also add that there is a certain
18 bit of userness to all of the -- to the ways in which
19 all of the current exemptions have been considered.
20 The audiobook function is really specifically thinking
21 about the harm to blind readers. The Internet Archive
22 exemptions, as we're referring to them, are really
23 specifically about archivists. So this would be a
24 class of works in the way that all the other classes
25 are classes and exemptions, but this specific harm

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1 would be to a kind of user and use that I represent.

2 LEGAL ADVISOR KASUNIC: Okay. Let me
3 switch gears for a minute and look at the issue of use
4 in another way. CSS is a technological protection
5 measure that protects access, and I don't mean to pick
6 on CSS, but that's the main point at least in relation
7 to the specific facts that we have here. But the
8 purpose of the CSS systems is essentially to limit
9 copying. Access is the hook for the contractual copy
10 restrictions that are put on DVD players. But there's
11 no prohibition on the circumvention of technological
12 protection measures that protect Section 106 rights.
13 One could circumvent and -- this is actually might be
14 an initial question asked -- one could, if they could,
15 circumvent a DVD player's use restrictions without
16 violating 1201 in any way, right? Now, before I go
17 any further, is it possible to do that? Can I
18 circumvent -- my understanding is that DVD players do
19 not have a digital out on them.

20 MR. TURNBULL: No unprotected digital out.
21 Unencrypted.

22 LEGAL ADVISOR KASUNIC: No unprotected.
23 So, would there be a way to hack that feature?

24 MR. TURNBULL: I actually think it's
25 possible, I suppose, to take apart a DVD player and do

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1 something to hack that feature. I think the direct
2 answer to your question though I think is more apt in
3 the computer context, and actually a number of the
4 products that you probably found, I would guess work
5 this way, which is post decryption. What happens in
6 a computer, is that you put the disk in the drive, the
7 drive authenticates itself with the playback software,
8 the playback software then takes the content and
9 decrypts it from CSS and then, according to the rules
10 of the CSS license, it sends the content unencrypted
11 to the playback system and the display. The place
12 where the vulnerability is greatest of the system is
13 after the content has been decrypted and as it's being
14 carried through the computer to the display. And a
15 number of the products that you probably found are
16 called DVD rippers and they actually act on the
17 unencrypted strength.

18 LEGAL ADVISOR KASUNIC: That's part of the
19 analog hole, probably.

20 MR. TURNBULL: In this case, it's a
21 digital hole because the content is still in digital
22 form. After it's been decrypted, first of all, it may
23 be going to a digital computer display these days, and
24 so it may never get to analog until you see it. And,
25 secondly, it's likely converted to analog at a

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1 different place than the place where it is decrypted
2 from -- it's decrypted and then it's converted to
3 analog at a -- in different steps. I'm not
4 particularly advocating the use of these products, but
5 in answer to your question, yes, those products could
6 work and defeat the CSS overall system.

7 LEGAL ADVISOR KASUNIC: Okay. Then, so
8 it, setting aside the digital hole situation, where it
9 would just be an issue in terms of hacking protection
10 measure that was applied to the DVD player, the copy
11 control or the use control on that player. This whole
12 question, in such a case, would be whether the use of
13 the work after circumvention of this copy control is
14 infringing or non-infringing. It would be a simple
15 question of infringement. So, why should we consider
16 the uses, including infringing uses, that might occur
17 if an exemption is created?

18 By statutory design, technological
19 protection measures are -- technological protection of
20 access in Section 106 rights are distinct and treated
21 differently within the act. If CSS is an access
22 control, shouldn't our only concern be the harm that
23 will result from allowing access, not the harm that
24 will result from other uses of the works, such as
25 copying after access is achieved?

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1 MR. TURNBULL: I think the difficulty here
2 is dealing with the actual application of technology
3 within a framework that the Congress has established,
4 in that as you correctly point out, the ability to
5 access the work then allows you to do a variety of
6 things with the work, which the access control is
7 intended to prevent and/or to inhibit. And it seems
8 to me that the Congress -- CSS and the DMCA were sort
9 of developed in the same sort of time-frame, and that
10 CSS was, in fact -- and you can go back to some of the
11 legislative history -- was exactly the kind of thing
12 that the Congress was intending to protect.

13 And so the question of whether the
14 protection is for the purpose purely of accessing the
15 work so that you can see it or whether it actually --
16 the protection is against accessing the work for a
17 whole variety of downstream purposes, that then might
18 be enabled because you gained access to the work in an
19 authorized way. And I think that's how I would look
20 at that.

21 LEGAL ADVISOR KASUNIC: Okay.

22 REGISTER PETERS: Can I ask a question?

23 LEGAL ADVISOR KASUNIC: Of course.

24 REGISTER PETERS: I'm trying to get a
25 handle on the issue of access control. Somehow I

1 think I've lost it. In this instance, you actually do
2 have access to the work. You're problem is that you
3 want to go to a particular scene, so you're trying to
4 directly access a particular scene as opposed to
5 access the work in general?

6 PROFESSOR DECHERNEY: There might be a
7 number of ways of solving the problem. The problem is
8 how to use clips in this -- you know, quickly,
9 effectively, being able to compare them, and so, it's
10 possible that there were a device that would allow you
11 to do that, and then you would be able to access
12 multiple DVDs at the same time and go specific points,
13 and do it quickly. Right now, the best way to do it,
14 the only way that I know of, is to actually make
15 copies of segments of the work. And the only way to
16 make a copy of the segment of the work that I know of,
17 and to do it at a high quality, is to use some sort
18 decryption device software.

19 REGISTER PETERS: But when you're
20 decrypting, aren't you focusing on the copy control,
21 rather than the access control?

22 PROFESSOR DECHERNEY: Yes. But that's the
23 way, I mean, again --

24 REGISTER PETERS: Oh I know you're going
25 to talk about the mixed --

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1 MR. BAND: Yes. I think it's all, I mean,
2 it's all bundled together. I mean, and so the only
3 way to get to the -- the only way to get for your
4 computer to make the copy, or at least one way, I
5 mean, maybe there's other technologies now that allow
6 the copy to be made later on and don't really involve
7 decryption, but involve breaking into the stream
8 somewhere else, in which case that would be right,
9 that you don't need to circumvent the access control,
10 you're doing something else. And that software is
11 certainly unlawful under 1201(b), I would imagine, but
12 the act of using that software would not be unlawful,
13 you know, given the peculiarities of the drafting of
14 the DMCA. But, to the extent that we're not, you
15 know, we're not talking about using that 1201(b)
16 infringing software, to the extent we're talking about
17 something like DCSS -- the way that DCSS works is it
18 firsts decrypts it to make the copy because CSS
19 doesn't allow you to decrypt and make a copy.

20 PROFESSOR DECHERNEY: Is it a logical
21 possibility to make a copy without access? Wouldn't
22 access have to precede copying?

23 REGISTER PETERS: You really do have
24 access to the content on the DVD. I mean, you have an
25 authorized copy, you have a compliant player, and

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1 therefore, you do have access to "the work." So, I'm
2 still struggling a little bit with regard to the issue
3 of this being an access control problem. Yes.

4 MR. HERMAN: If I may. I'd like to ask
5 the office to imagine the scenario under which
6 somebody -- let's say take my iBook, and I -- let's
7 say I take my iBook's licensed DVD player software,
8 and I hack into it, and I reverse-engineer it so that
9 it still uses the DVD key -- the CCA key, the thing
10 embedded in the software, but now it will also spit
11 out clips of movies for me to use in a PowerPoint
12 presentation. Now I ask you to imagine this scenario
13 happening and to imagine me developing the software
14 and, as someone who is violating either and/or
15 1201(a)(2) or 1201(b), that the DVD/CCA and/or the
16 motion picture industry takes me to court over this
17 issue, because I've clearly violated the development
18 trafficking bans, right?

19 Now, I ask you to imagine the scenario
20 when they do so, and don't claim that using the
21 software also is a violation of 1201(a)(1). Imagine
22 that scenario. I have a lot of trouble imagining that
23 scenario, right? And I don't think that the motion
24 picture industry or the DVD/CCA would hold back from
25 making that claim in saying that, by hacking this

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1 software, I've eliminated my license, right? I
2 violated my license to use the licensing terms that
3 the CCA provides, and I've, therefore, also committed
4 a 1201(a)(1) infringement.

5 REGISTER PETERS: Okay. Let me just see
6 if I've got this right. Although -- the argument is
7 that the reproduction and the access control are
8 combined, and therefore, the real issue is that in
9 order to take advantage of the ability to copy what I
10 believe is a fair use, even though I have access to
11 the work itself, I have to crack it to enable the use.
12 Right? Okay.

13 PROFESSOR DECHERNEY: And all the other
14 existing methods for accessing the work don't meet the
15 educational standards, I would say. So, disk
16 switching for example, or the camcorder, right? Those
17 are other access models. But, since those are not
18 adequate, this is the only access control that's
19 needed then.

20 LEGAL ADVISOR KASUNIC: Although we do
21 have some evidence now that there's a possibility of
22 hacking it without circumventing -- that everybody has
23 access when they put it in an authorized DVD player.
24 So, lawful acts is not an issue. The question is, how
25 do you get past the contractual restrictions that the

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1 electronics manufacturers have agreed to and imposed
2 in their technology? How do you get to the ability to
3 reproduce and at least -- Mr. Turnbull said that it is
4 possible and there is no prohibition on the act of
5 circumventing, if someone could do it, of
6 circumventing that copy control.

7 MR. TURNBULL: I might indicate that the
8 CSS license requires its licensees to take measures to
9 make it difficult to do what we were talking about
10 before. And some of the measures that the individual
11 implementers may use, may themselves be technological
12 protection measures that would be subject to
13 circumvention rules. But, the CSS license itself and
14 CSS itself, by that time, is gone. Okay. So it might
15 be more complicated.

16 LEGAL ADVISOR KASUNIC: Well, let me turn
17 back to something you said, Mr. Turnbull, about in
18 terms of my question about should we consider the
19 adverse affects of uses as opposed to the adverse
20 affect of access, which, like we said, everyone has
21 access. So there isn't any adverse affect to the
22 access because we all, as long as we're not buying
23 illicit players, that we have access. Why should we
24 care about the use?

25 You mentioned that things that Congress

1 knew about and -- but one thing we see in the plain
2 language of the statute is that -- and pretty clearly
3 in the legislative history, is that there was concern
4 for distinction between circumvention of access
5 controls to which we have protection, and
6 circumvention of copy controls that were found to be
7 unnecessary. So why should we be concerned about the
8 uses in relation to the potential effects of uses?

9 MR. TURNBULL: I guess if -- the
10 proponents of the proposed exemption are the ones who
11 have sort of brought forth the uses that they want to
12 make, which are beyond access. And, so, on the one
13 hand you could look at that and say, no, what you're
14 really talking about is something that's not covered
15 by this proceeding because you do have access to the
16 work. And that would be a way of looking at that, and
17 I don't know that we would object to that if that's
18 where you came down and you denied the exemption on
19 the ground that it was asking for something that went
20 beyond access.

21 I think the intertwining of the access
22 technological protection measure with the sort of
23 rules that lie behind that, I mean, are the practical
24 effect of that's what's happened in the marketplace.
25 But, if you didn't want to see it that way and you

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1 want to divide it, then I think you would have a basis
2 for denying the exemption request, because it doesn't
3 seek access.

4 LEGAL ADVISOR KASUNIC: Okay. Let me --
5 I have one final question, then I'll turn it over to
6 my colleagues. Since we have a distinguished group of
7 1201 experts here with us today, I wonder if you can
8 help me with a problem that occurred after something
9 -- thinking about something that Mr. Metalitz -- an
10 argument he made in a previous hearing a week or so
11 ago. If an exception to the prohibition issues during
12 a three-year period, we have concluded that the record
13 is de novo in the next three-year period, but can this
14 be true in all cases? For example, if the Register
15 were to recommend an exemption in this case, would the
16 fact that new ways to purchase motion pictures became
17 available in the future that allowed copying clips
18 change the reality that libraries of works on DVDs
19 with CSS are being created now?

20 If the Library of Congress or if a
21 university library were to invest in a comprehensive
22 film archive in DVD format, would later formats have
23 any relevance to non-infringing uses of the format to
24 which they had invested in the DVDs? Would these
25 libraries be expected to re-purchase new copies of all

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1 of these works in order to get the benefits of less
2 restrictiveness on the particular copies such as that
3 suggested by, perhaps, the AACCS system for new optical
4 disks?

5 MR. TURNBULL: Yes. I can say two things.
6 One is that, again, the requested exemption would
7 apply to AACCS protection potentially here. And so the
8 four corners of what you would have exempted would
9 have covered the technology that's coming onto the
10 market with the added capabilities. And so I think
11 you need to think about that as well. The second
12 thing is that a number of the technologies that we're
13 talking about are not technologies that are inherent
14 to AACCS, it's simply that they're coming into the
15 market in the context of AACCS because it's a new
16 system and they're new ways to provide rules.

17 It is possible to apply many of those same
18 techniques to the existing CSS protected DVD. And so
19 some of those same techniques, for example, putting
20 the disk in a computer DVD tray and having a website
21 to go to to get authorization to do a particular thing
22 with that DVD, whether it's a clip or a full managed
23 copy or whatever, is something that could be done with
24 the existing CSS protected DVDs. And so the fact that
25 it sort of first arose in the context of AACCS doesn't

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1 mean that it's only applicable there. And, I would
2 say, that if you give an exemption, I would be
3 concerned that you would inhibit the development of
4 those kinds of new technologies.

5 MR. METALITZ: I think if you look at the
6 exemption that's requested here, it deals with copies
7 that are protected by technological measures that
8 prevent their educational use. Now, I think from what
9 we've heard today, I think the proponents equate that
10 with DVDs with CSS. I don't know if it applies
11 perhaps to something else, but I think they're
12 equating it to DVDs with CSS. Today, we have to look
13 at whether that in fact this description, protected by
14 technological measures that prevent they're
15 educational use, actually describes DVDs with CSS. We
16 would assert that it does not for several reasons. I
17 mean, we've demonstrated other ways to make
18 educational uses of DVDs that are protected by CSS.
19 Professor Decherney says they're not good enough and
20 I appreciate that.

21 The problem is that we're not dealing here
22 with what are the best standards as perhaps developed
23 by a group of educators in the field of media studies,
24 we're dealing with the concept of fair use. And as
25 we've heard a couple of times from Mr. Attaway, the

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1 Second Circuit, at least, in interpreting this, and I
2 think it does very much apply to anyone who is
3 claiming fair use, no just to consumers, has made it
4 clear that fair use doesn't require that you meet the
5 best standards, that you meet the best practices in a
6 particular professional organization.

7 So, the issue kind of is, is it good
8 enough, does it satisfy they're requirements of fair
9 use, does it satisfy the availability for use for non-
10 infringing purposes, which is what the statute asks
11 you to look at, or does it fall short of that? The
12 second reason why we would say that protected by
13 technological measures that prevent they're
14 educational use does not equate to DVDs with CSS is
15 what Mr. Turnbull said. There may be ways with CSS to
16 enable them to make the uses that they wish to make in
17 a manner that's even better than what was demonstrated
18 with the Pioneer technology or the other ways that
19 have been talked about here. They've never approached
20 the DVD/CCA to try to see if there are such methods.

21 But, at least what Mr. Turnbull is saying,
22 is it may be possible to do that and to enable clip
23 compilations even with the existing CSS. If we move,
24 or when we move to a system where DVDs for example or
25 audiovisual works are protected by -- but we already

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1 are in a system where they're protected by
2 technological measures other than CSS, but when we
3 move to AACS then you'd have to look at whether that
4 meets this description, and I would submit that it
5 doesn't based on what I've heard here today, but I'm
6 no AACS expert. You've got some people that are much
7 more knowledgeable about that than I am.

8 But the uncertainty that would be created
9 by this as to whether CSS is now would be covered by
10 this exemption in all cases and, certainly with new
11 technologies that might come out in the next three
12 years, it would be even less clear whether this
13 exemption covers them. I think that uncertainty is
14 also something that you would probably need to take
15 into account.

16 REGISTER PETERS: I was going to actually
17 ask a question that's somewhat similar. I was going
18 to ask you because it's your proposed exemption. In
19 using the words, "prevent" educational use, it's very
20 clear by even the examples that we saw the use isn't
21 prevented. You just don't think it's the best
22 educational experience. So if in fact you did in fact
23 use these words, I'm not sure this gets you where you
24 want to go.

25 MR. BAND: Well, there's different -- at

1 least the wording that the Library's proposed would be
2 that prevent the creation of clip compilations because
3 we're working from the assumption that, at least at
4 this point in time, the only effective way to be able
5 to, you know, do everything that Professor Decherney
6 was talking about, in terms of the seamless movement
7 from one clip to the other or the side-by-side
8 comparison, could only be done by a compilation. And
9 so the only way -- and CSS in its current form or the
10 other technologies that are being talked about in
11 their current form, would prevent the making of that
12 compilation.

13 Now, it could very well be that in three
14 years the technology is at the point that there really
15 is no need for making compilations and these people
16 won't be, including myself, I guess, if I'm back here
17 in three years, will not be able to make a case. And
18 at that point, you know, you'll well there's really no
19 reason to have to make a compilation, and, therefore,
20 you don't get an exemption.

21 On the other hand, if the technology still
22 has not advanced to the point where the educator is
23 able to do everything that he or she needs to do to
24 teach the class effectively, at that point, you could
25 say, yes, okay, we'll go another three years to do

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1 clip compilations until again, you know, in three
2 years after that, maybe at that point, the technology
3 will be out there that there's no need to make
4 compilations, and we won't be able to meet our burden
5 of showing that it's important.

6 PROFESSOR DECHERNEY: I hope it doesn't
7 come down to a decision about quality and the kinds of
8 images that are used, because clearly there's a sort
9 of hierarchy of issues of quality. And so, a
10 camcorder versus a DVD, time shifting versus the quick
11 change of digital clips. Right now, this is the
12 educational standard and it's very important to be
13 able to use the current educational standard in
14 education. You wouldn't ask students, for example, to
15 use a 1970's textbook in the same way that we might be
16 asked to use a VHS tape, right? This is an older
17 medium, it has an older educational use. And what you
18 use in education today are DVDs, and actually what's
19 used in hundreds of classrooms everyday, university
20 classes around the country, are digital clips. This
21 is the standard for education. So by educational use,
22 this is what's available, this is what we use.

23 REGISTER PETERS: Fritz?

24 MR. ATTAWAY: If you define the ability to
25 exercise fair use in terms of quality, then even if

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1 you give them the exemption they're asking for,
2 arguably they're still not able to exercise fair use
3 because the quality of a DVD is nowhere near the
4 quality of hi def. So, they're still not able to
5 exercise fair use as they define it as the best
6 possible quality. When you get into a discussion of
7 what is acceptable quality of use, you get in on a
8 slippery slope that leads you all sorts of places, and
9 I just don't think you want to go there. Certainly,
10 the Second Circuit didn't want to go there.

11 PROFESSOR DECHERNEY: I was encouraging
12 that we not get into a discussion of aesthetics and
13 quality. The category is actually multimedia works
14 protected by technological protection measures that
15 would include high definition, and this is a way of
16 avoiding discussions of quality. It's not an
17 exemption for DVDs.

18 REGISTER PETERS: My question had to do
19 with the word "prevent." And what I'm hearing in your
20 answer is in reading, "prevent their educational use,"
21 that you focus on educational use and that there are
22 standards within educational use that really go to
23 what Fritz is referring to about "quality." Is that
24 right?

25 PROFESSOR DECHERNEY: Yes.

1 REGISTER PETERS: I won't --

2 PROFESSOR DECHERNEY: But now I'm hoping
3 that you'll accept it as enough for people in the
4 profession that this kind of standard is important.
5 It's important to me, to my colleagues, to students,
6 and it's that kind of standard that we would like to
7 protect.

8 REGISTER PETERS: I was just trying to
9 figure out the scope of the exemption. What you were
10 proposing.

11 LEGAL ADVISOR KASUNIC: Just one last
12 question for Mr. Decherney. Does the proposed class
13 that the Library Copyright Association proposed;
14 audiovisual works and sound recording distributed in
15 digital format, when all commercially available
16 additions contain access controls that prevent the
17 creation of clip compilations and other educational
18 uses. Does that formulation work for you?

19 PROFESSOR DECHERNEY: Now that's
20 interesting. So the only difference between that and
21 our exemption really is -- no, no, it doesn't
22 obviously. We really care about keeping things in an
23 educational context and narrowing that context as much
24 as possible. So this wouldn't be as a broad based
25 exemption. It's actually a narrowly focused

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1 exemption.

2 LEGAL ADVISOR KASUNIC: I guess I'm not
3 clear in what's the problem you had with this?

4 PROFESSOR DECHERNEY: Can I hear it one
5 more time?

6 LEGAL ADVISOR KASUNIC: Yes. Let's let
7 him read it for a second.

8 PROFESSOR DECHERNEY: No. I think
9 actually that would satisfy us. If there were
10 digitally available examples that were unencrypted,
11 then we would be happy to use those non-encrypted
12 versions as long as the quality was the same.

13 LEGAL ADVISOR KASUNIC: Now, we're just
14 looking at the language of this and wouldn't -- it
15 looks like it could be a little bit unclear,
16 particularly in the context of where there is evidence
17 that there are VHS versions available of this, would
18 -- I guess that could be corrected if you had the
19 insertion of digital editions, when all commercially
20 available digital editions contain access controls
21 that prevent the creation of clip compilations and
22 other educational uses. Is that --

23 PROFESSOR DECHERNEY: Then that's better.
24 Yes.

25 LEGAL ADVISOR KASUNIC: Okay. That's all

1 I have.

2 REGISTER PETERS: Okay. Jule.

3 ASSOC REGISTER SIGALL: I have a series of
4 questions for Ms. Benedetto mostly. Pioneer makes a
5 recordable DVD player that they sell to consumers. Is
6 that right?

7 MS. BENEDETTO: Correct.

8 ASSOC REGISTER SIGALL: This allows you to
9 produce DVD disks that can be played in other DVD
10 players, right?

11 MS. BENEDETTO: Correct.

12 ASSOC REGISTER SIGALL: What kinds of
13 inputs does that kind of player accept? What are the
14 -- does it include the RCA jacks, S Video? What kinds
15 of things does that kind of player accept?

16 MS. BENEDETTO: A number of different
17 inputs, RCA, composite, DV from a DV camera, or S
18 video.

19 ASSOC REGISTER SIGALL: Does that kind of
20 player restrict the recording of material coming in
21 through any of those inputs onto a DVD?

22 MS. BENEDETTO: Yes it does restrict it.
23 If it detects that it's being -- if there's a source
24 content from a DVD player that has a DVD in it that
25 has CSS encryption or any other type of copy

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1 protection, it detects that and it does not allow you
2 to record that.

3 ASSOC REGISTER SIGALL: Even through the
4 standard composite jacks, it would not record it?

5 MS. BENEDETTO: That's correct.

6 MR. TURNBULL: I think it's the
7 Macrovision that's generated by the DVD player that
8 actually accomplishes it, not the CSS natively. So
9 it's --

10 ASSOC REGISTER SIGALL: So Macrovision is
11 the thing that the recorder or DVD player reads and
12 then determines that it shouldn't record this material
13 on to a --

14 MS. BENEDETTO: That's correct. Mr.
15 Turnbull is correct. It's detecting the Macrovision
16 signal.

17 ASSOC REGISTER SIGALL: Is Macrovision a
18 copy control or an access control? For anyone.

19 MR. TURNBULL: I think that's pretty
20 clearly a copy control because it doesn't have
21 anything -- there's no inhibition on access.

22 ASSOC REGISTER SIGALL: And is Macrovision
23 the only thing that a recordable DVD player uses to
24 determine whether it should record the material onto
25 the DVD?

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1 MS. BENEDETTO: Yes. Well, on the
2 recorders -- I mean CPRN --

3 MR. TURNBULL: No CG, no. I'm not sure
4 about the Pioneer recorders, but a number of recorders
5 that are on the market also look for what's called
6 CGMSA, which are signal electrical pulses in the
7 vertical blank interval that have the effect of
8 creating sort of -- it's copied freely, copy one
9 generation or copy number. And so CGMSA is also
10 required to be generated on the output -- on the
11 analog outputs of DVD players. And so frequently the
12 analog signal will carry both Macrovision and CGMSA.

13 ASSOC REGISTER SIGALL: Is CGMSA a signal
14 that's sent from an ordinary DVD -- commercially
15 released DVD? Or is it just restricted to broadcast
16 signals.

17 MR. TURNBULL: No, no, no. It's from --
18 it's required to be generated off of a -- on a DVD
19 player where the content says that, you know, whatever
20 the signal is, whatever the copy control state is
21 based on what the content says.

22 ASSOC REGISTER SIGALL: Okay. Is CGMSA a
23 copy control or an access control?

24 MR. TURNBULL: Copy control.

25 ASSOC REGISTER SIGALL: It's a copy

1 control. So what kinds of things can be recorded onto
2 a recordable DVD in ordinary -- what kinds of things
3 can -- kinds of input material would not fail the test
4 and be allowed to be recorded?

5 MS. BENEDETTO: Anything that does not
6 contain Macrovision coming from a tape or tape source,
7 broadcast signal that has some of the other copy
8 protection that Mr. Turnbull talked about. So, any
9 source that's not protected.

10 ASSOC REGISTER SIGALL: So if someone were
11 to -- do you think it's possible for someone to alter
12 the technology in a recordable DVD player to not pay
13 attention to Macrovision or CGMSA, and allow the
14 recording to happen? Is that a technological
15 possibility?

16 MS. BENEDETTO: Sure. It's technically
17 possible. There would need to be -- that would
18 require both firmware and hardware, certainly in our
19 recorder's packs.

20 ASSOC REGISTER SIGALL: Do you know of any
21 devices out there that don't obey the Macrovision
22 rules or the CGMSA rules and allow recording of
23 material?

24 MS. BENEDETTO: No. I'm not aware of any
25 of those devices.

1 MR. TURNBULL: I would add that I'm also
2 not aware of any legal obligation, so this is
3 something that a number of manufacturers, maybe all
4 the manufacturers, have voluntarily done as part of
5 their participation, sort of, in the overall
6 ecosystem. But there's no requirement by law that
7 says that the DVD recorder and the analog input has to
8 look at either Macrovision or CGMSA.

9 ASSOC REGISTER SIGALL: And if you were
10 using -- would it be possible to both either build
11 such a device and use such a device without
12 circumventing the CSS controls on an ordinary DVD?
13 You're shaking your heads. That's a yes?

14 MS. BENEDETTO: Yes.

15 ASSOC REGISTER SIGALL: Okay. Ms.
16 Benedetto, another question. The Pioneer device that
17 you showed and the examples that you cited as for
18 educational use, do you have a sense of how much this
19 has been used in film education classes as opposed to
20 general English classes or other types of educational
21 courses? Has this been used with respect to film
22 education?

23 MS. BENEDETTO: It has, but I couldn't
24 document that or give you an indication as to how
25 frequent.

1 ASSOC REGISTER SIGALL: Okay. We may
2 follow up with a question along those lines. Let me
3 ask Professor Decherney, if it were possible for you
4 to have a DVD of clips, is that something that in your
5 mind would satisfy the educational environment that
6 you're trying to live under? A DVD in an ordinary
7 player that could skip and pause and jump back and
8 forth. One that you can create so you can have some
9 customizable -- it'll be customized to the class
10 you're trying to teach. But would that, a physical
11 disk, a DVD, be something that would meet your
12 standards in terms of educational objectives?

13 PROFESSOR DECHERNEY: I'm just trying to
14 envision this kind of machine, it would be -- I don't
15 know you would create the content of that DVD so that
16 it was useful for every class. How can it be done
17 without some sort of copying and creation.

18 ASSOC REGISTER SIGALL: I'm not talking
19 about --

20 PROFESSOR DECHERNEY: Yes, I know. I mean
21 its, potentially there could be some device that would
22 meet all of our needs. There doesn't seem to be a
23 device that exists now. We keep talking about what
24 that potential device would look like. I don't know
25 how long it would take to develop that device. I

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1 don't know if there's a market for the device and so,
2 I can't speak as well as the other members of the
3 panel to the possibility of that device existing.

4 ASSOC REGISTER SIGALL: Let me get at it
5 this way. Of the uses that you have described that
6 you'd like to make, that you think are the best suited
7 for the environment in which you are trying to teach,
8 are these all necessarily computer based, hard drive
9 based copies on which you're relying? In a PowerPoint
10 presentation, is it the case where you put in on a
11 laptop and you come in and have the kind of random
12 access that the laptop and that kind of copies affords
13 you? Is that -- I just want to make sure I understand
14 exactly the technology you're using.

15 PROFESSOR DECHERNEY: Right now that's the
16 only technology that seems to work.

17 ASSOC REGISTER SIGALL: Okay.

18 MR. TURNBULL: If I can just interject.
19 The DVD RAM recordable disk is designed for precisely
20 that kind of use, and so that is a form of DVD
21 recordable media that is a random access. It was
22 intentionally designed for that purpose.

23 ASSOC REGISTER SIGALL: Okay. Is there a
24 device on the market today that would allow a film
25 instructor to take commercially released DVDs,

1 authentic copies that they've purchased, and create a
2 DVD RAM clip compilation that they can use in class?

3 MR. TURNBULL: I don't know because I
4 don't know the population of DVD recorders that record
5 onto DVD RAM whether they respond to Macrovision and
6 CGMSA. I know that many do. I don't know whether all
7 do.

8 ASSOC REGISTER SIGALL: Ms. Benedetto,
9 does Pioneer make the thing that records onto DVD RAM?

10 MS. BENEDETTO: No, we do not.

11 ASSOC REGISTER SIGALL: So, getting back
12 to the questions about your -- the environment. Right
13 now, the use you'd like to make is one that you use
14 computers and hard drives to make the types of
15 educational uses.

16 PROFESSOR DECHERNEY: Right.

17 ASSOC REGISTER SIGALL: Is it -- maybe you
18 haven't considered this because the technology isn't
19 there, but is it possible for you to make a similar
20 use using DVD technology, assuming you can construct
21 the DVD, maybe using the tools they have --

22 PROFESSOR DECHERNEY: No, no. It's
23 possible. But wouldn't it require a similar exemption
24 to bypass -- right now, at least, to bypass CSS or
25 other forms of encryption in order to get there?

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1 Isn't that what we just heard?

2 ASSOC REGISTER SIGALL: Well, I'm trying
3 to get -- well they seem to say that the recording of
4 the DVD, the technology doing that, doesn't use access
5 controls, it actually relies on copy controls, like
6 Macrovision and CGMSA. And, the law, the statute 1201
7 doesn't create a liability for the act of
8 circumventing copy controls in part because that was
9 inserted there to preserve fair uses and other uses of
10 materials.

11 MR. BAND: The technology that would allow
12 the circumvention of the copy control is driven under
13 1201(b), so it still wouldn't be available to the
14 Professor. Either way, I mean, basically, I mean,
15 you're creating a situation that's kind of a catch 22
16 to say, well, you can't get an exemption here because
17 there's a cockamamy way of doing it this way, but of
18 course in the real world, there is no technology that
19 will ever allow you to do that legally. So, you know,
20 it's like you're damned if you do, your damned if you
21 don't.

22 You know though that if we do it this way,
23 there is a -- you know, again, this is part of the
24 problem that the crazy way the DMCA was drafted that,
25 you know, 1201(b) allows circumvention, but doesn't

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1 allow circumvention devices. 1201(a), again, has an
2 exemption for certain acts of circumvention, but
3 again, doesn't provide any exemption -- you don't have
4 the authority to grant an exemption for circumvention
5 devices. At least in this case we know that there
6 happens to be a technology out there that people could
7 use.

8 Again, this is sort of an interesting
9 construct, but in the real world it will be useless.
10 It won't help media professors to do anything because
11 that technology, at the end of the day, won't be
12 available.

13 GENERAL COUNSEL CARSON: So the only time
14 we should grant an exemption is when there's an
15 illegal device like DCSS freely available? Is that
16 what you're saying? Because it sounds like that's
17 what you're saying, as a practical matter.

18 MR. BAND: Well, I mean, look, I didn't
19 write the DMCA, but it certainly seems that, you know,
20 I think that it would be obviously better to have
21 exemptions -- it makes more sense to have exemptions
22 that work than exemptions that don't work. And so if
23 we're trying to come up with something that works,
24 here we at least finally --

25 GENERAL COUNSEL CARSON: In reality

1 though, the premise that it works is based upon the
2 marketing and trafficking of an illegal program.

3 MR. HERMAN: But that criticism exactly
4 also applies to all of the responses, if you can hack
5 -- you can hack Macrovision and you can hack the -- I
6 don't know the analogy there.

7 GENERAL COUNSEL CARSON: There's nothing
8 illegal about hacking Macrovision.

9 MR. HERMAN: But the same problem will
10 exist that it's illegal for a manufacturer to
11 distribute or import a device that hacks it. And so
12 those technologies that circumvent Macrovision fall
13 into the same critique that you're levying about DCSS,
14 right? And the simple question is, should we allow
15 people to use these technologies that are illegal to
16 manufacture and sell in order to make a non-infringing
17 use.

18 MR. BAND: And I would submit, you know,
19 maybe the best solution obviously would be, you guys
20 grant this exemption and then Mr. Turnbull's clients
21 come up, or maybe Time Warner comes up with a
22 circumvention technology, you know, especially aimed
23 at the educational market, and they make it available
24 at not cost or low cost, and that way there's no
25 notion of legitimization or DCSS. That they just

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1 provide a legal alternative but then make sure that
2 it's only provided to the kinds of people they want to
3 provide it to, again, knowing to some extent that this
4 is all a bit of a kabuki, like everything -- like this
5 whole proceeding, but it's the notion is -- but a
6 kabuki that they're giving you the same thing that you
7 can get, you know, from any of Rob's -- any of the
8 websites that Rob found. But at least, that way
9 they're not legitimizing the fact and we don't have to
10 sort of -- we sort of can pretend that we're -- that
11 everyone's, you know, doing everything above board.

12 ASSOC REGISTER SIGALL: Let me test -- let
13 me try to reframe my generally to test what I think
14 are two assumptions in your response. The one
15 assumption is that there is no technology available
16 that would allow someone to make a clip compilation on
17 DVD right now. I don't know if that's true or not.
18 It seems like it's possibly true, but we don't know
19 that information. So, my first question is to, does
20 anyone on the panel have information as to whether
21 either a recordable DVD player or other technology can
22 allow people to make compilations on disk of films
23 from commercially released films?

24 MR. ATTAWAY: Well, Mr. Sigall, you
25 obviously attended the analog hole demonstration that

1 I did several weeks ago, and you know that such
2 devices do exist. I wouldn't suggest that you rely on
3 the availability of the analog hole to deny an
4 exemption for clips for educational uses because I'm
5 hopeful that Congress will soon remedy this situation
6 of the analog hole. But, yes, devices exist today
7 that do take advantage of the analog hole that will
8 record on a DVD directly from a DVD player, and this
9 can be done quite easily, and compilations can be
10 constructed in that way.

11 ASSOC REGISTER SIGALL: I'm glad you
12 brought up the analog hole because that was actually
13 my last question. I still want to go back to this
14 group to ask another question based on Jonathan's
15 comments. Is the recording of film using a camcorder
16 like you're demonstration showed, is that an example
17 of the analog hole?

18 MR. ATTAWAY: No. Certainly not as we see
19 it. It is -- I guess in one way it is taking digital
20 material and converting it to analog, which is what
21 you see with your eye and the eye of the camera, and
22 then the camera converts it back to digital. So, in
23 one respect, I guess it is, but that's not - our
24 analog hole solution would not interfere with
25 camcording.

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1 ASSOC REGISTER SIGALL: And that's my next
2 question. Why wouldn't any potential analog hole
3 legislation not interfere with camcording?

4 MR. ATTAWAY: I guess it's because we
5 don't see that as a significant threat to the
6 exploitation of motion pictures. If we can convince
7 the Congress to close the analog hole along the lines,
8 that we have recommended, that would not interfere
9 with camcording, I think that would meet our needs.

10 ASSOC REGISTER SIGALL: Is it not a threat
11 because the quality of the resulting is not very high?

12 MR. ATTAWAY: No. I think it is the
13 inconvenience is the primary deterrent. DVDs are so
14 inexpensive that we don't feel that a substantial
15 number of consumers would take the time to camcord off
16 their neighbors DVD so they could have a copy a movie
17 that they could go and buy for \$25.00. Of course it
18 will allow for commercial piracy, but we're going have
19 to deal with that in any case and we do deal with that
20 through the criminal statutes.

21 MS. AISTARS: If can also just step in a
22 little bit about the analog hole legislation. As with
23 other multi-industry efforts that we've engaged in,
24 our intent is always to craft a solution that is as
25 narrow as possible and doesn't sweep in legitimate

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1 products. And so to address the sort of activity
2 that Mr. Attaway was demonstrating for you would
3 entail significant burdens on legitimate consumer
4 electronics devices and that's just a step that we
5 haven't been willing as multi-industry collaborators
6 to solve these issues to take. Because, again, the
7 effort here has always been to keep solutions at a low
8 cost and keep them easily implementable and leave as
9 much design and creative ability for the folks that
10 are building devices and selling them to consumers as
11 we can. So, we've taken the same approach in
12 legislative and regulatory activities.

13 ASSOC REGISTER SIGALL: Okay. Let me just
14 go back to the proponents again, because one of the
15 things that Jonathan said was that -- I think he used
16 the legal term cockamamy to describe the production of
17 a DVD and that's really my question which you've
18 answered a little bit, but I just want to make sure
19 I've heard everything. I mean, would it be cockamamy
20 to suggest that you could have a similar educational
21 value to have a DVD which had relatively random access
22 to various clips in you're classroom, as opposed to
23 potentially a computer-based type copy of the --

24 PROFESSOR DECHERNEY: Right now, as far as
25 we know, the only way you create that DVD is through

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1 a computer using DCSS.

2 ASSOC REGISTER SIGALL: But, assuming, I'm
3 not talking about you create it, but the actual having
4 that result and product, would that be satisfactory to
5 your educational purpose?

6 PROFESSOR DECHERNEY: In general, I like
7 the flexibility of a computer. I think it's
8 necessary. All the examples I show here can only be
9 achieved using a computer and a presentation. None of
10 the slides I showed could possibly have been created
11 using just a DVD.

12 MS. AISTARS: Could I just weigh in a
13 little bit about -- this certainly isn't the case
14 today. But, we have mentioned AACCS a couple of times
15 in these discussions and I think that that does
16 potentially provide a solution to these issues as we
17 move into licensing it further. The technology that's
18 currently being licensed is sort of -- we're offering
19 the first phase license for the technology in which
20 the managed copying ability isn't yet fully flushed
21 out. But very shortly we intend to move to the final
22 stage of licensing which will enable people to make
23 entire managed copies onto their hard drives for
24 instance, for a home media server.

25 And, as I referred in my written

1 testimony, there's no technological reason why the
2 same AACCS technology that allows you to make a full
3 copy couldn't allow you to make protected clips, if
4 that's what the market showed a demand for. So I
5 think, if this is truly the case that there is a
6 desire for this kind of ability, then certainly the
7 technology can accommodate it.

8 ASSOC REGISTER SIGALL: One last question.
9 Does the AACCS and managed copy system that you're
10 describing, is that an access control or a copy
11 control?

12 MS. AISTARS: It's an encryption system
13 with key authentication, so it would be both.

14 REGISTER PETERS: Can I ask Ms. Aistars,
15 this AACCS, when in the next three years or three and
16 a half years, do you see it being deployed for use by
17 people who teach film studies?

18 MS. AISTARS: That's probably something
19 that's beyond my scope of knowledge to comment on.
20 But I can say that the AACCS technology is one element
21 of next generation optical media technology. So you
22 should look also to people who are proponents of
23 either the HD/DVD technology or the blueray
24 technology, which are the two formats that we know of
25 thus far that would be incorporating the AACCS

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1 technology as one element of those formats. I know
2 that HD/DVD has launched and there are players
3 available on the market and our company is issuing
4 disks to support those players, so I suppose it's a
5 question, you know, how quickly either one of those
6 formats will be picked up by the consumer in education
7 marketplace. But they'll certainly be available and
8 are available.

9 REGISTER PETERS: More likely or less
10 likely that that happens before October 28, 2009?

11 MS. AISTARS: I think we would be
12 incredibly disappointed as promoters of the format if
13 they didn't take off by the end of the year, frankly.
14 End of this year.

15 GENERAL COUNSEL CARSON: All right. So,
16 I guess to be sure we understand, product will be out
17 there for consumers that has AACCS on it, probably
18 before the end of this year?

19 MS. AISTARS: Product is currently out
20 there for consumers that has AACCS on it. It doesn't
21 -- the devices that I am aware of in the marketplace
22 do not yet have the managed copy ability incorporated
23 in them, but all of the disks that are being issued
24 under the content protection licenses will include a
25 URL that will direct the disk to go to the appropriate

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1 website of the content owner to authorize the making
2 of the copy. So, the disks will already be capable of
3 providing the managed copy functionality as soon as
4 devices that can support that sort of copying are
5 produced.

6 GENERAL COUNSEL CARSON: What do we know
7 about when the managed copying function will actually
8 be available?

9 MS. AISTARS: I'm trying to think what the
10 public announcement was. I mean, it's certainly --
11 the technology has been specified and, at the moment,
12 the companies who are licensing the technology are
13 finishing the details of the next set of licenses.
14 So, it's hard to predict how long that would take.
15 The interim licenses that are currently available will
16 be available only until the end of June in the case of
17 devices applicable to CE and IT products and the end
18 of July in the case of content product. So, that, I
19 would suggest as a likely time frame for the second
20 set of licenses and the products implementing them to
21 come onto the marketplace.

22 GENERAL COUNSEL CARSON: And how much do
23 we know about whether, once this managed copying
24 functionality is available, whether it will permit the
25 making of clips? It strikes me that if you can do the

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1 whole, you should be able to do the clip. But you
2 seem to have expressed at least, perhaps, some
3 reservation on that. So I just want to know what we
4 know about that.

5 MS. AISTARS: I can tell you what the AACSS
6 licensors require of content participants, so it's
7 really a question of what content participants might
8 wish to offer in addition to what's required. So the
9 requirement on content participants will be to enable
10 the making of a full managed copy. But certainly --
11 and I don't know what the plans are of particular
12 studios in this regard, because it's not something
13 that's been publicly announced. But, certainly,
14 people are considering a variety of other sorts of
15 offerings that you might want to enable.

16 You can imagine that, for instance, if a
17 consumer wanted to have a copy to take on a small
18 portable device, the consumer might not be interested
19 in having the full resolution copy, and would prefer
20 a copy more suitable to the portable device's
21 capabilities. So that might be one option that you
22 see people offering. I've suggested the clip scenario
23 as another option, and certainly there may be lots of
24 other things that studios are thinking about that I'm
25 just not aware of and won't be until it's publicly

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1 announced. But it's not a technology-driven issue.
2 The technology can accommodate it. It's a question of
3 whether there's interest in the marketplace for
4 enabling such a use.

5 GENERAL COUNSEL CARSON: Are you aware of
6 any discussions among content providers or the people
7 who are responsible for AACCS, specifically about
8 permitting the making of clips, portions of the entire
9 content of the DVD?

10 MS. AISTARS: Sorry. Can you repeat your
11 question?

12 GENERAL COUNSEL CARSON: Yes. You say
13 you're not sure what's going to be done. Have there
14 been discussions specifically about the ability to
15 make clips -- to make copies of portions of the entire
16 --

17 MS. AISTARS: Whether the technology is
18 capable of doing so?

19 GENERAL COUNSEL CARSON: Whether that will
20 be deployed. Have there been any discussions about
21 even, should we, shouldn't we, will we, won't we?

22 MS. AISTARS: Yes. It's not something
23 that we're allowed to discuss in these discussions.

24 MR. TURNBULL: They're two different
25 issues. I think that the studios offerings, in terms

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1 of managed copy, I think is what Ms, Aistars is
2 talking about, I think the question of whether the
3 technology would be deployed in a fashion that would
4 be user-friendly to the clips is a different question.

5 GENERAL COUNSEL CARSON: Can you answer
6 that question?

7 MR. TURNBULL: Well, since, if we get out
8 of here at some point -- there are a couple of us on
9 this panel who are headed to an AACS meeting. Perhaps
10 we could carry a message.

11 GENERAL COUNSEL CARSON: And if there's
12 any messages you can deliver back to us, that would
13 help as well. Let me ask the folks on the right side
14 of the table. I assume, up until now, you've had no
15 problem with AACS because you haven't encountered it.
16 Is that correct?

17 PROFESSOR DECHERNEY: Yes.

18 GENERAL COUNSEL CARSON: Let me ask
19 whether, in terms of talking about the next three
20 years, if there were to be an exemption, if it were
21 limited to addressing motion pictures that are
22 protected by CSS, would that serve your needs for the
23 next three years?

24 PROFESSOR DECHERNEY: It's difficult
25 because I only know as much as you do about the market

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1 for high definition disks for blueray and HD/DVD. And
2 so there would be too many unknown factors. Not just
3 the capabilities of AACCS, but the availability of
4 DVDs. But if, in a year from now, high definition is
5 the standard, and I really hope that it will be, we
6 would, you know, like to have access to those clips.
7 I don't know if AACCS will provide the kind of access
8 we need, so it's actually -- I would prefer -- I mean,
9 there are too many unknowns to be able to make that
10 decision right now.

11 GENERAL COUNSEL CARSON: Is there anyone
12 on the panel who has any reason to believe that during
13 the next three and a half years commercially released
14 motion pictures won't continue to be released on DVDs
15 with CSS as one option? Another way to put the
16 question is, is there any reason to believe that these
17 more advanced formats which will AACCS on them may, to
18 some degree, supplant the DVDs that we're all buying
19 and viewing today, so that there will be commercially
20 released motion pictures on the new media that aren't
21 available on DVDs with CSS in the next three and a
22 half years?

23 MS. AISTARS: My guess is that the markets
24 will continue to exist in parallel. Not every
25 consumer is going to switch over to the next

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1 generation of optical disks immediately, and certainly
2 as a studio, you want to have your content available
3 to consumers in the formats in which they're seeking
4 to access it. So I would expect that we would
5 continue to issue both CSS protected DVDs and also
6 AACS protected HD/DVDs and blueray disks.

7 I'd also want to comment though, you're
8 question implied that it may not be problematic to
9 allow a circumvention of CSS during the next three-
10 year period, but -- and I think maybe Bruce Turnbull
11 is more suited to discuss this with the panel, but
12 certainly there have been, as Mr. Turnbull noted,
13 since AACS is maybe the first place where we talked
14 about the enabling of managed copies, there's nothing,
15 you know, magical about AACS being able to do that.
16 You can enable the same sort of thing with CSS for
17 instance. So, I wouldn't want to do anything in this
18 rule making proceeding that would preclude the ability
19 or the likelihood of that sort of a step being taken
20 in the DVD/CCA licensing context.

21 GENERAL COUNSEL CARSON: Okay. Although,
22 you have suggested the possibility, perhaps
23 likelihood, that there will be such an ability with
24 AACS. At this point, no one, I assume, is aware of
25 any possibility or likelihood that it will be made

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1 available with respect to CSS. Is that correct?

2 MR. TURNBULL: It's a little awkward,
3 candidly, because the internal discussions of DVD/CCA
4 are, if not subject to an NDA, at least subject to an
5 expectation of confidentiality. Perhaps I can say,
6 and then I can consult with my client, as to what we
7 might say in the follow-up, that the notion of managed
8 copy is something that has not escaped the attention
9 of the DVD/CCA.

10 GENERAL COUNSEL CARSON: Alright. Well,
11 you can only tell us what you can tell us. But, of
12 course, keep in mind that what you can't tell us, we
13 can't take into account.

14 MR. TURNBULL: I understand and I will
15 take that back and see if we can provide more.

16 GENERAL COUNSEL CARSON: Alright. Now Mr.
17 Turnbull, you have talked about the possibility of
18 DVD/CCA giving licenses to people like Professor
19 Decherney to engage in the circumvention that they say
20 they need to engage in. Is that correct?

21 MR. TURNBULL: I have said that we have
22 invited people to come talk to us and that no one has.

23 GENERAL COUNSEL CARSON: Does DVD/CCA
24 itself have the power to license someone like
25 Professor Decherney to circumvent CSS for particular

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1 purposes?

2 MR. TURNBULL: I believe it does. It has
3 an exclusive license -- it is the licensor of CSS
4 technology, and so to license what would amount to a
5 special purpose product, which would instead of
6 directing the content to the playback system -- the
7 display system of a computer would allow the making of
8 copies of at least clips of the movie. I don't know
9 of any reason why it's not in their power.

10 GENERAL COUNSEL CARSON: So let's say
11 Professor Decherney came to you and said I'd like a
12 license to circumvent CSS in order to make this
13 compilation that I want for my class --

14 MR. TURNBULL: I don't know that I would
15 describe it as circumventing CSS. First of all, it
16 would be done by permission, and so what Chris was
17 saying is that it wouldn't be circumvention.

18 GENERAL COUNSEL CARSON: All right. Fair
19 enough. Fair enough.

20 MR. TURNBULL: Second of all, what I'm
21 talking about is what happens to the content after it
22 is decrypted. And so the CSS is actually already
23 removed at that point and so you're not circumventing
24 any more, that's --

25 GENERAL COUNSEL CARSON: You would give it

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1 to him removed, is that what you're saying?

2 MR. TURNBULL: No. What -- you would have
3 a playback system, and that's actually how DCSS works
4 is that it decrypts the content from CSS, and rather,
5 at that point, rather than sending it to the display,
6 which is what the license requires the playback system
7 to do currently, it sends it to the hard drive to make
8 a copy of it. And in the possibility of an authorized
9 system to do that, you would then say, okay, once
10 you've decrypted the content, instead of displaying
11 it, you're permitted to use the computer internal
12 routing system to send it to a hard rive to make a
13 copy of it, under the following circumstances. And,
14 again, I don't mean to be speaking ahead of the Board
15 of Directors of DFD/CCA, but it is the case and in
16 each rule making, you know, we have offered the
17 opportunity for people to come forward and talk to us.
18 And I think that there would be sympathy for this kind
19 of a situation.

20 GENERAL COUNSEL CARSON: So clearly,
21 you're not telling us you would permit them to do
22 that, you're jut saying you'd talk to them about it
23 and you'd see what happens.

24 MR. TURNBULL: Well, I -- right. Because
25 you need to see what the specific proposal is, and

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1 again, you know, sitting here today, we haven't had
2 any proposals made to us. For example, one of the
3 things that people would look at is does the device
4 that you're authorizing allow the making of a copy of
5 the entire movie? Or only, is it somehow enabled for
6 30 or 45 second or 60 second clips. And then, you
7 know, those kinds of issues you'd have to get into.

8 GENERAL COUNSEL CARSON: I'm trying to
9 figure out how useful this would be for Professor
10 Decherney. You're talking about a device. I mean,
11 you license devices. Frankly, all Professor Decherney
12 wants to be able to do is what, for all I know, he's
13 already been doing, but he probably doesn't quite
14 admit it -- use whatever means that are available out
15 there already so that he can make the copies of the
16 clips that he wants to make. Because he's probably
17 not -- he probably doesn't have the capability to make
18 a device. Let's face it, he's a film professor, he's
19 not a technologist.

20 I gather, I think, if I'm hearing you
21 correctly, you're not saying the DVD/CCA would
22 consider giving Professor Decherney permission, even
23 if it has the power to do so, maybe it doesn't to
24 engage in that kind of conduct. What you're saying is
25 you would license him to make a device that he's

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1 probably not able to make -- or somebody --

2 MS. AISTARS: I guess I'm not certain that
3 it would be Professor Decherney that would be
4 approaching us to make a device. I would imagine it
5 would be somebody who wants to, you know, issue a
6 software product that enables this. But, that aside,
7 I think this solution that the DVD/CCA is suggesting,
8 you know, frankly, takes care of the problem that
9 people have been complaining about this morning, which
10 is that even if you grant an exemption for certain
11 purposes, you may not have the technology available to
12 you. So isn't it better to have a dialogue with
13 DVD/CCA to enable the creation of legitimate devices
14 that can be used for such purposes.

15 MR. TURNBULL: I suspect that, well, I
16 know in other circumstances there have been computer
17 science courses that have been aimed at hacking CSS
18 and that have been offered at various universities.
19 I suspect that you could offer a course where the
20 assignment would be to create such a software product
21 and that might actually be useful.

22 MS. AISTARS: DCSS was created by a 14-
23 year-old, you know, guy. I'm sure we've got talented
24 folks at the University of Pennsylvania.

25 GENERAL COUNSEL CARSON: Steve, first

1 signal. You're free to talk but let Steve go first.

2 MR. METALITZ: I just was going to say, I
3 assume that if someone approached the DVD/CCA, they
4 would be thinking maybe there's a market for this.
5 And I think there's two possibilities here. One is
6 that all the hundreds and hundreds of film and media
7 studies professors who Professor Decherney has
8 referred to, and in their organizations in support of
9 his proposed exemption, they might be interested in
10 such a product. And, therefore, perhaps there would
11 be a market for it.

12 The other alternative is that Professor
13 Decherney, who I know is a very hard guy to please,
14 because he's not satisfied with any of the
15 alternatives that have come forward here, including
16 the alternative that Mr. Sigall was drawing out about
17 something that does what he wants to do but does it on
18 a DVD player rather than on a computer. He may be the
19 only one. And it may not be possible to please him --
20 to create a device that will satisfy him but maybe it
21 would satisfy the rest of that part of the market.

22 GENERAL COUNSEL CARSON: I think sitting
23 next to him is probably another one.

24 MR. BAND: But I guess the point is, and
25 this is what underlies -- you know, and I completely

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1 agree with the premise of the question, and that is
2 that, you know, it is, at the end of the day, a very
3 small market, maybe it's just Professor Decherney or
4 maybe it's, you know, a hundred people, maybe it's a
5 thousand people, it's still a relatively small market.
6 And I suspect, notwithstanding the protestations down
7 the table of how willing people are to work, I have a
8 feeling that the negotiation is going to take some
9 time. Okay, because the DVD/CCA has many numbers and
10 it's going to take time and it's not going to be
11 something that a -- even if Professor Ed Felten's
12 class, they wanted to develop -- I have a feeling it's
13 still enough to hire a lawyer to sit down and work out
14 a license arrangement and, you know, it would take a
15 year or two, and then maybe there would be something
16 available. So again, as a practical -- I mean, it
17 sounds good, but in the real world and as a practical
18 matter, it is, you know, sort of this offer well we're
19 willing with you, it's sort of a meaningless gesture.

20 GENERAL COUNSEL CARSON: Okay. Ms.
21 Aistars, we heard sort of a similar sentiment from you
22 in your testimony about Time Warner's willingness to
23 talk to people like Professor Decherney and cooperate
24 with them and try to work something out. Is it along
25 the same lines as Mr. Turnbull's? In other words, are

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1 we talking about the licensing of devices or are we
2 talking about perhaps a situation where you would
3 actually tell Mr. Turnbull, yes, you can go ahead and
4 use whatever means you need to in order to make that
5 clip compilation off of our DVDs of our movies. Is
6 that a possibility or is that not a direction in which
7 Time Warner would go?

8 MS. AISTARS: The requests that have been
9 made to Warner Brothers that I'm aware of have not
10 been to make compilations, but rather to use clips in
11 particular scenarios. So our authorizations have
12 always been directed towards the use of the clip
13 rather than the creation of a compilation. I mean, we
14 are periodically approached to get the authorization
15 to get a particular clip for use in a particular
16 scenario. Those aren't really the norm of our
17 requests, and I guess it would have to be judged in
18 the context in which it's received. It's really an
19 issue of the effort and underlying costs to produce
20 the clip. If we're requested that requires us to
21 master specifically for one user, that may be cost
22 prohibitive to do for the user.

23 GENERAL COUNSEL CARSON: Okay. I think you
24 just clarified what wasn't clear for me in the last
25 sentence or so. But the kind of requests you're

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1 talking about are requests for you to actually give
2 them the clip. Is that correct?

3 MS. AISTARS: We typically don't get those
4 requests is what I'm saying. We typically get
5 requests from people who, in one way or another,
6 already have access to the clip. You know, I don't
7 know whether they're accessing it through, you know,
8 playing it back on a Pioneer system or whether
9 they've, in some other fashion obtained access to the
10 clip. But the request to us is typically I want to
11 use the following segment of The Matrix on this
12 interactive classroom website to demonstrate the
13 following point. And so it's the use that we're
14 considering and not actually how they obtained the
15 clips.

16 GENERAL COUNSEL CARSON: You don't really
17 ask them how they got it, you just go ahead and say
18 it's all right to use it, basically, when you do grant
19 it. Is that what's going on?

20 MS. AISTARS: To the extent that -- I
21 mean, I can give you copies of some of the letters
22 that we have issued, if we're talking about a
23 classroom exemption letter, those typically say,
24 assuming that the disk was legally obtained and that
25 the use is for an educational use and in a classroom

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1 setting, and not otherwise commercial, the classroom
2 use exception would, you know, apply, and you're
3 authorized to use the clip.

4 GENERAL COUNSEL CARSON: Is it your
5 interpretation of those authorizations that they would
6 also extend -- would they have any effect whatsoever
7 with respect to a potential claim that Warner Brothers
8 might have against the person, if it turns out that
9 person had hacked through CSS in order to make that
10 copy? In other words, you said in at least an
11 implicate authorization for them to do that? Is it a
12 waiver of your rights against them or do you have
13 every -- have you retained right to pursue your cause
14 of action against them for violation of 1201(a)(1)?

15 MS. AISTARS: I can't give you a blanket
16 answer on that.

17 GENERAL COUNSEL CARSON: It's pretty key
18 to what we're talking about here though, isn't it?

19 MS. AISTARS: Again, I can't give you a
20 blanket answer that applies to, you know, every
21 requested use. Our letters are typically targeted to
22 a particular user's request. Frequently, they are
23 issued in the form of, you know, no objection letters,
24 so, I would have to answer it on a scenario by
25 scenario basis.

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1 GENERAL COUNSEL CARSON: Okay. So
2 Professor Decherney came to you and said, look, I
3 teach film. I'd like to be able to take clips from
4 DVDs of various Warner Brothers movies and put them
5 into compilations that I will use only for purposes of
6 display to my classroom -- in the classroom. And to
7 do so, I'm going to take them off the DVDs and put
8 them into these compilations on my hard drive. Any
9 prediction on how Warner Brothers would react?

10 MS. AISTARS: I don't have a prediction.
11 I would be happy to consult with our Director of Clip
12 and Still Licensing if you wish.

13 GENERAL COUNSEL CARSON: Okay. Well, if
14 you have anything meaningful about that, that could be
15 helpful. Yes.

16 Mr. Metalitz -- actually, everyone
17 starting at Mr. Metalitz to the left. Let's assume
18 for the moment that an exemption is going to be
19 issued. If that's the case, wouldn't it be preferable
20 from your point of view if that exemption were limited
21 to circumvention for purposes of classroom teaching,
22 rather than just an exemption that extended to DVDs?

23 MR. METALITZ: Yes. Based on the
24 assumptions that you gave, yes. You would have to
25 decide that that was a -- that that described a

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1 particular class of works, but assuming that you did,
2 yes, that would be better than saying anyone can
3 circumvent CSS on DVD for any reason.

4 GENERAL COUNSEL CARSON: And you certainly
5 recounted to us what the process we went through in
6 the first two rule makings in determining how one
7 defines a class of works. But let's assume that we're
8 willing to rethink that. Is that something you'd want
9 us to do? Is that something that's preferable rather
10 than come out -- not really the situation now, where
11 if we find there is a justification for an exemption,
12 we issue an exemption that is potentially much broader
13 than the harm that was brought to our attention. And
14 isn't it perhaps preferable for us to be able to issue
15 an exemption that is more finely tuned to the problem
16 that's been presented to us?

17 MR. METALITZ: Well, speaking for myself,
18 I'm confident that if you found that this request met
19 all the statutory criteria and that you were going to
20 issue an exemption, that you would do as you have done
21 in previous ones, and try to fit it as closely as
22 possible to the particular non-infringing -- the
23 particular impact that has been proven on non-
24 infringing use. I think you've done that. You've
25 sought to do that. Whenever you've recognized an

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1 exemption and, I mean, we can go into the details in
2 specific exemptions, but I think that's how you've
3 approached it. And I would encourage you to approach
4 it in that way too on this one, if you conclude that
5 the statutory criteria have been met. Which we hope
6 you will not conclude that.

7 GENERAL COUNSEL CARSON: Understood.
8 Also, Mr. Metalitz, you say you accept that the
9 existing methods, the ones that we've heard from
10 everyone at that end of the table, aren't good enough,
11 at least for Professor Decherney. And you point out
12 that, you know, nevertheless, there are methods out
13 there. Shouldn't we take into account that if it's a
14 fact, and it's certainly been asserted, that Professor
15 Decherney at least doesn't believe -- and he's made at
16 least some kind of a case, that the methods that have
17 been demonstrated at that end of the table aren't
18 really sufficient for his purposes. I mean, isn't
19 that something we should take into consideration and,
20 if in fact we conclude that he's right, then isn't he
21 perhaps entitled to an exemption that would permit him
22 to do what he needs to do for his pedagogical needs?

23 MR. METALITZ: Well, I think the problem
24 with that approach is that it kind of reads into the
25 copyright act a requirement to incorporate the

1 professional aspirational standards of every different
2 group, in this case, film and media studies professors
3 -- as to what would be the best way for them to make
4 these uses. And it kind of reads that into the Fair
5 Use Doctrine. I think what the Second Circuit and
6 they're not the only ones, but the Second Circuit, I
7 think, said it quite forcefully and in it's context is
8 that that's not fair use is about.

9 GENERAL COUNSEL CARSON: Didn't they say
10 that in the context of a First Amendment challenge?

11 MR. METALITZ: Pardon me?

12 GENERAL COUNSEL CARSON: Didn't they say
13 that in the context of a First Amendment challenge?

14 MR. METALITZ: Yes. I mean, it was.

15 GENERAL COUNSEL CARSON: Different
16 context.

17 MR. METALITZ: But that was based on, well
18 that was based on the argument that fair use is
19 constitutionally required. That's how the Plaintiff
20 chose to bring that case.

21 GENERAL COUNSEL CARSON: But, are you
22 saying that what Professor Decherney proposes to do is
23 not a fair use?

24 MR. METALITZ: No. I'm not saying that
25 what he's proposing to do is not a fair use. I'm

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1 saying that the Fair Use Doctrine does not necessarily
2 give him the right to do it by -- over the objection
3 of copyright owners, doesn't necessarily give him the
4 right to do that in the best possible manner. In the
5 manner that most fully satisfies his objectives and
6 his desires with regard to how he's going to make that
7 use. I agree this is a matter of degree. I mean,
8 there's at some point at which potentially it falls
9 below the floor. And, so I'm not saying that it's an
10 irrelevant criterion. But I think the starting point
11 has to be, is he able to make the use, even in a form
12 that's not totally satisfactory to him, or does the
13 Fair Use Doctrine really incorporate some requirement
14 to meet the highest possible standards that could be
15 developed by a professional organization, without
16 regard to the technologies perhaps, without regard to
17 the market conditions, and so forth.

18 That I think is really the end point of
19 his argument, which is that, no it can't be on the
20 Pioneer machine, and it can't be on the other machines
21 that do something similar to that, and it can't even
22 be on a DVD player. It's got to be on my laptop. And
23 if it's not on my laptop, I'm not able to fulfill my
24 responsibility as an educator. I think that's a -- it
25 would be a pretty extreme reinterpretation of the

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1 Copyright Act to say that that's the criterion by
2 which we define what's fair use and what's not fair
3 use.

4 GENERAL COUNSEL CARSON: Would it be an
5 extreme interpretation of the Copyright Act to
6 conclude that the way he does it is a fair use?

7 MR. METALITZ: The way he does it?

8 GENERAL COUNSEL CARSON: The way he makes
9 his compilations is a fair use. Would that be an
10 extreme interpretation of the Copyright Act?

11 MR. METALITZ: Well, the question you have
12 to ask is what's the impact of 1201(a)(1) on his
13 ability to make non-infringement uses.

14 GENERAL COUNSEL CARSON: That's right.
15 Absolutely right.

16 MR. METALITZ: And without regard to what
17 he wants to do may be a non-infringing use, but there
18 may be many other ways to make non-infringing uses
19 that don't require circumvention.

20 GENERAL COUNSEL CARSON: Understood.

21 MR. METALITZ: And that's I think the way
22 that you've approached this, including the
23 availability -- you know, no one likes to talk about
24 the, you know, the old person in the attic but VHS
25 still exists. And, in fact, we've seen time again in

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1 these proceedings assertions that, well, VHS isn't
2 even available anymore. And, in fact, that turns out
3 to be factually not true in many, many cases. Of
4 course it's not as good as showing the DVD clip, but
5 is it enough to satisfy the requirement that you,
6 which you have to look out for, is what's the level of
7 impact on non-infringing use.

8 GENERAL COUNSEL CARSON: Mr. Attaway, you
9 wanted to say something.

10 MR. ATTAWAY: Yes. A couple of points.
11 First of all, going back to the Second Circuit
12 decision, they're discussion was not limited to the
13 First Amendment context. They said, "We know of no
14 authority for the proposition that fair use, as
15 protected by the Copyright Act, much less, the
16 Constitution, guarantees copying by the optimum
17 method." So, it was not limited to just eh First
18 Amendment context.

19 And, secondly, if you were to decide that
20 despite the fact that the ability to exercise fair use
21 in a way that the educators say they want to exercise
22 fair use is available but not in sufficient quality,
23 I think you would have to base that decision on a
24 decision to grant an exemption on probative evidence
25 that the educational experience somehow is adversely

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1 affected by the difference in quality. And I'm
2 certainly not aware of any evidence in this record,
3 other than mere assertion that the difference in the
4 quality between a camcorder copy or a VHS copy and the
5 original DVD adversely affects the educational
6 experience.

7 MR. TURNBULL: I have a unrelated point.
8 In relation to the aforementioned AACCS meeting, I have
9 a flight leaving in an hour and a half. Are we likely
10 to go on? Should I excuse myself for five minutes and
11 see if I can make alternate arrangements?

12 GENERAL COUNSEL CARSON: Is the meeting
13 today or is it tomorrow? I mean, how --

14 MR. TURNBULL: The meeting is tomorrow,
15 and I could conceivably could get a later flight.
16 It's just that, at the moment, I based on the 12:30
17 end time, I made this arrangement. I apologize.

18 GENERAL COUNSEL CARSON: Sure. Well, no,
19 we clearly have a lot of questions. I probably got
20 about ten minutes worth. I don't know if that tells
21 you. And a couple more people. Yes.

22 MR. TURNBULL: As I said, if I can excuse
23 myself from the table for just a couple of minutes,
24 I'll go make the phone call and see if I could
25 rearrange.

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1 GENERAL COUNSEL CARSON: Do we want to
2 take a break and just throw in the towel and say we're
3 going to be here a while? Let's take a ten minute
4 break. It's been over two hours since our last one.

5 (Whereupon the above-entitled
6 matter went off the record at
7 1:16 p.m. and resumed at 1:32
8 p.m.)

9 GENERAL COUNSEL CARSON: First, Ms.
10 Aistars wanted to give us some more information in
11 response to one of the questions I asked before the
12 break, so, go ahead.

13 MS. AISTARS: Yes. You had asked about if
14 there was anything helpful that I could point you to
15 in terms of previous approvals we might have issued or
16 otherwise, you know, how we might react to a request
17 to make a compilation. And, as I noted, that's
18 something that we do on a case-by-case basis. But I,
19 in the break, was able to flip through a file and pull
20 out a request that was submitted by someone at the
21 Bowling Green State University who wished to use clips
22 of the Hudsucker Proxy in both face-to-face and online
23 distance education course that he taught. From the
24 context of the letter it does appear that the clips
25 were obtained from legally purchased tapes. I think,

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1 in this instance, it may have been from a VHS. But,
2 in any event, the approval was granted to make a copy
3 that is available on the website and to students both
4 in the distance education and face-to-face versions of
5 the class. I'd be happy to go through and review the
6 files a bit more closely and see if I could find
7 something that is more directly on point to the
8 particular question. But certainly there have been
9 requests granted that involved copying.

10 GENERAL COUNSEL CARSON: Okay. While
11 we're on that subject, dos anyone here have any
12 knowledge of the practices of the other motion picture
13 studios? Are they similar to Time Warner? Does
14 anyone know in this respect?

15 MR. HERMAN: I have a story from an
16 article that's either just coming our or has come
17 out. It's by Stretchers and McLeod and its in a
18 journal called Cultural Studies. I'm confident that
19 they would be comfortable with me giving you the full
20 copy of the article. But here's a story from the
21 article that I think illustrates sort of the concerns
22 on the academic side of things.

23 "Directors, Rob Epstein and Jeffrey
24 Friedman, who transcribes Russo's argument from the
25 medium of point to the screen, secured permission for

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1 every clip that they used in The Celluloid Closet. In
2 fact, they sought hundreds of permissions from over
3 40 different rights holders to use these properties.
4 In the DVD commentary track, Epstein and Friedman
5 implicitly make it clear that this film could not have
6 been made by anyone but privileged Hollywood insiders.
7 They began the rights clearance process by writing
8 letters to the studios. But after these businesses
9 did not respond, they grew increasingly frustrated and
10 angry." And the authors are quoting the words of
11 these directors here. "Frustrated and angry.
12 "Normally this would spell the end of a production
13 before it got off the ground. But one of the film
14 makers grew up 'in the business' and knew many of the
15 studio heads. So, with a few phone calls to some key
16 executives, the directors cleared the rights to many
17 of the clips that Russo describes in his book. Many,
18 but not all. In the same commentary track, the
19 directors openly discuss numerous examples of parts of
20 the book that were self-censored out of the film
21 because they could not obtain the rights."

22 And I feel like this description, combined
23 with the second-hand story that I gotten from Joe
24 Turow himself, in describing the assemblage of clips
25 for a five minute documentary called Primetime

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1 Doctors, Why Should You Care, which has perhaps two to
2 three minutes total worth of five clips from old TV
3 shows and movies, and the way the Robert Wood Johnson
4 Foundation spent \$17,500 for clearing these clips for
5 something that was merely distributed for free as an
6 educational tool to doctors, so they could better
7 understand how media framing and media representation
8 of doctors will shape patient expectations.

9 I think when you combine these written
10 stories as well as a lot of specific experiences that
11 people have had, you see that -- I express great
12 skepticism towards claims that academics can approach
13 rights holders and say, hey, you know I'd like to use
14 this in this or that context and just clearly -- it
15 clearly would be fairest, but I just want to clear it
16 with you first in advance and then have that not --
17 our experience has not been that that's easy or cheap.

18 GENERAL COUNSEL CARSON: Yes. I'm sorry.
19 Can you state your name again?

20 PROFESSOR SENDER: My name is Katherine
21 Sender. I'm a colleague of Peter's at the University
22 of Pennsylvania. I also agree that I think licensing
23 goes against the spirit of fair use and even in the
24 case of getting licenses, I mean, my trying to get a
25 license to use a piece of music in a video, it took me

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1 two months to even find out who owned the licenses
2 even though there are two centralized agencies that
3 are supposed to issue this kind of information. And,
4 particularly when there's no profit involved, these
5 companies have absolutely no motivation to give
6 licenses.

7 And, in terms of the time delay, when
8 we're planning classes, we're often assembling
9 materials, you know, the day before, the night before,
10 the morning of. If we want to use something in class,
11 obviously we're not going to have time to then go and
12 say, okay I need to get a license to use this clip.
13 So I think -- licensing I think is anti-fair use and
14 I also think it's incredibly impractical.

15 GENERAL COUNSEL CARSON: All right. But
16 just continue on that. Professor Decherney or
17 Professor Sender, have you ever actually sought
18 permission from a motion picture studio to do what you
19 think you need to do in order to present film clips to
20 your classes?

21 PROFESSOR SENDER: I haven't. No.

22 GENERAL COUNSEL CARSON: Mr. Decherney?

23 PROFESSOR DECHERNEY: No. It would never
24 occur to me. What we do is using fair use in a very
25 clear various contacts, and --

1 GENERAL COUNSEL CARSON: We get the fair
2 use point, but given that we're dealing with Section
3 1201 here and you're asking for an exemption from
4 Section 1201(a)(1), the question is, has it ever
5 occurred to you and have you acted on if it has
6 occurred to you to go to the rights holders and say,
7 hey, would you please give me permission to circumvent
8 so I can engage in this fair use?

9 PROFESSOR DECHERNEY: It's not actually
10 something that occurred to us until we read the reply
11 comment and we've actually had a research assistant
12 contacting Warner and trying to find out the details
13 of the licensing agreement, and actually have not been
14 able to get very far in the three or four weeks that
15 we've been working on it.

16 GENERAL COUNSEL CARSON: Maybe you should
17 talk to Ms. Aistars.

18 MS. AISTARS: I would be real interested
19 as to who you spoke with because the files of letters
20 that I've looked at typically get turned around in one
21 business day, so the requests that I've seen are, you
22 know, very quickly acted upon. So, if you need a
23 contact I could put you in touch with our Director of
24 Still Licensing.

25 PROFESSOR DECHERNEY: I'd really like to

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1 hear more about it, yes.

2 MS. AISTARS: Only one other thing that I
3 wanted to say just to be clear. We're talking about
4 licensing and how expensive it is and so forth. At
5 least with regard to the approvals that I've
6 referenced, they haven't been fee-based licenses,
7 they've typically been no objection letters or letters
8 pointing the professor to either the classroom
9 exemption requirements or something along those lines.
10 So, in most events they've been entirely free.

11 GENERAL COUNSEL CARSON: Great. Ms.
12 Benedetto, the Pioneer device that you showed us, I
13 believe that it accommodates one DVD at a time, is
14 that correct?

15 MS. BENEDETTO: That's correct.

16 GENERAL COUNSEL CARSON: Now, are there
17 similar devices that would accommodate more than one
18 DVD at a time?

19 MS. BENEDETTO: There are carousel players
20 with these particular features. The advanced
21 interactive features that I showed you other than the
22 play list, no.

23 GENERAL COUNSEL CARSON: Okay. So, if you
24 want to do -- assuming that you were teaching a class
25 and you're talking about more than one film, aren't

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1 you really constrained in how you can do that since
2 you've got to be flipping DVDs back and forth in the
3 device?

4 MS. BENEDETTO: It does require you to
5 manually change them. Yes.

6 GENERAL COUNSEL CARSON: And there are
7 going to be delays, that at least in the course of the
8 classroom, are going to be rather significant, aren't
9 there when you do that?

10 MS. BENEDETTO: Yes. It does depend on
11 the disk. I mean, the disk also -- I mean, obviously
12 it's the time to change to the disk and some disks
13 require you to watch the FBI copyright, some do not,
14 so some of them allow you to get right to the content
15 immediately.

16 GENERAL COUNSEL CARSON: Okay. Professor
17 Decherney, one of the things you talked about, in
18 terms of why you need to do things the way you're
19 doing them, is the side-by-side presentation. How
20 often is that a techniques that you use in your
21 classes?

22 PROFESSOR DECHERNEY: It's hard to
23 quantify it, but it's something I do at least two or
24 three time in a lecture, and I give two lectures in a
25 class a week. So, say six times or so a week. Or, if

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1 it's two classes, 12 times a week.

2 GENERAL COUNSEL CARSON: Good. That's
3 all my questions.

4 MR. BAND: If I could comment specifically
5 to a point that Mr. Attaway was making before about
6 the quality issue. You know, ever since I've been a
7 small kid, I've been watching the Academy Awards and
8 they've always had all these awards for these
9 categories that I never quite understood. Sound
10 effects, sound editing, cinematography, all kinds of
11 other issues about visual editing, and, you know, I
12 can't understand the distinctions,

13 I guess Mr. Attaway's point is, you know,
14 that's kind of just a sham. I mean, there's really no
15 reason to give people all these different Academy
16 Awards because all those quality issues really are
17 irrelevant, and there's no need to teach the next
18 generation of American film makers any of those
19 techniques, because they really, at the end of the
20 day, are irrelevant. They're these, you know, kind of
21 high quality issues that only point to headed
22 academics like Peter Decherney worry about. Or I
23 guess, some members of the Academy worry about, but it
24 really isn't important. I just wanted to make that
25 point. Thank you.

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1 REGISTER PETERS: Okay. I just have a
2 couple of questions. One has to do with, you are
3 looking for an exemption for educational uses. What
4 exactly do you mean by educational uses? What's the
5 scope that you're talking about?

6 PROFESSOR DECHERNEY: Again, that's not --

7 REGISTER PETERS: I know it comes from a
8 university or college library. That's the source of
9 the audiovisual work.

10 PROFESSOR DECHERNEY: Right. So, yes,
11 there are other things delimiting the scope, So, this
12 would be DVD and DVD clips available to only to
13 professors who are going to use them within lectures,
14 as the way that it's primarily used now. It's
15 possible that they could be used even in a broader
16 context than that. So, for example, we use clips from
17 books, you might say, right. And those can be
18 distributed to students in a variety of ways through
19 -- keeping them within a classroom context. So, for
20 text, we use authenticated software and a program
21 called Black Board to make text available. And so
22 there's nothing in the exemption as it's written now
23 that I think would preclude that.

24 REGISTER PETERS: You're not talking about
25 distance education?

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1 PROFESSOR DECHERNEY: No.

2 REGISTER PETERS: Okay. So, you're
3 totally not using Section 110(2), which is available
4 for distance education. But just in class, in --

5 PROFESSOR DECHERNEY: In class, "on the
6 ground" as it's called, context.

7 REGISTER PETERS: Okay. Can I ask --

8 PROFESSOR DECHERNEY: You'll have to refer
9 back to a clip or to use it while taking a test for
10 example.

11 REGISTER PETERS: So the clips are stored
12 on a class website?

13 PROFESSOR DECHERNEY: No. Right now
14 they're stored on a private hard drive within the
15 department context. But, I'm just thinking about the
16 broader implications of the exemption and there might
17 be ways of using the clips in educational context
18 within a classroom context.

19 REGISTER PETERS: Okay. The exemption
20 that, with regard to derivative and collective works,
21 which contain audio works that are in the public
22 domain, I assume you're looking for something very
23 similar. And I guess my question is -- you're point
24 is that you have a right to get at the public domain
25 material, but the derivative or collective work itself

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1 may well be copyrighted work, so you want to
2 circumvent that. Does it matter whether or not
3 there's any other way to get the public domain
4 material?

5 PROFESSOR DECHERNEY: For the most part,
6 I mean, all the same concerns arise about quality and
7 the kinds of objects we're looking at. But in
8 addition, it's often less likely that public domain
9 works are available in any other context. We just --
10 for example, Keno video was one company that's
11 specialized in presenting classic films, many of which
12 are in the public domain. I submitted just a list of
13 DVDs that they distribute that are of great
14 educational use. In fact, those are I use DVDs more
15 highly, more frequently than any of the others, I
16 would say. And they're all on DVDs in which they're
17 bundled with copyrighted content. I know in previous
18 rule makings there's been a discussion about whether
19 or not works in the public domain could be available
20 on DVD and not encrypted while copyrighted work could
21 be encrypted. And while that sounds good, it's almost
22 impossible to find a public domain film that doesn't
23 have a copyrighted soundtrack added to it when it's
24 released on DVD. So, that would be another question
25 I guess, whether or not the soundtrack could be

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1 separate from the image track.

2 REGISTER PETERS: I know the Library of
3 Congress, when it was doing some experiments, did them
4 without the soundtracks because we couldn't clear the
5 rights on them. With regard to like, really works
6 that are extremely old, let's say no soundtracks,
7 silent films, is it possible that, like, places like
8 UCF, a film archive or the Library of Congress room
9 archive are a source, or are you really just focusing
10 on material that's been brought out commercially in a
11 DVD format?

12 PROFESSOR DECHERNEY: In order for UCLA,
13 the UCLA film archive, to restore something, they
14 often make a commercial agreement to release it on DVD
15 proof, Keno video or another collection. There
16 actually are one or two exceptions, so like, Treasures
17 from the Archive is a great one. That's organized
18 through the National Film Preservation Fund and that's
19 not a CSS encrypted DVD. But that's a very special
20 case and it's only two brief collections of films.
21 But most films restored by UCLA or The Eastman House
22 in Rochester are made commercially available with CSS
23 encryption.

24 REGISTER PETERS: Okay. I don't have any
25 other questions.

1 LEGAL ADVISOR TEPP: Most of mine have
2 been asked so I only just got this one quick one.
3 Professor Decherney, the CD switching that's been
4 discussed and some other work-arounds, would you
5 characterize those options as better than nothing?

6 PROFESSOR DECHERNEY: Yes.

7 LEGAL ADVISOR TEPP: Thank you very much.

8 PROFESSOR DECHERNEY: Is that it?

9 LEGAL ADVISOR TEPP: That's it.

10 REGISTER PETERS: Okay. I want to thank
11 all of you. It was extremely helpful even if
12 extremely long. But your testimony was very helpful
13 to us. I'm sure we'll have additional questions so
14 I'm sure probably all of us -- all of you will be
15 hearing from us. But with that, I hereby declare the
16 hearing closed. Thank you.

17 (Whereupon, the above-entitled matter was
18 concluded at 1:49 p.m.)

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