The hearing was held at 2:00 p.m. in the
ing room of the Postal Rate Commission, 1333 H
Street, NW, Washington, DC, Marybeth Peters,
Register of Copyrights, presiding.

PRESENT:

MARYBETH PETERS Register of Copyrights
DAVID CARSON General Counsel of Copyright
CHARLOTTE DOUGLASS Principal Legal Advisor
ROBERT KASUNIC Senior Attorney of Copyright
STEVEN TEPP Policy Planning Advisor

WITNESSES:

ALLAN ADLER Association of American
Publishers
JONATHAN BAND Various Library Associations
ROBERT BOLICK

McGraw-Hill
PAUL SCHROEDER American Foundation for the
Blind
EXEMPTION FOR LITERARY WORKS/eBOOKS FOR PERSONS WITH DISABILITIES

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MS. PETERS: Good afternoon.

I'm Marybeth Peters, the Register of Copyrights. And I would like to welcome everyone to the second of four days of hearings in Washington in this second anti-circumvention rulemaking.

The agenda for the next two hearings in Washington, which will take place here at the Postal Rate Commission, beginning tomorrow at 9:30 and next Friday, May 2nd, and for two additional days of hearings in Los Angeles on the 14th and 15th are available on our website.

Before going through further, let me introduce the rest of the panel. To my immediate left is David Carson, general counsel of the Copyright Office. To my immediate right is Rob Kasunic, who is senior attorney and advisor in the Office of the General Counsel. To his right is Charlotte Douglass, who is principal legal advisor to the General Counsel. And to David's left is Steve Tepp, who is a policy planning advisor in the Office of Policy and International Affairs.

I think most of you know the purpose of this rulemaking proceeding is to determine whether
there are any particular classes of works as to which uses are or are likely to be adversely
effected in their ability to make noninfringing uses if they are prohibited from circumventing the
technology access control measures.

The Copyright Office will be posting the transcripts of all hearings approximately one week after each hearing. These transcripts will be posted on the website as originally transcribed, but the Copyright Office will give everyone testifying an opportunity to correct any errors in these transcripts.

The transcript from April 11th are available on our 1201 page.

The comments, the reply comments, the hearing testimonies will form the basis of evidence in this rulemaking which, in consultation with the Assistant Secretary for Communications and Information of the Department of Commerce will result in my recommendation to the Librarian of Congress. The Librarian will make a determination by October 28, 2003 -- actually, hopefully before -- on whether or not exemptions to the prohibition should be instituted during this 3 year period.

The format of each hearing will be
divided into 3 parts. First, the witnesses will present their testimony. This is your chance to make your case to us in person explaining the facts and making the legal and policy arguments that support your claim that there should or should not be a particular exemption.

The statements of the witnesses will be followed by questions from the members of the panels. The panels may ask tough questions of the participants in an effort to define issues. We stress, however, that on each side both sides are likely to receive difficult questions and none of the questions should be seen as expressing a particular view by the members of the panel.

This is an ongoing proceedings. No decisions have been made as to any critical issues in this rulemaking.

The purpose of these hearings is to further refine the issues and the evidence presented by both sides. In an effort to obtain relevant evidence, the Copyright Office reserves the right to ask questions in writing of any participant in these proceedings after the close of the hearings. Any such written question asked and answers received will be posted on the Office's website.
After the panel has asked its questions of the witnesses if time permits, we intend to give the witnesses the opportunity to ask questions of each other. If we have not managed to come up with all of the tough questions that should be asked of each of you, I'm confident that your fellow witnesses will do the job for us.

So, let's begin. And I'm going to begin in the order that is listed on our website.

What we're looking at today is exemptions for literary works with respect especially to e-Books and persons with disabilities.

The first witness will be Paul Schroeder of the American Foundation for the Blind.


He will be followed by Robert Bolick of McGraw-Hill Professional.

And last, but certainly not least, is Allan Adler from the Association of American Publishers.
So let's begin with you, Mr. Schroeder.

MR. SCHROEDER: Thank you very much.

What are the time constraints and is there a system you will be using for a time warning?

MS. PETERS: No. We didn't set time limits. We wanted to give you the opportunity -- we don't want it to go too long, but we wanted to give you the opportunity to present your case.

MR. SCHROEDER: Thank you. I'll do my best to be relatively brief.

My name is Paul Schroeder, I am Vice President of Governmental Relations for the American Foundation for the Blind.

AFB has filed written comments in this proceeding urging that literary works be considered an exempt class. Our concern is that technological controls that are being employed to protect a number of categories of literary works from piracy and other forms of illegal use are, in fact, also interfering with fair use by individuals who are blind or visually impaired.

Let me stress a couple of points at the outset.

First of all, it's worth noting that the American Foundation for the Blind has a long track
record in history, both of advocacy on behalf of
people who are blind or visually impaired in access
to information and in creating opportunities for
accessing information such as in recording of audio
material, the pioneer in fact of the Talking Book
Program now run through the Library of Congress.

We also are a producer of published
materials. And so in that regard we, of course, are
very interested in insuring that copyright
protection is insured and that technological
measures in fact can be deployed to insure copyright
protection. However, we have determined, and our
testimony did in fact include examples, the
technological measures are being deployed in a way
that defeats access for people who are blind or
visually impaired to electronic material.

Digital information or electronic
information cannot be understated the importance of
access to material in that form for people who are
blind or visually impaired. We are at the dawn, we
believe, of an opportunity for people who are blind
for the first time have access to the wealth of
material that sighted people have had for years in a
timely fashion. This has not been traditionally
true for people who are blind or visually impaired.
We have had to wait for formats to be made accessible through Braille, audiotape or large print, reconverting if you will material from the printed page into another form.

The advent of digital text or electronic text offers the scintillating opportunity for those of us who are blind or visually impaired to have access at the outset in the same fashion and in the same time as our sighted peers. Unfortunately, the deployment of measures to provide for protection of material in electronic text, though we grant the importance of those measures, has also in fact interfered with our ability to use that material.

For people who are blind or visually impaired it should be noted we require the use of special technologies to convert digital text into some other form. Typically, this takes the form of a screen reader, a piece of software that resides in a computer and converts digital text into speech, into Braille or into larger characters on the screen. This facilitates the use of the material for people who are blind or visually impaired in a way that allows them to have full access to the digital text.

Obviously, this requires an ability for
our software systems to be able to interact with the
digital text and any software or hardware
requirements for the production of that digital
text. In other words, our software has to be able to
get to and convert the digital material into speech,
into Braille or into larger print on the screen.

Unfortunately, many of the technological
schemes that have been put forward to date have, in
fact, interfered with our ability in many ways to
convert this material into accessible text. It
could be at the control level, it could be at the
level of the software actually being able to convert
text; and we have provided in our written testimony
some of the examples that come to mind.

I want to suggest that there is a long/history of fair use being protected for people who
are blind or visually impaired in the 1976
amendments and in the Chafee amendments to the
Copyright most notably. We are concerned that the
DMCA has tilted the balance in a way that could
interfere with the fair use opportunities for people
who are blind or visually impaired to access
copyrighted material in digital form.

We have presented examples that showcase
common e-text systems such as Microsoft Reader and
PDF, not to suggest that those are the only problems or to suggest that those companies in fact are not aware of or taking action with respect to accessibility, but to suggest that the common forms that are now being used to provide e-text and therefore to ensure copyright protection for e-text, are also thwarting access for people who are blind or visually impaired. We presented some examples of titles drawn from amazon.com with two problems; one being the titles themselves that we could not access and the second being that there was no indication for the consumer prior to purchase of those titles that in fact an individual who is blind or visually impaired would not be able to use their screen reading software to have access to those titles.

We do, in fact, hope and are certainly trying to work with industry, both the publishing industry and the technology industry, to develop protection schemes that will in fact allow our screen readers to have access to this material in a way that ensures fair use rights for people who are blind or visually impaired but also allows for appropriate copyright protection.

I think I'll leave it at that, and we can delve into some more of this during question
period.

MS. PETERS: Thank you very much, Mr. Schroeder.

Mr. Band?

MR. BAND: Thank you very much.

Fewer than 10 percent of the books published each year in the United States are ever made accessible in audio or Braille formats. Moreover, as we've heard, often it takes months or even years for a work to be made available in one of these formats. This delay presents particular difficulty for students who are trying to read required readings for courses.

E-book technology presents a unique opportunity for the visually disabled community. Text-to-speech synthesizers make these works accessible quickly and efficiently. However, as we've heard, many publishers use technological barriers to frustrate the operation of screen readers.

The library associations support an exemption to Section 1201(a)(1) with respect to technologically protected literary works in e-book form to permit access via a screen reader by an otherwise authorized person with a visual or print
disability.

What we propose is an extremely narrow exemption. It would only be available with respect to lawfully obtained e-books. Screen readers do not compete with books on tape because of the synthetic quality of the sound, thus an exemption would not harm the interests of copyright holders.

Other approaches for increasing access by the visually impaired are under discussion at venues such as the Open Electronic Book Forum. But the solutions are a long way off. The exemption would provide an immediate solution to an existing problem.

Opponents of the exemption make a series of curious arguments that completely miss the mark. They observe that most e-books also appear in print form and then perceptively note that neither Section 1201 nor technological barriers prevent access to these works in print form. They overlook the fact that for visually impaired people the availability of books in print form is meaningless unless it is also available in Braille or audio. And, as noted, 90 percent of the books are never available in either of these formats.

The opponents state that many of the e-
books do not block screen readers, and therefore an
exemption is not necessary for those e-books to do.
With all due respect, this is a truly ridiculous
argument. Are the publishers suggesting that all e-
books are fungible? That just because an e-book
edition of *Harry Potter*, for example, is screen
reader accessible, that a blind student has no need
to access a quantum physics book assigned in a
college course?

Opponents also suggest that by
distributing literary works in e-book form they are
doing consumers a great favor and that they
shouldn't be penalized by having to permit the use
of screen readers. These opponents demonstrate a
fundamental misunderstanding of the bargain they
struck when they asked Congress to enact the DMCA.

The content providers came to Congress
and stated that they needed help in developing the
market for digital works. Congress agreed to help by
prohibiting the circumvention of technological
measures, but conditioned that help on the granting
of exemptions when users of certain class of works
are likely to be adversely effected in their ability
to make noninfringing uses of the works. The
publishers have decided to exploit the market
opportunity in e-books. They're doing this not out of the goodness of their hearts, but because they see a potential for profits.

The DMCA is part of the legal framework that enables this profit. But the price of this added element of protection is exemptions in certain special cases. The publishers were given a benefit with a few very thin strings attached. Having taken advantage of the benefit, they can hardly complain about the strings.

The opponents argue at great length that proponents of the exemption have not met their evidentiary burden. I submit that we have. The testimony of the American Foundation for the Blind contains examples of e-books that block screen readers and are not, I believe, available in Braille or audio format. A blind person who cannot read even one of these books is adversely effected by Section 1201(a)(1).

Obviously this exemption will not give the visually impaired access to all the books in the Library of Congress or even all the books at the neighborhood Barnes & Noble. But it will give them access to e-books which over time will represent a growing share of the collections at the Library of
Congress and in Barnes and Noble.  

The Librarian should not deny the visually impaired this unique opportunity.  

Thank you very much.  

MS. PETERS: Thank you, Mr. Band.  

Mr. Bolick?  

MR. BOLICK: Thank you for the opportunity to appear and testify at this rulemaking proceeding.  

I'll have to restrict my comments to literary works distributed as e-books, because that is the only class of work about which I know anything that might be worth saying.  

I am particularly interested in conveying to the panel the fact that the e-book industry is still in its infancy. The e-book is still at the stage of incunabula. We now even have tablets to which we have to scroll and tap and read them; so one wonders whether they're going backwards in time sometimes.  

It's better to think of e-books as e-incunabula. There are fewer than 100,000 copyright literary works available as e-books in the market today. Not counting the multiple formats, the number is probably closer to 50,000 than 100,000.
The reasons for this are: Concern about
the easy dissemination of digital content; Concern
about the strength of consumer demand for which e-
books require a change in consumer behavior to buy
digital instead or as well as print; Concern about
our mastery of digital literacy, by which I mean
having the same mastery and facility in publishing
and consuming e-books as we have with print books.
And finally, concern over the additional costs in
delivering e-books to this market.

The norm in the e-book industry today is
change and experimentation. Businesses choosing
multiple formats in which to issue their e-books is
the norm. We are groping towards the right offer to
consumers and end users. That's why the AAP and the
American Library Association recently joined forces
and commissioned a white paper review of the
libraries and their patrons' experience with e-book
and DRM. The title of that white paper, "What
Consumers Want in Digital Rights Management: Making
Content As Widely Available as Possible in Ways that
Satisfy Consumer Preferences."

Publishers, librarians and other
stakeholders have also recently commissioned another
survey of the experience of e-books, and that one
came through the Open E-Book Forum. It can be found at their website.

Both studies found the primary dissatisfaction with e-books is not with limitations imposed by DRM, but those imposed by form factor limitations; readability, battery life, etcetera, and the paucity of available e-books.

Publishers only have an influence on form factors, we don't control it. We do have a control over the number of e-books we place in the market. But as I have noted, we have felt constrained by a combination of factors. Making e-books a class of work exempt from the DMCA's prohibition on circumvention of access control measures is not likely to make publishers feel less constrained.

Digital piracy is real. Misunderstanding of copyright and fair use is real. My experience with e-book vendors, customers, pirates and stakeholders in the standards organizations leads me to believe that we still have work to do to generate a market in which all of the participants are digitally literate and satisfied with what they receive from the e-book bargain.

Many, if not all, of the
dissatisfactions expressed in the commentary are
being addressed by the publishing and technology
companies response to market demand and tackled in
standards-making organizations like the Open E-Book
Forum. The AAP and its members have contributed to
the OEBS recently accepted coordinated requirements
statement on DRM, which can be found at the OEBS
website. That work involved the careful analysis and
normalization of statements of need and requirements
from a broad range of stakeholders. The results are
being taken to the next stage of standards making by
this group, which is to agree a rights grammar for
expressing conditions of permissions in a rights
expression language.

Publishers are also attending to other
standards necessary to facilitate a robust e-book
market. Standards such as the digital object
identifier, ONEX for Online Exchange of trading
information and the Digital Sales Report format.

Again, these efforts are not taking
place in a vacuum, but involve representatives from
key stakeholders in the community.

I hope that the panel will take these
points into consideration when weighing whether e-
books as a class of work should be exempt from the
prohibition on circumvention of access control and accept that far from having a substantial adverse impact on society, publishers' efforts with e-books and DRM are having a positive impact.

MS. PETERS: Thank you very much.

Mr. Adler?

MR. ADLER: Thank you for the opportunity to appear here today on behalf of the Association of American Publishers.

Very often we hear people talk about the Digital Millennium Copyright Act and the Copyright Act itself as if they were two different statutory regimes. And the fact of the matter is the Digital Millennium Copyright Act was a series of amendments to the Copyright Act which were carefully considered by Congress with respect to how those amendments would integrate with existing provisions of the Copyright Act, both those providing for the rights of copyright owners as well as the limitations on those rights.

I think one of the problems with the issue that we're discussing on this panel is a misunderstanding about the way in which accessibility in terms of the needs of people who are blind or otherwise have print disabilities meets
up with the term access and the issue of
accessibility as it was addressed by Congress in the
DMCA under Section 1201(a).

Accessibility in terms of individuals
who have particularized needs because of
disabilities is something that is provided for by
Congress in the context of the Copyright Act
specifically and was provided for by Congress
several years before the enactment of the DMCA.
Section 121 of the Copyright Act, which is popularly
known as the Chafee Amendment, was specifically
designed by Congress as a limitation on the right of
copyright owners in order to meet the perceived
needs of persons who are blind or otherwise have
print disabilities in order to provide them with
access in the context of those disabilities to print
materials.

When Congress enacted the DMCA and
addressed the question of a copyright owner's right
to use technological protection measures to control
access to a copyrighted work and gave the ability of
the law to help the copyright owner enforce the use
of such technological measures, it could have at
that time if it had thought it necessary address the
issue of accessibility with respect to individuals
who have print disabilities. But it didn't, because it didn't believe that such an accommodation was specifically necessary with respect to access controls. Because the access issue that is dealt with in Section 1201 is not the same as the accessibility issue that is dealt with under the Chafee Amendment.

Now, the Chafee Amendment has been, I think, a fairly successful piece of legislation by Congress, particularly with respect to its designed aim, which is to expand the ability of persons who are blind or have print disabilities to be able to access print materials in specialized formats that will allow them to use those works in the same way that individuals can who do not have such disabilities. The result of which has been that the National Library Service, for example, no longer has to depend upon the cooperation of authors and publishers in granting permission to reproduce copyrighted works. The American Printing House for the Blind has been able to increase its production of materials that are in specialized formats, including Braille, audio cassette talking books and software to allow for the translation of text-to-speech, the recording for the blind and dyslexic
organization has been able to build upon its record
in expanding the availability of talking books to
this books. And AAP worked with a new organized
called Benetec to create a website known as
Bookshare, which allows for the scanning of books to
be provided into digital texts so that they could be
made available in specialized formats to people with
such disabilities.

But in noting all of these successes,
it's important also to note what Congress didn't do
in the Chafee Amendment. And what I mean by that,
it's specifically talking about a kind of limitation
that Congress placed in the Chafee Amendment as it
was engaging in the balance of the rights of
copyright owners with the needs of persons with
these special disabilities.

The Chafee Amendment authorizes certain
entities to reproduce or distribute certain literary
works in specially formatted copies without
permission from or payment to the copyright owner,
but nothing in the Chafee Amendment requires the
publisher of a copyrighted literary work to insure
that the published format chosen by the publisher
for the distribution of that work meets the
accessibility needs of persons with print
disabilities.

I would suggest to you that if the exemption that has been proposed is granted, we would be seeing this body engage in a limitation on the rights of copyright owners that Congress deliberately chose not to enact in the process of enacting the Chafee Amendment. And the reason Congress, I believe, chose not to enact such a limitation was because it was consistent with something that we have argued over a great deal in proceedings before the Copyright Office, and that is the question of whether or not there is a right of access to works, literary works that are protected under the Copyright Act that is provided by the Act itself. And as this body has said, and as a number of federal courts have said, there is no unqualified right of access to works on any particular machine or device, or in any particular format of availability. And the fact of the matter is if the exemption being sought today was granted, the Copyright Office would, I believe, be creating essentially a right of access in a particular format of availability. Something that hasn't existed before.

Now, the danger there, of course, is not
only in the precedent that that would set, but it
more practical terms what it would mean for the
distributors of e-books. We had already seen with
the Elcom Soft case, for example, what happens when
somebody purports to simply facilitate fair use of
an e-book literary work by being able to disable
digital rights management technological safeguards
simply to facilitate what they would consider to be
fair use. The fact of the matter is, is that in the
way people construe this is general parlance they
would believe that they have an exemption to do away
with whatever digital rights management technology
was protecting the rights of copyright owners. I
don't imagine that in the marketplace today it would
be possible for this body to create a meaningful
exemption that would not essentially swallow up the
limitations that the body sought to include with it.
You've already heard that e-books is a
format for distribution of literary works that
probably would not even exist in today's marketplace
without the fact that Congress recognized the
ability of copyright owners to be able to use access
controls and other technological safeguards to
protect their interests in the digital environment.
And the fact is, is that to create an exemption of
this kind I think would begin to open up a wedge within that careful scheme that Congress created that ultimately going down the road would create a great deal of misunderstanding and probably clamor for further widening of it based upon the precedent that would be established.

Thank you.

MS. PETERS: Thank you very much.

I'm going to start the questioning, there's actually, like, two separate two proposed exemptions that you're looking at. One has to do with the people who are very upset about "tethering" or limiting an e-book to a particular machine and then there's the separate one that deals with those who are visually impaired, blind or visually impaired. And I'm looking at the publishers because my guess is there are two different things for you, too. And could you comment specifically on the proposal with regard to those who are blind and visually impaired, what is the issue on whether or not a publisher chooses to actually make the screen reader available and what's the downside to making it available?

MR. ADLER: Well, I'll defer to a publisher in a moment.
MS. PETERS: Okay.

MR. ADLER: But let me just say because I represent an organization that represents a number of publishers --

MS. PETERS: Right.

MR. ADLER: -- they have diverse views about that. There are some publishers who very strongly believe that there is a performance right issue and there's a question about competition with respect to commercially produced audio versions of literary works and the enabling of that audio capacity either in a e-book format or as an audio book. There are other publishers who are members of AAP, however, who don't have that view. And that's precisely why we believe that this is a marketplace issue and it allows for competition between publishers in the making available of works with greater or lesser functionality.

MS. PETERS: Okay. Mr. Bolick?

MR. BOLICK: At McGraw-Hill when we publish e-books, we publish in multiple formats. One of the formats is PDF, and we always turn on the text-to-speech permission within the e-book format. Other publishers do not.

I can understand their perspective, a
bit. As you hear over the phone actresses and so forth answering the phone for you or actors answering the phone for you, it's very easy to do a text-to-speech or a digital interpretation using an actor or an actresses' voice. That sounds an awful lot like a performance. So that technology can just as easily be applied to a book and have Leonard Nimoy read your novel as having a voice that sounds like Stephen Hawking.

But at McGraw-Hill and at other publishers the text-to-speech switch is turned on. If there were an exemption that said get rid of the circumvention or the prohibition to circumvention, then it seems to me that we are throwing out the baby with the bath water, because there are an awful lot of other elements of protection that go with it. So we'd be concerned to see an exemption in this particular area.

The marketplace will rule. The formats are going to get better. And one of the reasons that we publish in so many formats is that some formats suit some consumers better than others.

MS. PETERS: Mr. Schroeder, you're seeking the exemption. My question is are people actually able to circumvent today to turn on the
screen reader? Maybe that's not a good question to ask. What I was actually trying to get at was even if there's an exemption, you still have to be able to make the work available. I mean, so you've got to figure out how to circumvent. So I was wondering about the efficacy of such an exemption?

MR. SCHROEDER: I'll acknowledge that I think we have a somewhat difficult case to make in this environment. Certainly this would better have been put to Congress at the time of framing DMCA because what should have happened is an assurance that technological schemes could not, in fact, be put into place unless accessibility for people with disabilities had been considered and insured with, perhaps, some exemption which would be typical from other laws such as undue burden where it simply could not be done.

In this case, I think we're trying to do the best we can with what the Librarian of Congress has in front of them to make a determination about. The fact is that people are not able to circumvent some of the security systems, and it's at least ambiguous as to whether in fact our technology developers, screen reader developers in a highly specialized market should in fact even be providing
any assistance or any means of doing so. I think you could probably mount an argument that in fact in doing so they really are insuring fair use, the Elcom Soft case notwithstanding.

So I don't know how to answer the rest of your question in the context of their environment.

I do want to make one other point, though, which is that the argument about text-to-speech being the same as commercial audio is absurd. It may be, and there may come a time when in fact we have a sophisticated enough technological environment when it's not just the sound of the speech, but all of the other things that go into a audio performance; the timing, the inflection, are in fact able to be duplicated or in fact able to be put forward in such a fashion that a true synthetic speech performance would come close to a human audio performance in a way that it would be difficult to tell the difference. But I can assure you, and AFB as a producer of high quality audio material for the Library of Congress under the Talking Book Program we know a little bit about human recorded audio and high performance audio material. They are not even close to being the same.
So to argue that text-to-speech offers any kind of conflict or any kind of commercial harm to a producer of audio material is absurd.

MS. PETERS: Do you want to say anything?

MR. ADLER: Well, you know, it's a question I think, first of all, of who gets to make the judgment about whether or not someone who is considering offering as a commercial product an audio reading of a literary work would find that they would have to be competing with a synthetic reading of that same literary work. It may well be the case that in terms of Mr. Schroeder's experience he views the things as apple and oranges, but at the moment we're experiencing advances in technology where synthetic speech, particularly for example in the digital talking books produced by Recordings for the Blind and Dyslexic is beginning to become very sophisticated and sounding more and more like human voices being read.

MR. BOLICK: It's also the case that in negotiations with agents that these are rights that are on the table for trade publishers in particular. And it is more on the trade publishing side where this is an issue.
McGraw-Hill doesn't pretend to be a large trade publisher comparable to Simon & Shuster, Random House and so forth publishing novels and textbooks. And it would be far easier to find your quantum physics book read to you aloud than it would be your *Harry Potter*, I suspect.

But in the trade negotiations those are rights that are on the table. And if the publisher has a practice of wanting to, as we do, offer text-to-speech automatically, that's just what we do. It's who we are. It's what we stand for. It puts us at a competitive disadvantage with those publishers who do not view it that way.

MS. PETERS: Okay. Yes?

MR. BAND: If I could back to actually that point, but also the question that you asked Mr. Schroeder.

I think you hit the nail on the head; that is to say an exemption does not mean that a publisher is prohibited from using a technological measure. I mean, if they want to still distribute the work with the screen reader access turned off, they're certainly perfectly free to continue doing that. What we're looking at here is if, notwithstanding their choice to continue to use the
technological protection, the user has the ability
to circumvent that protection? No one's forcing the
publisher to do anything. The publisher can do
whatever it wants. The only question is what is the
user able to do and is the user able to circumvent
the technological protection.

And then you asked a very interesting
question to Mr. Schroeder, which is okay, how likely
is it that a user will circumvent a technological
protection? And there are two levels to that
question, or two ways of answering it.

You could certainly ask what is the
likelihood of people generally and then, perhaps all
the more so, visually impaired people to have the
technological sophistication themselves to
reconfigure their computer or reconfigure the
software so that they are able to circumvent the
technological protection; that is a fair question.
But, of course, that question can be asked with
respect to every exemption. And if we get into that
discussion, then perhaps this whole rulemaking is
ridiculous because no exemption will ever meet that
standard.

But it also leads to a second conundrum
or a second solution, which is perhaps the user
himself will not have the technological sophistication to develop the software to circumvent the technological protection, but could someone else provide it? For example, Mr. Schroeder's organization, would they be able to provide it? But, of course, that leads to another problem.

MS. PETERS: Yes.

MR. BAND: The exemption is only for, at least it appears to be on its surface, only for uses for the act of circumvention and not circumvention devices. And that's a whole other problem. But, again, that issue also goes to the entire nature of the proceeding as opposed to the specific exemption.

MR. ADLER: But it's not an irrelevant issue because the fact of the matter is if the burden of proof that is the core of this proceeding is that the proponents of an exemption first have to demonstrate that there is substantial adverse effect on specific uses of a particular class of works, I would assume that any proposed exemption that would be adopted by such a rulemaking would have to be able to demonstrably alleviate that particular substantial adverse effect. And if by adopting the exemption, in fact as a practical matter you can't alleviate the substantial adverse
effect, then there's no justification in adopting
the exemption.

MR. BAND: But, of course, the statute
does not use the word substantial adverse effect.
The statute, which the Copyright Office kindly has
given us a copy of, says adversely affect and not
substantially or severely adversely affected. But,
again, that point gets to the entire proceeding that
you're asking for a level of proof that is circular
and no exemption would ever be granted. And surely
Congress did not intend to set up a rulemaking
proceeding that was illusory.

MS. PETERS: One last quick question.
Mr. Schroeder, Bookshare. I think in your comments
you said a lot of stuff doesn't really work for you.
But I know the intent of that organization is to
basically have more and more material available for
those who are blind or visually impaired. And I just
wondered if your view may be based on an experience
you have today but may not be there in a not too
distant future?

MR. SCHROEDER: Bookshare and Web Brow,
which is through the Library of Congress, are two
excellent examples of how digital information is
being made available to people who are blind or
visually impaired taking advantage of the Chafee Amendments in particular. And I, in fact, applaud and have said in many places that I applaud the publishers working with Bookshare to ensure that that web based delivery system and distribution system could go forward to provide accessible materials. However, it depends on a world, and this is important because it's important in understanding what Mr. Adler was saying about the Chafee Amendment. It depends on a world in which you could not reasonably be expected that publishers could provide material easily in an accessible form for people who are blind or visually impaired. It depends on a world in which still people have to convert a printed page into some other form of access. And even under Bookshare, and certainly under Web Brow, in both instances, a significant amount of work has to be done to transform printed material, or in some instances digital material, into a form that is accessible and useable for people who are blind or visually impaired.

That's a world in which blind people still don't have access to very much material. In a world in which people regularly trade and distribute and deal in e-text test, that's a world in which
properly configured people who are blind or visually impaired have nearly full access to information, commercial and otherwise. That's the world that we're certainly trying to strive toward. And that will be at least assisted in insuring that: (a) organizations like ours and others and developers of assisted technology in fact are not committing violations of the MCA or the entire Copyright Act if they provide individuals with a means to make fair use of material that they have a right to. And if that means cracking an encryption system, then that's what it means. Because that, of course, should not be a violation if your intent is to read and to utilize the materials. If it becomes a violation, then you intend to have unlawful uses for that material.

MR. BAND: And let me just add a critical point. We're always talking about accessing material that the user has paid for. I mean, that he has lawfully obtained. We're not talking about breaking into a secure website and getting something without permission. We're only talking about a situation where, you know, as in the AFB testimony where, you know, you go to amazon.com, you download and then you need to circumvent it because it's not
screen reader enabled. So you've paid for it. We're only talking about a situation where you have paid for access but notwithstanding the fact that you have paid good money for the access, you aren't able to use it.

MS. PETERS: Okay. I need to let the other panel members -- I could go on further.

So, David?

MR. CARSON: I've got a couple of basic questions I think, both of them are grounded in the text of Section 1201.

This first one is for any and all of you who have any views on it. We've been talking about situation, I guess the easiest example is where a screen reader which would convert text to speech doesn't work and you want to do it in order to convert the text to speech so that someone who can't see the text because of visual impairment can hear it.

So the question is, is the act of doing that a noninfringing act. And if so, why? If not, why not?

MR. SCHROEDER: I think our view would be that the act of doing that according to the reading of the statute and the accompanying
committee report, the act of using a screen reader
to convert text into speech or some other form for a
blind or visually impaired person would not be
infringing. Would not infringe the copyright.

MR. CARSON: If you can elaborate. I
don't know if you're a lawyer, but legal analyses is
always helpful when you're trying to explain whether
something is infringing or not.

MR. BAND: Well, if I could add, I mean
under Section 106 it would have to be a public
performance. But we're talking about -- I mean, you
have a public performance right but not a private
performance right. And so that's the first level of
analysis, that this would -- what we're talking
about is something that someone would be doing at
home. And certainly if they were to do it in a
broader context where it would be a public
performance, then that could conceivably could be
infringing. But then you would get to the second
tier, which would of course be fair use. And it
could be that under certain circumstances that kind
of public performance might be permissible under
Section 107 or might be permissible under Section
110, but I would imagine in most cases what we're
really talking about is something that is a private
performance and therefore not implicated by the
Copyright Act.

MR. ADLER: I think if you look at the
Chafee Amendment, the Chafee Amendment explicitly
says that digital text is one of the specialized
formats in which an authorized entity as defined in
that exemption is permitted to reproduce and
distribute certain copyrighted works without
obtaining the permission of the copyright on it.

Now, that doesn't ultimately resolve the
issue as to whether or not taking that digital text
and using it with text-to-speech software to
translate it into an audio version is or is not a
performance. The simple fact of the matter is, is
the Chafee Amendment only dealt with two rights that
are among the exclusive rights enumerated in the
Copyright Act. It only dealt with reproduction and
distribution. It did not deal with the question of
performance at all.

But I think more importantly to the
analysis, while Congress designated digital text as
one of the permissible specialized formats, it
didn't in any way provide any special right of
access to digital text. It didn't guarantee that a
person would be able to translate a particular work
into digital text or to be able to demand that
digital text be available for purpose of using it
with text-to-speech translation software.

Congress assumed that if it had among
various types of specialized formats digital text to
the extent that digital text could be used to make
the work accessible to a person who was blind or
otherwise has print disabilities, it would be all
right to do so without having to engage the
permission of the copyright owner. What Congress did
not do was to say that a work could be translated
into digital text specifically so that it would be
capable of being used with text-to-speech
translation software.

And the fact of the matter is, is one
can see that even certain specialized formats that
are widely used in this community to meet the needs
of print disabilities, one was specifically excluded
from the Chafee Amendment, and that was large print.
The reason it was specifically excluded was because
it was recognized by the Copyright Office in
testimony before Congress and ultimately by Congress
that large print was already a viable commercial
marketplace. And what Congress was trying to get at
with the Chafee Amendment was the recognition of the
fact that servicing the needs of people who are
blind or otherwise have print disabilities, the
sheer volume of people involved, the incentives for
commercial producers to be able to meet the needs of
those people, was not likely to occur. And
therefore, Congress stepped in and through
regulation decided to meet those needs.

But with respect to the issue of access
to a work under 1201, Congress is deliberately
recognizing that these are works put into the
commercial marketplace where they are subject to
competition. Congress didn't have to mandate either
the right of a copyright owner to use a
technological measure or determine in anyway under
what circumstances a particular technological
measure controlling access to a work could be used.
Congress recognized that whether or not particular
copyright owners would use access controls with
respect to particular works would be part of their
calculation of how to put that work into
distribution in a competitive marketplace.

So, it really still is a marketplace
issue.

MR. CARSON: All right. But back to my
question, and if Mr. Band responds in particular. I
think he articulated what might be the right of the
copyright owner under Section 106 that would be
implicated, and his theory is it's a performance
right but not a public performance, so it's a
noninfringing use. Do you have a response to that?
What right would be violated simply by taking that
digital text and converting it to speech so that I
can hear it? What rights of the copyright am I
violating when I do that?

MR. ADLER: Well, again, as I said,
within the membership of AAP at least there is some
diversity of opinion as to whether or not there is a
specific right. And I assume from the discussions,
it would be the performance right that is being
discussed.

There is no uniform view on that as far
as I know. And Congress, simply, has been
absolutely silent with respect to that issue.

MR. CARSON: So at least some publishers
-- oh, I'm sorry, Mr. Bolick, I don't mean to --

MR. BOLICK: Well, for some publishers
they might view it this way: That a text-to-speech
version of an e-book could be separately saleable
item and considered a derivative work. We have a
work that is non-text-to-speech, we have one that is
text-to-speech, we have one that is print, we have one that's large print. All of these go into the market commercially.

We're looking at an interesting case right now of a gentleman in Pennsylvania who is offering his services to anybody, not just the disabled, to send your book to me and I'll convert it and send it back to you on a CD in a MP3 file. This is very interesting to us. We don't know what the implications of this are. For some publishers, I'm sure they're having cows. For others, we think oh, good right on. There's a wide church within the publishing community. But I could say for those who are on the side of not looking for this particular exemption to go forward, they would fear that there's a market here in the future for text-to-speech. We could have some converted text-to-speech in one tone, some converted text-to-speech with your favorite voice for this actress, that actor, and so on. They will view this as something that they could put into the market competitively.

So, it may be the derivative work issue that they would view as being infringed.

MR. SCHROEDER: If I could add, while the Committee, the House Commerce Committee didn't,
obviously, directly address this topic, it did in its report accompanying the copyright amendments that include the MCA speak to the issue of manufacturing and distributing products whose design is to craft technology. And it says the Committee believes it is very important to emphasize that Section 102(a)(2) is aimed fundamentally at outlawing so called black boxes which are expressly intended to facilitate circumvention of technological protection measures for purposes of gaining access to a work. It goes on to say the provision is not aimed at products that are capable of commercially significant noninfringing uses. Parenthetically I would add screen readers would certainly, I would think, fall into that category. Consumer electronics and then it lists several categories. And then ends by talking about used by businesses and consumers for perfectly legitimate purposes.

If I as a blind person use a screen reader, which of course has a variety of noninfringing uses attached to it, to turn text into synthetic speech or large print on my screen, Allan, or Braille, I would argue that I'm hard pressed to see how anyone could see that as a violation of the
A copyright owner in allowing that access.

If my friend reads me printed material from a book in the privacy of an office or home, I don't think anyone has ever considered that to be a violation of copyright, although one could certainly argue that that's an audio performance of that material.

If, however, I make a tape of my friend doing that and start selling that book, clearly I've done an infringement of copyright. And I would think that in that case, just as in many other infringements, of course one could take legal action. But the mere act of using a screen reader for a noninfringing use, that is to gain access to and use the material for appropriate personal uses as a consumer, would certainly seem -- I would have a hard time seeing where that could be a violation of the Act.

MR. ADLER: I don't think that the issue here is primarily whether or not the use of text-to-speech translation software is an infringing use. I think, for one thing, I think Paul's analysis slides dangerously into the broader question of a fair use exception, which is already being addressed I think in other comments and in another panel. And no one
in this proceeding, I think, is talking about banning from the marketplace any particular type of software that would have the capability of doing that.

What we're discussing is whether or not there should be as a matter of the rulemaking authorized to the Copyright Office and the Librarian of Congress a new exemption adopted that would allow for the ability to circumvent specific access controls that are used in the context of e-book simply because those access controls do not enable the use of text-to-speech software. And I think this gets us into broader questions about whether in fact we are within the scope of this rulemaking talking about a particular class of copyrighted works, and even addressing the issue of whether or not e-books should be the gravamen of such an exemption.

MR. CARSON: But I think, Allan, I think you are making a concession that not all copyright owners make with respect to both classes we're hearing. Because I think what I'm hearing you say is that at the very least here what is behind the proposal is an attempt to permit people to make what everyone agrees is noninfringing uses. Is that
true?

Q. What I'm saying is that the position with AAP is somewhat limited because there's a disagreement among members with respect to which particular rights are implicated by the use of this type of software and whether, in fact, there would be an actionable infringement involved. But I think ultimately we could posit for the purposes of addressing the proposal exemption that even if it were considered to be noninfringing use, I don't think that the exemption that is being requested and has been proposed, is justified under the terms of the rulemaking.

MR. CARSON: My second question is based on the statute also, and I think it's been assumed in all the comments and in the testimony, but I just haven't heard much explicitly about it and I want to make sure I've got it right here.

Everyone agrees that what we're talking about here, the circumstances when you're not able to use that screen reader to convert text-to-speech, for example, the reason you can't do it is because in fact there is a technological measure that is controlling access. Is that the problem? Because of isn't, of course, there's no reason to talking to
it. I just want to make sure it's understood.

MR. SCHROEDER: That is in fact correct for the arguments that we're making here. There may be other reasons. There may be certain forms of text -- of painting text to the screen, putting text on a screen that in fact would not be capturable through software that is not so much a security measure, but a particular implementation measure. But, obviously, we are arguing here that there are technological security measures that they themselves interfere with use of a screen reader.

MR. CARSON: I'd like to know a little more about -- I mean, I've seen the ascertain, but I haven't really seen any concrete description of what they are and how they're doing what you say they're doing.

MR. ADLER: Particularly, to amplify that with respect to Jonathan's comment that he's only talking about lawfully obtained e-books. Now, I assume that lawfully obtained means something beyond purchased e-books, but certainly to the extent that we're talking about e-books that are purchased in the commercial marketplace, there's an obvious issue of consumer choice. And there's also a series of options among which consumers can choose with
respect to whether or not they get e-books that are published by a publisher who has enabled or has not enabled text-to-speech software translation.

MR. BOLICK: Also, just to deal with perhaps a little bit of the technical aspect of this. It differs from format to format.

If you look at the Acrobat approach, you set the permissions in advance and one of the permissions is text-to-speech. Then the encryption of DRM is applied and wraps the package.

Obviously, if the publisher has set the text-to-speech at no not permitted then applies the DRM, then the situation that you're looking to understand exists.

Microsoft's DRM works a little bit differently and will work considerably differently 3 months or 4 months or 6 months from now, so it's really hard -- we're looking at a moving target, especially with that particular reader.

It's only at the highest level of encryption that the text-to-speech does not work. At lower levels it does work, although at those lower levels they plant your credit card number on the screen of the book. So you paid your money, takes your choice, I suppose.
The reason I'm mentioning both of these semi-technical explanations of those two situations is that's one of the reasons that McGraw-Hill publishes a book in both formats. The consumer may choose to deal with one. IF they want text-to-speech, then they will not pick the -- from us, they will not pick the Microsoft reader version, which is set at the highest level of technology because it doesn't -- we can't put text-to-speech capability into it. It just doesn't work. We can do it with the PDF in the Acrobat format. So buy the Acrobat version.

MR. CARSON: If I understand your answer correctly, in either case, even to the two cases you're giving us here, the inability to convert text-to-speech is because of a technological measure that's controlling access. Is that a fair statement?

MR. BOLICK: Yes.

MR. CARSON: Okay.

MR. SCHROEDER: And it's important to add it's a technological measure under the control of the publisher that can be chosen, at least in those two instances. We have not done a thorough review of all technological measures to determine...
where accessibility barriers lie in each of them. It's something we could certainly do, but it's not something that we have done. But in those two instances, and in fact the examples we've included in our written testimony, reflect reader and PDF, Acrobat -- it is important to note that it is the choice. And I would say to Allan that, you know, would that we did have a choice as McGraw-Hill is suggesting, that's commendable. Would that we did have a choice among books that did in fact include in a text-to-speech capability and those that were in other format that did not; that is simply not the case.

MR. ADLER: Well, you do. You may not necessarily have the choice among e-books, but you certainly do have the choice --

MR. SCHROEDER: We can choose no access, I suppose. I mean it is, of course, always a choice.

MR. ADLER: No. Or you could, of course, choose access through Bookshare or through any other avenue that is authorized under the --

MR. SCHROEDER: If the material is available there. And, of course, as we know the vast percentage of material is not available through those sources.
MR. ADLER: The vast amount of material is available as print material, which is translatable under the Chafee Amendment through a number of organizations and a number of different means to be capable of being used with text-to-speech translation software. The problem you have is that you're insisting that something that is published as an e-book, that is published in a digital form that comes with certain controls that limit certain uses of that digital text is not completely open to be used with text-to-speech translation software whether or not the publisher chooses to make it so. And we feel much more secure going down the 120 -- sorry, the 121 Chafee Amendment route to deal with this issue than to start trying to throw the switches on technology that's changing under our fingers every 3 months.

MR. BAND: Right. But, again, I guess that gets to the point that I was making that, you know, you ask for the DMCA, you wanted the technological -- you wanted the prohibition on technological protections, you wanted the prohibition of the circumvention of technological protections. You got that, but Congress said in certain cases, you know, the price of that is that
in certain cases people are going to be allowed to
circumvent that. And that's why we're here.

MR. ADLER: Yes. But, okay. If we're
going to get to that question, then it said that
they would be able to do that with respect to access
controls that adversely affect the ability to make
noninfringing uses of a particular class of
copyrighted works. Now, Congress could have said of
a particular class of copyrighted works in a
particular medium or in a particular format. But it
didn't say that. And it could have chosen to say
that. It talked only about the class of copyrighted
works, and that has been, I think, quite reasonably
interpreted by the Copyright Office based on both
the language of the statute and the legislative
history to refer to the nature of the works as works
of authorship under the Copyright Act.

If you interpret this to be a particular
class of copyrighted works depending upon the format
in which they are distributed, that's an entirely
different interpretation and one that Congress
didn't enact.

MR. BAND: Well, we're trying to make
the exemption narrower. If you want to make it as
broad as that, well sure -- you know, I'm happy to
take an exemption for all literary works. I don't think they'll give it to me, though.

MS. PETERS: Okay. Rob?

MR. KASUNIC: Well, I'm still hearing after David's questions some conflicting views of whether this is a use or an access control. I think I heard that turning off the e-book read aloud feature, for instance on the Adobe Acrobat or the Microsoft Reader version was an access control. Then Allen, you just said if certain uses are limited, so we're talking on the other hand about uses.

Just assuming that this is an access control, if it isn't then there would be no prohibition, right? We can agree on that, that you could circumvent. Assuming that there is an access control that shuts off the read aloud function of an e-book reader, isn't it turning off the read aloud function always, even by circumvention, going to be noninfringing use separate and distinct from what was addressed in the Chafee Amendment dealing with the specific 106 rights of reproduction and distribution. The Chafee Amendment didn't address public performance, and more particularly didn't address private performance because it's not covered
by Title 17. So didn't since reading aloud would
always be a private performance in this context,
wouldn't this always be a noninfringing use?

MR. ADLER: It may well be the case, and
that's why if you look at the reply comments that
AAP submitted specifically addressing the proponents
of this exemption, we didn't rest our argument on
the question of whether in fact it would or would
not be an infringing use. We talked in terms of
whether in fact the class of works that they were
proposing as the body for the exemption was a class
of copyrighted works within the meaning of the
statute. And we believe it is not.

We focused on the fact that the
availability of e-books with access controls that
protect the interests of the publishers was
fulfilling the purpose that Congress had in enacting
the DMCA to encourage copyright owners to make their
works available in the marketplace through digital
distribution and through other forms of digital
media, which is what has occurred. E-books would
have existed without the DMCA.

And the fact of the matter is that that
has vastly increased the amount of material that's
available in the marketplace. Now the fact that it
hasn't specifically addressed the accessibility needs with respect to people who have print disabilities was something that Congress could readily have addressed, knowing that just two years prior to the enactment of the DMCA Congress had specifically addressed the needs of that community through the enactment of Section 121, the Chafee Amendment. But what it did not do in the Chafee Amendment, and what it did not do in the DMCA was to give that particular community, more so than any other community, the right to choose what format, what medium they accessed a copyrightable work in.

If a publisher decides not to make works available in an electronic medium at all, if publishers decide to simply eliminate e-books, there's absolutely nothing in the copyright law that would require them to do so either for the ordinary user under the guise of fair use or for users within Paul's community who do have special accessibility needs because they have print disabilities.

MR. BAND: But it seems to me that Allan's argument goes too far. The fact that Congress did not give an exemption can be used with respect to absolutely every exemption that anyone ever comes before the Copyright Office in this
rulemaking procedure. You're always saying look, Congress could have done that but it didn't, and therefore, you don't qualify.

MR. ADLER: No, but there's a very real argument, Jonathan, which is that I have heard you argue in other context and you argue in this context essentially that Section 1201 and the entire anti-circumvention scheme have had an adverse effect on the rights of users of copyrighted works, in part because they don't provide for the limitations that the Copyright Act provides on the rights of copyright owners, for example under Section 107 fair use or for that matter, under 108 the libraries, or Section 110 for educational institutions. You believe that the anti-circumvention provisions have been detrimental because Congress did not look at those provisions and say we need to provide specific exemptions in order to make these other limitations function properly.

The fact is Congress didn't do that because it didn't think it was necessary to do that.

MR. KASUNIC: Well, looking in terms of these noninfringing uses, there is a balancing that has to take place and some statutory factors in this rulemaking that have to be considered. But I do
want to look at the -- so this balance will be part
of this process of whether an exemption is
appropriate.

But I want to focus for a second on my
handout, subsection 1201(a)(1)(D) which deals with
the particular class that can be exempted. And I
want to find out your understanding of this
provision. Is it your understanding -- and let me, I
guess, read this -- the subsection is the "The
librarian shall publish any class of copyrighted
works for which the librarian has determined
personal and to the rulemaking conducted under
subsection (c) that noninfringing uses by persons
who are users of a copyrighted work are or are
likely to be adversely affected and the prohibition
contained in subparagraph (a) shall not apply to
such users with respect to such class of works for
the ensuing 3 year period.

Is it your understanding of this
subsection that any noninfringing use -- that if any
noninfringing use is found to be adversely affected
-- and again this will be based on the balancing
that has to take place -- if any noninfringing use
is adversely affected by the prohibition on
circumvention, then all noninfringing uses will be
permitted by an exemption? For instance, if e-books is the appropriate class, will that allow all noninfringing uses of e-books to -- in order to circumvent for a noninfringing use, but will not allow circumvention for infringing purposes??

MR. ADLER: E-books is a particular form in which works of authorship can be made available to and distributed to the public. The fact is, as I said before, there is nothing in the copyright law that requires a publisher to make a work available in digital form.

To the extent that the publisher chooses to make a work available in digital form, Congress recognized the ability and the right of the copyright owner to use certain technological measures to restrict both access to the work and certain uses of the work. So by definition Congress must have understood that there would be noninfringing uses that could be made of that work which could not be made because the work was subject to access controls or use controls.

The notion that simply asserting that a noninfringing use, somebody's intended noninfringing use, would be adversely affected because they can't engage in the use because of the use of an access
control or a use control by the copyright owner, that can't be the end of the analysis. If that were so, then it would mean that any of the uses that a user intended to make which were noninfringing would necessarily trump the ability of the copyright owner to use an access control or a use control. And that's something that Congress clearly couldn't have intended.

MR. SCHROEDER: But we have shown that there is certainly harm to individual who are blind or visually impaired who require the use of a screen reader to access material whether or not the publisher is free to provide any book or not. There is no doubt that that is a freedom available. But what we've attempted to argue is that there is a specific group of people, people who are blind or visually impaired, and there may be others but there's a specific group of people who are harmed by virtue of their disability and by virtue of the technology they are required to use to access this material.

It's hard for us to understand what else Congress could have intended. Yes, it would have been better if they had said in Section 1201 that these access controls shall not be put into place
without considerations of accessibility. But, of course, they didn't. And Mr. Adler's quite right. But it does say -- it does deal with the fact that people or persons shall have an opportunity to circumvent for fair use purposes or should at least be able to petition for an exemption. And it seems to me that that's all we're trying to argue, is that there is a group of people who are harmed by the use of certain access controls and they should be able to have the opportunity to make use of the material; that is to say to get around those controls.

It is quite likely that, in fact, our developers of screen readers are not in fact going to be able to do that in all cases. But that doesn't really speak to issue under the purview of the Librarian of Congress. All we're looking for is an exemption to take away the ambiguity so that in fact it's clear that people who are blind or visually impaired relying on specific technologies have a right to fair use of material protected by those technologies.

MR. BAND: But getting to your very specific question about 1201(a)(1)(D) and exactly what it means. I think the term any class of copyrighted works is a very elastic term. I mean,
the Congress could have again chosen different
terms, but the term "class" is undefined in the
statute. I don't believe it appears any -- I don't
know, it might be used somewhere else in the
Copyright Act. It doesn't leap to mind anywhere
that it is in fact used.

So it's an elastic term.

And I think it can be viewed as broadly
or narrowly as one chooses in terms of or, you know,
as the Librarian chooses when formulating an
exemption. And I think that the phrase "class of
works" could be fashioned in such a way that it
really does apply to literary works in e-book form
where the screen reader function has been turned
off, or whatever the appropriate technical term is.
I think that that does define a class of works,
because again the term class is a very elastic term
that can be used as broadly or narrowly as the
Librarian wishes. And I think used in that manner I
think that that gives the Librarian a great deal of
flexibility to fashion an exemption that does
capture, that does reflect the balancing of those
five factors that does enable a noninfringing use
but at the same time does not compromise or
unreasonably compromise the copyright holder's
MR. ADLER: But, Jonathan, if the premise of your argument is accepted, why stop there? How does that differ from your proposing that e-books that are subject to any access controls which take the works embodied or the work distributed thereby in anyway out of the clear should be subject to an exemption for purposes of circumvention?

MR. BAND: Because I think at that point the Librarian would have to weigh the factors and may determine that that class is too broad and would have, you know, an adverse effect not so much on the user, but would have an adverse effect on the copyright holder. I don't see the term "class of works" as being handcuffs on the Librarian.

MS. PETERS: Going to Charlotte.

MS. DOUGLASS: Okay. Following up on class of works --

MS. PETERS: Your microphone.

MS. DOUGLASS: Oh, sorry. Just maybe can speak louder, I probably can be heard.

Following up on the class of works, I would like to know whether you, Ms. Schroeder, agree to the narrowing description of what your exemption
-- the exemption that you're seeking. Would you agree to Mr. Band's description of the exemption that you're seeking? In other words, not all literary works but literary works that don't permit screen readers to be used? Very loosely, of course.

MR. SCHROEDER: Yes. I don't know. We haven't contemplated that. It might be a reasonable approach.

MS. DOUGLASS: I see. If that were the exemption, if that narrow description were the exemption sought, how would you feel about it?

MR. ADLER: I think we would still feel it was unjustified in large part because it would open the door, I think, to the next request that would follow.

We've been talking about this, and in part I guess it's because the DMCA begins with the word "digital." But the fact of the matter is when you look at Section 1201 and the discussion about technological measures that control access or effectively control access to a copyrighted work, there's nothing that limits those to the digital context. And so if you read this literally as applying in the analog context as well, the argument would be that anything that controls access to a
copyrighted work that adversely affects the ability
of a user to make noninfringing uses of those works
would be subject to an exemption allowing its
circumvention. And I think that's an extremely broad
premise.

MS. DOUGLASS: But if it were narrowed
to only digital works, you'd still --

MR. BOLICK: Well, the only thing that
stands between this and a digital version of it is a
box scanning this into a digital file. And I guess
I would also wonder if screen reading technology is
okay, what about just simply reading directly off of
a disk? There are additional technologies that can
be used to convert print into speech. So, again,
it's the opening the door issue that I think is of
current concern.

MS. DOUGLASS: So you would object as
well?

MR. BOLICK: I think so.

MR. ADLER: And, again, I would point
out to you that in the Chafee Amendment it's
important to recognize that Congress didn't
authorize any user to be able to reproduce and
distribute a work in a specialized format. They only
authorized entities. And the reason they did that
was because if they had authorized the users who
were in fact the beneficiaries of that exemption, it
would be almost impossible to police and it would
effectively mean that they have allowed people
generally to be able to claim that they have a
legitimate reason for doing so and that they are
able to reproduce and distribute these works without
having to worry about permission from the copyright
owner if they could make a claim that they were
either blind or subject to other print disabilities.
But Congress didn't say the users themselves could
do that. In trying to create a balance where there
was going to be some limitation on that authority,
it limited the authority of the exemption only to
certain authorized entities.

MR. BAND: But, of course, in the Chafee
Amendment they were looking at the distribution
right and they were contemplating people making
something -- you know, certain entities making it
broadly available. Here, of course, we're talking
about something that someone's going to do in the
privacy of their own home.

It seems to me, again, that the
Copyright Office and Librarian have the ability to
craft the term "class of works" as broadly or
narrowly as they want, and they can -- you know, there are very able lawyers in the Copyright Office. I'm sure they're going to be able to come up with the proper terminology that would not lead to the parade of horribles that Allan has suggested. And then also the notion of sort of a "slippery slope," we allow one exemption and that inevitably allows for other exemptions.

Well, again, that's your job. It's your job to prevent the slippery slope and to draw the line and to say, you know, this yes, this no. And I have confidence that you'll be able to do that.

MR. ADLER: But, Jonathan, I would suggest that able lawyers though they are, they would recognize that they're prohibited from establishing one definition of a particular class of copyrighted works for purposes of one kind of exemption and then having a different definition of that term for another. So if they were to read from a particular class of copyrighted works in the way that you would prefer for purposes of this exemption, they would also have to read it in that way for purposes of all other proposed exemptions, meaning that the class of copyrighted works could be read not in terms of the actual works of authorship,
but based upon the intended users or the particular medium or format in which the work is distributed.

MR. BAND: And that would be fine with me. I don't know if it would fine with them. But I think that that would be the appropriate definition of class of works. And, again, I think that they would be able to, in the balancing, make sure they're sound.

MR. BOLICK: But given that the definition is certainly going to involve whatever the technology stands as today, how will you keep up with your definition as technology changes tomorrow? When the Microsoft DRM changes in just such a manner that I put my biometric recognition over the screen and it knows that I am a member of the AFB so text-to-speech is turned on?

MR. BAND: But I think the answer to that is that in the rulemaking proceeding, any exemption you grant has to be renewed every 3 years. It doesn't last automatically. Again, that's not a feature I necessarily like, but in this context it's helpful to me. So, yes, I like it in this context.

You know, if every 3 years, technology changes, there's, in essence, an automatic sunset and in that sense that should add a level of comfort
with respect to an exemption here that you frankly don't have almost in any other area of the law. That automatic sunset feature.

MS. DOUGLASS: Okay. I have an unrelated question to what we were just talking about, and that is could you tell us approximately -- this is very specific. What percentage of e-books don't have the option for conversion to special formats? Do you have any idea about, you know, numbers or anything generally?

MR. SCHROEDER: Are you directing that to me?

We have not done that review. I don't have an answer for you.

MS. DOUGLASS: Okay.

MR. BOLICK: I don't have a statistical answer to that, but I would say that compared to the year 2000, today there are many more e-books available on the market in which text-to-speech is available than there were in the year 2000.

MS. DOUGLASS: Okay.

MR. CARSON: Can you tell us, is it more do than don't permitted?

MR. BOLICK: Personally, I believe more do than don't. But I'd have no statistical measure
on that issue. We'd have to check with all of the
distributors such as Lightning Source and Overdrive.
They could begin to tell us that.

MR. ADLER: But, again, as we pointed
out in the reply comments that we had submitted, if
you go to the website of any major publisher that
offers e-books, typically you're going to find the
same array of services offered which is they will
not only provide you with a chart that typically
distinguishes among the characteristics of the DRM
views by the different vendors of e-book software
and hardware, but they will in fact provide you with
the ability to download the different versions of e-
book software offered by Adobe or by Microsoft or by
Gemstar or any of the others.

So there is a choice in the marketplace
that even today in what is still very much an
nascent market is extant and it's only going to
continue to grow.

MS. DOUGLASS: Okay.

MS. PETERS: Steve?

MR. TEPP: Thank you.

Correct me if I'm wrong, but I'm
proceeding on the assumption that the reason

technological protection measures were attached to
e-books in the first place were generally concerns about piracy. And so the question I'm getting at is to what extent over the number of years now that e-books have been out there has piracy been a problem and to what extent is that piracy a problem?

MR. BOLICK: Well, there is an interesting phenomenon going on out there. There are a lot of digitally pirated books, books that have gone through the scanner that are placed into ASCII text format and then placed on peer-to-peer servers out there. And there are tens of thousands of them. These were not hacked e-books. These were books that were physically painfully, manually transferred over into dot-txt files.

Within a very short period of time, a year, the percentage of txt files fell and the number of PDF files and lit files, the Microsoft Reader files, rose. Again, those were not hacked e-books. These were books that were being scanned, digitized and then dubbed into the PDF format and the lit reader.

A few books are creeping from the formerly published e-books into that market or into that black market, if you will. But clearly the digital format is the pirate's format of choice as
opposed to printing a ton of printed books and
shipping them around, although we have that problem
still as well.

MR. ADLER: I would also just be careful
about the use of the word "piracy." Because that
tends to have the loaded definition for some people
of people who are deliberately engaged in stealing
another's property to engage in commercial
competition with them. But one of the problems that
the use of access controls was designed to address
is remember, many people get their e-book text
delivered to them via the Internet. They download
them. And one of the problems there was raised by
the First Sale Doctrine as some people believe it
should apply to transmitted works in digital
formats.

This office took the position that that
was not what the intention of the First Sale
Doctrine was. But the fact of the matter is without
having certain technological controls, in reality
the practice would be that people would be able to
not pass on their e-book device with the text in it,
but would be able to freely pass on the e-book text
while still retaining their own copy, and it would
reproduce. And that, of course, would mean the
possibility that other potential sales that might occur simply won't occur because people will be able to acquire copies of their e-books text for free.

MR. TEPP: Mr. Bolick's response triggers a question, and I can't remember if this was in any of the submissions, so I apologize if I'm asking something that's in the written submission. And for anyone on the panel, to what extent are e-books out there in completely unprotected format?

MR. BOLICK: There are tens of thousands of public domain works available at the University of Virginia's E-Text Library. Project Gutenberg has many thousands.

So the numbers that I gave before where I said 50 to 100,000, that's copyrighted works.

MR. TEPP: I meant with regard to copyrighted works.

MR. BOLICK: With regard to copyrighted works, there are a handful of publishers who will put the books up with no protection whatsoever.

MR. TEPP: Okay. Thanks.

If I can jump in with one other question, switching over to the tethering issue which we've not spent as much time on yet this afternoon.
A general question for anyone at the table who wants to address it. Are tethering restrictions access controls or copy controls?

MR. ADLER: Well, for purposes of this proceeding I would say they're access controls. Since this proceeding doesn't reach the other kinds of controls, and therefore would not have to make a decision regarding --

MR. BAND: I would agree as a general matter that the tethering seems to be more of an access control issue rather than a copy control issue.

MR. BOLICK: Well, I get to be the odd man out; it's a little bit of both. One of the reasons that an e-book would be tethered to a particular software application or to a particular device, more particular to the software application, is that we would be concerned as publishers that it could be easily moved from one device to the next device, to the next device because it is a perfect copy.

Usually the DRM that ties the e-book to the application on your device holds it there. Now, you may have multiple applications of the application, multiple activations of the
applications such that you can have your Microsoft
Reader on 3, 4 up to 8 devices, in fact. And you
can for your purposes have 8 copies of the work on
your 8 different devices. But it really doesn't
work that way in the real world because people move
computers and then their hard drives die or
whatever, so they have to get a new copy of
Microsoft Reader that takes up another activation,
because it's reading an ID off of the device.

So there is a copy element that is of
concern in tethering.

MR. TEPP: Thanks.

MS. PETERS: Okay. I think I'll go to
Rob again.

MR. KASUNIC: I just have two real short
questions. One was --

MS. PETERS: Mike.

MR. KASUNIC: Oh, I'm sorry. Mr. Bolick,
you had mentioned about the Microsoft Reader and
that only at the highest level is the text-to-speech
function turned off, highest level protection, isn't
that right?

MR. BOLICK: That's what I understand,
yes.

MR. BOLICK: In the Adobe Reader do you
know whether the default is on or off in that? Do you have to turn it on or is --

MR. BOLICK: I'm sorry, I don't recall. There are a number -- there are about 4 switches that you have to throw. One for printing, one for copy/paste, one for text-to-speech. I can't remember whether they're switched to yes or off.

MR. SCHROEDER: I believe they're switched off, but we could check. But we could check that.

MR. BOLICK: Right.

MR. KASUNIC: That would be helpful, too.

MR. BOLICK: When we transmit the meta-data and the information about our files to our distributors, we have to tell them because they handle the final packaging. We tell them what permissions to set. So presumably -- something has to be done.

MR. KASUNIC: I'm curious if you don't tell them anything, where it does it end up? So what's the default?

MR. BAND: Well, just regardless of whether it's on or off, I'd like to join Mr. Schroeder and commend McGraw-Hill for making sure
that it's set on “on” so that the screen readers
work with the McGraw-Hill e-books.

MR. KASUNIC: The other thing I'd just
like to find out is how -- in talking about e-books,
how other formats fit into this situation? For
instance, when we're talking about text readers and
the availability of hearing the text, how do we fit
into this analysis, for instance, I know there are a
lot of other commercial companies out there that
provide books in audio format. I subscribed for my
commute for a long time to one that could download
the books and could download them onto a MP3 player
and play them in the car or radio. How do we in
terms of talking about e-books in a broader sense,
how do we consider all the other formats available
on the market?

MR. ADLER: In all honesty, it's not an
issue I've gotten very far into, in part because
there is a separate trade association to which the
divisions of AAP members that publish audio books
that belong that deals with specifically with the
issue of audio books. And so we did not address
that issue at all in our reply comments in this
proceeding. And I don't know that AAP actually has
given much thought to that question.
MR. BOLICK: Could you elaborate on the question a little? I'm not sure where you're going with it.

MR. KASUNIC: Well, in terms of talking about the balance on the market and what the effect of the prohibition is, part of what we would be looking at is what is available on the market.

MR. BOLICK: Now I understand.

MR. KASUNIC: And I wonder what we should be considering in terms of -- we've been talking a lot about e-books, but not as much about these other formats that are available that may provide the same benefit as a read-aloud function but that would be available through another source.

MR. BOLICK: Well, I can't provide you with a statistic, but I hope you will ask for them afterwards and we can supply it. But the size of the audio book market has been growing rapidly over the past 3 to 5 years. And we do have statistics at the AAP that indicate what it's been for 2000, 2001 and on to the present.

It's a very vibrant market. And even online with a company like audible.com where you can download MP3s to a specific device that is promoted by audible.com. And, again, it's going to be
tethered to that particular device. They seem to be
doing well.

MR. SCHROEDER: The only point I would
add to that is that we have not done an
investigation either of the market size or of the
following, and that is the controls that are put on
those materials either that would be controls that
one would have to get through, the hurdles one would
have to get through in order to actually download
the material or the controls that one would have to
invoke in order to actually read the material;
whether that's on a specific hardware device or
whether in fact the user has some control over it.

My suspicion would be, and it's only a
suspicion, that some of the producers of audio
materials would have their books controlled in such
a way that, again, a blind user relying on a screen
reader to navigate around a screen to find boxes
that need to be checked would, in fact, not be able
to do it because it's pretty common practice that
those kinds of systems are often designed without
the appropriate controls that would allow a screen
reader user to get at them.

So I suspect, although I don't know,
that that could be a problem. I do know that in the
case of a major producer there have been
accessibility issues related to the players that
they provide. But that, I would agree is probably
outside the scope of what we're looking at.

MR. KASUNIC: Thank you.

MS. PETERS: Mr. Schroeder, are you
saying that blind and visually impaired really
cannot use the audio books that are on the market,
that you really do need a different format?

MR. SCHROEDER: No. I'm not saying
that. I'm saying that my suspicion would be material
provided via an electronic distribution through the
Internet could likely be controlled in such a way
that a blind user would not be able to access the
controls in order to fill in boxes, check boxes,
etcetera, and put in passwords and those sorts of
things that would give them the access to the
material. We haven't done an investigation of audio
producer's sites to determine whether in fact it's
true. I'm simply arguing that that would not be
surprising, it would not be unusual to find sites
that would in fact thwart use by someone using the
screen reader.

MS. PETERS: Okay. So you're really
only talking about when you would get the material
through the Internet and therefore, you anticipate
that there would be a password or something else
that would be required?

MR. SCHROEDER: Well, it would also be
ture if it were distributed in a DVD or CD and again
required the use of the navigation through a screen,
a menu of any sort. There is no -- let me put it
this way: There's certainly no guarantee, there's
certainly no requirement on the producer of that
material that it be accessible to users making use
of a screen reader or any other kind of technology
to access their computer, their hardware. And so
there's no reason to believe that there wouldn't be
accessibility challenges.

There are plenty of blind users using at
least one of the producers mentioned a few minutes
ago.

MS. PETERS: Okay. Thank you.

David?

MR. CARSON: Okay. A question for Mr.
Adler or Mr. Bolick. Let's assume that on October
28th the Librarian of Congress issues regulations
which include an exempted class along the lines of
that which is being sought by Mr. Schroeder and Mr.
Band. How are you harmed? What's the harm in that?
MR. ADLER: Well, I would assume one of
two things would happen, which would be that
probably many more publishers rather than risking
having their digital rights, management technologies
that they use circumvented by people who believe
they have a right to do so beyond what the scope of
the exemption says would probably enable text-to-
speech translation software if they don't already do
so now.

MR. CARSON: You're trying to tell us
about the --

MR. ADLER: Or they would simply produce
works that don't have that capability at all.

It isn't really the question of harm.
It's a question of whether or not this is a
legitimate circumstance for the government to have
to step in to regulate what is clearly a competitive
marketplace with respect to the offering of this
particular product. Where the product is offered,
and I think that neither Jonathan nor Paul has
disputed this, by some publishers with text-to-
speech translation capability fully enabled and by
others with it not fully enabled. And as long as the
marketplace has that kind of competitive capability,
the question is whether or not this is an
appropriate circumstance for the government to
intervene with regulation to require it one way or
the other.

MR. CARSON: But it's not -- I mean, the
government has already intervened with regulation.
The regulation is called the DMCA. What we're
seeking is a reduction in the regulation. But,
again, it wouldn't require the publisher to do
anything. It would simply be a matter of what the
user is able to do without violating the law.

MR. BOLICK: Well, our concern would be
that with that chink in the armor of the DRM
technology, then some publishers will, as Allan was
suggesting, will back off. So what would the harm
be? Fewer e-books.

MR. CARSON: How realistic is -- let's
assume for the moment that the chink is a chink that
simply relates to that aspect of the technology that
might prevent someone from using the text-to-speech
feature. Is that such a chink that a publisher
would be so concerned that oh my God, we're going to
lose all our protection and we're going to have to
stop producing this stuff?

MR. BOLICK: If you tackle the problem
by hitting at the anti-circumvention, okay. If you
tackle the problem at the DRM level, then yes it's
oh boy, now it's more thing I've got to think about.
If you tackle it at the issue of setting the
permission, well McGraw-Hill has no problem. We
already do it. But as Allan is pointing out, it's a
marketplace issue.

Some publishers, you know, would object
to being forced or required to turn that on because
it denies them a market otherwise that they would
want to exploit.

MR. ADLER: As we've pointed out, e-
books, unlike the situation with certain
transitional -- with the advent of certain
technologies in other industries dealing with the
distribution of copyrighted works, e-books are not a
good place to supplant print material. It's quite
clear to the publishers that that is a circumstance
that even if they desired it, would not occur based
upon the rate of penetration that e-books have made
in the marketplace.

So what you have is e-books introduced
in the marketplace as an alternative product for
consumers which have certain capabilities and
functionalities that they could enjoy that they're
unable to enjoy using the exact same literary work
in a print format. If it becomes too difficult or
too problematic to introduce that format in the
marketplace, it simply won't be expanded and, in
fact, it might disappear.

MR. SCHROEDER: Needless to say, we fail
to see that there's any real harm to the publishing
industry. We certainly believe there's harm to users
who are blind or visually impaired in not having
access to material. And I guess I would want to
know, you know, why hasn't the publication of
printed books declined with the advent of the
optical character scanner. Certainly that's commonly
available. And, in fact, we're not even asking for
anything remotely like that kind of openness and
availability. We're simply asking for a removal of
the ambiguity. And I think it is an ambiguous
situation facing blind users, because again I would
argue that we do have a fair use right to circumvent
technological protections in order to access
material for fair use purposes. It hasn't, to my
knowledge, been tested in a direct way and an
appropriate way. And certainly that might be the
way to do it. But it seems to me that in this
instance we know that there's a class of users
that's going to be harmed, it seems unlikely that
there's going to be any real harm to the publishing
industry anymore than the advent of scanners really
did harm to the printed publishing industry.

MR. BAND: In fact, I think an argument
could be made that it would benefit the publishers
of e-books. The example that was given by the AFB,
they suggest that a lot of times when a person's
looking at e-books it's hard to know when you see
it, let's say on amazon.com, you don't know whether
or not it is screen reader enabled or not. And that
ambiguity, that uncertainty might deter some segment
of the visually impaired people from buying that
product. But once they know that if they buy it,
either it will be enabled or if it's not enabled,
that they might be able to enable it on their own,
that could eliminate a barrier that now exists to
their buying that product.

MR. ADLER: Well, let me just make two
comments in response.

I think what you've heard Paul is
precisely the problem. Despite the fact that they
have couched this in terms of the needs of the print
disabilities community, in essence this is another
guise of the claim that fair use needs to be enabled
with an exemption to --
MS. PETERS: To an access --

MR. ADLER: -- 1201. And the fact of
the matter is I think it's quite predictable that if
the Copyright Office were to endorse this proposed
exemption and the Librarian were to adopt it, that
the argument would be made that it is very difficult
to make a distinction between why this particular
use, noninfringing use, should be accorded an
exemption and other noninfringing uses that could be
couched as fair use would not have such an
exemption.

I assume you have asked the question
about what harm this would bring to publishers as
part of a balance of this, because of course the way
the regulation -- the rulemaking proceeding actually
works, the burden is not on the publishers in this
instance to argue why they wouldn't be harmed. The
burden is on the proponents of the exemption to
demonstrate why they are harmed in the absence of an
exemption.

MR. CARSON: But I also assume you'd be
the last to tell us we shouldn't be concerned if
you'd showed us all sorts of harms that would ensue
to you if we --

MR. ADLER: Absolutely. Yes, correct.
MR. CARSON: Let me sort of rehearse an analysis of this thing and see how far any and all of you are willing to go along with me in it.

I think we have, I won't use the word consensus, but at least a willingness on this side of the table to accept the argument and a total endorsement of the argument over there that what we're talking about, certainly what Mr. Schroeder and Mr. Band are talking about, is a noninfringing use. Do we have a consensus? Do we have an understanding that that particular noninfringing use in fact is being -- people who want to make that infringing use is, in fact, being adversely affected by technological measures that are controlling access to these works or is that not the case?

I think I know where you are in that.

MR. ADLER: I think that primarily the issue is the question of the extent to which the adverse affect can be characterized. Because we have all agreed that there are e-books in the marketplace that are offered clearly enabling the use of text-to-speech software. The question really is just how serious is the adverse impact in terms of how many of those e-books offerings don't permit it and do we have any real number to point to.
MR. CARSON: Okay. So you're pointing they haven't made that case?

MR. ADLER: Right. And I think that once you take that situation where we don't have a specific set of percentages to assign one way or the other, the next important thing to look at is are there alternative sources of access to the same identical literary works? And the answer to that, clearly, is yes. And not only are those same literary works made available in print form, but Congress has explicitly provided for this community to be able to have access to those works at the cost of the rights of copyright owners through Section 121.

MR. CARSON: So if I were to tell you if everyone were to stipulate here, which no one will, that 50 percent of all e-books have the ability to convert from text-to-speech disabled, and if we were all to tell you right now if it were 50 percent that's good enough for us, there's a problem there. What would be the next step in the analysis? Do we have an exemption now or what else would be there to stop us from getting to the exemption?

MR. ADLER: Well, the first step would be to argue that e-books are not the only source of
the literary works that they wish to access.

MR. CARSON: Okay. There's hard copy.

What else is there?

MR. ADLER: Well, there's print --

MR. CARSON: Right. Okay.

MR. ADLER: Print is available in a variety of ways.

MR. CARSON: Okay. So part of our balance is the availability of print and what can be done with that.

MR. ADLER: The point isn't that it's just available as print. The print is that the Chafee Amendment makes it possible for that print to be available in a number of different ways. It can be available as Braille. It can be available as digital text. It can be used with text-to-speech software. It can be available, in some cases, in terms of large print, although not specifically under the Chafee Amendment.

MR. SCHROEDER: I don't see how you can use the Chafee Amendment as a sort of defense here. Because the Chafee Amendment is in lieu of actually requiring publishers to make their material available to some form of the marketplace. In other words, publishers are freely allowed to place their
products in the marketplace knowing full well that it completely denies access to a whole group of people. And so you have the Chafee Amendment, and it was a good balance of allowing -- the cost of rights owners I think is a little bit of a stretch, Allan. But, okay. Allowing access to --

MR. ADLER: The Chafee Amendment says that --

MR. ADLER: Allowing access to materials by a third party producer in order to put in the specialized format, knowing full well that the publisher's not losing anything because it's recognized that they weren't making it available. And so I don't see that as a defense. To say that there's e-books in the marketplace, some of which have text-to-speech turned on and some don't, I guess if we were to do that analysis and come up with a 50/50 ratio, I would certainly say that there's a vast degree of harm there. But even if it's only -- even if the degree is 80 to 20 of text-to-speech enabled and not, it doesn't really matter in the end because the exemption still should be available because that 80/20 could reverse to 20/80 at the stroke of a button on the part of a publisher with absolutely no ability on the part of the
consumer to have a say or a voice, or any control of
the marketplace. And all we're saying is that the
individual ought to be able to thwart those access
measures when they're inappropriately denying access
to an individual simply because of visual
impairment. And that's really what this is based on.

MR. BAND: But I'll go maybe a step
further. Let's say we were only talking about 5
percent. You know, this is sort of like Abraham
bargaining with God with the number of righteous
people in Sodom, but maybe that analogy isn't
completely fitting here.

MR. BOLICK: The movie industry.

MR. BAND: That's right.

But let's say it turns out that right
now 95 percent of e-books are screen reader enabled.
Then we're basically saying that the exemption we
want is only applying as a practical matter--it
could be that you'll draft it in a careful way that
it only applied to that universe of 5 percent.
Right? And I think the way we've formulated it, it
would only apply to that 5 percent. We're really
talking about a very, very narrow exemption that the
likelihood of it harming the publishers is truly
infinitesimal. But it seems to me that if it is
only that 5 percent you're still talking about, for
a blind college student who needs one of those books
in that 5 percent, that's a very severe problem for
him and he is adversely affected in a very
meaningful way.

So I don't think we need to quantify it.
And, indeed, if we quantify it, the smaller the
universe makes it even more compelling to have the
exemption because the adverse impact on the
publishers will be smaller.

MR. ADLER: But that's not true.
Because, first of all, the fact of the matter is, is
that we already have provided ways for which
instructional materials that are needed in
specialized formats can be provided to the students
who need them. And, again, that is done without them
having to pay for them.

But when you talk about this as being
something that can be done in a fairly surgical
fashion, the reality as we all know is that if you
in fact -- right now there is no exemption that
justifies circumventing access controls with respect
to e-books. If you create an exemption we're then
going to be dealing with the problem that people are
going to be developing the means in which to
implement that exemption. And the fact of the matter is we keep hearing Paul go back and forth talking about this as fair use on one hand, and on the other hand talking about this as the special needs of a very limited and definable community. The fact of the matter is if this type of exemption is adopted, the way it's going to play in the marketplace is, is that the tools will become available to circumvent DRM, DRM will be circumvented to do more things than simply enable text-to-speech translation software to be used.

And part of the balance that the Copyright Office and the Librarian have to consider, and the reason why they have to look so closely at the degree of harm, the degree of adverse impact, the degree of need for the exemption is because of the recognition that the adoption of any exemption is going to justify the creation and the distribution of tools to implement that exemption. And once that happens, it's impossible to control.

Now you said before correctly that if you took that argument too far, there would never be any exemption. That's the reason why the Copyright Office has to consider very, very carefully whether in fact the exemption is needed or whether the
marketplace has the capability of dealing with the problem that the exemption is supposed to address, whether there are alternatives in terms of the sources of materials that people can turn to so that they don't need the exemption to be adopted and implemented.

MR. BOLICK: Well, could I add --

MR. CARSON: Well, you're talking about -- go ahead.

MR. BOLICK: Could I add a positive point related to the question of what the alternatives are that you asked. What are the alternatives?

And e-books have been demonstratively effective in providing a new alternative. I agree with the AFB that we, you know, this is a dawn. And one of the outputs of the e-book industry has been the Open E-Book specification and the adoption of XML across the publishing industry. It's a spinoff of what we're doing to get e-books into the market.

We use those same formats to make them available to the disabled community whenever we give to Bookshare files. IF we give them the files, we try to give it to them in the OEB format or the XML format. So this is a net benefit that has come
across the disabled community simply because e-books have been going into the market.

I think we can address the needs without an exemption.

MR. CARSON: Allan, a moment ago you were talking about if there were an exemption, how the marketplace would respond. And I want to make sure I understand what you were saying. If your concern basically that if there were an exemption, no matter what it really meant, people would perceive it very broadly and react as such?

MR. ADLER: Well, we're going to be here I think arguing over whether or not a particular software that is designed to essentially pierce the DRM technology is software that is being marketed primarily for the purpose of addressing the needs of the communities with print disabilities. The fact of the matter is once that software is available and the justification is going to be based upon this type of an exemption, it's going to be very difficult to see as a practical matter how anyone is going to be able to police use of that software or the distribution of that software to simply crack e-book DRM for whatever purpose.

MR. CARSON: Well, are you suggesting
then that if there is an exemption issued in October along the lines of that which is being requested, it would be legitimate for people to market and distribute that software to people who want to use it for purposes of engaging in the conduct that is being exempted?

    MR. ADLER: I would suggest to you that the very next step of the proponents of the exemption would be to ask for the tools necessary to make that exemption meaningful.

    MR. CARSON: And who would they have to ask for that?

    MR. ADLER: Well, the question I guess they would have to ask Congress for that.

    MR. CARSON: So is that our concern?

    MR. ADLER: I think it should be your concern, because again as I said, I think Congress has spoken on the issue specifically of how to address the accessibility needs of people with print disabilities. They did so 2 years -- just 2 years prior to the enactment of the DMCA through enactment of the Chafee Amendment. And when they enacted the DMCA, surely Congress was aware of what it had done just two years previously, but it didn't see the need to create any special exemptions at that time.
It created this rulemaking procedure which, obviously, requires very careful and precise calculations, including as to where the burden of persuasion for the need for exemption should lie and whether in fact there are other considerations that should be weighed as counter balancing the arguments made in favor of an exemption. What we've suggested to you is, is that the arguments made in support of such an exemption we believe are outweighed by the fact that these materials are available in the marketplace through alternative sources, and specifically that those alternative sources have been enabled by the action of Congress itself in the copyright context. And technology hasn't really made much of an impact on that, or at least they can't quantify in any meaningful way to justify the risk that would flow from adoption of an exemption the nature of the harm that they claim is resulting.

MR. CARSON: Okay. One last issue I want to raise. Allan, you were talking about the class of works and how you define it. And if I understand correctly, but I want to make sure I understand your position correctly, you were saying that in determining what a class of works is, it's not legitimate to include reference to the format in
which a work may be marketed? Is that accurate?

MR. ADLER: I don't think -- I mean, in my view I don't think that the rulemaking proceeding created by Congress given the statutory standard provided and the words that they chose to use would allow you to differentiate between exactly the same kind of works based on solely on the medium or format in which they're distributed.

MR. CARSON: Okay. You have a comment, Mr. Bolick?

MR. BOLICK: I would sympathize with these comments, because having gone through one of the working groups at the AAP trying to come up with identifier schemes for e-books, the first task we had was what is an e-book. And we literally spent hours and days trying to come up with a proper definition of what is an e-book. Some folks think it's actually a Rocket e-book, others think that it is a website, others think that it is actually a downloadable static item. I happen to think that it is what we produce with Harrison's On-Hand, which connects with a website; that's an e-book.

I don't envy you if you are going to try to create a class of works around the definition of an e-book.
MR. CARSON: Okay. Going back to what Allan was talking about. I mean, one approach that was suggested was that in classifying a class of works for purposes of this particular rulemaking, the classification would begin with reference to attributes of the works themselves but could then be narrowed by reference to the medium on which the works are distributed or even to the access control measures applied to them. I gather you're saying that's much too liberal an application?

MR. ADLER: I think it's too broad because the result would be it's almost, I think, inevitable that the kinds of classes of works defined by medium would be those involving digital medium. And it seems that that would be directly counter to the purpose of Congress in enacting this section of the DMCA in the first place.

Congress was seeking to encourage the distribution of copyrighted works in digital formats. If in fact you're going to be able to argue that only those classes of certain types of works of authorship that are distributed in digital formats are the ones that should be subject to the exemptions, it seems to run directly counter to Congress' intention. And based upon what we've seen
of the comments that have been filed and the exemptions that have been proposed, in terms it's all of the digital media; it's DVDs, it's e-books.

MR. CARSON: Well, the words I read to you were taken out of our decision two years.

MR. ADLER: Right.

MR. CARSON: So I gather you're telling us we need to be narrower or more constricted in our definition of what a class of work is than they were.

MR. ADLER: I thought the results you reached, perhaps, may have been a little narrower than the scope of your standard there. I was satisfied with the results based upon the analysis you gave for rejecting certain specific types of proposed exemptions. For example, the ones that basically said works that are going to be used for fair use purposes.

I think that same kind of analysis applies here, because I've heard Paul repeatedly interchangeably argue that it's not just the needs of what otherwise would be considered a very highly definable limited community. But in fact they see this as part and parcel of fair use. And so the arguments would become almost indistinguishable.
MS. PETERS: Let me ask one last question. It actually comes from the comment that was made by, I guess, they're called the joint reply comments. And it's the point where the advocate here says that what we're supposed to be looking at is whether implementation of technological protection measures has caused adverse impact on the ability of users to make lawful uses. So you were looking at a cause factor. And this comment seems to suggest that in fact there weren't very many e-books, there were more e-book so in fact you've got more access and some of those do in fact have the text-to-speech enabled, so really aren't you better of than you were before e-books started to grow and make this available?

So my comment, Mr. Schroeder, is if that's the test, aren't you better off than you were?

MR. SCHROEDER: A market -- publishers get to define the market. And I don't think Allan's right in the comment about fair use and my use of it with respect to people who are blind or visually impaired. So let me come to the answer to your question.

If, in fact, e-books are widely
available in a form that can be readily accessed by people who are blind or visually impaired, we're much better off. And that's really the whole point that we're trying to make. We're not very well off, the Chafee Amendment and Bookshare and the wonderful work of the National Library Service, all those things notwithstanding, we're not all that well off when it comes to access to commercially published material. The vast -- vast majority is not available through any of those means, and we're throw in commercial audio, abridged and even unabridged for heaven's sake. We're not particular well off when it comes to access to commercial material.

The market tends to make its decisions, and I am sure that there are other user groups probably of specific kinds of computer technologies, for example, who are shutout of the e-book marketplace. And I understand, I think, Allan's thing about the genie out of the bottle, and I suppose those groups might make an argument that there should be an exemption for their needs as well.

But the user group that I'm particularly concerned about, and the user group that the
publishing industry does not address to any great
degree is people who are blind or visually impaired,
whether it's in the production of e-books or any
other kind of commercial material.

We may or may not argue about whether they
should. They're not required to, and they don't.

And so the generation of e-books offers
us the most wonderful opportunity. It is a bit like
water in the desert. We are so close. We believe
it's there. We believe that we have the opportunity
to do what you all take for granted; to go to
Borders or Amazon, or Barnes & Noble and get
anything you want readily accessible to you in a
variety, usually, of forms.

MS. PETERS: Okay. I understand your
desire. But I do think you admitted that you are
better off than you were because of these e-books--

MR. SCHROEDER: We have the potential to
be better off than we are, but it's not clear to me
that the e-book industry is moving in the direction
that in fact is insuring any better degree of access
to people who are blind or visually impaired than
the hard copy printed book industry is.

MR. BOLICK: I would have to object to
that as publishers. Putting more and more of our
books into the market as e-books as best we can, affording as best we can and picking the distribution channels through public libraries and university libraries where we are using McGraw-Hill the PDF format to do so with text-to-speech on; those books are widely available to the patrons of those institutions. That was not the case 3 years ago.

MR. BAND: But I think the important point is there is no question that e-books are a great opportunity. No matter what percentage are screen reader enabled, there is no question that e-books present a great opportunity. And there is no question that the ability to have technological protections of those e-books has facilitated their distribution. That has now, provided great comfort to the publishers.

Now, to what extent the DMCA as a whole has contributed to that, that's a complex causation question. But even if for present purposes we agree that the inability to circumvent the technological protection as a general matter has facilitated the distribution of e-books, the general provisions of the DMCA don't speak to the significance of turning the screen reader function on or off. And we're
saying -- and I guess the point is this -- that I think it would be hard to demonstrate, it would be very hard for the publishers to demonstrate, that the fact that they have been able to turn the screen reader function off has facilitated the distribution of the e-book. I don't think it has. And it's that narrow aspect of the technological protection, it's that narrow aspect of the DMCA protection that we want an exemption from.

We're not saying that the visually disabled people should be able to turn off all the technological protections -- that they should be able to circumvent all the technological protections which, for present purposes, we're assuming have facilitated the e-book market. We're only saying that they should be able to circumvent one narrow feature.

MS. PETERS: Could I ask a question about circumventing one narrow feature? Can you circumvent one narrow feature or do you circumvent much more?

MR. BOLICK: Yes, you circumvent much more. The text-to-speech isn't access control, it's a permission set the meta-data describing what can be done with a file.
MS. PETERS: So it's X control, it's DRM? It's digital --

MR. BOLICK: No. I'm sorry.

MS. PETERS: Okay.

MR. BOLICK: Access control, DRM, one in the same.

MS. PETERS: Okay.

MR. BOLICK: The permission for the application to work for text-to-speech in and of itself, turning that flag one way or the other is not access control in and of itself.

MS. PETERS: That piece?

MR. BOLICK: That piece.

MS. PETERS: You can't go after just that piece?

MR. BOLICK: As the creator of the file or the packager of the file, yes, I can go after that one piece. I can turn text-to-speech on or off. I can turn copy/paste on or off separately.

MS. PETERS: You can, but he can't? If he couldn't go in and just do that?

MR. BOLICK: That's correct.

MR. BAND: But I guess the point is, that if I were to circumvent the technological protection, and again putting the specific
technological details aside, once I were to break open the DRM, all that I would be doing legally would be using the text-to-speech function. If I were to also at the same time circumvent the protection on making a copy, and I then made a copy, I would be violating the copyright law and you'd have a way of getting at me.

MR. BOLICK: It doesn't work that way.

MS. PETERS: I hear you. Mr. Bolick, you're shaking your head no.

MR. BOLICK: Technically it doesn't work that way. Once you break the wrapper, then you have access to all the permission settings.

MS. PETERS: I understand Steve has one more question, is that right?

MR. TEPP: Yes.

MS. PETERS: Okay.

MR. TEPP: The proponents of the --

MS. PETERS: Your microphone.

MR. TEPP: Sorry. I must have turned it off by accident.

The proponents of the exemption I have a question for. Mr. Adler has made an argument based on his application of Section 121 that you can take a regular text publication and digitize it pursuant
to that section, and that digitized copy would then
be available for use with a screen reader. Do you
agree with that?

MR. SCHROEDER: Yes. Well, here, hold
on a second. Section 121 doesn't really deal with
what I can do. I as an individual can scan a book
and turn it into text which can then be read with a
screen reader. It can also be read on several other
kinds of devices as well designed and used for
people who blind or visually impaired. That's
available tome without regard to the Chafee
Amendment Section 121.

The Chafee Amendment allows a third
party produce to the right to be able to make a
certain specialized format, copies of that material
and then make it available to an individual.

So, yes, if I'm willing to undergo the
burden of doing optical character recognition work
on a book that I've purchased in print, I have
access to. And, incidentally, if that book is only
sold as an e-book, I'm not sure that there's an easy
way around that one. I guess I could, you know, pay
somebody to print it for me, perhaps, and then if I
can break the DRM and then scan it, and then turn it
into -- so you understand that it is not exactly a
trivial matter to scan a book and turn it into accessible speech if a blind person even has an access to that commercial product of an optical character scanner.

As for Section 121, yes, a third producer can do it. So in, fact, if you can find someone who will take that book and produce it in a specialized format for you as an individual, I suppose, yes, you can argument that that's available. I'm not sure how that really deals with access to e-books themselves and getting around the technological measures which, in themselves, limit access for a particular user group, in this case people who are blind.

MR. TEPP: I'm not sure how it doesn't. I mean, if the text of a hard cover book is the same as the subject matter and the text in an e-book, an e-book is protected but through the application of Section 121 a third party producer can give you the same subject matter, the same copyrighted work in a way that you can use it with a screen reader; do you think that has implications for this rulemaking?

MR. SCHROEDER: No. (A) it assumes there's a third party producer available to you to do that; (B) it assumes you have the financial
capability to pay that producer if the producer in fact in requiring -- and many do because they have to. You know, it's an expensive undertaking to put a book into Braille or even to do the work of doing optical character recognition scanning and then cleaning up the scan into a form that's actually meaningful.

I think anyone who has done a scan knows that there's a lot of things that interfere with making that a very readable and useable copy. And so that deals with the third party producer. They've got to be: (a) available to you; (b) that means you may have to afford their rates for producing that material, and; (c) you have to wait for them to do it on their schedule.

With respect to the individual, you either have to have access to a scanner yourself and the ability and patience to convert that scan to text into something that's actually meaningful taking out columns and graphics, and dealing with pagination that sometimes does or does not in fact convert very well. All those things put up against having an access to a clean well formatted e-book copy, I don't see how those things are equivalent in the slightest.
MR. CARSON: In other words -- in other words --

MR. ADLER: The processes that you already have available, the bargain that Congress already made specifically to address this particular problems was one that has now fostered the creation of Bookshare, it has advanced the work of groups like the National Library Service and RFB. I mean, the problem here is, and I find this somewhat ironic, you seem to find the e-book to be something that could create great opportunities except that before it has acquired even the beginning of a mainstream audience to be able to support continued development of it, you want to bring in government regulation in a way that publishers will find to be the most particularly sensitive type of government regulation telling them that they're not going to be able to provide the kind of protection for works that are distributed in digital format the Congress basically said under the DMCA they were going to be allowed to do in order to encourage them to release the book in that format in the first place.

MR. SCHROEDER: We actually want to remove government regulation that in fact interferes with our opportunities to have access to e-books.
But the fact is the market is not the same. Chafee notwithstanding and Bookshare and all the other good
efforts, you cannot possibly argue here, I think.
Surely you're not arguing that in fact blind people
have access to the same -- even close to the same
level of commercially published material as people
who are not blind?

MR. ADLER: No, I'm not arguing that at all. But I am arguing that that problem, which is a
very genuine and serious problem, cannot be in any
substantial way attributed to the impact of Section
1201 of the DMCA.

MR. SCHROEDER: Only because the e-book
market is a nascent market. I mean, heck if we'd
been there when Gutenberg invented the press, we
might have been having requirements in place for
Braille had it been invented at the time and, you
know, this argument would be somewhat mute.

MR. ADLER: But I'm suggesting --

MR. SCHROEDER: But here we are at a
nascent market saying blind people need access to
it. I mean, you're arguing, Chafee Amendment and the
other provisions based on sort of an old market, a
market that understood that in fact it was not
feasible to make printed material into accessible
copies for blind people in the marketplace. It had to be done in an after market specialized production fashion.

We're not in that market anymore with e-books. And, no, we would agree that it's a nascent market today and by no means does it give us access to the broadest variety of material. But we are making the assumption, and hoping that e-books do take off and that, in fact, when they take off or as they take off people who are blind have full access to this market right alongside their sighted their peers and that there not be technological measures in our way to the extent that we can work around those measures to have access to material. Hopefully, we don't have to.

I mean, I do commend McGraw-Hill, and I'll take back part of what I said. I think McGraw-Hill's books probably have afforded me a much better market situation than was true 3 years ago, and I appreciate that. And I'll be up on your website very soon checking out what you've got available.

MR. BOLICK: That's good for a discount.

MR. ADLER: I would also urge you to look at the websites of other major commercial publishers. Because I think you'll find the same
thing at many of them.

MR. BAND: But, Allan, I'd be willing to stipulate that the Chafee Amendment should be the only amendment or the only provision in the Copyright law for visually impaired people for all time if you're willing to stipulate that you're not going to seek any amendment from now on to the Copyright law. That you think that it is now in perfect pristine form for all time going forward and that you're not going to seek any kind of amendment going forward.

MR. SCHROEDER: You can bargain somebody else's rights away, not mine. Thank you.

MR. BAND: But it's an absurd bargain. The fact that the fact that the Chafee Amendment addressed one aspect of the community's needs should in no way limit it. It wasn't as if Congress said this is the only and exclusive remedy that will ever be provided. They didn't say that. And to keep on saying "Well, you know, there was an exemption given and now you want more," I mean I could say that about term extension, I could say that about a lot of things.

MR. ADLER: Right. I understand that.

But what I'm arguing is, is that to take the
position that a new product that has been offered
into the market that offers consumers a new kind of
choice that they've never been able to have before
simply because the technological capabilities didn't
exist before, and you want to impose regulation of
the most fearful kind because of the door that it
opens, not because of the specific nature of the
exemption itself as you propose it to be written.

But because of what's likely to happen in the
marketplace as well is in the political sphere. Can
you promise us by the same token that if you receive
this exemption, that you wouldn't be saying "Well,
you know what? Fair use can just sit off on the
side because now we've addressed this problem and we
don't need to argue anymore that fair use needs an
exemption to allow people to circumvent access
controls in order to implement a variety of other
noninfringing uses." Of you wouldn't say that.

You're going to continue to argue that.

And if the Copyright Office and the Librarian adopt
this exemption, that's going to be the first crack
that's going to say to e-book producers uh-oh, we
have a serious problem before we've even got a
market to justify the investment that we're
continuing to make.
MS. PETERS: I think Charlotte will have the final question.

MS. DOUGLASS: Well, this is just a couple of clarifications for material that has been touched on already.

You mentioned, Mr. Adler, that you didn't want to see a government mandate for how e-books were issued, and I assumed that you meant that if there were an extension of the publishing industry would do, would be to just turn off the --

MR. ADLER: Well, I think in some respects you could look at the exemption and its impact as being somewhat analogous to the notion of affirmatively having the government require that any e-books that be issued must be capable of being used with text-to-speech translation software.


MR. BOLICK: But that is -- just to clarify. The text-to-speech within most of the e-book formats is a permissions flag inside the file.

MS. PETERS: Right.

MR. BOLICK: I thought that what you were looking to grant an exemption on was an exemption to cracking DRM to get at something.
So --

MS. DOUGLASS: Right. But --

MR. BOLICK: -- the exemption that is before you isn't on the flag, the exemption is cracking something to get at the flag, correct?

MS. DOUGLASS: Right. But I thought Mr. Adler was saying that that wouldn't be necessary because if there were an exemption, it would be done on the publisher side rather than the --

MR. ADLER: No. What I'm saying is, is that I think in the marketplace right now we have already seen that without the imposition of government regulation there are a number of publishers, including major publishers like McGraw-Hill and I believe Harper Collins is another one.

MR. BOLICK: Correct.

MR. ADLER: That routinely affirmatively enables the use of text-to-speech translation software. I don't see the argument convincingly made that the marketplace is not working to address this problem. If it's not working quickly enough, I think that can be attributable to the fact that e-books are a relatively new product that have not garnered mainstream acceptance in the marketplace, in part because of the difficulty that DRM causes
the users of e-books. That's an issue for publishers to have to address, and they are attempting to address it. But I don't think government regulation at this stage is going to be terribly helpful to either growing the e-books market or making sure that this provides for the long term a source of reading material in the types of formats that are needed by the community with print disabilities.

MR. BAND: I just find, again, you know I've made the point before, but I just find this constant reference to an exemption as a government regulation very curious, Allan, going back to your first amendment days, your ACLU days, I guess I would suggest that the First Amendment is also a government regulation.

MR. ADLER: Well, yes, it is. And you know the fact of the matter is in 1996 Congress enacted a very substantial government regulation in respect to the publishers. The Chafee Amendment basically said look you lose control over reproduction and distribution of these materials, period, under this exemption. And we've learned to live with it. In fact, not only have we learned to live with it, but we think we've established a fairly good record of working with the community to
address these needs by trying to expand in a fairly
incremental way that has at each stage of the course
taken advantage of new technology to make the Chafee
Amendment expand the alternative sources of these
materials for the community that needs them.
Bookshare being the latest example.

And we've taken a lot of heat for
supporting Bookshare. There are a number of people
within this community, and particularly in the
author's community, particularly in the community of
literary representatives who I guess hadn't read the
Chafee Amendment in some time and thought that
Bookshare was wholesale stealing of their property.
We tried to explain to them that, in fact, it
wasn't. We explained that we had participated in
working out the balancing act that Congress had done
in trying to address this community's needs. And we
have continued to try to address these community's
needs on the foundation of Chafee.

But for you to come in and say now that
e-books by definition must be made to address this
problem simply because the technology permits it to
be made if the government mandates that, I think
that that's actually in the long run going to be a
very unwise strategy if you really think e-books
holds a valuable role in the future.

MR. SCHROEDER: But I don't think we're arguing that. Nor are we arguing that you haven't made efforts. I mean, I think I've said before, I think Chafee offers you a pretty good balance. Not there was any real sincere likelihood that the publishers were going to be required to actually make their product useable by the blind and visually impaired market, but it offers you a good balance in the sense that you don't have to do the after-market work, somebody is doing that.

But in the context of e-books, I think it is in fact not entirely unlike Chafee, although you're right, it's giving the power to the individual to some degree to have the ability to get past access controls, whether you call them a flag or not, it's an access control that in fact thwarts access to the material for one particular group of users. And I want to stress that. That people who are blind or visually impaired are the group that's being singled out and denied access to this material. And there's no reason for that.

And so, yes, the answer would be for publishers simply to produce material with the text-to-speech flags on, for example, and to work with
the developers of software to insure that access is allowed. But that's not a requirement and that's not what anyone is seeking. I would desire it, but it's not what we're seeking. It's Congress' role to do that.

What we are seeking is an assurance that the individual and/or producers of the specialized technology made use of by this particular group of individuals has the opportunity to have access to this material if you won't provide the access in any other way.

MS. PETERS: Well, it is now 4:30 and I'm going to take the privilege of chairperson and close the hearing.

And I want to thank each and every one of the witnesses. Your testimony was certainly informative. I think that a lot of questions came bubbling up, and I think that we may have some more questions that we will be getting back to you with.

MR. ADLER: We'd love them.

MS. PETERS: Okay. We're very happy that you're -- because you're going to get them.

So, thank everybody.

And we all will be back tomorrow morning at 9:30. And if anyone else wants to come back,
you're welcome.

(Whereupon, at 4:30 p.m. the hearing was adjourned.)